A VIJAY PANDEY

v.

STATE OF UTTAR PRADESH

(Criminal Appeal No. 1143 of 2019)

B JULY 30, 2019

[ASHOK BHUSHAN AND NAVIN SINHA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 8, 15 – Prosecution case that appellant was carrying 10 kgs. of opium – Appellant contended that he was falsely implicated – Trial Court convicted appellant u/ss. 8, 15 of NDPS Act – High Court upheld the conviction of the accused – On appeal, held: No independent witness from the locality was included in the investigation and all the witnesses were police officials – There was no explanation for the non-availability of any independent witness in a residential locality – Further, though the Laboratory report of the seized sample was obtained, but the identity of the sample seized from the appellant was not conclusively established – In the circumstances, mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself – The sample seized and that tested have to be co-related – Thus, the conviction by the courts below unsustainable and accordingly set aside.

Allowing the appeal, the Court

HELD : 1. The seizure was made in the early morning at the door step of the appellant. It is difficult to believe that in a rural residential locality, the police were unable to find a single independent witness. No name of any person has been mentioned who may have declined to be a witness. The High Court, despite noticing the absence of any recovery memo prepared at the time of search and seizure under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, opined that the deposition of the police witness to that effect was sufficient compliance. Though the Laboratory Report was obtained, but the identity of the sample stated to have been seized from the appellant was not conclusively established by the prosecution. [Para 5] [776-D-F]

2. The failure of the prosecution in the present case to relate the seized sample with that seized from the appellant makes the case no different from failure to produce the seized sample itself. In the circumstances the mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself. The sample seized and that tested have to be co-related. The conviction by the Trial Court and upheld by the High Court are unsustainable and are accordingly set aside. The appellant is acquitted. [Paras 8, 10] [777-F; 778-E-F]

Mohan Lal v. State of Punjab **AIR 2018 SC 3853 : 2018 SCR 1006 ;** *Vijay Jain v. State of Madhya Pradesh* **(2013) 14 SCC 527 : [2013] 4 SCR 293 ;** *Ashok alias Dangra Jaiswal v. State of Madhya Pradesh* **(2011) 5 SCC 123 : [2011] 4 SCR 253 – relied on.**

Case Law Reference

[2018] SCR 1006	**relied on**	**Para 7**
[2013] 4 SCR 293	**relied on**	**Para 8**
[2011] 4 SCR 253	**relied on**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1143 of 2019.

From the Judgment and Order dated 10.10.2018 of the High Court of Judicature at Allahabad in Criminal Appeal No. 7351 of 2007.

Tripurari Ray, Balwant Singh Billowria, Suresh Kumar Sharma, Parveen Kumar, Prafulla Kumar, Rajesh Singh, Advs. for the Appellant.

Sanjay Kumar Tyagi, Ajay Kr. Prajapati, A. K. Pandey, Yogesh Pachouri, Sandeep Singh, Advs. for the Respondent.

The Judgment of the Court was delivered by

NAVIN SINHA, J.

1. The appellant assails his conviction and sentence under Sections 8 and 15 of the of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as "the NDPS Act") for 15 years along with fine of Rs.1,50,000/- under Section 31 of the NDPS Act.

A 2. The appellant is stated to have been carrying a plastic flour packet in his right hand leading to recovery of 10 kgs. of opium. No independent witness from the locality was included in the investigation and all the witnesses are police officials only.

3. Learned counsel for the appellant alleging false implication B contends that he was apprehended as he stepped out of his house. There is no explanation for the non-availability of any independent witness in a residential locality. There is non-compliance with Section 50 of the NDPS Act. The prosecution failed to prove that the sample produced in court was the same as seized from the appellant.

C 4. Learned counsel for the State submits that the appellant has a previous history of two convictions under the NDPS Act and he is a habitual offender. Section 50 has been complied with. The Trial Court has recorded its satisfaction that the sample produced in court was the same seized from the appellant. In any event it has caused no prejudice to the appellant.

D 5. We have considered the respective submissions. The seizure was at 06.40 AM at the door step of the appellant. We find it difficult to believe that in a rural residential locality, the police were unable to find a single independent witness. No name of any person has been mentioned who may have declined to be a witness. The High Court, despite noticing E the absence of any recovery memo prepared at the time of search and seizure under Section 50 of the NDPS Act, opined that the deposition of the police witness to that effect was sufficient compliance. Though the Laboratory Report was obtained, but the identity of the sample stated to have been seized from the appellant was not conclusively established by F the prosecution.

6. The accused had raised an objection regarding the sample produced in court not having been established as seized from him. The Trial Court opined that "the *malkhanas* in the State of Uttar Pradesh were in miserable condition and strange and objectionable thing come to G the eyes". The plastic packet produced was of very low quality and the quality of ink used in writing the name of the accused on the same was not decipherable and may have got erased with passage of time. Nonetheless, since the allegations against the appellant had been proved by the witnesses, the failure to conclusively identify the sample produced as having been seized from the appellant was inconsequential. H

Unfortunately, the High Court did not deal with this aspect of the matter at all. The fact of an earlier conviction may be relevant for the purpose of sentence but cannot be a ground for conviction *per se*.

7. In ***Mohan Lal vs. State of Punjab,*** AIR 2018 SC 3853, it was observed:

> "10. Unlike the general principle of criminal jurisprudence that an accused is presumed innocent unless proved guilty, the NDPS Act carries a reverse burden of proof under Sections 35 and 54. But that cannot be understood to mean that the moment an allegation is made and the F.I.R. recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of ten years, absence of any provision for remission, do not dispense with the requirement of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities."

8. The failure of the prosecution in the present case to relate the seized sample with that seized from the appellant makes the case no different from failure to produce the seized sample itself. In the circumstances the mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself. The sample seized and that tested have to be co-related. The observations in ***Vijay Jain vs. State of Madhya Pradesh***, (2013) 14 SCC 527, as follows are considered relevant :

> "10. On the other hand, on a reading of this Court's judgment in *Jitendra's case*, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce

during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in the case of Ashok (supra), this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant."

9. In ***Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh***, (2011) 5 SCC 123, it was observed:

"12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused."

10. We are, therefore, unable to uphold the conviction of the appellant. The conviction by the Trial Court and upheld by the High Court are unsustainable and are accordingly set aside. The appellant is acquitted. He is directed to be released forthwith unless wanted in any other case.

11. The appeal is allowed.

Ankit Gyan Appeal allowed.