

Yusuf @ Asif vs State on 13 October, 2023

Author: Pankaj Mithal

Bench: Pankaj Mithal, Abhay S. Oka

2023 INSC 912

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.3191 OF 2023
[Arising out of SLP (CrI.) No. 3010 of 2023]

YUSUF @ ASIF

...APPELLANT

VERSUS

STATE

...RESPONDENT

J U D G M E N T

PANKAJ MITHAL, J.

1. Leave granted.

2. Heard Mr. Narendra Hooda, learned Senior counsel for the appellant and Ms. Aishwarya Bhati, learned Additional Solicitor General for the respondent.

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3. On the basis of the information received by the Intelligence Officer of Narcotics Control Bureau¹, a lorry parked near Puzhal Central Jail, Chennai, was intercepted by NCB on 28.03.2000 early in the morning. Four persons were found in the lorry and upon search, they were found in possession of commercial quantity i.e. 20 kgs of heroin kept in two jute bags. The samples were drawn from each of the packets i.e. 14 big and 12 small polythene packets kept in the two jute bags and they were

seized under a seizure memo i.e. Mahazar. All the four persons were arrested after receiving the analyst report that the seized substance was nothing else but heroin.

4. Consequently, the case crime No.113/2000 was registered.

The trial court upon consideration of the evidence on record held all the four persons guilty under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985² and convicted them to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1 lakh each, in default of which a further imprisonment of one year was ordered.

1 hereinafter referred to as “NCB”² hereinafter referred to as “NDPS Act”

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5. All the four accused persons preferred appeal before the High Court. During the pendency of the appeal, A⁴ (Ganesh Ram) died and the appeal was dismissed as abated against him vide order dated 15.07.2022. The High Court vide judgment and order dated 11.10.2022 dismissed the appeal holding that there is no error in the findings recorded by the trial court and, therefore, the accused persons were directed to serve the remaining sentence after adjusting the period of imprisonment already undergone.

6. Aggrieved by his conviction and sentencing by the trial court and its affirmation by the High Court, A¹ alone has preferred the present appeal assailing the judgment and order of the High Court dated 11.10.2022.

7. It may be relevant to mention here that A¹ is the owner of the contraband and the same was being transported from Madhya Pradesh to Chennai with the help of A² to A⁴. A¹ had reached the place of seizure of the contraband to receive it, once it had reached Chennai.

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8. We have heard learned Senior counsel for the appellant. The main plank of his argument is that the entire action of seizure and sampling is wholly illegal. It was done in violation of the mandatory provisions of Section 52A (2) of the NDPS Act as the procedure prescribed therein was not followed in drawing the samples and seizing the alleged narcotic substance. Furthermore, there is a serious doubt about the correctness of samples sent for analysis as to whether they were actually the samples of the seized contraband.

9. Learned counsel for the respondent on behalf of the State submitted that the search and seizure was based upon the prior information received by the Intelligence Officer of NCB who has been examined as PW1. The accused persons were disclosed the identity of the officers and after obtaining their consent in writing, the search was carried out in the presence of Superintendent of Police, NCB (PW8) who was a gazetted officer. After seizure, two samples from each packet were drawn and packed separately and were sealed. The NCB seal No.12 was affixed to it and the correct seal number

was

4|10 mentioned in the Mahazar and all other documents except in the godown receipt whereby inadvertently seal No.11 was mentioned. The Officers involved in the search, seizure and arrest operation had duly submitted their report as referred to under Section 57 of the NDPS Act.

10. In order to test the above submissions, it would be relevant to refer to the provisions of Section 52A (2), (3) and (4) of the NDPS Act. The aforesaid provisions provide for the procedure and manner of seizing, preparing the inventory of the seized material, forwarding the seized material and getting inventory certified by the Magistrate concerned. It is further provided that the inventory or the photographs of the seized substance and any list of the samples in connection thereof on being certified by the Magistrate shall be recognized as the primary evidence in connection with the offences alleged under the NDPS Act.

11. For the sake of convenience, relevant sub-sections of Section 52A of the NDPS Act are reproduced hereinbelow:

5|10 “52A. Disposal of seized narcotic drugs and psychotropic substances. (1) (2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of

(a) certifying the correctness of the inventory so prepared; or

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(b) taking, in the presence of such Magistrate, photographs of [such drugs or substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub-

7|10 section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the

8|10 presence of a gazetted officer is not sufficient compliance of the mandate of sub-section (2) of Section 52A of the NDPS Act.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.

15. In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer in charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone 3 Union of India vs Mohanlal and Anr (2016) 3 SCC 379

9|10 would constitute primary evidence for the purposes of the trial.

16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.

17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with fine of Rs.1 lakh and in default of payment of fine to undergo further imprisonment of one year is hereby set aside.

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18. The appellant has already undergone more than 6 years of imprisonment out of 10 years awarded to him. He is on bail and has been granted exemption from surrender by this Court. Therefore, his bail bonds, if any, stands cancelled.

19. The appeal is allowed with no order as to costs.

..... J.

(ABHAY S. OKA) J.

(PANKAJ MITHAL) NEW DELHI;

OCTOBER 13, 2023.

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