

Mohammed Khalid vs The State Of Telangana on 1 March, 2024

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Bench: B.R. Gavai

2024 INSC 158

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(S). 1610 OF 2023

MOHAMMED KHALID AND ANOTHER

...APPELLANT(S)

VERSUS

THE STATE OF TELANGANA

...RESPONDENT(S)

WITH
CRIMINAL APPEAL NO(S). 1611 OF 2023

JUDGMENT

Mehta, J.

1. These appeals take exception to the final impugned judgment dated 10th November, 2022 passed by the High Court for the State of Telangana at Hyderabad rejecting the Criminal Appeal No. 594 of 2011 preferred by the appellants assailing the judgment dated 30th May, 2011 passed by the Metropolitan Sessions Judge, Hyderabad(hereinafter being referred to as 'trial Court') in Sessions Case No. 563 of 2010.

Narendra Prasad Date: 2024.03.01 17:15:23 IST Reason:

2. By the aforesaid judgment, the learned trial Court, convicted the appellants for the offence punishable under Section 8(c) read with Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985(hereinafter being referred to as the 'NDPS Act') and sentenced each of them to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- each, in default, to suffer simple imprisonment for a period of six months.

3. During the pendency of the appeal before the High Court, A-1 (Mohd. Ishaq Ansari) expired and, therefore, the proceedings qua him stood abated before the High Court.

4. For the sake of convenience, the accused will be referred to as A-1(Md. Ishaq Ansari)(expired), A-2(S.A. Shafiullah), A-3(Mohd. Khalid) and A-4(Md. Afsar).

Brief Facts :

5. Mr. M. Srinivasa Rao, Inspector of Police(PW-1), West Zone Task Force (hereinafter being referred to as 'Inspector PW-1') claims to have received credible information on 8th May, 2009 regarding transportation of ganja by two persons from Sangareddy to Hyderabad in a 'Toyota Qualis' vehicle. PW-1 apprised his superior officers about such source information and after obtaining permission, secured the presence of two panchas, namely, Shareef Shah and Mithun Jana, to associate as panchas and proceeded to the spot along with his team. The Inspector PW- 1 and the team members intercepted a Toyota Qualis vehicle bearing registration no. AP 09 AL 6323 near Galaxy Theatre at 15:00 hours. A-1 and A-2 were allegedly found present in the vehicle. The Inspector PW-1 served them a notice under Section 50 of the NDPS Act. On the request of the accused, a Gazetted Officer i.e., Inspector PW-4(V. Shambabu) was called to the spot to associate in the proceedings. The accused were again given a notice under Section 50 of the NDPS Act by PW-4(V. Shyambabu) who also participated in the search proceedings and it is alleged that three bundles of ganja weighing around 80 kgs found lying in the vehicle were seized in presence of Inspector PW-1 and the panchas.

6. A-1 and A-2 were arrested and interrogated at the spot. Three samples weighing about 50 grams were drawn from each bundle contraband and remaining muddamal ganja was seized vide confession-cum-seizure panchnama (Exhibit P-3). One part of the sample was handed over to A-1 and A-2.

7. Inspector PW-1 thereafter proceeded to hand over the accused along with the seized articles to LW-10(G. Naresh Kumar, Sub-Inspector of Police, Golkonda Police Station)(hereinafter being referred to as 'Sub-Inspector LW-10') for further action. Based on these proceedings, a complaint came to be lodged at the Golkonda Police Station and Criminal Case No. 181 of 2009 was registered and investigation was commenced.

8. One part of sample collected from the recovered contraband was forwarded to the Forensic Science Laboratory (FSL) from where a report (Exhibit P-11) was received concluding that the sample was of ganja as defined under Section 2(b) of the NDPS Act. Acting on the confession/interrogation of the two occupants of the car, i.e. A-1 and A-2, the Investigating Officer (PW-5 K. Chandrasekhar Reddy)(hereinafter being referred to as 'Investigating Officer PW-5') apprehended the accused A-3 and A-

4. After concluding the investigation, a charge-sheet was filed against the four accused in the trial Court.

9. Upon being charged for the offence punishable under Section 8 read with Section 20(b)(ii)(c) of the NDPS Act, the accused pleaded not guilty and claimed trial. The prosecution examined five witnesses and exhibited 13 documents to prove its case as per the following table:-

