

(1998) 05 BOM CK 0002
In the Bombay High Court
Case No : Criminal Appeal No. 59 of 1997

Bindersing Nirmalsing Kaili and Others	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 06-05-1998

Acts Referred:

Bombay Prohibition Act, 1949 — Section 66
Criminal Procedure Code, 1973 (CrPC) — Section 212, 215
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 2, 20, 27, 42

Citation : (1999) 101 BOMLR 607 : (1999) 1 MhLj 643

Hon'ble Judges : J.A. Patil, J;G.D. Patil, J

Bench : Division Bench

Judgement

J.A. Patil, J.—This appeal by original accused Nos. 1 and 2 is directed against the judgment dated 20.1.1997 passed in N.D.P.S. Case No. 2/96 by the Additional Sessions Judge, Khamgaon. The learned Judge tried both the accused along with other two accused for the offences punishable u/s 18 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "the NDPS Act" for short) and u/s 66(1)(b) of the Bombay Prohibition Act. The learned Judge acquitted the remaining two accused but held accused Nos. 1 and 2 guilty of the above-mentioned offences and sentenced each of them on the first count to suffer rigorous imprisonment for ten years with a fine of Rupees One Lakh, in default to suffer simple imprisonment for three years and on the second count to suffer rigorous imprisonment for six months. Feeling aggrieved by the order of conviction and sentence, accused Nos. 1 and 2 have preferred this appeal.

2. The prosecution case in brief is that on 12.5.1996 at about 10.30 p.m. P.S.I. Sasthe of Nandura Police Station received an information that opium and country liquor were illegally kept at the dhaba of Lakhwindersingh (accused No. 3) near Naigaon Fata on Nandura-Malkapur Road. On receipt of the information, P.S.I. Sasthe contacted on phone the Executive Magistrate Vairale and Circle Police Inspector, Nandura Wankhede and apprised them of the information received. He

further requested them to come to the Police Station. P.S.I. Sasthe also arranged to call two panchas and informed them about the information which he had received. Thereafter at about 00:30 hours the raiding party comprising of P.S.I. Sasthe, C.P.I. Wankhede, Executive Magistrate Vairale, other police staff and two panchas proceeded in two jeeps to the dhaba of accused No. 3. Both the jeeps were stopped at some distance from the dhaba and thereafter the members of the raiding party went to the dhaba on foot.

3. At that time, accused Nos. 1 and 2 were present in the dhaba. On enquiry, both the accused disclosed their names and stated that they were running the said dhaba. P.S.I. Sasthe introduced himself as well as C.P.I. Wankhede and Executive Magistrate Vairale to both the accused and gave search of all the members of raiding party. In the presence of two panchas search of the Dhaba was taken and ten sealed bottles each of the capacity of 750 ml. containing country liquor were found in a wire bag by the side of the counter. One of the sealed bottles was taken as a sample bottle. It appears that since no opium was found in the dhaba, the surrounding area was searched for that purpose. At that time, a polythene bag was found kept concealed under a heap of dried banana leaves on the embankment of banana orchard behind the dhaba. It was found that there were 86 small packets in all containing 890 grams of opium. In addition there were 9 big packets containing in all 450 grams of opium. Thus, the total quantity of opium found was 1.340 kg. and it was of the value of Rs. 4,300/-. In the personal search of accused No. 1 a cash amount of Rs. 2,300/- was found. Out of the 95 packets of opium, one small packet and one big packet were taken as samples. These two packets weighed 60 grams. All the above mentioned articles were then seized under a panchanama. The samples of liquor and opium as well as the remaining quantity thereof were duly sealed and labelled. Both the accused were taken in custody and thereafter the raiding party returned to the police station where P.S.I. Sasthe lodged his complaint Exh. 29 against the two accused for the offences punishable under Sections 20 and 27 of the NDPS Act and u/s 66(1)(b) of the Bombay Prohibition Act. The initial investigation was carried by P.S.I. Sasthe who found that accused Nos. 3 and 4 were partners of accused Nos. 1 and 2 in the said business of dhaba. Therefore, on 13.5.1996 he arrested accused Nos. 3 and 4 also. The further investigation of the case was carried by C.P.I. Wankhede. In the course of the investigation, the samples were sent to the Chemical Analyser. The Chemical Analyser opined that the sealed packet contained opium having 3.2 grams of morphine and that opium falls u/s 2(xv)(a) of the NDPS Act. The Chemical Analyser further found that the sealed bottle contained 42% v/v of ethyl alcohol in water. He opined that it was not a medicinal/antiseptic/toilet preparation nor it was a flavouring material. In due course, the investigation was completed and all the four accused came to be charge-sheeted.

