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STATE OF RAJASTHAN
v.
UDAI LAL
(Criminal Appeal No.843 Of 2008)

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MAY 8, 2008

[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

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Narcotic Drugs and Psychotropic Substances Act, 1985 – s.36B and s.8 r/w s.15 – Conviction under, by Special Judge, NDPS cases – Set aside by High Court in appeal – Challenge to – Held: The High Court failed to analyze the evidence in proper perspective, and highlighting minor irregularities/contradictions, it acquitted accused-Respondent on flimsy grounds without assigning sound reasons – It failed to consider all the relevant materials and circumstances – Matter remitted to High Court for fresh disposal – Code of Criminal Procedure, 1973 – Chapter XXIX – s.374.

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Bags containing poppy husk powder were allegedly recovered from a truck. Respondent was driving the said truck. The Special Judge, NDPS cases, convicted him under s.8 r/w s.15 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Respondent filed appeal before the High Court which allowed the same holding that the evidence led by the prosecution was not sufficient to bring home the guilt of Respondent.

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In appeal to this Court, the question which arose for consideration is whether the prosecution had established the charges leveled against Respondent and the High Court erred in acquitting him while exercising power under s.36B read with Chapter XXIX of CrPC.

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Allowing the appeal and remitting the matter to High Court for fresh disposal, the Court

HELD:1.1. The onus of proof lies on the prosecution.

x To prove the fact that as to whether on 19.08.2001 at 3.15 p.m. Station House Officer, PW7, recovered 119 bags containing doda powder from the possession of the accused-Respondent for which he was not having any permission letter, the prosecution recorded the statement of PWs 5, 6, 7, 11 and 12. It is true that except PW12, all the witnesses are from the Police Department. Though the prosecution has recorded the statement of independent witnesses PWs 1, 2, 3 and 4, these four independent witnesses have been turned hostile. However, the said witnesses have admitted to put their signatures at the required place on the documents prepared on the spot by the prosecution. Like P.W.1 other witnesses, namely, P.W.2, P.W.3 and P.W.4 have also admitted that they put their signatures at the proper place on the documents prepared by the police. Also that the Special Judge has pointed out that out of these witnesses even a single witness has not given any such statement that the said signatures have been taken from them under terror, pressure or without their free consent. The Special Judge has also observed that while the said witnesses are educated and have admitted to have signed with their free consent, it is proved that all the four witnesses were present on the spot where the prosecution party has very much carried out the proceedings. These material aspects have not been properly considered by the High Court except discarding them on the ground that they turned hostile. [Para 7] [44-C-H, 45-A]

1.2. Among the other witnesses, namely, P.Ws. 5, 6, 10, 11 and 12 except PW12, others belong to the Police Department. However, the High Court has not analyzed and adduced any reason for not accepting their evidence except pointing out minor contradictions here and there. [Para 8] [45-B]

1.3. The High Court failed to take note of the relevant aspect, namely, the quantity of recovery articles is quite huge (115 bags) which could not be produced in the Court

A but on behalf of the prosecution 5 bags have been produced in the Court. It is also seen that besides this, at the time of recording the statement, the Investigating Officer produced the samples of articles taken from the seized articles in the Court. In such circumstance, considering
B the huge quantity merely because the prosecution has not produced all the 119 bags in the Court, an inference cannot be drawn against them. The Special Judge had rightly noted, that at the time of recording the statement Investigating Officer had produced the samples of the
C articles in the Court. This relevant aspect has also not been properly dealt with by the High Court. [Para 9] [45-C,D,E]

1.4. Though the High Court found fault with the Special Judge in analyzing the evidence and other materials, on the other hand it is the High Court which failed to analyze the evidence in proper perspective and highlighted the minor irregularities/contradictions and acquitted the accused on flimsy grounds without assigning sound reasons. [Para 10] [45-F]

E 1.5. The High Court failed to consider all the relevant materials and circumstances. Further, s.36B of the NDPS Act empowers the High Court to deal with the appeal and dispose of the same and exercise all powers conferred by Chapter XXIX and Section 374 of the CrPC, in particular. It is settled law that when the view taken either by Sessions Judge or Special Judge was found by the High Court to be manifestly wrong and that it had led to miscarriage of justice, the High Court is entitled to interfere and set aside the same. Such recourse has not been
F adopted by the High Court in this case. [Para 10] [46-C,D,E]
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Khet Singh vs. Union of India, (2002) 4 SCC 380 – referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
H NO. 843 of 2008

From the final Judgment and Order dated 15.9.2005 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Appeal No. 1050 of 2002

Milind Kumar and Aruneshwar Gupta for the Appellant.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. State of Rajasthan, aggrieved by the judgment and order dated 15.09.2005 passed by the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Appeal No. 1050 of 2002 acquitting the respondent/Udai Lal, who had been convicted by the Special Judge, NDPS cases, Chittorgarh under Section 8/15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') and sentenced him to undergo 10 years' rigorous imprisonment and a fine of Rs. One lakh, has filed the above appeal.

