

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.01.2018

DELIVERED ON : 02.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.1408 of 2004

State By:

Inspector of Police,
N.I.B.C.I.D.,
Salem.
(Cr.No.51/2003)

... Appellant

Vs

1.Saji Xavier
2.Milacious
3.Thomas
4.Pyju

... Respondents

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, against the judgment dated 15.07.2004 in C.C.No.35 of 2004 on the file of the learned Special Judge, Essential Commodities Act, Salem and pray that this Court may be pleased to set aside the order of acquittal and convict the accused as charged.

For Appellant : Mrs.T.P.Savitha
Government Advocate (Crl.Side)

For Respondents: Mr.R.Rajarithnam (for R2 to R4)

No Appearance (for R1)

JUDGMENT

The Appellant preferred this Criminal appeal to set aside the order of acquittal passed by the learned trial Court in C.C.No.35 of 2004, Dated 15.7.2004 on the file of Learned Special Judge, Essential Commodities Act, Salem for the offence under section 8 (c) read with 20 (b) (ii) (c) and 25 of N.D.P.S Act.

2.The brief case of the appellant:

On 22.7.2003 at about 14.30 hrs the staff of NIB CID, Salem have conducted raid for detecting Narcotic cases and at Dharmapuri District Thoppur, Kurunji Nagar Commercial Check Post North side of the road and arrested the accused Saji Xaveir (A1) age 27/03 S/o T.U. Xavier, Thengum Kuddiyil, 60018 Rajakumari south post, Iudukki District, Kerala State and seized 32 kgs of Ganja a Narcotic drugs worth Rs.1,60,000/- without valid licence or permit which possessed by the accused. On 22.7.2003 at about 15.00 hrs the staff of NIB CID, Salem have conducted raid for detecting Narcotic cases at Dharmapuri District, Thopur Kurunji Nagar, Commercial Tax check post and seized 27 kgs of Ganja from the remaining accused worth of Rupees One Lakh thirty five thousand without valid licence or permit. Under the cover of mahazar Exhibit P12 to P15 after following the mandatory provisions, in this connection a case in Cr.No.51 of 2003 was registered on the file of the Salem NIB CID under section 8(c) r/w 20(b)(ii)(B) and 25 of NDPS Act 1985 as amended by Act 9/2001 and 25(1) of Arms Act. The sample Ganja in two pockets weighing 25 gms each one for chemical analysis and another one for Court sample were taken and sent to the Laboratory, Salem and it was as ascertained as Ganja.

3.PW6, Inspector of Police who took up the investigation recorded the statement of witnesses and also sent to the properties to the Court and gave requisition for chemical analysis. PW3, chemical analyst on analyzing the sample properties gave a report Exhibit 28 to 31 stating that the samples were found to be Ganja.

4.Charges were framed against the accused Nos.1 to 4 / respondents 1 to 4 to which they did not plead guilty and claimed to be tried. Thereupon, prosecution examined 6 witnesses and produced 36 exhibits and MOs 1to 20. After the prosecution concluded its oral evidence, the trial Court recorded further statement of the accused under Section 313 of the Code and the accused in their further statement denied generally all the incriminating circumstances brought to their notice by the trial Court and stated that they were falsely implicated in this case. After evaluating the oral and documentary evidence on record and the submissions made on behalf of both the sides, the trial Court came to the conclusion that the prosecution failed to prove an essential ingredient of the offence regarding the conscious possession of the contraband substance ganja by the accused and ultimately recorded acquittal of the charges framed under section 8 (c) read with 20 (b) (ii) (c) and 25 of N.D.P.S.Act and 25(1)(UP) of Indian Arms Act,1959.

5. Being aggrieved by and dissatisfied with the aforesaid judgment and order passed by the trial Court, the appellant State has preferred the present appeal.

6. I heard Mrs. T. P. Savitha, learned Government Advocate (Criminal Side) for the appellant and Mr. R. Rajarathinam, learned counsel for the respondents 2 to 4 and perused the entire materials available on record. No representation on behalf of the 1st respondent.

7. The learned counsel for the petitioner submits that the judgment of the Trial Court in acquitting the accused is contrary to law weight of evidence and probabilities of the case.

