

(2000) 09 BOM CK 0028

In the Bombay High Court

Case No : Criminal Appeal No's. 673 of 1996 and 14 of 1997

Dharmaveer Lekhram Sharma and Another

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 13-09-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 165

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 50, 8

Citation : (2001) 5 BomCR 9 : (2001) CriLJ 4886 : (2001) 77 ECC 687 : (2001) 2 RCR(Criminal) 788

Hon'ble Judges : P.V. Kakade, J;J.A. Patil, J

Bench : Division Bench

Advocate : A.P. Mundargi, K.M. Sangani, A.R. Khan, Ganesh Gole and U.S. Patil, in Cri. A. No. 673/1996 and A.M. Shringarpure, APP in Cri. A. No. 14/1997, for the Appellant; A.M. Shringarpure, Assistant Public Prosecutor in Cri. A. No. 673/1996, V.T. Tulpule and Imtiyaz Abdul I. Patel, in Cri. A. No. 14/1997 for respondent No. 1 and G.H. Keluskar in Cri. A. No. 14/1997, for the Respondent

Judgement

P.V. Kakade, J.—Both these appeals arise out of judgment and order passed by the Special Judge, Greater Bombay, in N.D.P.S. Special Case No. 13 of 1994, wherein in all seven accused persons were involved for commission of the offences punishable under the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter called as N.D.P.S. Act), out of whom Accused Nos. 1 and 2 were convicted for the commission of the offence u/s 22 read with section 8(c) of the N.D.P.S. Act, and each of them was convicted and sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1,00,000/-, in default to undergo R.I. for one year. They were also convicted for the offence punishable u/s 29 read with section 8(c) of the N.D.P.S. Act and sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1,00,000/- each, in default to suffer R.I. for one year.

The substantive sentences were directed to run concurrently. Accused Nos. 3, 4, 5, 6 and 7 were acquitted of all the offences.

Convicted accused Nos. 1 and 2 have preferred Criminal Appeal No. 673 of 1996, whereas the State has preferred Criminal Appeal No. 14 of 1997 against acquittal of five accused persons. Both the appeals have been heard together.

2. The facts giving rise to the case, in short, are thus:

On 4th November, 1993, Police Inspector Surya, Officer-in-charge of Ghatkopar Unit of the Narcotic Cell, reported for duty at 7-30 a.m. Thereafter he received an information from his informant on phone that two persons, namely, accused Nos. 1 and 2 were about to deal in mandrex tablets near Rasul Jiva Compound, Kishanrao Khade Marg, Saat Rasta, Mumbai. The descriptions of the accused were also given. The informant himself showed his willingness to meet the officer to point out the said two persons. This information was reduced to writing in the information book and copies thereof were sent to the superior officers.

In consequence of this information, raid was arranged. Two panchas were called and they were apprised of the situation. Pre-trap panchanama was drawn and entry was made in the station diary. The raiding party along with panchas left for the spot at about 10-30 a.m.

The informant met on the way and the vehicles were parked near the spot which was near Shirin Talkies at Saat Rasta area. About 10-15 minutes thereafter two persons were seen coming out of the gate of Rasul Jiva Compound and informant pointed them out to be the same persons who were suspects. Thereafter the informant went away. Accused No. 1 Sharma was carrying a gunny bag with him which he had kept near his feet and he was talking to accused No. 2. At that time, two customers came there. Accused No. 2 Papa was also carrying a bag with him. Accused Nos. 1 and 2 started talking with the two customers who had arrived on the spot. The said customers are accused Nos. 3 and 4.

It is the prosecution case that accused No. 1 opened the gunny bag and took out a packet containing something and handed it over to accused No. 3 and also one bag was handed over by him to accused No. 4. At that point of time, members of the raiding party surrounded all the four accused and detained them. The officer P.I. Surya disclosed their identity being policemen and also expressed their intention to take their search on the ground that it was suspected that they possessed narcotics. The officer apprised them of their legal rights to be searched by a Gazetted Officer or a Magistrate, and further informed that he as well as P.I. Mehta accompanying him, were also Gazetted Officers in the raiding party. Thereafter the search was conducted of all the four accused persons. Accused No. 1 was found carrying 10 kgs. of mandrex tablets, Accused Nos. 2, 3 and 4 were found carrying 5 kgs. each, of mandrex tablets.

The raiding party thereafter conducted test on identification kit which confirmed the fact that the contraband article was mandrex tablets which was a narcotic. After necessary formalities, a panchanama in detailed was drawn mentioning the properties seized on the spot and thereafter all the four accused persons were arrested and brought to the office of the raiding party and a complaint was filed.

