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**IN THE HIGH COURT OF KARNATAKA
CIRCUIT BENCH AT DHARWAD**

DATED THIS THE 30TH DAY OF AUGUST 2011

BEFORE

THE HON'BLE MR.JUSTICE B.V.PINTO

CRIMINAL APPEAL No.2674/2010

BETWEEN:

1. Sri. Mahammad Iqbal Abdulrehaman
Siddiqui, Age: 39 years,
Occupation: Arabic Private Teacher,
R/o. Ambadagatti, Taluk: Bailhongal,
District: Belgaum.
2. Sri. Basavaraj,
S/o. Chandrashekhar Jaganure,
Age: 39 years, Occ.: Spice Merchant,
R/o. Kakati, Tq. & Dist. Belgaum. ...Appellants

(By Shri Satish Kumar R. Mugali, Advocate)

AND:

The State of Karnataka,
Through Police Inspector,
Narcotic Drugs Cell, C.O.D.,
Bangalore, Now rep. by
High Court Government Pleader. ...Respondent

(By Shri Vinayak S. Kulkarni, H.C.G.P.)

This criminal appeal is filed under Section 374(2) of the Code of Criminal Procedure seeking to set aside the judgment of conviction and order of sentence dated 08.06.2010 passed by the Special Judge (Principal

Sessions Judge), Belgaum in Special Case No.96/2007 for the offence punishable under Section 22(B) read with Section 8(C) of Narcotic Drugs and Psychotropic Substances Act, 1985.

This criminal appeal is coming on for hearing this day, the Court delivered the following: -

JUDGMENT

This appeal is filed challenging the judgment dated 08.06.2010, passed by the Special Judge (Principal Sessions Judge), Belgaum in Special Case No.96/2007, convicting the appellants of the offence under Section 22(b) read with Section 8(c) of Narcotic Drug and Psychotropic Substances Act and sentencing them to undergo rigorous imprisonment for a period of six years and to pay fine of Rs.25,000/- each, in default of payment of fine, to undergo rigorous imprisonment for six months.

2. It is the case of the prosecution that on 23.06.2007 at about 07:45 p.m. in Belgaum Central Bus Stand, near the platform meant for buses going from Bijapur to Bagalkot, the appellant No.1 was found in possession of 1,016 grams of heroin, which is



Psychotropic Substance, worth about Rs.1,00,00,000/- contained in a rexin bag of accused No.1 and accused No.2 was found in possession 1,018 grams of brown sugar i.e., Psychotropic Substance, worth about Rs.1,00,00,000/- contained in his bag and the said possession was without any permit or licence and was held for the purpose of sale, thereby accused Nos.1 and 2 contraband the provisions of Sec.8(c) of Narcotic Drugs and Psychotropic Substances Act which is punishable under Section 22(c) of the said Act. The accused Nos.3 and 4 were also charged for the offence of possession of the heroin, but since they were acquitted, it is not necessary to mention about the charge against them.

3. The prosecution in order to prove the case against the accused has examined in all 19 witnesses, P.Ws.1 to 19 and got marked Exs.P-1 to P-5 and produced M.Os.1 to 18. The defence of the accused was one of the total denial. However, after hearing the prosecution and the defence, the learned Special Judge



was pleased to convict the appellants while acquitting accused Nos.3 and 4 of the said charge. The convicted accused have filed this appeal.

4. Heard Shri Ganapati M. Bhat, the learned counsel appearing for the accused – appellants and Shri Anand Kumar Navalgimath, learned High Court Government Pleader appearing for the respondent – State.

5. The learned counsel for the appellant submits that the accused were not informed of their right to be searched in the presence of a Gazetted Officer at the time when their person was searched. The raiding party had issued a letter Ex.P-33 in which it is stated that the Police Inspector would like to search the persons of accused Nos.1 and 2 and that it was questioned whether they are interested in being searched by any other Gazetted Officer or the Magistrate. Answer to the said question by accused was that they would like to be searched by another Gazetted



Officer. Thereafter, the Inspector of Police – P.W.18 summoned P.W.2. By the time P.W.2 arrived, the search of the accused was already over and that P.W.2 only recovered a mobile phone from the possession of accused No.1 and he has not recovered any contraband goods from the possession of accused Nos.1 or 2. It is therefore, submitted by the learned counsel that the prosecution case has not been proved by the evidence of witnesses and therefore the accused are entitled for an order of acquittal. It is further submitted by him, despite Ex.P-33, nowhere the raiding party had informed the accused of their right to be searched in the presence of a Gazetted Officer and therefore, the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act are not complied with.

6. The learned counsel relies on the ruling reported in **2002 SCR (Criminal) 628**, wherein it is stated that even if it is communicated to the accused that he had a right under the law to be searched before the authorities, unless it is informed to the accused



orally, the provision of section 50 are not said to have been complied with and the accused are entitled for an order of acquittal.

