

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 18TH DAY OF NOVEMBER, 2020

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

CRIMINAL APPEAL No.101/2011

BETWEEN:

CHANNABASAPPA,
S/O KALAPPA,
AGED ABOUT 70 YEARS,
AGRICULTURIST,
R/AT BEERUT SHAGYA VILLAGE,
KOLLEGALA TALUK,
CHAMARAJNAGAR DIST.

... APPELLANT

[BY SRI Y.S. SHIVA PRASAD, ADVOCATE (PHYSICAL HEARING)]

AND:

STATE OF KARNATAKA BY
HANUR POLICE STATION,
REP. BY SPP,
HIGH COURT BUILDINGS,
BANGALORE - 1.

... RESPONDENT

[BY SRI DIWAKAR MADDUR, HCGP (PHYSICAL HEARING)]

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) OF THE CR.P.C. PRAYING TO SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE INCLUDING FINE AMOUNT IN SPL.C.NO.6/08 DATED 20.12.2010/03.01.2011 PASSED BY THE DISTRICT AND SESSIONS JUDGE, CHAMARAJANAGAR CONVICTING THE APPELLANT/ACCUSED FOR THE OFFENCE PUNISHABLE UNDER SECTION 20(a)(i) OF THE NDPS ACT.

THIS CRIMINAL APPEAL COMING ON FOR HEARING THIS DAY, THE COURT DELIVERED THE FOLLOWING:

J U D G M E N T

This appeal is filed challenging the judgment of conviction and sentence dated 20.12.2010 passed in Special Case No.06/2008 on the file of the District and Sessions Judge at Chamarajanagar challenging the conviction of the accused for the offence punishable under Section 20(a)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and sentencing him for rigorous imprisonment for a period of three months and to pay a fine of Rs.2,000/-.

2. The factual matrix of the case is that on 24.12.2007 at about 7.15 a.m., P.W.5 – Police Inspector had received the credible information and based on that information along with the panchas and his staff, he raided the land bearing Survey No.421/1 of Berut Shagya Village, Kollegal Taluk and found that the accused had cultivated 15 ganja plants in the midst of chilli plants without any licence or permit. Hence, a case has been registered and thereafter investigation has been conducted and charge-sheet has been filed against the accused for the offence punishable under Sections 20(a) and 20(b) of the NDPS Act.

3. The accused appeared before the Trial Court and denied the charges leveled against him and hence the prosecution relied upon the evidence of P.Ws.1 to 7 and got marked the documents at Exs.P.1 to 11. The accused has not led any defence evidence. The sample ganja was marked as M.O.1. The Trial Judge after considering both oral and documentary evidence placed on record convicted the accused and sentenced him and hence the present appeal.

4. The main ground urged in the appeal is that P.W.5 who conducted the raid, he himself investigated the matter and filed the charge-sheet and the same is not permitted. He ought not to have conducted the investigation and filed the charge-sheet. The learned counsel appearing for the accused relies upon the judgment of this Court in the case of **SHANTHAPPA AND OTHERS v. STATE BY AREHALLI POLICE STATION** reported in **2001 Cri.L.J. 2822**. Referring this judgment, the learned counsel would contend that P.W.5 himself registered the FIR and conducted the investigation and filed the charge-sheet. Hence, the inspector is having vested interest in proceeding and hence the same has to be set aside.

5. The learned counsel would also submit that P.Ws.1 and 2, who are the independent witnesses have not supported the case of the prosecution. With regard to the presence of the gazetted officer, the witnesses have admitted in the cross-examination that in Exs.P.4 to 7 – photographs, the gazetted officer is not found and hence it is clear that gazetted officer was not present at the spot and hence his evidence cannot be believed. The Trial Judge failed to consider this aspect.

6. P.W.3 FSL witness in the cross-examination categorically admitted that he has not separated the ganja leaves, stems, fruiting and flowering tops. Hence, it cannot be held that the same is ganja. P.Ws.5 to 7 are the official witnesses and their evidence cannot be believed. They categorically admitted that in the photographs they cannot see the crop of turmeric and only small chilli plants are found and have not complied with the provisions of Section 57 of the NDPS Act. Hence, the entire material placed before the Trial Court is not enough to convict the accused. Hence, it requires interference of this Court.

7. Per contra, the learned High Court Government Pleader appearing for the State would submit that though both P.Ws.1 and 2 have turned hostile, they have admitted their signatures available on Ex.P.1 - mahazar. The photographs Exs.P.4 to 7 clearly discloses that these panch witnesses were also present at the time of conducting the raid and seizing M.O.1. Hence, the evidence of P.Ws.1 and 2 cannot be discarded in toto though they turned hostile.

