A UNION OF INDIA

v.

JAROOPARAM

(Criminal Appeal Nos. 741-742 of 2011)

B JANUARY 31, 2018

[N. V. RAMANA AND S. ABDUL NAZEER, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.52A – Disposal of seized narcotic drugs – Allegation of recovery of 7.2 kg of contraband material (opium) from respondent-accused – Conviction under s.8/18 r/w s.29 – Acquittal by High Court on the ground that the bulk quantity of the seized case property was not disposed of by the Executive Magistrate; that statement of accused under s.67 was recorded in police custody and the signature of accused was falsely obtained on blank papers – Held: In the impugned order, the High Court has observed that the order of the Executive Magistrate did not show that the property was disposed of, but it was recorded therein that after the preparation of the samples, the samples and the bulk quantity of property were returned to the investigating officer – Thus, it is apparent that the property was not disposed of – Omission on the part of the prosecution to produce the bulk quantity of seized opium created doubt on the genuineness of the samples drawn from the allegedly seized contraband – A bare perusal of the record showed that at no point of time any prayer was made by the prosecution for destruction of the said opium or disposal thereof otherwise – Even no notice was given to the accused before such alleged destruction/disposal – High Court committed no error in disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence – The independent witnesses also turned hostile and did not support its case – It is manifest from the record that they had simply put their signatures on the papers at the whims of investigating agency – The version of prosecution that the accused voluntarily made the confessional statement cannot be believed in the light of admission by Narcotics Officer (PW 5), a key prosecution witness, that the statement of accused under s.67 of the Act was recorded while he was in his custody and the time was not mentioned

on the statements – This fact was further corroborated with the statement of PW 6 also that the statement of accused was recorded after arrest and while in custody – Thus, it cannot be said that the statement of the accused confessing the crime was of voluntarily made under the provisions of the Act – Interference with the order of High Court not called for.

Dismissing the appeal, the Court

HELD: 1. From the proceedings of Executive Magistrate, it is crystal clear that the remaining seized stuff was not disposed of by the Executive Magistrate. The contraband stuff as also the samples sealed as usual were handed over physically to the Investigating Officer (PW 6). Also the trial Court in its judgment specifically passed instructions to preserve the seized property and record of the case in safe custody, as the co-accused was absconding. In such situation, it assumes importance that there was nothing on record to show as to what happened to the remaining bulk quantity of contraband. The absence of proper explanation from the prosecution significantly undermines its case and reduces the evidentiary value of the statements made by the witnesses. [Para 9] [624-B-D]

2. Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of Court on the genuineness of the samples drawn from the allegedly seized contraband. However, the simple argument that the same had been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by the Magistrate. A bare perusal of the record shows that at no point of time any prayer had been made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is to for its disposal is to obtain an order from the competent Court of Magistrate as envisaged under Section 52A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application.[Para 10] [624-E-G]

3. There is no denial of the fact that the prosecution has not filed any such application for disposal/destruction of the

allegedly seized bulk quantity of contraband material nor any such order was passed by the Magistrate. Even no notice has been given to the accused before such alleged destruction/disposal. The trial Court appears to have believed the prosecution story in a haste and awarded conviction to the respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect of the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence. [Para 11] [624-H; 625-A-B]

4. Turning to the other discrepancies in the prosecution case, PWs 1 and 2 the independent witnesses portrayed by the prosecution have turned hostile and did not support its case. It is manifest from the record that they had simply put their signatures on the papers at the whims of investigating agency. Another aspect that goes in favour of the accused is that, the version of prosecution that the respondent voluntarily made the confessional statement cannot be believed in the light of admission by Narcotics Officer (PW 5), a key prosecution witness, that the statement of accused-respondent under Section 67 of the Act was recorded while he was in his custody and the time was not mentioned on the statements. This fact further gets corroborated with the statement of PW 6 also that the statement of accused was recorded after arrest and while in custody. Thus, it cannot be said that the statement of the accused confessing the crime was of voluntarily made under the provisions of the Act. [Para 12] [625-C-F]

Noor Aga v. State of Punjab & Anr. **(2008) 16 SCC 417 : [2008] 10 SCR 379 – relied on.**

Case Law Reference

[2008] 10 SCR 379	**relied on**	**Para 10**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 741-742 of 2011.

From the Judgment and Order dated 23.02.2010 of the High Court of Madhya Pradesh, Indore Bench in Criminal Appeal Nos. 621 and 772 of 2008.