7. The learned High Court government Pleader on the other hand submits that the evidence of P.W.2, who is a Gazetted Officer, clearly indicates that he was present at the time when search was made and that during the search, heroin (brown sugar) was seized from the possession of the accused. Therefore, he submits that the order of conviction does not suffer from any illegality or infirmity. He submits that the appeal may be dismissed.

8. On a credible information, Inspector of Police Narcotic Drug Unit, Corps of Detectives, Bangalore, proceeded towards Belgaum Bus Stand on 23.06.2007 at about 19:00 hours along with other raiding party. When he reached the platform, in the Bus Stand where buses going towards Bijapur and Bagalkot were parked, it was found that two persons were sitting on the chair.



On questioning the said persons, it was revealed that the persons were in possession of blue colour bags. The complainant immediately informed his Superior Officers and also prepared a written information and sent the same by tappal. He thereafter summoned the Officials and also summoned Panchyatdars. On reaching platform, two persons were waiting for arrival of some other persons in the spot mentioned above. At about 20:00 hours, the raiding party suddenly caught hold of the persons who were sitting on the bench in the Bus Stand and when questioned them, they told their names as Mohammed Iqbal and Basavaraj and they also disclosed their addresses. The accused Mohammed Iqbal was holding a black bag and when questioned as to what was inside the bag, they told that they are in possession of the tea powder. Basavaraj was holding green colour bag and he has also informed that he is carrying tea powder. However, on raising suspicion, the police opened the bags and there was coffee coloured powder inside the bag and it was smelling like any



intoxicated substance. When questioned, the accused revealed that the said material is brown sugar. Immediately, the material which was in the possession was tested by means of testing machines and it was found that the powder in the possession of the accused was heroin, which is a Narcotic Drug. Thereafter, the raiding party questioned the accused as to whether they are in the possession of any permit or licence for possessing the Narcotic Drug. It was also questioned as to whether they would be interested in getting searched in the presence of a Gazetted Officer or a Magistrate or whether they could themselves search the accused. The accused informed that they would like to be searched in the presence of a Gazetted Officer. Thereafter, the complainant phoned up to the said Gazetted Officer to appear and to be a witness for the search conducted by the Officers. The said Officer agreed for being a witness to the search and seizure and thereafter, the accused were subjected to the search of their persons by the said Gazetted Officer. At the time of search, one Nokia phone



(11011) was recovered from the possession of accused No.1. Apart from the Nokia phone, no other materials were seized from the possession of accused No.1. There was no material seized from the possession of accused No.2 Basavaraj. Thereafter, materials found in the possession of both the accused was held by the Police and the bags in which heroin was found were superscribed as Guptas Mehak Tea and the same was brown mix with yellow colour powder and the same was weighing 1,016 grams. The value of the said powder in a international market was Rs.1,00,00,000/-. Thereafter, sample was removed from the said bag and seized for the purpose of testing and the remaining materials i.e., 1,086 grams was separately packed. Thereafter, the Black Diamond C.T.C. Tea bag in the possession of the accused No.2 - Basavaraj was searched. The same contained 1,018 grams of heroin, the value of the said material in the international market was about Rs.1,00,00,000/-. Again the sample of 10 grams was taken from the bag, which was in the possession of



Basavaraj and the balance was again sealed by packing the same, based on which, the Police Inspector – the complainant has registered the case in Crime No.172/2007 for the offence under Section 22(c) of Narcotic Drugs and Psychotropic Substances Act, 1985. After subjecting the materials for chemical examination by Forensic Science Laboratory, the charge sheet came to be filed against the appellants and two others who were roped in on the basis of the voluntary statement of accused Nos.1 and 2.

9. P.W.1 – Sachin Shivaji Kirtan does not speak anything about accused Nos.1 and 2 and he has turned hostile to the case of the prosecution. P.W.2 – Sidramappa T. Dodamani, is the Superintendent of Central Excise. He has stated that on 23.06.2007, on receipt of a telephone call from Shri Sachin Shivaji Kirtan, the Inspector of Police, he came to the Belgaum Bus Stand at about 18:50 hours and received a requisition given by the Inspector. Thereafter, he came near platform where buses for Bijapur and Bagalkot



were parked. He has found both the accused Nos.1 and 2 who were detained by the raiding party. He has asked both the accused as to whether they intend to get searched in the presence of a Gazetted Officer and he introduced himself as the Gazetted Officer. Thereafter, accused No.1 was searched. A mobile phone (Mobile No.11011) was found in the possession of accused No.1, which was having a SIM card of Hutch Company. Thereafter, when accused No.2 was searched, nothing was found in the possession of accused No.2. Thereafter, bags of accused No.1 was opened and in the said bag 1,016 grams of powder, which was found to be heroin (brown sugar) was detected. Thereafter, when the bag of accused No.2 was searched, it was found that there was brown sugar weighing 1,018 grams in the said bag. Samples from both these bags belonging to accused Nos.1 and 2 were taken and the remaining material was seized. In the cross-examination, it is elicited that many persons had assembled while searching accused No.1 on that day. C.W.1 had



informed them that accused Nos.1 and 2 were found possessing heroin. He has further stated that no incriminating materials were seized from the person of accused Nos.1 and 2 in his presence.