8. The learned High Court Government Pleader would also submit that the FSL report was received and P.W.3 categorically deposed that M.O.1 is ganja. P.W.4 is the gazetted officer and he categorically deposes that he accompanied the panch witnesses and also the police and ganja M.O.1 was seized in his presence. Nothing is elicited from the mouth of P.W.4 to disbelieve his evidence. The learned counsel would submit that P.Ws.5 to 7 are the official witnesses and they were present at the time of seizing the same. Nothing is elicited in the cross-examination to disbelieve the case of the prosecution. Hence, it does not require any interference.

9. Having heard the arguments of the learned counsel for the appellant and the learned High Court Government Pleader appearing for the State and on perusal of the material available on record, the points that arise for the consideration of this Court are:

- (i) Whether the Trial Judge has committed an error in convicting the accused/appellant for the offence punishable under Section 20(a) of the NDPS Act?
- (ii) What order?

Point Nos.(i) and (ii):

10. Before considering the material available on record, this Court would like to make it clear that though the charge-sheet is filed against the accused for the offence punishable under Sections 20(a) and 20(b) of the NDPS Act, the charge has been framed for the offence punishable under Section 20(a)(i) of the NDPS Act. The prosecution relied upon the evidence of P.Ws.1 to 7 and got marked the documents at Exs.P.1 to 11. According to the prosecution, P.Ws.1 and 2 have accompanied while visiting the spot and in their presence they have seized the ganja plants. P.Ws.1 and 2 have turned hostile. However, in the

cross-examination, P.W.1 and P.W.2 admits that the sample packet bears their signatures.

11. P.W.3 – Chief Chemist and Public Analyst in his evidence says that he has examined the seized articles which was sent to him and given the report in terms of Ex.P.2. In the cross-examination, he admits that he has not separated the ganja leaves, stems, fruiting and flowering tops. The P.W.4 – doctor in his evidence says that on 24.11.2007 at about 7.40 a.m., when he was in his residence, he was called to the police station and he was requested to be present at the time of seizure of the ganja as the gazetted officer. Accordingly he accompanied P.Ws.5 to 7. P.Ws.1 and 2 were also present. The police took out the sample of the ganja from all the plants and sealed the same and also conducted the mahazar in terms of Ex.P.1 and he has signed Ex.P.1 and identifies his signatures as Ex.P.1(c). He was subjected to cross-examination. In the cross-examination, a suggestion was made that he has not visited the spot and no mahazar was conducted in his presence and he has signed the mahazar in the police station, and the said suggestion was denied. It is suggested that no panchas were taken to the spot and the same was denied.

12. P.W.5 - CPI conducted the raid based on the information after obtaining the permission in terms of Ex.P.3. P.W.5 in his evidence says that he has secured two panchas and also the gazetted officer and found the accused in the house and the accused only led them to the spot where he had planted the ganja and the same was seized. He identifies M.O.1 and through this witness Exs.P.4 to 7 - photographs are marked. P.W.5 was subjected to cross-examination.

13. In the cross-examination, he admits that he has not stated in the report about the turmeric crop grown in the said land. He admits that in terms of Exs.P.4 to 7 the said turmeric plants were not grown. But he admits that they had taken the photographs at the spot. He further admits that in the photographs, Medical Officer is not seen. It is suggested that there were no panchas present at the time of mahazar and they have not seized any article and the same was denied. However, he admits that the land was standing in the name of wife of the accused.

14. P.W.6 is the PSI who accompanied P.W.5 and his evidence is replica of the evidence of P.W.5. In the cross-

examination, he admits that except the accused, no other persons were there in the land and no revenue officials accompanied them. P.W.7 is the Police Constable and his evidence is also replica of the evidence of P.W.5. He was subjected to cross-examination. In the cross-examination, he admits that there are lands of other persons by the side of the land of the accused and he does not remember the names of the panchas. It is suggested that M.O.1 – sample of ganja was not seized at the spot and the same was denied.

15. Having considered both oral and documentary evidence placed on record, there is no doubt that P.W.5 – Police Inspector took the permission to conduct the raid in terms of Ex.P.3. On the basis of that permission only he conducted the raid. Ex.P.1 is the mahazar which contains the signature of P.Ws.1, 2, 4 and so also P.Ws.5 to 7. The FSL report is Ex.P.2 and it contains the signature of P.W.3. Exs.P.4 to 7 are the photographs. The FIR was registered in terms of Ex.P.9. RTC Ex.P.10 stands in the name of wife of the accused. Apart from the documentary evidence, the prosecution relies upon the evidence of P.Ws.1, 2 and 4 who are the independent witnesses.

