(2011) 2 Crimes 596 : (2010) ILR (MP) 2191 : (2010) 3 MPHT 144

Madhya Pradesh High Court

Case No: None

Nannu Sahu		APPELLANT
	Vs	
State of Madhya Pradesh		RESPONDENT

Date of Decision: April 19, 2010

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 173, 311, 313, 386, 391#Evidence Act, 1872 â€" Section 165#Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€" Section 2, 20, 35, 42, 50#Negotiable Instruments Act, 1881 (NI) â€" Section 138

Citation: (2011) 2 Crimes 596 : (2010) ILR (MP) 2191 : (2010) 3 MPHT 144

Hon'ble Judges: Rakesh Chandra Mishra, J

Bench: Single Bench

Judgement

R.C. Mishra, J.
This appeal has been preferred against the judgment-dated 27.11.2007 passed by Special Judge under the Narcotic

Drugs and Psychotropic Substances Act, 1985 (for short "the Act"), Jabalpur in Special Case No. 19/2007 whereby the appellant was convicted

u/s 8 read with Section 20(b)(ii)(B) of the Act and sentenced to undergo R.I. for 7 years and to pay fine of Rs. 50,000/- and in default, to suffer

R.I. for 2 years.

2. Prosecution story, in short, is that on 25.03.2007 at about 2.30 p.m., N.R. Ghudawat (PW7), who was posted as Sub-Inspector at P.S. Omti,

Jabalpur, received a credible information that the appellant, while carrying Ganja on a bicycle for the purpose of sale, was expected to arrive at the

turn of St. Norbert School located near Bhanvartal Garden. After recording the corresponding information in the Rojnamcha and observing all

other statutory formalities, he proceeded towards the spot along with other members of the police force and panch witnesses namely Jameel Khan

(PW1) and Basant Sonkar (PW4). At about 4.40 p.m., the appellant was seen coming from the side of bus-stand pedaling a cycle with a white

plastic bag on its carrier. He was apprised of his legal right where under he could require presence of Gazetted Officer or Magistrate for the

purpose of search. However, he declined to exercise the right. Accordingly, with his consent only, the bag was searched. It was found to contain a

total quantity of 15.250 Kgs. of Ganja. The contraband was duly seized and two samples of 25 gms. each were drawn. One of the samples was

forwarded to FSL, Sagar. The corresponding report (Ex.P-20) indicated that the sample contained Ganja that is cannabis hemp within the meaning

of Section 2(iii)(b) of the Act.

3. The appellant pleaded false implication at the instance of one Shri Khampariya who, at the relevant point of time, was posted as ASI at P.S.

Garha, Jabalpur. To bring home the charge, the prosecution examined as many as 7 witnesses including the detecting officer and the panch

witnesses. No evidence was led in defence. Upon a critical appraisal of the evidence on record, learned trial Judge, for the reasons assigned in the

impugned judgment, proceeded to hold the appellant guilty of the offence charged with.

4. In the memo of appeal, legality and propriety of the conviction have been questioned on the following grounds-

(i) Non-compliance with the statutorily mandatory provisions of Sections 42 and 50 of the Act.

(ii) Absence of signatures of the panch witnesses on the panchnama (Ex.P-29) relating to search of the Detecting Officer N.R. Ghudawat and

other members of the raiding party.

(iii) Non-corroborative evidence of Basant Sonkar (PW4), cited as one of independent witnesses to the proceedings relating to search, seizure and

sampling of the contraband.

(iv) Absence of explanation as to where the seized property was kept before being forwarded to the FSL for chemical examination.

In addition, learned Counsel for the appellant, placing reliance on decision of the Supreme Court in Jitendra and Another Vs. State of M.P., has

strenuously contended that the appeal deserves to be allowed on the solitary ground of non-production of the seized contraband as article of

evidence before the trial Court. Attention has also been invited to the fact that in a series of judgments passed by co-ordinate Benches of this

Court including those rendered in (i) Abdul Gani Vs. State of M.P., and (ii) Harish v. State of M.P 2010 (1) MPHT 90 convictions have been set

aside on the aforesaid ground.

5. However, a close analysis of the judgment in Jitendra''s case (supra) would reveal that the Apex Court had only disapproved the observations

made by a single Bench of this Court in Jitendra and Another Vs. State of M.P., that non-production of the contrabands before the trial Court was

not fatal to the prosecution case in view of the fact that the defence also did not insist upon production of the contraband. Still, the appeal against

conviction was not allowed solely on the ground of non-production of Charas and Ganja allegedly seized from the possession of the accused-

appellant as articles of evidence before the trial Court but also for the following reasons-

(i) No independence witness as to the recovery of the narcotic drugs from the possession of the accused was examined.