3. *BRIEF FACTS:*

According to the prosecution, on 19.08.2001, at about 3.05 p.m. one Himmat Singh, Station House Officer, Police Station, Chanderiya, received an information from Mukhbir about transporting illicit liquor in truck No. RJ 09/G/0604 and acting on that information he alongwith Amar Singh P.W.5, Udai Singh P.W.6, Gopal P.W.11 after calling two motbirs Dinesh Khatik P.W. 1 and Iqbal P.W.2, taking with them the necessary articles for investigation, started in Government jeep. At 3.15 p.m., as per the information received, the said truck arrived there from the side of Chittor and was got stopped by signaling. The truck was covered by tarred canvass. After removing the canvass from the truck, when the truck was searched, the back side of bags was found to be of maize and in the rest part of the truck there were gunny bags. While checking the maize bags, smell of narcotic substance was felt and after giving notice to driver Udai Lal, he was asked about his option to be searched either by a Magistrate or Gazetted Officer or Station House Officer himself. The driver gave his consent in writing to give search to the

- A S.H.O. In the search of the truck, 21 bags of maize and 119 bags of poppy husk were found, which were seized at the spot and out of those seized bags two samples of 500 each were taken out from five bags and sealed and marked then and there. The rest of the material was also seized and sealed. The accused Udai Lal was arrested and a case against him under Section 8/15 of the NDPS Act was registered. During investigation, the material was found to be got loaded by one Dalchand Brahmin, as such he was also arrested under Section 8/28 of the Act. Challan against both the accused was filed in the Court.
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- C The matter came up before the Special Judge, NDPS Cases, Chittorgarh and the parties were heard on framing of charge. Charge under Section 8/15 of the Act was framed against the accused/Udai Lal while the other accused Dalchand Brahmin was left out for the offence under Section 8/29 of the Act. The accused denied the charge. The prosecution, in support of its case, examined P.Ws 1 to 12 and Exh. P-1 to P-22. After closing of the prosecution evidence, when the statement of the accused was recorded under Section 313 of the CrP.C., he stated that neither he was driving the truck nor the poppy husk was recovered from him. He claimed himself to be innocent. In defence, the accused examined himself as D.W.1 and also examined D.Ws 2-5. The learned Special Judge, after considering the materials and hearing both sides, by judgment and order dated 02.12.2002, convicted the accused for the offence under Section 8/15 of the NDPS Act and sentenced him as mentioned above.
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- G Aggrieved by the judgment and order passed by the learned Special Judge, the accused preferred S.B. Criminal Appeal No. 1050 of 2002 before the High Court of Judicature for Rajasthan at Jodhpur. By the impugned judgment, the High Court, after finding that the evidence led by the prosecution is not sufficient to bring home the guilt of the accused interfered with the order passed by the Special Judge set aside the conviction and sentence and allowed the appeal. Questioning the order of acquittal by the High Court, the State of Rajasthan
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through Secretary, Department of Home Affairs has filed the
above appeal. A

4. Heard Mr. Milind Kumar, learned counsel for the appel-
lant and none appeared on behalf of the respondent.

5. As mentioned above, the respondent/accused was B
charge-sheeted for the offence under Section 8/15 of the NDPS
Act. Learned counsel appearing for the State of Rajasthan sub-
mitted that the High Court was not justified in acquitting the ac-
cused overlooking the fact that the respondent/accused was C
found to be illegally transporting narcotic substance and it was
found proved from oral and documentary evidence that 119
bags containing 4,717 Kgs of Opium powder have been recovered
from the truck on which only respondent/accused was
present and that the truck was in his possession. He also sub-
mitted that the ultimate conclusion of the High Court cannot be D
sustained in view of the law laid down by this Court in *Khet Singh*
vs. Union of India, (2002) 4 SCC 380.

6. As stated earlier, the prosecution has examined P.Ws 1
to 12 and also produced documentary evidence Exh. P-1 to P-
22. Though the Special Judge, on consideration and apprecia- E
tion of the entire materials, accepted the prosecution case, the
High Court discarded them on the simple ground that first they
turned hostile and secondly their presence itself is doubtful. The
High Court has also adduced another reason for acquittal, F
namely, that out of the total of 119 bags recovered, samples
were taken out only from 5 bags and none of the witnesses could
state their exact weights. It also concluded that the reason for
not producing all the 119 bags before the Court is not convinc-
ing. In the light of the reasons stated in the order of the High
Court, learned counsel for the State of Rajasthan took us through
the entire materials produced by the prosecution. Before ana- G
lyzing the same, it is relevant to mention that in order to consoli-
date and amend the law relating to narcotic drugs, to make strin-
gent provisions for the control and regulation of operations re-
lating to narcotic drugs and psychotropic substances, to pro- H

A vide for the forfeiture of property derived from, or used in, illicit
traffic in narcotic drugs and psychotropic substances, to imple-
ment the provisions of the International Convention on Narcotic
Drugs and Psychotropic Substances, the Parliament enacted
B NDPS Act in the year 1985. This is a special Act and it has
been enacted with a view to make stringent provisions for the
control and regulation of operations relating to the narcotic drugs
and psychotropic substances. With this background, let us ana-
lyze whether prosecution has established the charge leveled
against the respondent/accused and the High Court is justified
C in acquitting him while exercising power under Section 36B read
with Chapter XXIX of the Code of Criminal Procedure, 1973.