P.Ws.1 and 2 have turned hostile. However, in the cross-examination, they have admitted their signatures available on sample packet and they identified the signatures on Ex.P.1. It is also important to note that the prosecution relied upon the photographs which are marked as Exs.P.4 to 7. On perusal of those photographs, it discloses that the Investigating Officer and the panch witnesses – P.Ws.1 and 2 were present at the spot. In the cross-examination of P.Ws.1 and 2, the Public Prosecutor did not confront those photographs to P.Ws.1 and 2 and those photographs are marked through P.W.5 subsequent to the examination of P.Ws.1 and 2. Hence, it is clear that P.Ws.1 and 2 were present at the spot on the date of conducting the spot mahazar in terms of Ex.P.1. P.Ws.1 and 2 have admitted their signature available on Ex.P.1. It is important to note that the panch witnesses have turned hostile and the prosecution relies upon the evidence of P.W.4. It is the evidence of the prosecution that P.W.4 was secured to the police station and thereafter P.W.4 accompanied them and in the presence of the gazetted officer – P.W.4, ganja was seized. It is important to note that P.W.5 – Investigating Officer in the cross-examination categorically admits that P.W.4 is not appearing in the

photographs at Exs.P.4 to 7 and looking into the photographs there is no doubt that P.Ws.1 and 2 were present but P.W.4 was not present.

16. It is important to note that the narcotic substance has to be recovered in compliance of Sections 42 and 43 of the NDPS Act. The gazetted officer though deposed before the Court that in his presence ganja was seized, I have already pointed out that in Exs.P.4 to 7 photographs he is not appearing and P.W.5 also categorically admits that he is not seen. Hence, the prosecution has not proved the fact that the same was seized in the presence of the gazetted officer. Though the prosecution claims that the gazetted officer was secured before seizing the same, no material is placed before the Court to prove the same. The very admission of P.W.5 that the gazetted officer is not seen in the photographs, clearly depicts that the signature of P.W.4 was taken somewhere else and not at the spot. The other official witness P.W.6 and 7 though deposes that P.W.4 was present at the spot, no material is placed before the Court to prove the same. Hence, the very presence of P.W.4 has not been proved and also no material that the same was seized in the presence of P.W.4.

17. The non-compliance of Sections 42 and 43 of the NDPS Act is fatal to the case of the prosecution. It has to be noted that special enactment was brought into force to combat the menace in the society. At the same time, in order to book a person, it requires strict compliance of the procedures. Hence, the absence of non-compliance of strict procedure envisaged under the NDPS Act, amounts fatal to the case of the prosecution. No doubt the Trial Court having taken note of the presence of P.Ws.1 and 2 in the photographs, though they turned hostile, they have admitted the signatures available on Ex.P.1 and also considering the evidence of P.Ws.4 and 5 to 7 comes to a conclusion that the same was seized. No doubt Exs.P.4 to 7 discloses the presence of the accused at the spot. But the Trial Judge has committed an error in not considering the legal evidence available on record. The Trial Judge has not discussed anything about compliance of Sections 42 and 43 of the NDPS Act with regard to the seizure and the same was seized in the presence of the gazetted officer. The evidence of the prosecution with regard to the presence of P.W.4 does not inspire the confidence of the Court to come to the conclusion that the same was seized in the presence of gazetted officer. The

legal evidence has not been considered by the Trial Court. The Trial Court gone into considering the fatal aspects of the case and strict compliance as envisaged under the special enactment has not been considered by the Trial Court. No doubt in the cross-examination of P.Ws.5 to 7, nowhere it is elicited that these official witnesses were having ill will against the accused to book the case against the accused. The evidence of the official witnesses cannot be brushed aside when the defence failed to elicit any answers from the mouth of the official witnesses. However, this Court has to take note of the legal evidence available on record and I have already discussed with regard to legal evidence regarding seizure of the narcotic substance and non-compliance of Sections 42 and 43 of the NDPS Act while seizing the narcotic substance. Hence, I am of the opinion that benefit of doubt goes in favor of the accused with regard to non-compliance of the provisions enumerated in the NDPS Act. First of all, the seizure of ganja plant was not proved by adducing any legal evidence. Hence, the Trial Court has committed an error in convicting the accused and sentencing him for the offence punishable under Section 20(a) of the NDPS Act.

18. In view of the discussions made above, I pass the following:

ORDER

- (i) The appeal is allowed.
- (ii) The impugned judgment of conviction and sentence dated 20.12.2010 passed in Special Case No.06/2008, is hereby set aside.
- (iii) The accused is acquitted for the offence punishable under Section 20(a) of the NDPS Act.
- (iv) Fine amount, if any, deposited before the Trial Court, is ordered to be refunded to the appellant.
- (v) The Registry is directed to transmit the Trial Court records forthwith.

**Sd/-
JUDGE**

MD