NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 451 OF 2011

Bothilal **...Appellant**

versus

The Intelligence Officer
Narcotics Control Bureau **...Respondent**

with

CRIMINAL APPEAL NO.1185 OF 2011

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. Criminal Appeal No.451 of 2011 has been preferred by accused no.3 and Criminal Appeal No.1185 of 2011 has been preferred by accused no.1. As per the case of the prosecution, PW-2 Nalini Ranjan, Intelligence Officer, Narcotics Control

Bureau (for short, 'NCB'), South Zonal Unit, Chennai received information on 16th May 2002. Based on the information, she along with her team and two independent witnesses namely Devendran and Prabhu conducted a raid at Room No.303, Hotel Suriya, Periamet, Chennai where accused no.4 – F. Anna Raj was staying. The officers of NCB found that apart from accused no.4, accused nos.1 to 3 were also present in the room. The door of the room was opened by accused no.1. In the room, a bag containing narcotic substance was found which was seized. The narcotic substance found was 5.067 kilograms of heroin. The Trial Court convicted the accused no.1 (appellant in Criminal Appeal No.1185 of 2011) for the offences punishable under Section 8(c) read with Sections 21(c), 27A, 28 and Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'NDPS Act'). He was sentenced to undergo rigorous imprisonment for a period of 11 years and to pay a fine of Rs.1 lakh. In default of payment of fine, he was sentenced to undergo rigorous imprisonment for six months. Accused no.3 (appellant in Criminal Appeal No.451 of 2011) was convicted for the offences punishable under Section 8(c) read with Sections 21(c) and 29 of the NDPS Act. The sentence is the same as that of accused no.1. In appeal, while confirming the conviction, the High Court of Judicature at Madras reduced the sentence of both of them to ten years. The default sentence was reduced to one month. The other two accused with whom we are not

concerned, were convicted for different offences punishable under the NDPS Act.

SUBMISSIONS OF THE APPELLANTS

CRIMINAL APPEAL NO. 451 OF 2011

2. Shri Sushil Kumar Jain, the learned senior counsel appearing for the appellant has made submissions in Criminal Appeal No.451 of 2011 preferred by accused no.3. At the outset, he pointed out that till he was released on bail, accused no.3 had undergone sentence for a period of eight years nine months and twelve days. He submitted that both the Courts have relied upon the confessional statement of the appellant recorded under Section 67 of the NDPS Act before the officers of the NCB who are invested with the powers under Section 53 of the NDPS Act. Relying upon a decision of this Court in the case of ***Tofan Singh v. State of Tamil Nadu***[1], the learned senior counsel submitted that the officer before whom the confessional statement was made being a police officer, the bar of Section 25 of the Indian Evidence Act, 1872 (for short, 'the Evidence Act') is attracted. He submitted that the confessional statements are not admissible in evidence against the accused.

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3. The learned senior counsel submitted that the contraband was allegedly recovered from Room no.303, which was booked in the name of accused no.4. Therefore, there was no seizure from accused no.3. He further submitted that PW-2 – Nalini Ranjan could not have acted as a Gazetted Officer for the purpose of effecting search under Section 50 of the NDPS Act. He pointed out that PW-2 was heading the raid since the very inception from the stage of receipt of information. In fact, she had led the raiding team. Therefore, she cannot act as an independent person.

4. The learned senior counsel further submitted that the officer who has the power to enter, search, seize and arrest without any warrant or authorization, has no power to investigate the offence and the said power has to be exercised by the officer authorized under Section 53 of the NDPS Act. He submitted that as provided in sub-Section (3) of Section 52, the seized articles are required to be forwarded without any unnecessary delay to the officer empowered under Section 53. He, further, submitted that in this case, PW-2 who had seized bags containing alleged contraband, drew representative samples of the contraband. He submitted that the officer had no power to do it and it could have been done only under the permission of the Magistrate in accordance with clause (c) of sub-Section (2) of Section 52A. The learned senior counsel submitted that only the samples drawn under sub-Section (2) of

Section 52A and certified by the Magistrate become primary evidence in respect of the offence. He relied upon the decision of this Court in the case of ***Union of India v. Mohanlal & Anr.***[2] He, therefore, submitted that the prosecution is vitiated as the work of drawing the sample was done by PW-2 without following sub-Section (2) of Section 52A. Lastly, the learned senior counsel submitted that the statements of the two independent witnesses could not have been read in evidence as the prosecution failed to prove that the presence of the witnesses could not be procured. He submitted that in the circumstances, the evidence of PW-2 should have been subjected to a closer scrutiny. He submitted that there is no corroboration to the evidence of PW-2 except for the alleged confessional statement which was not admissible in evidence.

