
(1993) 06 BOM CK 0060
In the Bombay High Court
Case No : Criminal Appeal No. 696 of 1991

Amina Abdul Shaikh	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 09-06-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20

Citation : (1993) 3 BomCR 549 : (1993) 95 BOMLR 829 : (1993) MhLj 1703

Hon'ble Judges : S.P. Kurdukar, J; M.F. Saldanha, J

Bench : Division Bench

Advocate : R.S. Sayeed and S.B. Shetye, for the Appellant; K.H. Chopda, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

M.F. Saldanha, J.—An unusual but important aspect relating to the manner in which a search and seizure is required to be conducted in cases falling under the Narcotic Drug and Psychotropic Substances Act, 1985 (hereinafter referred to as "the N.D.P.S. Act") has been canvassed in the present appeal. Briefly stated, the question that is posed is as to whether in an exceptional situation where the accused happens to be a female and a personal search is required to be conducted when the raid has taken place "on a crowded public road or some such place", whether it is not incumbent on the prosecuting authorities to proceed to a respectable and secluded area where the search may be conducted in confidence and in a manner that does not give rise to any doubt. It will be necessary to first set out a few relevant facts.

2. On 6-10-1989, information was received by Police Sub-Inspector Khot (P.W. 3), who belongs to the Special Branch and was attached to the Khadak Police Station, Pune, about the commission of an offence under the N.D.P.S. Act. The Police Sub-Inspector in question prepared a report and under the instructions of the Police Inspector took necessary steps for conducting a raid. He secured the

services of two Panchas, one of whom was a lady because the information indicated that the suspect was a woman. Police Sub-Inspector Khot, the panchas along with a lady constable and his staff and the necessary equipment that is required for a raid of this type went to Colony No. 10 and on reaching the appointed place, they found a lady who was standing in the lane. The lady constable apprehended the lady in question and the Police Sub-Inspector asked the suspect as to whether she desired to take a search of any of the members of the raiding party, which she declined. It is alleged that she was also asked as to whether she desired to be searched in the presence of a Gazetted Officer, which also she declined. As it was a public road the accused was taken by the lady constable to a public bathroom and it is alleged that the lady constable conducted a personal search and recovered a small cloth-bag which was attached to the waist of the suspect and which, in turn, contained another polythene bag. On opening this polythene bag, paper packets were found which contained Ganja and Charas. The contents of the paper packets were collected together and weighed and it was found that 75 gms. of ganja and 28 gms. of charas were recovered in all. Apart from this, a sum of Rs. 52/- in cash was recovered from the suspect. The Ganja and the Charas were thereafter packed in a paper, seals were affixed under a panchanama and thereafter the same were handed over to the Muddemal Clerk at the Police Station who is Ganpat Masalkar (P.W. 2). Incidentally, it needs to be mentioned that Ganpat Masalkar (P.W. 2) is the same person who carried the packet to the Chemical Analyser three days later. On analysis, the Chemical Analyser's Report indicated that Ganja was detected in sample No. 1 and charas was detected in sample No. 2. We need to qualify here that even though the quantity was not too small that for some strange reason the Police did not draw representative samples and, consequently, the whole of the packet was sent to the Chemical Analyser. This is certainly not the best procedure to follow unless the quantities seized are extremely small. At the time of seizure, representative samples must invariably be drawn and separately sealed. This, however, will not be a good enough ground to vitiate the present prosecution.

3. The accused, who had been placed under arrest, was charge-sheeted and put on trial before the learned Additional Sessions Judge, Pune, who convicted her of the offence punishable u/s 20 of the N.D.P.S. Act and awarded her a sentence of rigorous imprisonment for ten years and a fine of Rs. 1,00,000/-, in default, rigorous imprisonment for two years. It is against this conviction and sentence that the present appeal has been preferred.

4. Kumari Sayeed, learned Counsel appearing on behalf of the appellant-accused, has taken us through the entire evidence on record. The first witness in this case Hirabai Gunjal (P.W. 1) had acted as a Panch, but it is necessary for us to point out that she also happens to be a social worker and a Special Executive Magistrate. She has stated that she had accompanied the raiding party, that the accused was apprehended by the lady constable, Sunanda Kumbhar (P.W. 4), and that after complying with the requisite formalities, the accused was taken to

a public bathroom where the lady constable searched her and recovered from her possession the bag in which the contraband was ultimately found. In her evidence, she indicates that she had accompanied the lady constable to the bathroom, that the place was relatively small and that, therefore, as of necessity, she was required to stand outside. Learned Counsel has severely attacked this finding on the ground that, in the first instance, the Police ought not to have used the services of the Special Executive Magistrate as a Panch. She has pointed out to us that Hirabai Gunjal (P.W. 1) has admitted that she is on good terms with the Police and that the Police call her off and on and that on some occasions she has acted as panch and as a witness. The contention is that Hirabai Gunjal (P.W. 1) is, therefore, in the category not only of a habitual panch but, more importantly, of a person who is "on good terms with the police" and that was, therefore, does not qualify to come within the category of "an independent person". The learned A.P.P. has vehemently objected to this argument and he has pointed out that the Police were perfectly justified in having taken a lady who happened to be a Special Executive Magistrate and a person of some status to act as a panch, particularly having regard to the bad experience in several cases where panchas at a subsequent point of time are not traceable or turn out to be unreliable. In our considered view, there is no objection whatsoever to the use of a person of this status as a panch, but as regards the second aspect of the matter, there is something substantial that will have to be said.

