

(2000) 09 BOM CK 0067

In the Bombay High Court

Case No : Criminal Appeal No. 605 of 1996

Abdul Hameed Manjur Ahmed Shaikh and Another

APPELLANT

Vs

S.C. Fulambrikar @ Phulambrikar and Another

RESPONDENT

Date of Decision : 26-09-2000

Acts Referred:

Bombay Prohibition Act, 1949 — Section 66, 81

Evidence Act, 1872 — Section 45

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 25, 29, 52, 8

Citation : (2001) 2 BOMLR 987

Hon'ble Judges : A.B. Palkar, J

Bench : Single Bench

Advocate : Mrs. Revati Mohite-Dere, for the Appellant; Mr. P.S. Thakur and Mrs. P.H. Kantharia, Assistant Public Prosecutor, for the Respondent

Judgement

A. B. Palkar, J.—Appellants have challenged their conviction and sentence for offence punishable u/s 25 read with section 29 of the N.D.P.S. Act. Appellants are sentenced to suffer R.I. for 10 years and to pay fine of Rs. 1 lakh each and in default to undergo R.I. for one year. Prosecution case in brief is as follows :

2. S.C. Phulambrikar, Superintendent, Central Excise and Customs Preventive Department, was attached to the Pune Division and Inspectors Tonape and Krishnamurthy were under him. On 12.4.1994 at about 4.00 p.m. Inspectors Tonape and Krishnamurthy were in the office. Information was received that one Ashok Leyland truck bearing registration No. ABT 2893 was to pass by National Highway No. 9 carrying 500 kgs. of Ganja. The truck was to arrive at Hadapsar between 6.30p.m. and 10.00 p.m. One Anil kumar, proprietor of M/s. Anil Kirana Stores of Varangal, Tahsil Basavkalyan, Dist. Bidar had loaded Ganja in the truck from Andhra Pradesh for being sent to Pune. This information was reduced to writing and the said chit was kept in an envelop and relying on the information, DRI-I form was placed before the Superintendent Fulambrikar. As usual report was prepared by Krishnamurthy and submitted to Fulambrikar and seeking

permission to proceed further as per information. The Superintendent forwarded the form to the Collector, Central Excise who directed to take immediate action to his subordinates. Immediately thereafter Superintendent Fulambrikar, Inspectors Tonape. Krishnamurthy and Mahadik went to Hadapsar Check post. Panch witnesses were called there and information was disclosed to them. After keeping vigilance they found a truck coming from Solapurside. The truck was bearing No. ABT 2893, which was intercepted. There were two persons in the truck, one was driver and the other was cleaner. They disclosed their names as Abdul Hamid Manjur Ahmed and Uslam Salim Mulla and on making enquiry the driver told that the truck was having 125 gunny bags of ground nut seeds and the same were loaded by Kasarah & Co. at Jammekunta, District Karim Nagar in Andhra Pradesh. It was to be delivered to M/s. Tanna Exports of Bombay. On further enquiry the driver told that the truck also contained 13 gunny bags of ganja weighing about 500 kgs. The driver also told that ganja was loaded by one Anil Kumar of Varangal with the help of Karishma Transport Corporation of Warangal. The truck was owned by one Nizamuddin, accused No. 4, and accused No. 1 was engaged as driver by Nizamuddin and accused No. 2 was also the employee of Nizamuddin. The truck has been rented by Nizamuddin and it was engaged by Karishma Transport Corpn. for transporting the ground nut seeds, and that Anilkumar had paid Rs. 8000/- to the said Transport Company towards transport charges of ganja. Thereupon the goods were checked and 13 bags of ganja were found. They were separated from the other goods and on being weighed it was found to be weighing 515 kgs. Thereafter two sample packets of 50 grams were taken from each bag and the same were marked as A, A-1 duplicate. B, B-1 duplicate and so on. The packets were sealed and the remaining ganja was also sealed. Signatures of panchas and accused were obtained and after completing usual formalities of sealing, panchanamas was drawn. Documents regarding the truck were produced by the driver and they were also seized. The property was produced by Inspector Tonape before the Custodian of the department and the same was deposited in the godown of the department. The Superintendent Fulambrikar then gave a compliance report to the Assistant Collector. Sample packets were sent to the Chemical Analyser on the next day. Further investigation was conducted by Fulambrikar. Accused were arrested and their statements were recorded u/s 67 of the N.D.P.S. Act in which they admitted all the material facts. Accused Nos. 4 and 5 did not appear before the authorities of the department as they secured anticipatory bail.

