Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO. 76/2023
IN
CRIMINAL APPLICATION (MAIN) 514/2023(f)

STATE OF GOA THR.
POLICE INSPECTOR DITENDRA NAIK . ..... Applicant.

Versus

MOHAMED YUSUF AND ANR. ..... Respondents.

Mr S.G. Bhobe, Public Prosecutor for the Applicant-State.

Ms Caroline Collasso, Advocate for Respondent No.2.

CORAM : M.S. SONAK &

VALMIKI SA MENEZES, JJ.

DATE : 6th February 2024.

ORAL ORDER : (Per VALMIKI SA MENEZES, J.)

1. Heard Shri S.G. Bhobe, Public Prosecutor for the Applicant-State of Goa and Caroline Colasso for the Respondent No.2.

2. Criminal Misc. Application No.76/2023 has been filed to condone delay of 98 days in preferring an appeal against Judgment dated 23/12/2022 (impugned Judgment) passed by

the learned Sessions Judge-I, Panaji acquitting the accused Mohamad Yusuf and David Johnson respectively, in Special Criminal Case (NDPS) No.44/2017 and Special Criminal Case No. (NDPS) No.46/2017. Criminal Application (Main) No. 514/2023 (F) seeks this Court's leave to appeal against the aforementioned Judgment of the Sessions Judge.

3. For the reasons mentioned in Criminal Misc. Application No.76/2023, and after hearing the Respondents, the delay of 98 days in filing the Appeal/Application for Leave is condoned. With the consent of the learned Counsel for the Applicant and Respondents, we have proceeded to hear the application seeking leave to appeal against the impugned Judgment.

4. Special Criminal (NDPS) Case No.44/2017 came to be registered against the Respondent No.1 by the Anti Narcotic Cell (ANC), who is alleged to have conducted a raid on 21/3/2017 at house No.608/2, owned by one Saesh Naik at Anjuna, Bardez, Goa. It was alleged that during the raid, Respondent No.1 was found in illegal possession of MDMA weighing 17 gms. and ecstasy tablets weighing 13 gms. and was accused of committing offences punishable under Sections 22(c), 25-A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act).

5. Special Criminal (NDPS) Case No.46/2017 came to be registered against the Respondent No.2 by the ANC, who is alleged to, during his custody in an earlier case, had disclosed that he had sold narcotic drugs in his rented house, owned by Victor D'Souza; upon a raid conducted on 23/3/2017 Respondent No.2

was found in illegal possession of MDMA weighing 20 gms., DMP weighing 40 gms., and LSD liquid weighing 30 gms. and was accused of committing an offence punishable under Section 22(c) of the NDPS Act, 1985.

6. Pursuant to this Court's direction by Judgment dated 4.5.2018, the Special Court was directed to club both charge-sheets and Respondent No.2 was directed to face a single composite trial, whereby the Trial Court recorded common evidence in the two files. After recording evidence, the Special Court has acquitted both the Accused of the offences punishable under Sections 22(c), 25-A and 29 of the Act, against which the present application seeking leave to appeal has been filed.

7. It is the submission of learned Public Prosecutor Shri Bhobe that the Trial Court has failed to appreciate that the onus lay upon the Respondents to prove that they were not in conscious possession of the drugs as contemplated under Section 35 of the Act. He further submits that the Special Court has failed to consider the evidence of the expert witness (PW.14), who has deposed as to the structural and molecular formula and weight of the substance recovered in the raid, which proved that the substance was in fact MDMA and as such, the order of acquittal has resulted in grave miscarriage of justice. He further submits, on taking us through the evidence and the findings of the Trial Court, that the Trial Court has misread material evidence of the Chemical Analyzer, as also the evidence of PW.4, PW.5, PW.8 and PW.19, who were Police Officers, part of the raiding party.

Mr. Bhobe submits that these would constitute compelling reasons for interference with the impugned Judgment and sufficient ground to grant leave to the Applicants to appeal.