PW1 M. Srinivasa Rao, complainant-cum-investigating officer PW2 Mohd. Illiyas Akber, panch witness PW3 Sk. Shamshuddin Ahmed, panch PW4 V. Shyambabu, Gazetted Officer PW5 K. Chandrasekhar Reddy, Investigating Officer Exhibit P1 Notice to accused Exhibit P2 Complaint Exhibit P3 Confession-cum-seizure panchnama of A1 and A2 Exhibit P4 Bunch of (2) photographs Exhibit P5 Signature of PW2 on panchnama of A3 Exhibit P6 Signature of PW2 on panchnama of A4 Exhibit P7 Signature of PW3 on panchnama of A3 Exhibit P8 Signature of PW3 on panchnama of A4 Exhibit P10 First Information Report Exhibit P11 FSL Report Exhibit P12 Seizure panchnama of A3 Exhibit P13 Seizure panchnama of A4

10. The accused, upon being questioned under Section 313 of Code of Criminal Procedure, 1973(hereinafter being referred to as 'CrPC') denied the prosecution allegations but chose not to lead any evidence in defence. The trial Court proceeded to convict and sentence the accused in the above terms by the judgment dated 30th May, 2011.

11. Being aggrieved by their conviction and the sentence awarded by the trial Court, the accused preferred an appeal under Section 374(2) CrPC in the High Court for the State of Telangana at Hyderabad which stood rejected vide the judgment dated 10th November, 2022.

12. A-3 and A-4 have preferred Criminal Appeal No. 1610 of 2023 and A-2 has preferred Criminal appeal No. 1611 of 2023 for assailing the impugned judgment dated 10th November, 2022 of High Court whereby the conviction recorded and sentences awarded to the accused by the trial Court have been affirmed.

Submissions on behalf of the accused appellants :

13. Learned counsel representing A-2(S.A. Shafiullah) advanced the following submissions to assail the impugned judgment and seeking acquittal for the accused:-

(i) That the independent panch witnesses associated with the search and seizure were not examined in evidence and hence the entire search and seizure proceedings become doubtful and are vitiated;

(ii) That it is admitted that the contraband ganja was seized from three bags which were also having green chillies therein. However, the Seizure Officer made no effort whatsoever to segregate the chillies and the alleged contraband and hence it cannot be held with any degree of certainty that the recovered contraband ganja fell within the category of commercial quantity;

(iii) That the prosecution failed to ensure compliance of the requirements of Section 52A of the NDPS Act inasmuch as, no sampling procedure was undertaken before the Magistrate;

(iv) That the Seizure Officer (Inspector PW-1) claims to have collected a total of three samples (one from each bundle of ganja) and handed over one part of the sample to the accused. However, when the articles were received at the FSL, three distinct sample packages were found which upon testing gave the presence of 'cannabis sativa'. It was thus submitted that only two samples remained with the Investigation Officer and hence there is a grave contradiction and doubt regarding the sanctity of the samples collected by the Seizure Officer (Inspector PW-1) at the time of seizure.

(v) Attention of the Court was also drawn to the evidence of PW-5 who stated that three samples of ganja were taken by Sub-Inspector LW-10, who handed over these sample packets to witness. However, this fact is contradicted by the evidence of the Seizure Officer(Inspector PW-1)), who stated that it was he who collected three samples from the contraband(three bundles of ganja) and handed one over to the accused under proper acknowledgment. Thus, as per the learned counsel, the FSL report is honest in the eyes of law as the sampling procedure is totally flawed;

(vi) That three bundles/packets of ganja were allegedly seized from the vehicle 'Toyota Qualis' in possession of A-1(Mohd.

Ishaq Ansari) and A-2(S.A. Shafiullah) but when Investigating Officer PW-5 appeared in the witness box, he produced seven packets wherein the contraband was packed. These packets were not having any seals or identifying marks, i.e., signature of the accused and the panchas. Thus, it is apparent that the original muddamal seized at the spot was never produced and exhibited in the Court;

(vii) That Sub-Inspector LW-10 who allegedly handed over the sample packets to Investigating Officer PW-5 was not examined in evidence. Furthermore, the carrier Constable who transmitted the samples to the FSL was also not examined by the prosecution;

(viii) No document pertaining to deposit of the samples at the Police Station and the transmission thereof to the FSL was exhibited on record. The samples were forwarded to the FSL after a gross delay of more than two months and hence, the FSL report cannot be read in evidence because the required link evidence is missing.

14. Learned counsel representing A-3 and A-4 urged that these accused were not found present at the spot at the time of seizure. They were arrested on 30th May, 2009 merely on the basis of the interrogation notes of A-1 and A-2 and were charged for offence under Section 8 read with Section 20(b)(ii)(c) of NDPS Act. As the prosecution never came out with a case that the contraband was recovered from the possession of these two accused, their conviction for the offence under Section 8 read with Section 20(b)(ii)(C) of the NDPS Act is ex facie illegal and unsustainable on the face of the record.