All the four accused persons were subjected to interrogations. In the course of their interrogations, Accused Nos. 1 and 2 revealed that the contraband was received by them through one Usman Gani and one Rehman Chacha from one Mahesh, Accused Nos. 5, 6 and 7 respectively. Accused Nos. 5 and 6 thereupon came to be arrested at the instance of Accused No. 2. After arrest of Accused nos. 5 and 6, they were put under interrogation on that very day and Accused No. 6 volunteered to show the place of Accused No. 7 where mandrex tablets were kept hidden. Memorandum thereof was prepared and further raid was arranged. Accused No. 6 led the raiding party to Bhayandar (West) area to a building in Parshwa Nagar. He further took the raiding party along with panchas to Block No. 202A, on the second floor of Building No. 2 and the door was knocked and was responded to by one Mahesh Accused No. 7 who opened the door. Accused No. 7 was apprised of his legal rights and was informed of the intention by the officers regarding search of his residence for suspected narcotics. Both the Police Officers specifically informed Accused No. 7 that both of them were Gazetted Officers in the raiding party. Consequent search revealed that mandrex tablets of the quantity of about 30 kgs. were kept hidden in a blue coloured rexine bag under a cot. It was seized under a panchanama as per the relevant rules. The identification kit gave positive test that it contained methaqualone. After drawing the panchanama and completing the necessary legal formalities, Accused No. 7 brought to the office along with muddemal property and was put under arrest.

The sample packets from the seized contraband which were prepared at the time of various panchanamas were sent to the Chemical Analyser for the purpose of analysis and in the same connection the Chemical Analyser's reports were received which are part of the record. On completion of the investigation the charge-sheet was sent to the Special Court against the accused.

3. All the accused person pleaded not guilty to the charge framed against them. The defence of the accused is that of total denial of any criminal liability.

4. The learned trial Judge proceeded with the trial, in which course the prosecution relied on the evidence of as many as five witnesses as well as certain documents. P.W. 1 Mehta and P.W. 5 Surya are the officers of Narcotic Bureau and were the members of the raiding party and Gazetted Officers. P.W. 2 Mrs. Choudhari, the woman police constable is the carrier of the contraband to the Chemical Analyser's office. P.W. 3 Babumiya is the panch witness to the memorandum and seizure at the instance of Accused No. 6 from the custody of Accused No. 7. P.W. 4 Akram is the panch witness of the seizure of the contraband from the custody of Accused Nos. 1 to 4 which was conducted initially.

On the basis of the available evidence on record, the trial Judge came to the conclusion that the prosecution had succeeded in establishing the main charges against Accused Nos. 1 and 2 and consequently convicted and sentenced them in the aforesaid manner. However, the evidence on record was not found conclusive and, therefore, the benefit of doubt was given to Accused Nos. 3 to 7 and in the

result they were acquitted. Hence both the appeals.

5. We have heard the learned Counsel for all the concerned parties in both the appeals and have critically scrutinized the entire evidence on record. We have also perused the judgment of the lower Court.

At the outset, we may note that in this case the Investigating Officer P.S.I. Chavan is not at all examined. Similarly, Police Constable Tambde, the person who filed F.I.R. Ex. 36 is also not examined as a witness and still the relevant documents have been exhibited on the basis of recognition of the signature of the informant by P.I. Surya. It may be noted that the panchanama of first seizure i.e. the seizure of contraband from Accused Nos. 1 to 4 remained to be proved as the panch did not support the prosecution case, but it was brought on record through the evidence of P.W. 5-P.I. Surya, it is pertinent to note that both these documents were made admissible in evidence in the absence of testimony of the Investigating Officer P.S.I. Chavan.

ring these factual aspects in mind, let us assess the evidence on record.

The main contention raised by Mr. A.P. Mundargi, the learned Counsel for the appellants is that the conviction and sentence of Accused Nos. 1 and 2 cannot be sustained since there has been no compliance with the provision of section 50 of the N.D.P.S. Act. It was pointed out that while Accused Nos. 1 to 4 were apprised of their legal rights regarding search, as contemplated u/s 50 of the N.D.P.S. Act, the officers of the raiding party also informed them that the concerned officers were Gazetted Officers. On such information, it was argued, that the accused persons declined to be searched from (sic before) the Gazetted Officers or the nearest Magistrate.

substantiate this argument, our attention was invited to the testimony of P.W. 1 Mehta as well as P.W. 5 Surya, who were Inspectors of Police and Gazetted Officers in the raiding party. P.W. 1 Mehta has stated that they informed the accused persons that they were being searched for the suspected narcotics and P.I. Surya also gave them understanding that they had right to be searched in the presence of the Gazetted Officers or Magistrate if they so desired. P.I. Surya further told them that he himself as well as P.W. 1 Mehta were the Gazetted Officers. Thereupon all the four accused persons declined the offer.