K. Radhakrishnan, Sr. Adv, Ms. Sadhana Sandhu, Ms. Kiran Bhardwaj, B. V. Balaramdas, Manish Vashishtha, Advs. for the Appellant.

Sushil Kumar Jain, Sr. Adv, Puneet Jain, Harsh Jain, Abhinav Gupta, Ms. Christi Jain (For Ms. Pratibha Jain), Advs. for the Respondent.

The Judgment of the Court was delivered by

N. V. RAMANA, J. 1. At the outset, it may be noted that Criminal Appeal No. 742 of 2011 has already been dismissed as abated by this Court's order dated 11th April, 2016 passed by the Hon'ble Judge in Chamber. We are now called upon to deal with Criminal Appeal No. 741 of 2011 only which is directed against the Judgment and Order dated 23rd February, 2010 passed by the High Court of Madhya Pradesh, Bench at Indore in Criminal Appeal No. 621 of 2008. By the said judgment, the High Court allowed the appeal of the respondent herein and acquitted him of the charges leveled against him under Section 8/18 (B) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act').

2. Brief history of the case as emanated from the prosecution story is that upon receiving information from an informant on 11th May, 2004 PW7—P.K. Sinha (Inspector) laid a trap and intercepted three accused persons including the respondent herein at Bhilkhanda Square and found 7.2 kg of contraband material (opium) in the possession of the accused—respondent. Two samples were then prepared weighing 30 grams each and marked as 'A1' and 'A2' and the remaining material was sealed and marked as 'A'. The accused confessed to have committed the offence and after recording his statement a report has been submitted to the Superintendent who appointed Harvindar Singh (PW 6) as Investigating Officer. After depositing the seized contraband at Malkhana, the samples were sent for chemical examination and a complaint under Sections 8/18 and 29 of the Act against the accused has been filed. Taking cognizance of the Complaint, the Special Judge, Neemuch by his judgment dated 21st April, 2008 convicted the accused and sentenced him to suffer rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/-.

3. Agitating the judgment of the learned trial Judge, the accused filed appeal before the High Court. By the impugned judgment, the High Court observed that the bulk quantity of the seized case property was

A not disposed of by the Executive Magistrate, the statement of the accused under Section 67 of the Act was recorded when the accused was in police custody after arrest and the signature of the accused were falsely obtained on blank papers and hence his statement cannot be taken as that of voluntarily made under the provisions of the Act. Therefore, the High Court allowed the appeal of the accused and acquitted him of the
B charges. The aggrieved State is in appeal before us.

4. We have heard learned senior counsel appearing for the State and learned counsel for the accused—appellant as well, and carefully gone through the material on record.

C 5. Learned senior counsel for the State centered his arguments on the provisions of Section 52A of the Act to submit that on 14th October, 2004 after submitting the seized case contraband property to the Executive Magistrate, it was found that two polythene packets contained 4 kg and 3.2 kg of opium respectively and from them 30-30 grams each of two packets have been prepared and marked as A3 and A4 and
D sealed. Before opening the seized stuff and after preparing the samples, photographs were taken and the Executive Magistrate has duly signed with seal on all the sealed packets and samples. The case property was accordingly destroyed under the provisions of the Act and the inventory and photographs were submitted during trial which form primary evidence
E under the Act, but the High Court failed to consider them to be under the provisions of law. Learned senior counsel further submitted that the High Court committed serious error by simply believing the testimony of the accused that his signatures were obtained on blank papers forcibly, though there was enormous evidence in support of the prosecution case.

F 6. Learned counsel for the accused, on the other hand, supported the impugned judgment and submitted that the High Court considered all aspects of the case in a prudent manner under the established provisions of law, particularly Section 52-A of the Act, and then only reached to the conclusion that the prosecution has failed to prove the case against the accused—respondent.

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7. Having considered the rival submissions and the material on record, at the outset, we think it appropriate to quote here what the High Court has observed in para 9 of the impugned judgment:

"In the proceedings under Section 52-A of the Act, Harvindar Singh, PW-6 has deposed that he got the property of this case
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disposed of by the Executive Magistrate of Singoli by order sheet Ex.P/28. At that time photos of the seized property were taken, which are Ex-P/34 and the same was kept in the envelope Ex. P/29. ***The order sheet Ex. P/28 shows that property was not disposed of by the Executive Magistrate and Tehsildar, Singoli, but after the properation of the samples A-3, A-4 and B-3, B-4 and C-3, C-4, the above samples and the bulk quantity of the property was returned to the presenting officer Harvindar Singh, Inspector of CBN.*** On this order sheet, there is receipt of articles by Inspector Harvindar Singh. In this way, only the samples were prepared by the Executive Magistrate and Tehsildar, Singoli, but actual property was not disposed of. In para 79 of the impugned judgment, it has also been ordered by the Court that the property be kept pending as co-accused is absconding. This also shows that the property was not disposed of. It was not produced at the time of the trial in the Court. ***In the absence of the production of the bulk quantity of the opium, it cannot be proved that the samples Articles—A, B, C, D, E, F were prepared from the bulk quantity".***

