
(2011) 08 MP CK 0047

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 7543 of 2010

State of M.P.

APPELLANT

Vs

Tulsiram and another

RESPONDENT

Date of Decision : 30-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378(3)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 35, 42, 50, 52

Citation : (2011) 3 JLJ 307

Hon'ble Judges : M.C. Garg, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

M.C. Garg, J.—This order shall dispose of an application filed by the applicant/ State u/s 378(3) of Code of Criminal Procedure seeking leave to file an appeal against the judgment delivered by the Special Judge, NDPS Act, Mandsaur in Special Sessions Case No. 13 of 2005 dated 13.8.2010 whereby, the respondents have been acquitted from the charges against them u/s 8/18 of the NDPS Act.

2. Briefly stated, the facts of the case are that on 13.3.2005 on receipt of information from the informant and after joining witnesses the raiding party apprehended respondents Tulsiram and Bhagirath, who were found in possession of opium. It is alleged that on investigation of the bag which was in the hands of Bhagirath two polythenes having 7 kgs. and 600 kgs. of opium respectively and on investigation of the polythene which was in possession of the accused Tulsiram 2 kgs. of opium was found therein without any valid licence or permission. Thereafter, after taking sample (30 grams each) from the seized bags/polythenes the same was smelt and burnt to confirm whether the seized article is contraband or not. The same was found to be opium -- a contraband article. The remaining seized contraband material was sealed and deposited in police station concerned and FIR was registered by ASI, S.K. Mishra. After

investigation, challan was filed. However, the Special Judge acquitted them of all the charges and it is against that order the applicant-State has filed this application seeking leave to file an appeal.

3. It is the submissions of the applicants that the order impugned suffers from material irregularities both, on facts and in law. It is submitted that benefit given by the Court below to the non-applicants herein is not justified.

4. It is also submitted, that even the judgment of the Court below with regard to delay in depositing the samples with the FSL Indore, is also not sustainable.

5. I have heard the learned counsel appearing for the applicant.

6. In this case, the Court below has acquitted the non-applicants of the charges levelled against them because, it has been found that there was a violation of section 52A of the NDPS Act during the course of the investigation. There are other infirmities also as noticed by the Court below in the impugned judgment which reflects that even provisions of section 42 as well as that of section 50 of the NDPS Act were not complied with. Thus, the Court below has found that in the facts of the case, once there was violation of sections 42, 50, 52A, 55 and 57A of the Act, the non-applicants could not have been convicted and were entitled to acquittal and thus, the order was passed in their favour.

7. Before going further, I may take note of the reasoning given by the Court below in having coming to the aforesaid conclusion regarding violation of sections 42, 50, 52A, 55, 57 and 52A of the NDPS Act in paragraphs 14 to 36 of the impugned judgment. The material paragraphs 31 to 36 are reproduced as under :

8. A reading of the aforesaid paragraphs of the judgment goes to show, that the Executive Magistrate had not used his own seal while sealing the contraband article and had used the seal of the concerned police station where the goods were deposited. Moreover, despite seizure of the goods on 19.10.2005 further proceedings have been taken of by the police on 6.12.2005 which is also violative u/s 50 of the NDPS Act.

9. It is also apparent, that the information given to the senior officer was also not immediately given and thus violation of the section 42 of the NDPS Act.

10. In the case of Noor Aga Vs. State of Punjab and Another, the Hon''ble Supreme Court has taken a strong view with regard to non-compliance of statutory provisions of the NDPS Act. Some benevolent observations were made by the apex Court in respect to violation of statutory provisions viz the right of accused who is presumed to be innocent unless his guilt is proved in accordance with law, are reproduced hereunder:

Burden of proof. -- The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for

grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs. 2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the Court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of wider civilization". The Courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In *State of Punjab Vs. Baldev Singh, etc. etc.*, it was stated :

It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed.

(See also *Ritesh Chakarvarti Vs. State of Madhya Pradesh*,

It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any Court but it is well settled that suspicion, however high may be, can under no circumstances, be held to be a substitute for legal evidence.

Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of section 35 of the Act. the actus reus which is possession of contraband by the accused cannot be said to have been established.

11. As stated above, the judgment of the trial Court establishes that in this case the main provisions of NDPS Act which are mandatory in nature were not been complied with, the benefit given to the non-applicants-accused persons by the Court below cannot be faulted with.

12. Similar view has been taken by the Punjab and Haryana High Court in the

case of Hoshiar Singh Vs. State of Haryana,

13. Similar is the view taken by the Hon"ble Supreme Court in the case of Directorate of Revenue and Another Vs. Mohammed Nisar Holia,

14. Even earlier the Hon"ble Supreme Court has taken a view with regard to non-compliance of mandatory provisions of section 42 in the case of The State of West Bengal and Others Vs. Babu Chakraborty,

15. Even this Court in the case of Kanwarlal v. State of Madhya Pradesh, reported in 2009 (1) EFR 111, has taken a similar view.

16. The learned Deputy Government Advocate relied upon a judgment delivered in the case of G. Srinivas Goud Vs. State of A.P., to submit that merely because the public witnesses have not supported the prosecution case, is not fatal to the case of prosecution as in every case it is not necessary to join public witnesses. It has also been submitted that once the search is conducted by the Gazetted Officer the, sending copy to superior officer is not mandatory. The same is the view in the case of Parshotam Lal and Others Vs. State, The said judgments on which the reliance has been placed by the applicant-State are of no consequences, inasmuch, the observations made by the learned Single Judge of the M.P. High Court that provisions u/s 52, 52A and 57 of the NDPS Act are not mandatory, cannot be sustained for the reasons stated above.

17. In any case, it is proved that there is violation of mandatory provisions of the NDPS Act. Firstly the information has not been sent to the superior officer, the public witnesses have not supported the case of the prosecution, the proceedings have been taken much delayed, the seal of the concerned officer was not used but the seal of the police station was used, etc.

18. The violations which are writ large have been referred to above in the cases relied upon by the applicant referred supra.

19. In these circumstances, when two views are possible and one which goes in favour of the accused and is supported by the judgments of the apex Court wherein, serious view has been taken for non-compliance of the mandatory provisions of the law, the submissions made by the learned Government Advocate cannot be sustained.

20. Accordingly, the application is dismissed.