CRIMINAL APPEAL NO. 1185 OF 2011

5. The learned counsel appearing for the appellant in Criminal Appeal No.1185 of 2011, while adopting most of the submissions made by the learned senior counsel in the companion appeal, submitted that the appellant had already undergone a sentence of about nine years. He submitted that the confessional statement of accused no.1 was not voluntary as is clear from the report under Section 57. Moreover, in the search, no incriminating material could be found against

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accused no.1 as it was accused no.4 who had booked the room in his name from which, the contraband was allegedly recovered. He would, therefore, submit that the Courts ought to have acquitted accused no.1.

6. The learned counsel submitted that adverse inference will have to be drawn against the prosecution for not examining the independent witnesses though they were available. He submitted that the accused have lost the opportunity to cross-examine the independent witnesses, thereby, causing prejudice.

7. The learned counsel appearing for the appellant further submitted that as per the prosecution's case, the contraband was recovered from room no.303 in Hotel Suriya, Periamet, Chennai where accused no.4 was staying. According to the prosecution's case, accused no.1 (appellant) was staying in room no.213 of the Himalaya Lodge, Triplicane, Chennai. He pointed out that according to the prosecution's case, information was received that accused no.1 was likely to receive 5 Kilograms of heroin from accused nos.2 and 3. He submitted that the prosecution has not proved that anyone has seen accused nos.2 and 3 carrying contraband to the room occupied by accused no.4. It is not the prosecution's case that it was accused no.1 who brought the contraband to room no.303. The contraband has been seized from the room occupied by accused no.4 who has been convicted only for the offences punishable under

Section 8(c) read with Section 30 of the NDPS Act. He submitted that even assuming that the accused no.1 showed contraband kept in a bag in the room occupied by the accused no.4, it cannot be inferred that he was in actual or constructive possession of or was dealing with the contraband. The learned counsel submitted that the entire case of the prosecution is suspicious and possibility of the prosecution framing accused no.1, cannot be ruled out.

SUBMISSIONS OF NCB

8. The learned Additional Solicitor General (A.S.G.) appearing for the respondent supported the impugned judgment and pointed out that even if the independent witnesses to the seizure were not examined, the offence can always be proved by the official witnesses. He submitted that the Courts below have believed the testimony of the official witnesses namely, PW-2 and PW-4 to PW-7. He submitted that the contraband was found in the hotel room where all four accused persons were present. He submitted that even if confessional statements are kept out of consideration, the conviction can be sustained on the basis of the evidence of the official witnesses and in particular, PW-2. The evidence of PW-2 has not been shaken in the cross-examination. The learned A.S.G. would urge that no

interference is called for with the concurrent findings of the Courts below.

OUR VIEW

9. The prosecution's case is that PW-2, who was the Intelligence Officer of the NCB, received information on 16th May 2002 at about 10:45 a.m that accused no.1 who was indulging in drug trafficking, has come to Chennai and was staying in room no.213 of the Himalaya Lodge, Triplicane, Chennai. He had come there to receive 5 kilograms of heroin from accused nos.2 and 3, who were staying in room no.211 of Hotel Blue Star International, Chennai. The information received was that the accused nos.1, 2 and 3 had planned to deliver the contraband to accused no.4 who was residing in room no.303 of Hotel Suriya, Periamet, Chennai. The job of accused no.4 was to transfer it to Tuticorin and from there, to Sri Lanka. PW-2 raided room no.303 occupied by accused no.4 along with other officers and two independent witnesses namely, Devendran and Prabhu. According to the prosecution's case, after the door was knocked on, it was opened and it was found that all the four accused were present there. When PW-2 questioned whether they were in possession of any narcotic drug, the first accused took out a blue coloured rexine bag which, according to the prosecution, contained packets of a total of 5.067 kilograms of heroin. PW-2 seized the heroine and took two samples from each packet by

placing them in two plastic covers separately. The plastic packets were sealed and the remaining contraband was also sealed. According to the prosecution's case, all the accused made confessional statements under Section 67 of the NDPS Act.

10. Though the two independent witnesses were not examined before the Court, their statements were marked as Exhibits P-19 and P-71. A perusal of the impugned judgment of the High Court shows that it was held that the conditions prescribed by Section 53A of the NDPS Act were not fulfilled and therefore, these two statements were inadmissible. The High Court believed the testimony of PW-2 and PW-4 to PW-7 and held that the confessional statements of the accused could be taken as corroboration for the evidence of official witnesses.