4. The learned Judge charged all the four accused firstly u/s 18 of the NDPS Act for possessing opium and secondly u/s 66(1)(b) of the Bombay Prohibition Act for possessing country liquor. Alternatively, he charged all the four accused u/s

27 of the NDPS Act. Alternatively, he charged accused Nos. 1 and 2 only under Sections 18 of the NDPS Act and Section 66(1)(b) of the Bombay Prohibition Act. All the accused pleaded not guilty. Accused No. 1 admitted that the Dhaba was being run by him. All the accused denied that any contraband liquor or opium was found in their possession.

5. In support of its case, the prosecution examined in all 8 witnesses including P.S.I. Sasthe P.W. 7, Executive Magistrate Vairale P.W. 6 and P.I. Wankhede P.W. 8 and the two panchas Amanulla P.W. 1 and S. K. Harun P.W. 2. In addition to the oral evidence, the prosecution also produced certain documentary evidence including the C.A. report. The learned Judge upon consideration of the evidence on record came to the conclusion that accused Nos. 1 and 2 only were found in possession of opium and country liquor in contravention of the provisions of the NDPS Act and the Bombay Prohibition Act respectively. In this view of the matter, he acquitted accused Nos. 3 and 4 but convicted accused Nos. 1 and 2 of the above mentioned offences and sentenced them as stated above.

6. Shri M.R. Daga, the learned Counsel for the appellant/accused, made three submissions before us. Firstly according to him, there was non compliance of the mandatory provisions of Section 42(2) of the NDPS Act with the result that the whole search was vitiated. Secondly, so far as opium is concerned, conscious possession thereof by accused Nos. 1 and 2 is not proved. Thirdly, Shri Daga pointed out that the charge, in so far as possession of opium is concerned, is defective as the place of offence is not mentioned in the charge. The time of offence is incorrectly mentioned and quantity of opium is also incorrectly stated. Shri Daga did not make any submission so far as possession of country liquor is concerned. He did not challenge the prosecution case in that respect.

7. Shri Dhote, the learned Additional Public Prosecutor, supported the judgment and submitted that the search in question falls u/s 43 and not u/s 42 of the NDPS Act. Therefore, according to him. failure on the part of P.S.I. Sasthe to forward a copy of the information received by him to his immediate official superior does not matter. Shri Dhote further pointed out that the immediate superior officer, namely, C.P.I. Wankhede as well as the Executive Magistrate Vairale both were present at the time of the search. Therefore, according to Shri Dhote no prejudice was caused to the accused when the search in question was taken. As regards the packets containing opium, Shri Dhote pointed out that they were found just behind the Dhaba and as such, they were in possession of the accused.

8. It is the prosecution case that specific information was received by P.S.I. Sasthe that opium and country liquor were kept in Lakhwindersingh's dhaba at Naigaon Fata on Nandura-Malkapur road. It is also the prosecution case that the raiding party carried search of the said dhaba in the presence of two panchas and recovered a bag containing 95 packets of opium which was found concealed under dried banana leaves behind the said dhaba. The information was received at 10.30 p.m. and the search was carried between 00.30 a.m. and 2.30 a.m. The

evidence of P.S.I. Sasthe shows that he recorded the information by making an entry in the station-diary. However he does not appear to have forwarded a copy of the said information to his immediate Superior Officer, i.e. C.P.I. Wankhede. Similarly, there is nothing in his evidence to show that he recorded the grounds of his belief for carrying out the search and seizure without a search warrant or authorisation though the same was to be carried out between sunset and sunrise.