8. The learned counsel for the petitioner submits that the learned Special Judge failed to see that illegal possession of huge quantities of Ganja by all the accused was proved by the prosecution.

The learned counsel for the petitioner submits that the learned Special Judge went wrong in discarding the evidence adduced on the side of the prosecution.

9. The learned counsel for the petitioner submits that the learned Judge went wrong in holding that the benefit of doubt should be given to the accused.

10. The learned counsel for the petitioner submits that other reasons given by the Learned Special judge in support of his judgment are incorrect and untenable.

11. The learned Counsel for the Respondent vehemently opposed the contentions raised by the appellant and cited the following decisions in support of his submissions.

- 1) 2005 (3) SCC 59 (State of Rajasthan vs Gurmail Singh)
- 2) 1998 (8) SCC 499 (State of Rajasthan vs Gopal)
- 3) 2002 (1) MWN (Cr1) 118 (Madras) (Ananthi vs State)
- 4) 2010 (4) MLJ (Cr1) 541 (Mary vs State)
- 5) 2013 (1) CLT (Cr1) 493 (Suresh vs State)
- 6) JT 2004 (7) SC 216 (Para 28) (State of WB vs Babu Chakraborty)

12. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Hon'ble Apex Court in catena of decisions.

In the case of "M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under;

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two views are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

Further, in the case of "CHANDRAPPA Vs. STATE OF KARNATAKA", reported in (2007) 4 S.C.C. 415, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge;

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental

principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views / conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

Even in the case of "STATE OF GOA Vs. SANJAY THAKRAN & ANR.", reported in (2007) 3 S.C.C. 75, the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under;

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

Similar principle has been laid down by the Apex Court in cases of "STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553 and in "GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP", 2007 A.I.R. S.C.W. 5589.

In the case of "LUNA RAM VS. BHUPAT SINGH AND ORS.", reported in (2009) SCC 749, the Apex Court in para 10 and 11 has held as under;

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangled. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

Even in a recent decision of the Apex Court in the case of "MOOKIAH AND ANR. VS. STATE, REP.BY THE INSPECTOR OF POLICE, TAMIL NADU", reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges levelled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate Court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be re-appreciate the entire evidence, though while choosing to interfere only the Court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was

against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC573]"

It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of "STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981, SC 1417, wherein it is held as under;

"...This Court has observed in *Girija Nandini Devi V. Bigendra Nandini Choudhary* (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

In a recent decision, the Hon'ble Apex Court in "*SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA*", JT 2013 (7) SC 66 has held as under:

"That appellate Court is empowered to re-appreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

13.I have perused the judgment of the learned Trial Court and carefully gone through the record of the case. None of the six witnesses including the Investigating Officer has stated as to how and where the seized ganja had been stored or in whose custody it was put into. There is specific provision contained in Section 52A of the Act, which requires that the seized narcotic substance has to be forwarded to the Officer in charge of the nearest police station who is required to prepare an inventory of such narcotic drug or psychotropic substance containing such details referring to their description, quality, quantity, mode of packeting, marks, number or such other identifying particulars of such narcotic drug or psychotropic substance or the packet in which they are packed besides other details, which are indicated by that particular provision. Not only that, an application has to be made to a magistrate with a request that he should certify the correctness of the inventory so prepared or allow to draw the representative sample of such drug or substance in presence of such Magistrate, who was certifying the correctness of sample so drawn. None of the

witnesses, especially, P.W. 1 or P.W. 6 who were the informant and the I.O. of the case, have given any evidence as to after being seized who were the authorities in whose custody the seized substance was transferred and whether the requirement of law as per Section 52A of the Act was fulfilled. Likewise, the evidence was completely lacking as regards compliance of the provision of Section 55 of the Act as there was no evidence given either by P.W. 1 or P.W. 6 that the recovered article was put into charge of the officer in charge of the Police Station or in his safe custody pending the orders of the Magistrate and all articles were really delivered to him. There is absolutely no evidence that the seized article was properly secured by being sealed by the Officer in charge as also the officer who had seized the articles and there was no further evidence that both the Officers-in-charge of the police station and P.W. 6 who had seized the articles, went to the place of storage of the article to draw up sample so as to packeting them by putting their individual seals for forwarding the sampled articles for chemical analysis by FSL. These are some of the infirmities which the prosecution case suffers from on account of the lack of evidence on compliance of the above two provisions.