5. Learned Counsel appearing on behalf of the appellant-accused thereafter drew our attention to the evidence of the Special Executive Magistrate cum panch witness Hirabai Gunjal (P.W. 1) who, undoubtedly, states that she was present at the time of the raid and that she even accompanied Sunanda Kumbhar (P.W. 4) to the bathroom where the appellant was searched, but admits that she was standing just outside, namely, close-by. Sunanda Kumbhar (P.W. 4), the lady constable, corroborates this position and admits that Hirabai Gunjal (P.W. 1) was virtually with one leg on either side of the threshold. Having regard to the limited space, this situation is understandable, but it has given rise to a difficulty of insurmountable dimensions. Among other things, what is pointed out is that the whole purpose of having brought a reliable person to act as a panch is completely frustrated because whatever happened, namely, the recovery of the bag from the person of the accused, was not within the physical presence of Hirabai Gunjal (P.W. 1). In the circumstances in which the search was carried out, it is Sunanda Kumbhar (P.W. 4) who ultimately alleges that the bag was recovered from the person of the appellant and that too in the course of the search that was conducted in the bathroom. Hirabai Gunjal (P.W. 1) has signed the panchanama, but her knowledge in respect of the recovery would be relegated to the category of second hand evidence in the circumstances in which the search was conducted. The learned A.P.P. has, undoubtedly, relied to the defence of the prosecution by pointing out that it is nobody's case that any third person was present there and that in these circumstances when "Hirabai Gunjal

(P.W. 1) states that she was virtually standing within a few feet from where the search was conducted that it would amount to virtual technicalities and hair-splitting to dispute the evidence. This unfortunately is not the crux of the matter.

6. The situation that has arisen in this case is not an unusual one because it has been indicated that in a large number of cases of this type the persons who sell contraband happen to be women. The contraband is invariably hawked in public places or in crowded areas and, therefore, when a raid is conducted, the woman is invariably apprehended in such a situation. This is not a case where the seizure was from the hands of the accused or from a bag that was in her hand or that was visible, but this is one of the cases where virtually a body search had to be done. The Police were quite right, is so far as it would not be proper or permissible to carry out such a body search in public. The question arises as to whether they were justified in carrying out the search in the nearest public bathroom in the aforesaid circumstances, which has inevitably resulted in the criticism that we have dealt with. We have no hesitation in recording that we disapprove of the manner in which the search was conducted in this case and we need to indicate that the search is one of the most important and crucial and vital aspects of the case and it should, therefore, be conducted in circumstances that inspire confidence and that are free from doubt. We cannot overlook the fact that such places are invariably so shabby, filthy and stinking and the Police can never be condoned if they use such a place for the so-called search. Secondly, the general get-up is anything but "private". Cumulatively, therefore, it would be essential to conclude that even if the lady constable had gone there that the panch would have kept a safe distance for obvious reasons.

7. The correct procedure would, therefore, have been for the raiding party to have taken the accused to some decent and secluded area where her personal search could have been conducted by the lady constable in the presence of the lady panch in the circumstances that inspire confidence. It is necessary that the authorities take note of this aspect of the matter in order to avoid damage being done to the case and in order to avoid any lacuna being made available which the defence would inevitably take advantage of. It is in these circumstances that we are constrained to hold that the evidence in respect of the seizure, on the facts of the present case, cannot be accepted and cannot form the basis of the present conviction. If that vital evidence is excluded, the prosecution must necessarily fail.

8. Learned Counsel appearing on behalf of the defence had canvassed certain other submissions, one of which is that the contraband when weighed by the Police at the time of the seizure consisted of 74 gms. of Ganja and 28 gms. of Charas. Learned Counsel has disputed the correctness of the identity of the contra band and has pointed out that the packet that reached the Chemical Analyser could never have been the very same one containing the contraband that is alleged to have been seized from the accused as there is no rational explanation for the considerable divergence in the weight. The learned A.P.P. has

advanced certain explanations before us which, to our mind, are not very satisfactory. We do not propose to record any 4 finding with regard to this aspect of the matter except to make a passing observation which, in our considered view, is one of necessity. In prosecutions of the present type, where the evidence in respect of the identity of the contraband is very crucial, it needs to be emphasised that every aspect and, more importantly, the weight of the contraband, which is something that is one of the most important features on which it can be distinguished or identified, must be attended to with a degree of precision and with a degree of correctness. Any amount of laxity, looseness or error could have fatal consequences to the prosecution and the authorities will, therefore, take a serious note of this aspect.

9. We need to qualify that on an overall view of the present case, the evidence of the various witnesses does inspire confidence to us and, accordingly, there is no ground on which the same would have been discarded. It is only because of the one serious infirmity in relation to the manner in which the search was conducted and, to be precise, the place at which the search was conducted that we are required to give the benefit of doubt to the present appellant-accused.

10. Having regard to our finding on the main issue, the present conviction is unsustainable and will have to be set aside. The conviction and sentence awarded to the appellant are accordingly set aside. The appellant is acquitted of the charge u/s 20 of the N.D.P.S. Act. Fine, if paid, is directed to be refunded. The appellant, who is in custody, shall be set at liberty forthwith, if not required in connection with any other offence. The appeal is thus allowed.