9. It was pointed out in *State of Punjab Vs. Balbir Singh*, that u/s 42(1) the empowered officer if he has prior information given by any person that should be necessarily taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunset and sunrise and this provision does not mandate that he should record his reasons of belief. It was further pointed out that under the proviso to Section 42(1), if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent, these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. In the instant case, though P.S.I. Sasthe recorded the information, he did not forward a copy thereof to C.P.I. Wankhede. However, he informed him on phone. Although the search was proposed to be carried in the midnight itself viz. between sunset and sunrise no ground of belief in terms of the proviso to Section 42(1) was recorded. Section 42(2) states:

Where an officer takes down any information in writing under Sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.

In the instant case, both these requirements were not complied with by P.S.I. Sasthe. It may be contended that since C.P.I. Wankhede was immediately apprised of the information received, failure to send a copy of the information so recorded to him was only of a technical nature without much consequences. There is some substance in this contention. However, so far as the failure to record reasons for the belief contemplated by the proviso to Section 42(1) is concerned, there is no justification. The said proviso in substance states that if the officer has reason to believe that a search warrant and/or authorisation cannot be obtained without affording an opportunity for the concealment of the evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. There is absolutely no explanation given by the prosecution as to why the requirement contemplated by the said proviso was not complied with. It will thus be seen that in the instant case there has been non-compliance of the provisions of Sub-section (2) of Section 42 of the NDPS Act.

10. In *Balbirsingh's* case (*supra*) it was observed:

The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving information, should reduce the same to writing and also record reasons for the belief while carrying out the arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently, the failure to comply with these requirements affects the prosecution case and, therefore, vitiates the trial.

11. Shri Dhote, the learned Additional Public Prosecutor, contended before us that since "dhaba" is a public place, the search thereof and seizure made therein would fall u/s 43 rather than Section 42 of the NDPS Act. The Explanation to Section 43 states that for the purpose of the said Section, the expression "public place" includes any public conveyance, hotel, shop or other place intended for use by or accessible to the public. We are, however, unable to accept the submission of Shri Dhote. Section 43 deals with the power of seizure and arrest in public place. Clause (a) of Section 43 inter alia contemplates seizure of any narcotic drug or psychotropic substance along with any animal or conveyance or article in any public place or in transit. Clause (b) contemplates detention and search of any person who has any narcotic drug or psychotropic substance in his possession and such possession appears to be unlawful. In the instant case, the search of a public place i.e. dhaba was made. Therefore, Clauses (a) and (b) do not have any application. Therefore, the proper section which would apply to the present case is Section 42.

12. Shri Dhote relied upon the decision in *Om Parkash @ Omi @ Fauzi Vs. State*, wherein it was held that non-compliance of requirement of secret information to be reduced into writing was not fatal particularly when the search was carried out at a public place and not in any building, conveyance or enclosed place. The facts in that case were to the effect that a Sub-Inspector who was on patrol duty received information that the accused was dealing in Charas and opium and that he would pass by the National Highway along with the Charas. The information was not reduced to writing and as the time was short the raiding party consisting of police officials was organized and the party proceeded towards the National Highway along which the accused was expected to pass. Accordingly, the accused happened to pass by the Highway. He was found carrying a bag in his right hand. Thereafter his personal search was taken and certain quantity of Charas was recovered from his possession. Obviously it was a search and seizure carried out in a public place and not in a building, conveyance or enclosed place. Therefore, the said search and seizure was covered by Section 43. This is, however, not so with the search and seizure in the instant case. As already pointed out, the same was carried out in a dhaba. Therefore, reliance placed by Shri Dhote on the above-mentioned decision is not proper and correct.

13. The above discussion will thus make it clear that there was no compliance of the provisions of Sub-section (2) of Section 42 which has been held to be mandatory by the Supreme Court in Balbirsingh's case. Consequently, the contention raised by Shri Daga in this respect will have to be accepted.