7. It is not in dispute that onus of proof lies on the prosecu-
tion. To prove the fact that as to whether on 19.08.2001 at 3.15
p.m. Station House Officer, Himmat Singh recovered 119 bags
D containing doda powder from the possession of the accused/
Udai Lal for which he was not having any permission letter, the
prosecution recorded the statement of P.W.5 Amar Singh, P.W.6
Udai Singh, P.W.7 Himmat Singh, P.W.11 Gopal Lal and P.W.12
Munir Khan. It is true that except Munir Khan, all the witnesses
E are from the Police Department. Though the prosecution has
recorded the statement of independent witnesses P.W.1 Dinesh,
P.W.2 Iqbal, P.W. 3 Ajay, P.W.4 Ramesh, these four indepen-
dent witnesses have been turned hostile. However, as rightly
F pointed out by learned counsel for the State, the said witnesses
have admitted to put their signatures at the required place on
the documents prepared on the spot by the prosecution. Like
P.W.1 other witnesses, namely, P.W.2, P.W.3 and P.W.4 have
also admitted that they put their signatures at the proper place
on the documents prepared by the police. It is relevant to note
G that the Special Judge has pointed out that out of these wit-
nesses even a single witness has not given any such statement
that the said signatures have been taken from them under ter-
ror, pressure or without their free consent. The Special Judge
has also observed that while the said witnesses are educated
and have admitted to have signed with their free consent, it is
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x proved that all the four witnesses were present on the spot where the prosecution party has very much carried out the proceedings. These material aspects have not been properly considered by the High Court except discarding them on the ground that they turned hostile. A

x 8. Among the other witnesses, namely, P.Ws. 5, 6, 10, 11 and 12, as stated earlier, except Munir Khan, others belong to the Police Department. However, the High Court has not analyzed and adduced any reason for not accepting their evidence except pointing out minor contradictions here and there. B

x 9. The High Court failed to take note of the relevant aspect, namely, the quantity of recovery articles is quite huge (115 bags) which could not be produced in the court but on behalf of the prosecution 5 bags have been produced in the Court. It is also seen that besides this at the time of recording the statement investigating officer has produced the samples of articles taken from the seized articles in the Court. In such circumstance, considering the huge quantity merely because the prosecution has not produced all the 119 bags in the Court, an inference cannot be drawn against them. As mentioned above, and rightly noted by the Special Judge that at the time of recording the statement Investigating Officer had produced the samples of the articles in the Court. This relevant aspect has also not properly dealt with by the High Court. C D E

x 10. Though the High Court found fault with the Special Judge in analyzing the evidence and other materials, on the other hand it is the High Court which failed to analyze the evidence in proper perspective and highlighted the minor irregularities/contradictions and acquitted the accused on flimsy grounds without assigning sound reasons. We have already pointed out that the NDPS Act being a special Act was enacted with a view to make stringent provisions for the control and regulation of operations relating to the narcotic drugs and psychotropic substances. In this regard it is apt and relevant to quote the following law laid down by this Court in *Khet Singh* (supra). F G H

A "16. Law on the point is very clear that even if there is any
sort of procedural illegality in conducting the search and
seizure, the evidence collected thereby will not become
inadmissible and the court would consider all the
circumstances and find out whether any serious prejudice
B had been caused to the accused. If the search and seizure
was in complete defiance of the law and procedure and
there was any possibility of the evidence collected likely
to have been tampered with or interpolated during the
course of such search or seizure, then, it could be said
C that the evidence is not liable to be admissible in evidence."

In the light of the above principles, we are satisfied that
the High Court failed to consider all the relevant materials and
circumstances. Further, Section 36B of the NDPS Act empowers
the High Court to deal with the appeal and dispose of the
D same and exercise all powers conferred by Chapter XXIX and
Section 374 of the Code of Criminal Procedure, in particular. It
is settled law that when the view taken either by Session Judge
or Special Judge was found by the High Court to be manifestly
wrong and that it had led to mis-carriage of justice, the High
E Court is entitled to interfere and set aside the same. Such
recourse has not been adopted by the High Court in this case.

11. In the light of the infirmities pointed out above, we accept
the State appeal, set aside the order impugned of the High
Court and remit the matter for fresh disposal. The High Court is
F requested to restore S.B. Criminal Appeal No. 1050 of 2002
on its file and dispose of the same afresh in the light of the principles
enunciated above after affording opportunity to both parties. It is
made clear that the High Court is free to arrive such conclusion
on consideration of the entire materials and we have
G not expressed anything on the merits of the case. We also request
the High Court to dispose of the appeal as early as possible but
not later than six months from the date of receipt of copy of this
judgment. The appeal is allowed to this extent.

H B.B.B.

Appeal allowed.