14.No Specimen seal was sent along with sample to Laboratory for the purpose of comparing with the seal alleged to have been affixed on the sample. Therefore, there is no evidence to prove satisfactory that the sample sent was the contraband alleged to have been seized.

(a) PW1, deposes that he affixed NIB seal on the contraband bag and on the sample cover.

(b) PW1 deposes that he kept the contraband and sample in the police station after getting order from the Magistrate to produce the same before the Trial Court. Except this, PW1 did not whisper anything about the sample and the NIB seal.

(c) PW6, the investigating officer says that he has forwarded the samples along with requisition letter to Court. He did not speak about forwarding of any specimen seal to Court.

(d) PW3 (Chemical analysis) says that she received four paper covers duly affixed with Court seal. She did not mention about the NIB seal alleged to have been affixed on the sample covers.

(e) Exhibit P 26(4) series are the requisition letters from PW6, the Inspector of Police to Court.

(f) Exhibit P 27 (4) series are the letters forwarded by Court to Chemical Laboratory.

In none of the letters, the seal/specimen seal was mentioned nor forwarded along with the samples.

(g) Exhibit P 28 to Exhibit P31 is the chemical analysis reports. In none of the reports, the NIB seal was mentioned. Neither the Laboratory has received the specimen seal.

(h) The alleged seizure was on 22.7.2003 and as per the evidence of PW1, the seized property was produced before Magistrate and the learned Magistrate directed them to produce the same before concerned Court. The seized property was kept in the Police Station. PW6 has also reiterated the same. Exhibit P24 is Form No.95. As per the endorsement on Exhibit P24, the date is 23.7.2003 and the Magistrate has written "to produce tomorrow EC Court, Salem". However the property was produced only on 29.7.2003 as seen from the backside endorsement on Exhibit P24.

15. There is no evidence to show that from 23.7.2003 till it was produced on 29.7.2003, where the case property was kept and there is no explanation from PW1 or PW6 why the case property was produced only on 29.7.2003 in violation of the Court order. This is another material aspect which would create reasonable doubt with regard to the alleged search and seizure from the accused.

16. It is the case of the prosecution that, PW1, before going to the spot, he had received information about the transportation of ganja by the accused, but he did not take along with him any independent witnesses. No independent witnesses were also examined for the alleged seizure. It is also fatal to the prosecution. The Chief and cross of PW1 in this regard is contradictory in nature. In the evidence of PW2 and PW4, no whisper about the calling of any independent witnesses at the alleged spot.

17. The alleged information is Exhibit P1. As per the evidence of PW1, it was communicated over telephone to Deputy Superintendent of Police, NIB, CID, Chennai (Exhibit P2) and the reply telephone message is Exhibit P3. Sending telephone message does not amount to compliance of section 42(2) which is mandatory. Deputy Superintendent of Police was not examined to prove whether he has been communicated by PW1 over telephone. The immediate official superior to PW1, is the inspector of Police (PW6). He has not been informed on 22.7.2003. The explanation given by PW 1 is not believable.

18. Now on careful scrutiny of the evidences adduced in this case, the evidence of PW2, PW4 and PW6 with regard to examination of PW2 by PW6 is contradictory in nature. The evidence of PW.2 mentions that he was examined by PW6 on

23.7.2003 evening in his (PW2) office Dharmapuri. The Evidence of PW4 mentions that PW6 examined PW2 in Salem NIB office on 23.7.2003. The evidence of PW6 says that he examined PW2 on two occasions.

19.All these material contradictions would prove that the appellant was not in a position to prove its case and therefore the trial Court has rightly acquitted the accused. There is no perversity in the judgment of the trial Court which warrants interference by this Court. Hence, this Criminal Appeal is dismissed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1.The Special Judge,
Essential Commodities Act, Salem.

2.Inspector of Police,
N.I.B.C.I.D.,
Salem.

3.The Special Public Prosecutor,
(CBCID), High Court, Madras.

Criminal Appeal No.1408 of 2004

rr(co)
nr 18/03/2019

सत्यमेव जयते

WEB COPY