(ii) The final report, u/s 173 of the Code of Criminal Procedure (for short ''the Code''), was submitted either without being aware of or without

reading the report of the FSL.

For this, reference may be made to Para ''9'' of the judgment that reads as under-

Taking the cumulative effect of all the circumstances, it appears to us that the material placed on record by the prosecution does not bring home the

charge beyond reasonable doubt. We are of the view that upon the material placed on record it would be unsafe to convict the appellants. They

are certainly entitled to the benefit of doubt.

6. It is well settled that a decision is an authority for what it decides and not for what could be inferred from the conclusion. As explained by the

Supreme Court in Padmasundara Rao and Others Vs. State of Tamil Nadu and Others, there is always peril in treating the words of a judgment as

though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a

particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

7. In this view of the matter, the decision of the Apex Court in Jitendra"s case (above) can not be treated as an authority for the proposition that in

each and every case, non-production of the contraband before the trial Court would entail acceptance of the appeal against finding of guilt. The

obvious reason is that when in a crimi- nal appeal, the appellate Court set aside the conviction on the ground of gross irregularities at the trial, the

question still remains as to what order to be passed, that is, whether to acquit the accused or to order a re-trial and the Court has to select the

alternative which will be more conducive to the ends of justice, looking to all the circumstances of the case.

8. Powers of the appellate Court have been defined in Section 386 of the Code and Sub-section (b)(i) thereof provides that in an appeal from a

conviction, it may reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent

jurisdiction subordinate to such Appellate Court or committed for trial. Nature, ambit and scope of this power of the Appellate Court (that was

conferred by analogously worded Sub-section (1)(b) of Section 423 of the Old Code) have already been examined by a five-judge of the

Supreme Court in Ukha Kolhe v. State of Maharashtra AIR 1963 SC 1531. Speaking for the majority, J.C. Shah, J (as his Lordship then was)

explained the legal position in the following terms -

An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the

proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the

nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over

which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate court

deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes

out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify

the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence

which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.

9. Moreover, decision of the Apex Court in AIR 2002 SC 2425 fortifies the view that Sub-section (b)(i) (supra) also contemplates remand of the

case for a limited purpose. In that case, the Court was required to deal with a situation wherein deposition of a witness namely Babu Ram, though

signed by the Presiding Judge of the Designated Court, did not bear signature of the witness. It was observed that instead of keeping aside the

entire statement purported to be the testimony of the witness, it would be more expedient to remit the case to the trial Court for filling up the said

deficiency by recalling and re-examining the witness afresh.

10. Further, a co-ordinate Bench of this Court in Manoj Rawat Vs. State of Madhya Pradesh, though in a case relating to offence under the Public

Gambling Act, 1867, affirmed the order of the appellate Court, remanding the case for re-trial for the purpose of exhibiting the seized instruments

of gaming as articles of evidence before the trial Court. While doing so, learned Judge referred to the guideline laid down by the Supreme Court in

Zahira Habibulla H. Sheikh v. State of Gujarat AIR 2004 SC 3114 to the effect that the Presiding Judge should not be a spectator and a mere

recording machine but must ensure that the trial is fair. In that case, the Apex Court quoted the following observations made in an earlier decision

rendered in Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi, -

It is a common experience in criminal Courts that defence counsel would raise objections whenever Courts exercise powers u/s 311 of the Code

or u/s 165 of the Evidence Act, 1872 by saying that the Court could not ""fill the lacuna in the prosecution case"". A lacuna in the prosecution is not

to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting

relevant answers from witnesses. The adage ""to err is human"" is the recognition of the possibility of making mistakes to which humans are prone. A

corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up.

11. As explained in Zahira''s case only, Section 391 of the Code is another salutary provision which clothes the Courts with the power to

effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not

and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to

the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to

be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. However,

whether a retrial u/s 386 or taking up of additional evidence u/s 391 is the proper procedure will depend on the facts and circumstances of each

case for which no strait-jacket formula of universal and invariable application can be formulated.

12. Now, adverting to the facts of the present case, it may be pointed out that that the seized contraband and its samples were deposited in the

Malkhana of the Court on 23/10/2007. However, the prosecutor-in-charge of the case apparently due to sheer ignorance of the legal position as

settled by the Apex Court in Jitendra''s case (supra) did not prefer to request the trial Judge to call the samples of the contraband made over to the

Nazir for being produced as articles of corroborative evidence against the appellant at the time of the examination of Detecting Officer N.R.