3. The report of the Chemical Analyser confirmed that the sample packets contained ganja and therefore, complaint was filed. Charges was framed u/s 8(c) read with sections 20(b)(i) 25, and 29 of the N.D.P.S. Act and sections 66(1)(b) and 81 of the Bombay Prohibition Act, 1949.

4. Accused pleaded not guilty. Their defence was of total denial.

5. Prosecution examined panch witness Dilip Badrinarayan Kabra P.W. 1. Inspector Ram Harinarayan Tonape P.W. 2. Inspector Krishnamurthy P.W. 3,

Custodian Satish Chandran P.W. 4, and Superintendent Fulambrikar P.W. 5. After scrutinising the entire evidence and considering the arguments advanced, the learned trial Judge found the appellants guilty and passed order of conviction as stated earlier.

6. In this appeal, Mrs. Revati Mohite Dere appearing on behalf of the appellants, argued only two points and contended that on these counts alone, the conviction of the appellants deserves to be quashed. Her first contention was that the raiding party was admittedly carrying a balance for weighing the material and sample packets prepared were of 50 grams each, whereas the sample packets received by the Chemical Analyser were of varying quantities which creates a suspicion as to whether the samples that were seized and prepared on the spot were the same which were sent to the Chemical Analyser or were different. She further contended that the sample packets which were sent to the Chemical Analyser were not handed over to the Custodian of the department and as such the same must have remained in the custody of the Inspector who conducted the raid. They were sent after three days to the Chemical Analyser and it is not clear from the evidence as to where they were lying for all these days and since no evidence is adduced as to the manner in which they were kept in safe custody to repel the suspicion of bearing tampered with in the meantime, the prosecution must fail on this count also. As against this, the learned Advocate Thakur appearing for the department contended that since the Chemical Analyser's report is to the effect that the seals were intact there was no doubt regarding the identity of the packets sent to the Chemical Analyser, there is no substance in the argument advanced on behalf of the appellants.

7. In view of this short argument, the evidence material to the argument is only required to be considered. Inspector Tonape has stated that 26 sample packets were prepared. Sample packets were kept in brown envelopes and they were closed and sealed by using wax as sealing material. On all the 26 packets signatures of panch witnesses as well as driver were obtained. He also signed on the same. The thumb Impression of the cleaner was also obtained. Papers were marked as A-1, A-1 duplicate, B-1, B-1 duplicate, and so on. The remaining 13 packets were closed and they were also sealed with wax. The other witness present in the raid i.e. Krishnamurthy has not stated anything about the incident that had taken place at the time of raid.

8. The Custodian Satish Chandran P.W. 5, has stated that the property consisting of 13 gunny bags, 125 bags of ground nut, and 13 sample packets of ganja were handed over to him for safe custody. In view of this categorical statement of the Custodian Satish Chandran, it is clear that only 13 sample packets were handed over to him. His evidence was not challenged. The packets which were sent to the Chemical Analyser were definitely not the same which were given in custody of Satish Chandran, Custodian. Because it is not his evidence that thereafter at any time, the sample packets which were handed over to him were collected from him by any other person or they were sent by him to the Chemical