Arguments on behalf of State :

15. Per contra, learned counsel representing the State, vehemently and fervently opposed the submissions advanced by learned counsel for the appellants. He urged that two Courts, i.e., the trial Court as well as the High Court, have recorded concurrent findings of facts for convicting the appellants and for affirming their conviction and hence, this Court in exercise of the jurisdiction under Article 136 of the Constitution of India should be slow to interfere in such concurrent findings of facts. He thus implored the Court to dismiss the appeals.

Discussion and Conclusion :

16. We have given our thoughtful consideration to the submissions advanced at the Bar and have gone through the impugned judgment and the evidence available on record.

17. Before discussing the prosecution evidence, we would like to note that the case as set up by the prosecution is regarding recovery of narcotics from a vehicle which was stopped during transit. Thus, the procedure of search and seizure would be governed by Section 43 read with Section 49 of the NDPS Act which are reproduced below:-

“43. Power of seizure and arrest in public place.—Any officer of any of the departments mentioned in Section 42 may—

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.—For the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

49. Power to stop and search conveyance.—Any officer authorised under Section 42, may, if he has reason to suspect that any animal or conveyance is, or is about to be, used for the transport of any narcotic drug or psychotropic substance [or controlled substance], in respect of which he suspects that any provision of this Act has been, or is being, or is about to be, contravened at any time, stop such animal or conveyance, or, in the case of an aircraft, compel it to land and—

(a) rummage and search the conveyance or part thereof;

(b) examine and search any goods on the animal or in the conveyance;

(c) if it becomes necessary to stop the animal or the conveyance, he may use all lawful means for stopping it, and where such means fail, the animal or the conveyance may be fired upon.”

18. We now proceed to some important excerpts from the prosecution evidence:-

(a) Complaint dated 8th May, 2009(Exhibit P-2) “Then I recorded the confession-cum-seizure panchnama of the accused persons A-1 and seized three bundles containing Ganja in it from their possession. On weighing the three bundles it was found about 80 kgs of Ganja in it. Out of the seized Ganja we have taken three samples and marked as S-

1 and S-3 each sample packet containing 50 grams of Ganja and affixed panch chits. Also seized Maroon, colour Qualis vehicle bearing No. AP 09AL 6323 Engine No. 2L9722612, Chassis No. LF50-104863512/01 from the possession of the accused persons. Out of the seized Ganja drawn three samples containing 50 grams marked S-1 to S-3, each packed in polythene covers and attached panch chits to them. The sample is supplied to the accused Mohd Ishaq Ansari and S.A. Ashafiullah.”

(b) Exhibit P-11(FSL Report) – “Received one sealed cloth parcel sealed with six seals, which are intact and tallying with the sample seal labelled as “Cr. No. 181/2009” containing a cardboard box containing three closed polythene packets each labelled as “S-1, S-2 & S-3” respectively described below through Sri K. Narsimulu, PC 7770 on 14/07/2009.” (C)PW-1 “I collected three samples weighing about 50 gms each and given one sample to the accused under proper acknowledgement.” “M.O.I is the ganja packed in seven bags.” “There are no panch chits right now on M.O.I bags.” “It is true that the bags, deposited before the court are not having, seals. I, have weighed the Ganja only and it is weighing 80 Kgs, but I have not weighed the chillies. The total weight of the Ganja bundles as mentioned in the panchnama includes the weight, of chillies. I have not mentioned about sealing of samples in my panchnama. I have not mentioned in panchnama in what containers. I have taken, the samples.” “As per the panchnama one sample was given to the accused. I have taken 3 samples and out of them I have given one sample to both the accused and two samples I handed over in police station.”

(d) PW-4 “PW1 seized 3 ganja bundles weighing around 80 kgs and collected samples of 50 grams from the bundles.” (e)PW-5 “Originally three bundles of ganja was seized from the accused and as the Ganja was becoming dry and turning into dust, and due to the holes of the bags it is coming out, and therefore we transferred the Ganja into 7 new bags, which was already marked as M.O.1.” “Three samples of Ganja have been taken by LW 10 and handed over the samples to me. We have forwarded the three samples to FSL through A.C.P., and submitted FSL report Ex. P.11.” “The samples were taken on 8.5.2009 and they were forwarded to FSL on 7.7.2009 i.e. after two months of taking of samples. The samples were not deposited in the court.” “I did not file any document to show that where the property was kept in Maalkhana. I did not produce any Maalkhana register in this case. The property was sent to FSL after two months of its seizure. The FSL report, does not

disclose about the panch chits and seals and quantity of samples. The property deposited in court is not having any official seals.” “I did not report to the court till today that the ganja was getting dried up and becoming dust, I converted them from three bundles to 7 bags for safe custody.”