Ghudawat (PW7) on 01.11.2007. It is relevant to note that statement of Jameel Khan (PW1), one of the panch witnesses, who came forward to

support the prosecution version, had already been recorded on 24.09.2007. Moreover, in the wake of the principle laid down in Zahira''s case

(above), the trial Judge was also expected to ensure a fair trial by directing production of the samples of the contraband, which was in the custody

of the Court only, at least at the examination of the Investigating Officer.

13. In such a situation, while allowing the prayer for suspension of sentence, vide order-dated 10.03.2010, a question was posed as to why the

case should not be remitted for a decision afresh after affording opportunity to the prosecution for getting the samples marked as articles of

evidence and also to the defence for challenging the identity thereof.

14. In response, learned Counsel for the appellant, while making reference to the decision of this Court in Hind Spinners, Dewas v. Jagdish

Chandra 2009 (3) MPWN 9 has submitted that sending the case for re-trial even for a limited purpose would not be proper in view of the fact that

the appellant has been in custody since 25.03.2007. However, fact of the matter is that even if the doctrine of proportionality is applied, the

offence of being found in an illicit possession of 15.250 Kgs. of Ganja would carry custodial sentence for a term of 71/2 years. The Judgment in

Hind Spinners''s case (supra), though based on the verdict of the Supreme Court in Ukha Kolhe''s case (ibid), is also of no avail to the appellant

as, in that case, both the parties in a complaint relating to the offence u/s 138 of the Negotiable Instruments Act, 1881, were aggrieved by the

order of the appellate Court directing re-trial.

15. Although, it is necessary to delve into the merits of the contentions relating to compliance with statutory provisions governing the search and

seizure yet, for arriving at the conclusion on the point as to whether the resuscitation of a three-year-old matter would be in the public interest, a

passing reference may be made to the recent developments in this field of law. Accordingly, even the non-compliance with the provision of Section

42(2) of the Act may not vitiate the trial if it does not cause any prejudice to the accused See. Karnail Singh Vs. State of Haryana, . This apart, in

State of Himachal Pradesh Vs. Pawan Kumar, the Apex Court, while explaining that provision of Section 50 of the Act would not apply to search

of bag or briefcase or any such article being carried by the accused, struck a note of caution that drug traffickers should not go scot-free on

technical pleas. Besides this, as observed by the Supreme Court in State of Punjab Vs. Baldev Singh, etc. etc., the social malady of drug abuse

has already acquired the dimensions of an epidemic. Viewed from this angle, remand of the case would also serve a public purpose.

16. As observed in Zahira''s case, the community acting through the State and the public prosecutor is also entitled to justice. The case of the

community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.

17. For these reasons, it would not be in the interests of justice to acquit the appellant solely on the ground of non-production of the seized

property in evidence before the trial Court. Still, taking note of the fact that the appellant has already suffered imprisonment for a period of 3 years

and has not been able to deposit the fine amount in pursuance of the order-dated 10.03.2010 suspending the custodial sentence, he is entitled to

be released on bail.

18. To sum up, in the peculiar facts and circumstances of the case, the case deserves to be remitted to the trial Court for a limited purpose of

getting the samples of the contraband produced as articles of evidence in the examination of panch witness namely Jameel Khan (PW1) and

Investigating Officer N.R. Ghudawat (PW7). Let it be clarified that this Court is not ordering a de novo trial. However, nothing contained herein

shall be construed as any expression of opinion on the merits of the case. It shall still be open to the appellant to raise all such pleas as are available

under law before the trial Court.

19. Consequently, without entering into the merits of the other contentions raised against legality and propriety of the conviction, the appeal is

allowed and the impugned conviction and the consequent sentences are hereby set-aside. The matter is remanded to the trial Court for decision

afresh after affording an opportunity to the prosecution to recall panch witness namely Jameel Khan (PW1) and Investigating Officer N.R.

Ghudawat (PW7) for a limited purpose of getting it samples identified. Needless to say that the defence would also be afforded reasonable

opportunity to cross-examine the corresponding witness on the point and in the light of any new incriminating circumstance brought on record, the

appellant shall be re-examined u/s 313 of the Code and be given an opportunity to lead evidence in rebuttal of the presumption under Sections 35

and 54 of the Act. This exercise be completed as far as practicable within a period of 3 months from the date of receipt of the record.

20. It is further directed that the appellant shall be released on bail on his furnishing a personal bond in the sum of Rs. 25,000/- (Rupees Twenty

Five Thousand) with a solvent surety in the like amount to the satisfaction of the trial Court for his appearance during trial.

21. Copy of this Judgment be forwarded to the Principal Secretary, Department of Law and Legislative Affairs, Bhopal for initiating appropriate

action against the public prosecutor-in-charge of the case for conducting the prosecution in a negligent manner in utter ignorance of the principle of

law laid down by the Apex Court in Jitendra''s case (supra).