11. Paragraphs 158.1 and 158.2 of the majority view in ***Tofan Singh's case***[1], read thus:

> "**158.** We answer the reference by stating:
>
> **158.1.** That the officers who are invested with powers under Section 53 of the NDPS Act are "police officers" within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

> **158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."**
>
> (emphasis added)

12. Admittedly, the confessional statements were made by the accused to an officer empowered under Section 53 of the NDPS Act and hence, in view of the bar of Section 25 of the Evidence Act, the confessional statements will have to be kept out of consideration.

13. As regards the statements of the official witnesses at Exhibits P-19 and P-71, the Special Court relied upon the same. The High Court considered the provisions of Section 53A, which reads thus:

> "**53A. Relevancy of statements under certain circumstances. –**
>
> (1) A statement made and signed by a person before any officer empowered under section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains. –
>
> (a) when the person who made the statement is dead or cannot be found or is incapable of giving

> evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or
>
> (b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.
>
> (2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act or the rules or orders made thereunder, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

14. A finding was recorded by the High Court that the prosecution has not proved that the witnesses are dead or cannot be found or are incapable of giving evidence or kept out of the way of the accused or their presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. These findings are based on the perusal of the entire record. There is no explanation offered by the prosecution about their failure to examine these two independent material witnesses.

Hence, the statements of both witnesses are not admissible in evidence.

15. Admittedly, PW-2 drew two samples from each of the packets of the contraband found in the hotel room and kept them in two separate plastic covers. These covers were sealed and the remaining contraband was also sealed. Thus, the prosecution claims that the samples were prepared even before the packets were sent to the Station House Officer. The submission of the learned senior counsel appearing for the appellant in Criminal Appeal 451 of 2011 was that a grave suspicion is created about the prosecution's case as this action by the PW-2, was contrary to Section 52-A of NDPS Act.

16. In paragraphs 15 to 17 of the ***Mohanlal's case***[2], it was held thus:

> **"15.** It is manifest from Section 52-A(2)include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (*a*) certifying the correctness of the inventory, (*b*) certifying photographs of such drugs or substances taken before the Magistrate as true, and (*c*) to draw representative samples in the presence of the Magistrate

and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act

> that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."
>
> (emphasis added)

Thus, the act of PW-2 of drawing samples from all the packets at the time of seizure is not in conformity with what is held by this Court in the case of ***Mohanlal***[2]**.** This creates a serious doubt about the prosecution's case that the substance recovered was contraband.

17. Even according to the prosecution's case, as can be seen from the version of PW-2, accused no.1 (appellant in Criminal Appeal No.1185 of 2011) was staying in room no.213 of Himalaya Lodge, Triplicane, Chennai. He was to receive 5 kilograms of heroin from accused no.2 and accused no.3 (appellant in Criminal Appeal no.451 of 2011). Accused nos.2 and 3, according to the case of the prosecution, were staying in room no.211 of Hotel Blue Star International, Chennai. It was accused no.4 who was staying in room no.303 of Hotel Suriya, Periamet, Chennai where PW-2 and other members of her party entered. The case of the prosecution is that after PW-2 and others entered the room, they called upon all the four accused who were present there to disclose whether they were in possession of the contraband. The prosecution's case is that accused no.1 showed a blue coloured bag from which the

recovery of about 5 kilograms of heroin was made. It is not the case of the prosecution that accused no.1 was carrying that bag with him or that it was in his custody. The bag was in the room occupied by accused no.4. Thus, it cannot be said that the contraband was found in the custody of accused no.1. At the highest, it was found in the room occupied by accused no.4. We may note here that accused no.4 has been convicted by the High Court only for the offence punishable under Section 30 of the NDPS Act which is for the offence of making preparation to do or omitting to do anything which constitutes an offence punishable under the provisions of Sections 19, 24 and 27A. The prosecution has not produced any evidence to show that the contraband was brought to the room of the accused no.4 by the other three accused persons or anyone of them. It is not the case that the room of accused no.4 was in possession of accused nos.1 to 3 who were staying in different hotels.

18. Therefore, in our view, the case of the prosecution is not free from suspicion. The prosecution has not proved beyond a reasonable doubt that the appellants in these two appeals were in possession of the contraband or that they brought the contraband to the hotel room of the accused no.4.

19. In the circumstances, we cannot sustain the conviction of the appellants in these two appeals. Accordingly, the impugned judgments are set aside and the appellants are acquitted of the offences alleged against them. Appeals are accordingly allowed.

.....J.
(Abhay S. Oka)

.....J.
(Rajesh Bindal)

New Delhi;
April 26, 2023.