19. A perusal of the evidence of the Seizure Officer (Inspector PW-

1) and the confession-cum-seizure panchnama (Exhibit P-3) would reveal that the prosecution claims to have recovered the contraband from three bags wherein the ganja as well as green chillies were present. Seizure Officer(Inspector PW-1) made no effort whatsoever to conduct a separate weighment of the contraband by segregating the chillies. Rather, the panchnama is totally silent about presence of chillies with the bundles of ganja. Thus, it cannot be said with any degree of certainty that the recovered ganja actually weighed 80 kgs. Seizure Officer(Inspector PW-1) also stated that he collected three samples of ganja at the spot and handed over one sample to accused. If this was true, apparently only two sample packets remained for being sent to the FSL. Contrary to the evidence of PW-1, PW-5 stated that three samples of ganja were taken by LW-10 who handed the same over to him. Thereafter, these samples were forwarded to the FSL through the ACP and a FSL report (Exhibit P-11) was received. When PW-5 appeared for deposition, he produced the muddamal ganja in the Court and it was seen that the same was packed in seven new bags as against the three bags referred to in the seizure memo (Exhibit P-3). Neither any proceedings were conducted nor any memo was prepared by the police officers for repacking the seized ganja bundles in new packaging.

20. The two independent panch witnesses i.e. Shareef Shah and Mithun Jana who were associated in the recovery proceedings, were not examined in evidence and no explanation was given by the prosecution as to why they were not being examined.

21. Sub-Inspector LW-10, who prepared three samples of ganja, as per the testimony of PW-5, was not examined in evidence. In addition thereto, the prosecution neither examined any witness nor produced any document to satisfy the Court regarding safe keeping of the samples right from the time of the seizure till the same reached the FSL. The official who collected the samples from the police station and carried the same to the FSL was not examined at the trial. From the quoted portion of the evidence of Seizure Officer(Inspector PW-1), it is clear as day light that he handed over one of the three samples to the accused. The witness also admitted that he did not mention about sealing of the samples in the panchnama. Contrary to the evidence of PW-1, PW-5 stated that three samples of ganja were taken out by Sub-Inspector LW- 10 and were handed over to the witness who forwarded the same to the ACP for sending it to FSL. In cross-examination, the witness admitted that he did not file any document to show that the property was kept in malkhana. The malkhana register was not produced in the Court. The FSL report (Exhibit P-11) does not disclose about the panch chits and seals and signature of the accused on samples. The property deposited in the Court(muddamal) was not having any official seals. The witness also admitted that he did not take any permission from the Court for changing the original three packets of muddamal ganja to seven new bags for safe keeping. These glaring loopholes in the prosecution case give rise to an inescapable inference that the prosecution has miserably failed to prove the required link evidence to satisfy the Court regarding the safe custody of the sample packets from the time of the seizure till the same reached the FSL. Rather, the very possibility of three samples being sent to FSL is negated

by the fact that the Seizure Officer handed over one of the three collected samples to the accused. Thus, their remained only two samples whereas three samples reached the FSL. This discrepancy completely shatters the prosecution case.

22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit P-11) is nothing but a waste paper and cannot be read in evidence. The accused A-3 and A-4 were not arrested at the spot. The offence under Section 20(b)(ii)(c) deals with production, manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of ganja. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of ganja with A-1 and A-2. The entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2.

23. It is trite that confession of an accused recorded by a Police Officer is not admissible in evidence as the same is hit by Section 25 of the Evidence Act. Neither the trial Court nor the High Court adverted to this fatal flaw in the prosecution case and proceeded to convict A-3 and A-4 in a sheerly mechanical manner without there being on iota of evidence on record of the case so as to hold them guilty.

24. As a consequence of the above discussion, we are of the firm opinion that the prosecution has miserably failed to prove the charges against the accused. The evidence of the police witnesses is full of contradictions and is thoroughly unconvincing. The conviction of the accused appellants as recorded by the trial Court and affirmed by the High Court is illegal on the face of record and suffers from highest degree of perversity.

25. Resultantly, the judgment dated 10th November, 2022 passed by the High Court affirming the judgment of the trial Court convicting and sentencing the accused appellants for the charge under Section 8(c) read with 20(b)(ii)(c) of the NDPS Act is hereby quashed and set aside. The appellants are acquitted of all the charges. They are in custody and shall be released forthwith, if not wanted in any other case.

26. The appeals are accordingly allowed.

27. Pending application(s), if any, shall stand disposed of.

.....J. (B.R. GAVAI)J. (SANDEEP MEHTA) NEW DELHI;

MARCH 01, 2024