10. P.W.3 – Chandrayya Puranikmath, P.W.4 – Hanumant M. Kalligud and P.W.5 – Anand Annappa Shetty are the witnesses for the seizure. But all the witnesses have turned hostile to the case of the prosecution. P.W.6 – Gopalkrishna R. Naik has also turned hostile to the case of the prosecution. So also P.W.7 – Ravi Somangouda Patil and P.W.8 – Harsha Mohan Oberoi. P.W.9 – Veeresh Ashok Pote has also turned hostile to the case of the prosecution.

11. P.W.11 is the Public Relation Officer in New Panvel, New Mumbai. His evidence is in respect of accused Nos.3 and 4. P.W.12 – Mazarhussain Mujawar is the holder of SIM No.9986803529 of Hutch Company and has stated that the said mobile was in the hand of accused No.1. P.W.13 – S.K.Madiwalar is the Constable



who was present at the time of the raid along with P.Ws.2 and 18. His evidence is similar to P.W.18. P.W.14 – C.Mohan is the Head Constable of Corps of Detectives who has carried the materials to the Forensic Science Laboratory, Bangalore for examination. P.W.15 is the Constable who has carried the First Information Report to the Court. P.W.16 is the Constable, who has taken the materials from the Forensic Science Laboratory and handed over to the Investigating Officer. P.W.17 has assisted in the investigation of the case and also was present at the time of raid and arresting the accused, registration of First Information Report and further investigation in the matter. P.W.19 is the Police Sub-Inspector, who has registered the First Information Report on 25.06.2007 midnight.

12. It is from the evidence of the above witnesses that the learned Special Judge has found the accused guilty and has convicted them.



13. On a careful re-appreciation of the entire materials on record, it is seen that P.W.18 is the Raiding Officer, who has conducted the raid and has found the accused Nos.1 and 2 in possession of heroin, which is a psychotropic material. However, he has not informed the accused before being searched that they have got a right to be searched in the presence of a Gazetted Officer. Ex.P-33 indicates that he had questioned the accused as to whether the accused are interested in being searched by him or by any other Gazetted Officer. The reply to the question is that the accused wanted to be searched in the presence of other Gazetted Officer. P.W.2 is such other Gazetted Officer who arrived at the spot on the request of P.W.18. It is the evidence of P.W.2 that after he came, only one mobile phone was seized from the possession of accused No.1, whereas no contraband goods were seized from the possession of either accused No.1 or accused No.2 in the presence of P.W.2. Even the evidence of P.W.2 does not disclose



that he had informed the accused of their right to be searched in the presence of a Gazetted Officer.

14. Under the circumstances, the very raid conducted and seizure effected in respect of the crime is vitiated as observed by the Hon'ble Supreme Court in the decision reported in ***State of Delhi Vs. Ram Avtar @ Rana (2011 SAR (Criminal) 628***, where it is observed as follows: -

“Narcotic Drugs and Psychotropic Substances Act, 1985 – Sec. 50 – (Prior to amending Act, 9 of 2001) – Personal search – Petitioner has a right to be informed of the choice – This duty cast upon the officer is imperative – Failure of – Render the recovery of illicit substance illegal – Notice in writing u/sec. 50 – Appellant was informed that Gazetted officer or a Magistrate could be arranged for taking his search if he so required – This intimation can not treated as



communicating to the appellant that he had a right under law, to be searched before the said authorities – Secret information – That accused was carrying samack – Police party had gone to conduct the raid – Accused who was coming on a scooter, had been stopped – Notice in writing was served – Conviction – Reversed by High Court – This appeal by State – Notice was not in conformity with the provision of Sec. 50 – of the Act – Order of acquittal – Proper and upheld, appeal dismissed.”

15. On a careful consideration of the above materials on record, I am of the opinion that the accused are entitled for an order of acquittal and accordingly, this appeal is allowed.

16. The accused – appellants are acquitted of the offences punishable under Section 22(b) read with Section 8(c) of the Narcotic Drugs and Psychotropic



: 17 :

Substances Act, 1985 and they are directed to be set at liberty forthwith, if they are not required in any other case.

17. Office is directed to transmit the operative portion of the judgment to the Central Jail, Belgaum and also to the learned Sessions Judge forthwith.

**Sd/-
JUDGE**

Rsh/Gab