

(1992) 11 BOM CK 0037
In the Bombay High Court
Case No : Criminal Appeal No. 148 of 1991

Ali Hussain Sayyed

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 03-11-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 12, 21, 57

Citation : (1993) 1 BomCR 732 : (1993) 95 BOMLR 12 : (1993) CriLJ 277

Hon'ble Judges : V.A. Mohta, J;A.A. Cazi, J

Bench : Division Bench

Advocate : Nitin P. Deshpande, for the Appellant; K.N. Chopda, Public Prosecutor, for the Respondent

Judgement

Cazi, J.—This appeal is directed against the judgment and order of the learned Additional Sessions Judge, Pune, dated 15th December 1990 in Sessions Case No. 82 of 1990 whereby the present appellant was convicted under S. 21 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (for short "N.D.P.S. Act") and sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1,00,000/- in default to suffer S.I. for one year.

2. In the trial Court there were two accused, the present appellant as accused, the present appellant as accused No. 1 and his wife Neerjaha Ali Sayyad as accused No. 2. Accused No. 2 was acquitted by the trial Court.

3. The prosecution case was as follows : On 5-12-1989 Police Sub-Inspector Sadashiv Baburao Khot, while he was present in the Police Chowky at Ramoshigate, received information at about 5-30 a.m. that (i) Ali Hussain Sayyad (which is the name of the present appellant), (ii) Kasorm Hussain Sayyad. and (iii) Bibi Khatubai Hussain Sayyad, were dealing in business of selling and purchasing of Narcotic Drugs. Accordingly he submitted his report (Ex. 15) regarding that information to his superior Inspector Jadhav. He went to the house of P. I. Jadhav for this purpose. P. I. Jadhav granted permission of PSI

Khot to raid the house of Ali Hussein and others. Thereafter he returned to Ramoshigate Police Chowky. He then called two panchas and after complying with the necessary formalities the Police staff along with the panchas left the Police Chowky at 6.05 a.m. taking along with them a pair of scales, wax, envelope etc. On the way they stopped at Khadak Police Station where PSI Khot submitted a report (Ex. 16) in writing before Police Station Officer informing him of the proposed raid. They reached Colony No. 10 at about 6.05 a.m. and assembled in front side of the house of the appellant. A lady (identified by PSI Khot as accused No. 2) ran away from that house. The appellant was present in the house. After complying with the necessary formalities and inquiring from the appellant whether he desired that his personal search be taken before the Magistrate or before the Gazetted Officer and after noting that the appellant declined it, the personal search of the appellant was taken in presence of the panchas whereupon 10 plastic bottles were found from the right side pant pocket of the appellant. These bottles were found to contain brown sugar which weighed 15 grams valued at Rs. 300/-. Then the house of the appellant was searched and one tin box was found kept in the attic in which there were 240 small plastic bottles containing brown sugar which weighed 325 grams valued at Rs. 7,200/-. One plastic bag was also found in the house containing brown sugar which weighed 352 grams valued at Rs. 25,200/-. All these articles were sealed with the labels bearing signatures of the panchas and the signatures of the Police were also affixed and wax seal was also affixed. (These articles were produced before the Court and were given article numbers.) Then panchanama (Ex. 12) was drawn. PSI Khot then filed the FIR (Ex. 15) against the appellant. He then submitted report (Ex. 18) to his superior. At the Police Station the offence was registered as C.R. No. 188 of 1989. The sealed muddamal property was handed over to the property clerk and the P.S.O. affixed thereon the seal of that Police Station. The contraband material was sent to the Chemical Analyser for analysis and the Chemical Analyser reported that the material was heroin.

4. Before the trial Court the prosecution led evidence in support of their case. The trial Court recorded the statement of the appellant under S. 313 of Criminal Procedure Code. After hearing the prosecution and the defence the trial Court came to the conclusion that the prosecution had proved that the appellant was found in possession of 602 grams of brown sugar in contravention of the provisions of N.D.P.S. Act and had thereby committed an offence punishable under S. 12 of the said Act and sentenced him as stated above. Hence, this appeal.

5. On behalf of the appellant five points were urged viz. (i) the prosecution case that sealing of the contraband and drawing up of the Panchanama of seizure of the articles were done at the house of the appellant and later the FIR was lodged at the Police Station is belied by the fact that the C.R. Number is entered on the labels which are sealed and also in the Panchanama; (ii) there was no proper report under S. 57 of the NDPS Act; (iii) wax seals were faint; (iv) number of the hut that was searched was not noted in the Panchanama; and (v) handwriting on

the label used for sealing the articles is different from the handwriting on the Panchanama. It was also pointed out that in this case the F.I.R. was lodged by P.S.I. Khot who has recovered the contraband brown sugar and thereafter the investigation of the case was left to PSI Khot himself and our attention was drawn to Nathiya and Another Vs. State of Rajasthan, . In that case the Police Officer Hamir Singh, who was said to have recovered the contraband charas from the accused entrusted with the investigation, and it was observed there - "It is surprising that he himself investigated into the offence. Justice and fair play require that the investigation should have been carried out by an independent officer, who was not in any way a party to the recovery proceedings." It was then observed - "I am, therefore, of the view that in this case, the investigation suffers from the basic infirmity, inasmuch as the officer recovering the contraband charas was the self-same person who had investigated into the case; the investigation was basically bad and reflects upon the credibility of the investigation." We will deal with all these points separately.