Analysed. Letter Exh. 95 sent to the Deputy Director of Forensic , Science Laboratory by the Inspector also shows that 13 sample packets were sent for analysis. The report of the Chemical Analyser shows that the quantity found in sample packets bearing Nos. 1, and 2, was 45 grams, quantity found in packets bearing Nos. 3,8, 9, 11 & 13 was 60 grams each, quantity found in packets bearing Nos. 4, 7, 10 and 12 was 70 grams, quantity found in packet bearing No. 5 was 85 grams, and quantity found in packet bearing No. 6 was 55 grams. The difference in quantity is not marginal and when the sample packets were admittedly not deposited with the Custodian, they were in custody of the Inspector who conducted the raid. The packets were sent to the Chemical Analyser on 15.4.1993 and till that date the same were in custody of the Inspector. There is no evidence to show as to where these packets were lying and in what condition they were and therefore, merely because Chemical Analyser's report shows that the seals were intact it is not possible to accept that the packets were in the same condition. In any case possibility of the same being tampered with cannot be ruled out.

9. Another aspect of the matter is that the property sent to the Court consisted of 15 packets, out of which one packet is prepared in presence of Special Judicial Magistrate as required u/s 52-A of the N.D.P.S. Act and remaining 14 packets are the remaining samples received from the Chemical Analyser. It is therefore obvious that the other 13 packets which were sealed on the spot are not sent to the Court and they remained with the Custodian. What has been done with those packets is not known. May be that when the other property was destroyed, these 13 packets were also destroyed. Therefore, the learned Judge was not right when he observed in the judgment that there are 13 more sample packets lying in the Court which could have tested by the accused, inasmuch as the remaining 13 packets were never sent to the Court and the entire sample packets sent to the Court are described in the muddamal property as per Exh. 56.

10. The sample packets were sent to the Chemical Analyser on 15.4.1993. The date of search was 12.4.1993 and therefore, the sample packets remained with the searching officer for about 3 days before they were handed over to the Constable for carrying the same to the Chemical Analyser. These packets should have been deposited with the Custodian of the property or otherwise should have been kept in some safe place by the Investigating Officer. It was not at all permissible for him to keep the packets in his possession. In the background of this, a mere statement in the report of the Chemical Analyser that the seals were intact is not sufficient to rule out possibility of tampering with, especially in view of the fact that there is vast difference in the weight of number of packets which according to the prosecution were of 50 grams each, which quantity was weighed on the spot at the time of seizure and panchanama. As already pointed out, had the difference in weight been marginal, one could have understood as an error in the balance, but considering the vast difference in weight and no explanation for the same forthcoming on record from the prosecution, it is crystal clear that the matter of difference in weight and keeping of the packets with himself by the

Investigating Officer or the Complainant for a period of 3 days creates serious suspicion regarding the identity of the samples sent to the Chemical Analyser and this matter goes to the root of the matter entitling the accused benefit of doubt created therefrom.

11. On behalf of the appellants, a judgment of the Division Bench of this Court was brought to my notice, which is in Mohd. Hussain Babamiyan Ramzan u. State of Maharashtra, Head note (B) is relevant, which is reproduced below :

"(B) Evidence Act (I of 1872) , Section. 45 Report of Chemical Analyser -Samples taken out from seized contraband remaining with Police Officer for three days without being noted down anywhere in records and thereafter sent to Chemical Analyser. No satisfactory explanation by prosecution to exclude possibility of tampering with them during period of three days -Certificate of Chemical Analyser that samples examined by him contained heroin must be discarded."

As laid down in this judgment, it was incumbent on the prosecution to have offered satisfactory explanation to exclude possibility of tampering with the sample within the period of 3 days when they were not deposited in the meanwhile to the Custodian of the property. When faced with these facts on record, the learned A.P.P., had no answer and could only say that since the seals were intact there must not have been any tampering with the samples. This has already been considered. In view of the above facts and circumstances of the case, these lacunae pointed out by the learned Advocate for the appellant having the effect of going to the root of the matter, the accused deserve to be acquitted.

12. Appeal succeeds and is allowed. The conviction and sentence passed against the appellants u/s 25 r/w 29 of the N.D.P.S. Act by the learned Special Judge, Pune, is set aside and the appellants are acquitted of the said charges. The appellants be set at liberty forthwith, if not required in any other case.