14. The second submission of Shri Daga relates to the conscious possession of the contraband opium. According to him, both the accused cannot be said to have been in conscious possession of the opium since the same was not found in their exclusive possession. In this connection, it may be noted that the contraband opium was found not inside the dhaba but outside it. The seizure panchanama Exh. 14 states that the surrounding area of the dhaba was searched and a polythene bag containing 95 packets of opium was found concealed under a heap of dried banana leaves on the embankment of banana orchard behind the said dhaba. Although both the panch witnesses, namely, Amanulla Baig and S.K. Harun have turned hostile and pleaded ignorance about the actual seizure of opium, P.S.I. Sasthe, C.P.I. Wankhede and Executive Magistrate Vairale have stated that a polythene bag containing packets of opium was found concealed under dried banana leaves behind the dhaba. According to P.S.I. Sasthe, the bag was found by the side of boundary of the field wherein dhaba was situated whereas according to the Executive Magistrate Vairale, the said plastic bag was found kept on the boundary, C.P.I. Wankhede has also stated the same thing. The seizure panchanama Exh. 14 described the boundaries of the land in which the dhaba is situated. The northern boundary is described as banana orchard of Ramdhan Patil. It may be noted that the dhaba faces the National Highway which is on the southern side. There is no clear evidence on record to show that the place where the polythene bag containing bags of opium were found was inside the land upon which dhaba is situated. On the contrary, finding of such a bag containing contraband opium on the embankment between two lands makes possession of the accused thereof very doubtful. The possibility of the polythene bag containing opium packets having been found in the land of Ramdhan Patil cannot be ruled out. At any rate, it is clear that the place where the polythene bag was found is open and accessible to all and there is no evidence to indicate that it was in exclusive possession of the accused only. This being the position, it cannot be said that the accused were in exclusive and conscious possession of the same, the submission made by Shri Daga in this respect, therefore, deserves to be accepted.

15. The third and last submission made by Shri Daga relates to the defects in the charge framed at Exh. 7. Clause (a) of the charge reads as under:

(a). That on 13.5.1996 at about 12:30 hours you were found in possession of 3.40 kg. opium worth Rs. 4,300/- in contravention of the provisions of Narcotic Drugs and Psychotropic Substances Act, and thereby an offence u/s 18 of the said Act.

Shri Daga pointed out that the charges does not specify the place of offence. He further pointed out that although the raid in question was carried out between

00:30 hours and 2:30 a.m., the charge mentions the time as 12:30 hours i.e. in the afternoon. Thirdly, as per the seizure panchnama the total opium found in 95 packets weighed 1.340 kgs. However, the charge mentions the weight as 3.40 kgs. The alternate charge at Clause (c) mentions the weight of opium as 3.40 kgs. It will thus be seen that the charge framed at Exh. 7 contains material errors and as such, it is defective. Section 212(1) of the Criminal Procedure Code states that the charge shall contain such particulars as to the time and place of the alleged offence and the person (if any) against whom, or the thing (if any) in respect of which, it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. Section 215 of the Cr. P. Code states the effect of errors in charge. It reads :

No error in stating either the offence or the particulars required to be stated in the charge and no omission stating the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission and it has occasioned a failure of justice.

Shri Daga contended before us that non mentioning of the place of offence and mentioning of incorrect time as well as quantity of opium found have misled the accused and thereby a failure of justice has occasioned. It is surprising to find that the charge Exh. 7 contains such patent errors and omissions. It only shows how in a slipshod manner the charge was framed against the accused. The object of framing a correct charge with necessary details is to enable him to meet the prosecution case and understand the exact allegation made against him. The errors pointed out in the charge Exh. 7 are obvious and they are sufficient to mislead the accused and result in failure of justice. We are, therefore, inclined to accept the submission made by Shri Daga.

16. From the above discussion, it will be seen that the prosecution has clearly failed to prove the charge u/s 18 of the NDPS Act against both the accused. The learned trial Judge has failed to appreciate the evidence properly and has not taken into consideration the above-mentioned shortcomings in the prosecution evidence. It is, therefore, not possible for us to maintain the conviction of both the accused for the offence under Sections 18 of the NDPS Act. As regards the conviction for the offence u/s 66(1)(b) of the Bombay Prohibition Act, we do not find any reason to disagree with the finding recorded by the learned trial Judge. As stated above, Shri Daga did not make any submission before us challenging the conviction of the accused on that count. Therefore, no interference is called for so far as the order of conviction and sentence relates to the offence u/s 66(1)(b) of the Bombay Prohibition Act.

17. In the result, the appeal is partly allowed. The order of conviction and sentence in so far as it relates to the offence u/s 18 of the NDPS Act is hereby set aside and both the appellants/accused are acquitted of the said offence. Their conviction and sentence for the offence u/s 66(1)(b) of the Bombay Prohibition Act are, however, maintained. The cash amount of Rs. 2,300/- seized from accused No. 1 be returned to him.