6. As regards point number (i), Mr. Deshpande, learned counsel for the appellant relies upon certain observations in Nathiya's case (supra). It is observed there : "In the present case, the F.I.R. Ex. P. 16 was admittedly recorded at 1 p.m. on 28-2-87 i.e. after the police party had reached the police station after making the recoveries. But, the recovery memo Ex.P. 1 bears the number of the F.I.R. The same is true of Ex.P. 2, Ex.P. 3 and Ex.P. 4. If the F.I.R. was registered after the alleged recoveries had taken place and after the accused-appellants had been apprehended, then those documents could not have recited the number of the F.I.R. at all. The prosecution has not explained this grave and serious discrepancy. The possibilities are that either F.I.R. had been recorded prior to the alleged recoveries and arrest or the at the F.I.R. number was inserted in these documents after the F.I.R. had been registered. Both ways, it seriously reflects upon the veracity of the prosecution story and creates a goods deal of doubt if recoveries had been made in the manner alleged by the prosecution, PW 5 Hamir Singh was under a duty to explain this discrepancy but he has not cared to do so. PW 1 Bijraj Singh, who is said to have accompanied Hamir Singh during the seizure proceedings has categorically admitted that the police party had gone back to police station after recovery memos, site plan, Fard Halat Moka had been prepared. If it is so, the number of F.I.R. recited in these documents was definitely a later interpolation which discredits the prosecution case." With respect, we do not agree with the above view expressed in Nathiya's case that this seriously reflects upon the veracity of the prosecution story and that it creates a good deal of doubt. Let us take the case of the articles. They were seized and sealed on the spots. Thereafter they were taken to the police station and the C.R. number was entered thereon. If they are required to be inspected and initialled by another officer then this would be done still later. If such initialling is required to be done at a specified place on the packing or labels, then such place would have to kept blank. Even in the case of a document it may require to pass through several stages and certain endorsement would be

required to be made at each stage. This does not adversely reflect upon the veracity of the prosecution story at all. Further in the present case PSI Khot has explained as to how the number came to be stated later on on the Panchanama and labels. If the crime register number on the Panchanama is required to be entered at the time of drawing up the Panchanama then in such cases no Panchanama can be made on the spot. Accordingly we reject point No. 1 as having no merit.

7. We will not consider the argument that there was no proper compliance with S. 57 of the N.D.P.S. Act. That section reads as follows :-

"57. Report of arrest and seizure. - Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior."

Now it is true that, while even though compliance with this is not mandatory - and therefore non-compliance would not render the prosecution case depending solely on such arrest and seizure as fatal - yet this provision of law is not a useless provision, but is meant to serve a purpose. The purpose we see it this. Heavy punishment is laid down for possessing contraband substance in violation of the provisions of the N.D.P.S. Act. At the same time it is easier to fabricate a false case of possession against a person than to fabricate a false case of say murder or rape or dacoity where also heavy punishments are laid down. Therefore, right from the time of receiving of information of possession of contraband substance record is required to be made at each stage of the progress of the matter and such record is required to be submitted to a superior officer so that fabrication of a false case is less easy than otherwise. Making timely reports which serve this purpose may be considered as sufficient compliance. If there is non-compliance it would be an infirmity bound to reflect on the credibility of the prosecution case.

8. In our case P.S.I. Khot, who made the seizure, submitted to his superior, the report, Ex. 18. Prior to that he had already given his F.I.R. stating the full particulars. This in our opinion is sufficient compliance.

9. As regards the contention that the wax seals were faint we fail to understand the import of this point that is raised. Whether the seals are faint or clear would be required to be considered only when the case is set up that the wax seals were clear at the time when they are affixed indicating that they were subsequently tempered with or changed. No such case was set up. If such a case has been set up then this aspect would have to be more carefully gone into.

10. It is true that number of the hut was not recorded in the Panchanama. We do not see the significance of entering the number of the hut when the prosecution found the appellant present in the hut which was searched and the appellant raised no contention that the hut searched was not his hut. This point therefore carries the appellant's case no further.

11. Same thing has to be said about handwriting on label being different from the handwriting of the panchanama. The panchanama may have been written by one person and the label may have been written by a different person. That is no infirmity in the prosecution case.

12. Finally we will deal with the point regarding investigation being carried on by the officer giving the F.I.R. According to the prosecution it is PSI Khot who received the information on the basis of which all action to nab the culprits was taken. Seizure of the contraband substance was also done by P.S.I. Khot. It is again P.S.I. Khot who lodged the F.I.R. After the F.I.R. was lodged the investigation of the case was assigned to none other than P.S.I. Khot himself. It is urged that this was not proper and for this reliance is placed on Nathiya's case (supra). We agree that this was not proper. We have already discussed earlier - while dealing with the point regarding compliance with S. 57 - that since heavy punishment is laid down for such offence greater care is required to be taken to ensure that the investigation is fair. However this would only require that the prosecution case be scrutinised with greater caution. In this case sufficient records were made to ensure the credibility of the prosecution case.

13. Under the above circumstances, we see no merit in this appeal and hence the same is dismissed. The order of conviction and sentence passed by the Additional Sessions Judge, Pune, is confirmed.

14. Appeal dismissed.