8. Countering these arguments, Ms Caroline Collasso for the Respondent No.2 submits that the Judgment of acquittal is founded upon sound reasoning and after considering all the evidence on record; she submits that the findings arrived at by the Special Court to hold that the expert evidence has failed to prove that the substance claimed to be in possession of the accused persons was a scheduled narcotic drug, cannot be faulted and no two views are possible on the specific finding given on that count. It was further argued for the Respondent No.3 that the view taken by the Trial Court rejecting the case of the Prosecution that the search of the houses in question was done after full compliance with the provisions of the Act, more so in full compliance with provisions of Section 52-A thereof, cannot be faulted as it is based upon correct appreciation of the evidence on record. The learned Counsel relies upon the Judgment of the Supreme Court in ***Ghurey Lal vs. State of Uttar Pradesh,*** reported in (2008) 10 SCC 450 to contend that there were no substantial and compelling reasons to overrule or disturb the judgment of acquittal.

9. On perusing the record of the Special Court and the impugned Judgment, we find that the finding arrived at by the Trial Court as to the glaring inconsistencies in the cross examination of PW.19, with that of PW.4, PW.5 and PW.8, who are all Police Officers, who were part of the raiding team, cannot

be faulted. On this count also, the Special Court has considered in great detail whether the evidence on record proves that the Accused were apprised of their right in compliance with Section 50 of the Act. The conclusions of the Trial Court from the evidence on record, are that there was no conclusive proof, the burden of which lay on the Prosecution, to demonstrate that the accused were apprised of their rights in a language known to them. The finding that there was a clear doubt from the evidence on record that the provisions of the Section 50 of the Act were not complied with, cannot be faulted and no two views are possible on the basis of the evidence on record.

10. The Trial Court has also analyzed, in great detail, the evidence of PW.12, Sudhakar, who is the Scientific Analyzer at the CFSL, Hyderabad who has conducted the analysis of the seized substance/tablets. In his evidence, Sudhakar had admitted that the UV-VIS Spectrophotometry are electronic devices, which are very important for the purpose of analyzing the material seized and that in the present case, neither the readings nor the printouts of the results of these tests were annexed to the report or produced in evidence. So also in the evidence of PW.8 Police Inspector Suraj Halankar, it has come on record that the CFSL Hyderbad does not have Standard Reference Material of LSD, which was alleged to be one of the substances seized in the raid and as such, confirmatory analysis was not possible. This was corroborated by the evidence of PW.17 Sanjeet Kumar that even the CFSL Calcutta does not have the Standard Reference Sample for LSD and MDMA. On this evidence also, the finding arrived at by the Trial Court that the

ability of the Forensic Laboratories to carry out the analysis and the confirmatory tests for LSD, had been suppressed and consequently, the conclusion that there is a clear doubt that the Accused were found in possession of LSD and MDMA, cannot be faulted.

11. The Special Court has also considered the entire evidence on the question of proof of conscious possession of the narcotics and whether this fact was proved as against Accused No.2. On considering the evidence of PW.5 Therron and PW.8, PI Suraj with the evidence of PW.19 a Police Sub-inspector, Special Court found major inconsistencies with regard to the place from where the keys to the room where the narcotic substance were recovered from. The evidence suggests, and as rightly concluded by the Trial Court that the Accused No.2 being in custody since 21/3/2017 and the keys of the house and the locker from where the recovery was made, having not found on his person, but were removed from under a stone outside the said house, there were grave doubts whether this evidence should be considered to establish conclusively that the keys were used by the Accused No.2.

12. In *Ghurey Lal* (supra), the Supreme Court, after considering the jurisdiction of an appellate Court sitting over a judgment of a Trial Court of acquittal, has made the following observations (17).

> *"70. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:*

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

i) The trial court's conclusion with regard to the facts is palpably wrong;

ii) The trial court's decision was based on an erroneous view of law;

iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

v) The trial court's judgment was manifestly unjust and unreasonable;

vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

13. Applying the well-settled principles crystalized in the above observations of the Supreme Court, this would not be a case, after considering the judgment of the Trial Court wherein the

conclusions and findings and the evidence on record, cannot be faulted to interfere with the judgment of acquittal.

There are no substantial or compelling reasons of the nature set out in para 70 of *Ghurey Lal* (supra) for us to disturb the Trial Court's order of acquittal. Consequently, the application for leave to appeal stands rejected.

VALMIKI SA MENEZES, J. **M.S. SONAK, J.**

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