



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.270/2023

1. Sunil Basant Malvi,
aged about 30 years, Occ. Private
r/o Ward No. 20, Chotta Talav,
Zilpura, Near Old Power House,
Chindwara (MP)
2. Sohail @ Sohail Khan s/o Shamim Khan,
aged about 22 years, Occ. Pvt. Work,
r/o Ward No. 26, Pataleshwar Ward,
Zilpura, Chindwara (MP)

.....APPELLANTS

...V E R S U S...

The State of Maharashtra, through
Police Station Officer, Crime Branch,
Mankapur PS, Nagpur.

...RESPONDENT

Mr. Prakash Naidu, Advocate for appellants.
Ms H. S. Dhande, A.P.P. for respondent – State.

CORAM:- ANIL L. PANSARE, J.
ARGUMENTS WERE HEARD ON : 27.10.2023
JUDGMENT PRONOUNCED ON : 06.11.2023

JUDGMENT

The appellants – original accused have taken exception to the judgment and order dated 23.03.2023 passed by Special Judge (NDPS Act) in N.D.P.S. Special Case No.704/2021, whereby the appellants have been convicted for the offences punishable under Sections 20 and 29 of the Narcotic Drugs and Psychotropic

Substances Act, 1985 (hereinafter referred to as the, “NDPS Act”) and have been sentenced to suffer 10 years imprisonment each and to pay a fine of Rs.2,00,000/- each, in default to suffer further imprisonment for six months each.

2. Briefly stated, the facts are that on 07.06.2021, PW5 Nitin Mishra received a secret information that the appellants would be transporting Ganja by Swift Dzire car from Koradi road to Chindwara. PW5 passed on the information to PW10 PI Vilas Kale. The information was reduced in writing as First Information Report. PI Kale arranged pancha witnesses and with his team swung into action. The police team in official vehicle reached near Remedia Hospital, from where the Swift Dzire was to pass. At about 11.00 a.m., they noticed that the Swift Dzire car was coming. The vehicle was intercepted and then searched. There were two bags in the dickey having strong smell of Ganja. The bags and Ganja were weighed separately. The first bag contained 20.390 kg. Ganja. The second bag contained 15 Kg. Ganja. The investigating agency has drawn samples of 24 Gms. Ganja each from two bags. The samples were sealed in the packet. The bags were also sealed by applying labels, which contained signatures of panchas, police and others. The personal search of the appellant

and other formalities were completed which, according to the investigating agency, were so done in tune with the provisions of the NDPS Act. The investigation was then completed and charge-sheet came to be filed. Since the appellants did not plead guilty to the charges, the prosecution has examined 11 witnesses to bring home guilt of the appellants. The trial Court having found the appellants guilty of the offences, has passed the impugned order.

3. Learned counsel for the appellants has challenged the order on the ground of non compliance of Section 52A of the NDPS Act, which reads thus:

“52A. Disposal of seized narcotic drugs and psychotropic substances.-

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the

nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence”

4. Learned counsel for the appellants submits that the samples were drawn at the spot and not before the Magistrate. He further submits that the samples were sent to the Chemical Analyser on 10.06.2021, whereas, the inventory of the contrabands was drawn before the Magistrate on 21.06.2021. These samples were not sent to the CFSL. This procedure of sending samples drawn at the spot and of not sending the samples drawn before the Magistrate is contrary to the law laid down by the Hon'ble Supreme Court in the case of Union of India Vs. Mohanlal, reported in (2016) 3 SCC 379, wherein the Supreme Court has held in paragraphs 15 to 17 thus:

"15. It is manifest from Section 52A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach

the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A (4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure.”

5. Thus, the Court has, in unequivocal terms, held that the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The Court has further held that the question of drawing samples at the time of seizure which, more often than not, takes place in the absence of Magistrate, does not in the above scheme of things arise. Despite such status, in the present case, samples drawn at the spot have been sent to the FSL.

6. The counsel for the appellants has then relied upon judgment in the case of *Simarnjit Singh .Vs. State of Punjab*,

reported in **2023 (3) Crimes 168.** The facts in this case were akin to the facts of the present case. The driver and other two persons sitting in the tempo were apprehended. The search of the tempo was conducted. It led to recovery of eight bags of poppy husk concealed under tarpaulin. The investigating agency has, from each part, drawn two samples of 250 Gms. The conviction was challenged for non compliance of *Mohanlal's* case (supra). The Supreme Court, by relying upon *Mohanlal's* case, has held that the act of investigating officer drawing samples from all the bags at the time of seizure is not in conformity with the law laid down by this Court in the case of *Mohanlal*, which creates serious doubt about the prosecution case that the substance recovered was a contraband.

7. The learned counsel for the appellant, by placing reliance upon the aforesaid judgments, submits that the present case is covered by these two judgments and, accordingly, prayed for setting aside the impugned judgment.

8. Learned A.P.P. has countered the submissions. However, when the evidence of witness was scrutinized, what transpires is that on 07.06.2021, the Swift Dzire car was intercepted. Two bags containing Ganja were found in the dickey.

The investigating agency has drawn samples from each bag. The evidence of PW4 Anita Gadbail indicates that the samples and the remaining Ganja were taken to the Court of Judicial Magistrate First Class on 21.06.2021 for inventory. Perusal of the inventory Exh.85 and FSL report Exh.88, indicate that the samples sent to the FSL were dated 10.06.2021.

9. Thus, it is clear that the samples drawn before the Magistrate on 21.06.2021 were not sent to the FSL. The samples that were drawn prior thereto at the spot, were sent to the FSL. This procedure is in blatant violation of the law laid down in *Mohanlal's* case. The Supreme Court in *Simarnjit Singh's* case, in which the facts were identical to the present case, has held that the seizure of contrabands was not in conformity with the law laid down in *Mohanlal's* case and thus set aside the conviction. Similar will be the fate in the present case. The evidence of the prosecution witnesses would clearly spell out that the seizure in the present case, is not in conformity with the law laid down in *Mohanlal's* case. This lapse will be fatal to the case of the prosecution and will thus create serious doubt about its case that the substance recovered was a contraband, Ganja.

10. The trial Court, seems to have been not properly appraised of the law laid down in *Mohanlal's* case, that resulted in passing an erroneous order. On this count alone, the impugned judgment is liable to be quashed and set aside. Hence, following order is passed.

ORDER

- (i) The appeal is allowed.
- (ii) The impugned judgment and order dated 23.03.2023 passed by Special Judge (NDPS Act) in N.D.P.S. Special Case No.704/2021, is quashed and set aside.
- (iii) Bail bonds of the appellants stand cancelled.
- (iv) The appellants be set at liberty forthwith, if not required in any other crime.

(Anil L. Pansare, J.)

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