8. What transpires from the above quoted paragraph is that after taking out two samples of 30 grams each, the Executive Magistrate returned the entire remaining seized property to the Investigating Officer—PW 6. To further ascertain the same, we have also carefully perused the exact content of the proceedings dated 14th October, 2004 (Annexure P-5) recorded by the Executive Magistrate, Singoli Tappa. The proceedings recorded as far as the respondent herein is concerned, read thus:

PROCEEDINGS

14.10.2004 : Case submitted. Shri Harvinder Singh, Inspector (Investigating Officer), Narcotics Bureau, Singoli has submitted three sealed packets of seized stuff in Crime No. 1/2004 under Section 8/18 and 8/29 of the NDPS Act, 1985. These packets were marked A, B and C and the details are given as under;

(1) A : On the packet marked "A" it was indicated that packet contains 7.200 kgs opium seized from Jaroopram S/O Ganga Ram Bishnoi. On opening the packet, transparent polythene bag was found, in which again two polythene packets found. One polythene indicated 4.000 kgs and the second one 3.200

A kgs opium respectively. A composite sample of 30-30 grams each have been taken from the two packets and kept in a small plastic polythene and marked A3 and A4 and sealed. The remaining seized stuff and samples sealed as usual are handed over to the presenting Officer Shri Harvinder Singh, Inspector.

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9. From the above proceedings, it is crystal clear that the remaining seized stuff was not disposed of by the Executive Magistrate. The contraband stuff as also the samples sealed as usual were handed over physically to the Investigating Officer Harvinder Singh (PW 6). Also the trial Court in its judgment specifically passed instructions to preserve the C seized property and record of the case in safe custody, as the co-accused Bhanwarlal was absconding. The trial Court more specifically instructed to put a note with red ink on the front page of the record for its safe custody. In such situation, it assumes importance that there was nothing on record to show as to what happened to the remaining bulk quantity of D contraband. The absence of proper explanation from the prosecution significantly undermines its case and reduces the evidentiary value of the statements made by the witnesses.

10. Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of Court on E the genuineness of the samples drawn and marked as A, B, C, D, E, F from the allegedly seized contraband. However, the simple argument that the same had been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by the Magistrate. On a bare perusal of the record, it is apparent that at no point of time any prayer had been F made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is to for its disposal is to obtain an order from the competent Court of Magistrate as envisaged under Section 52A of the Act. It is explicitly made under the Act that as and when such an application is G made, the Magistrate may, as soon as may be, allow the application [*See also* : ***Noor Aga*** Vs ***State of Punjab & Anr.*** (2008) 16 SCC 417].

11. There is no denial of the fact that the prosecution has not filed any such application for disposal/destruction of the allegedly seized bulk quantity of contraband material nor any such order was passed by the H Magistrate. Even no notice has been given to the accused before such

alleged destruction/disposal. It is also pertinent here to mention that the trial Court appears to have believed the prosecution story in a haste and awarded conviction to the respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect of the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence.

12. Turning to the other discrepancies in the prosecution case, PWs 1 and 2 the independent witnesses portrayed by the prosecution have turned hostile and did not support its case. It is manifest from the record that they had simply put their signatures on the papers at the whims of investigating agency. Another aspect that goes in favour of the accused is that, the version of prosecution that the respondent voluntarily made the confessional statement cannot be believed in the light of admission by Narcotics Officer (PW 5), a key prosecution witness, that the statement of accused—respondent under Section 67 of the Act was recorded while he was in his custody and the time was not mentioned on the statements. This fact further gets corroborated with the statement of PW 6 also that the statement of accused was recorded after arrest and while in custody. Thus, it cannot be said that the statement of the accused confessing the crime was of voluntarily made under the provisions of the Act.

13. For the aforesaid reasons, we are in complete agreement with the judgment of the High Court. We do not find any reason to interfere with the well reasoned judgment. The appeal lacks merit and is dismissed. Pending applications, if any, shall also stand disposed of.

Devika Gujral Appeal dismissed.