Similar is the version put forth by P.W. 5 Surya in this regard. According to him, after apprising the accused persons of their rights to be searched from Gazetted Officers or nearest Magistrate, they were given to understand that P.W. 1-Mehta as well as himself P.W. 5-Surya present on the spot were also Gazetted Officers. Same version appears in the panchanama -Ex. 33A, though it is not proved in the strict sense of the term. It was, therefore, urged that the right of the accused enshrined u/s 50 of the N.D.P.S. Act contemplates offer of search from a Gazetted Officer who is not part and parcel of the raiding party which is subjecting the accused for the search at the relevant time, but should be independent of such authority. In support of this argument, the learned Advocate

for the appellants sought to rely upon the ruling of our High Court in the case of Mohanlal Khetaram Jangid v. State of Maharashtra, reported in 1998(1) L.J. 405, wherein it is observed thus :

"(c) The object of section 50 is clear. It intends to ensure that search, if so required by the accused should be taken in front of an independent and a responsible officer. This independent and responsible officer in section 50 has been mentioned as either a Gazetted Officer or a Magistrate. Even though the raiding party could be accompanied by a Gazetted officer, surely such a Gazetted officer would not be an independent or responsible officer contemplated by section 50, as he cannot be considered to be an independent officer. Hence, when the accused is informed that he will be searched in the presence of a Gazetted officer who is a member of the raiding party, same will not amount to compliance with the provisions of section 50."

8. Therefore, in our considered view, the search of Accused Nos. 1 to 4 and consequent seizure of the contraband becomes a suspect for non-compliance of section 50 of the N.D.P.S. Act. In our view, inclusion of Police Officers, who are also Gazetted Officers, in the raiding party is obvious, however, mention of the fact while apprising the accused regarding their right as contemplated u/s 50 of the said Act, suggests, by necessary implication, that the accused were discouraged in opting for search by independent authority. The possibility of misleading the accused also cannot be ruled out in this regard.

9. The learned Counsel for the appellants further pointed out one more glaring infirmity in the prosecution evidence. According to him, at the relevant time and place, all the four accused persons were jointly apprised of their right contemplated u/s 50(1) of the N.D.P.S. Act, and therefore there is no valid compliance with the said provision of law which should vitiate the search.

The evidence of P.W. 1, in this regard, shows that he has stated that "They were also given to understand that they were being searched for the suspected narcotics. P.I. Surya also gave them understanding that they had a right to be searched in the presence of Gazetted Officers or Magistrate if they desired so. P.I. Surya also told them that he himself and Mr. Mehta were the Gazetted Officers. All those four persons then declined the offer and also told that they could be searched by we people."

Similar is the version given by P.W. 5-P.I. Surya which shows that the appraisal of the right u/s 50 of the N.D.P.S. Act was joint and common and not individual.

10. In this regard the learned defence Counsel sought to place reliance on the ruling of Punjab & Haryana High Court in the case of Paramjit Singh & another v. State of Punjab, reported in 1997(1) Crimes 242, wherein it is observed that the appraisal of right must be given to each accused individually and not jointly, especially when presence of independent public panch at the time of search is rendered doubtful.

11. In the present case before us also, the panch witness has not supported the prosecution and his presence at the relevant time of the search of the accused persons has become doubtful. In view of this position, it was necessary for the officers of the raiding party to apprise the accused persons individually regarding their right contemplated u/s 50(1) of the N.D.P.S. Act so as to facilitate contemplation about such right. In our view, it should be manifest from the record, and testified to in the substantive evidence by the witnesses, that every individual accused was apprised of such right regarding the search u/s 50 of the said Act. In absence of such evidence, we are of the view that there is no proper compliance of the mandatory provision of section 50 of the N.D.P.S. Act in this case.

12. The safeguard or protection to be searched in the presence of a Gazetted Officer or a Magistrate has been incorporated in section 50 of the N.D.P.S. Act to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. Personal search, more particularly for offences under the N.D.P.S. Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in the presence of a Gazetted Officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right u/s 50. Therefore, in our considered view, the appraisal of right to the accused is not an empty formality and it should be made in the precise manner and to individual accused persons so that to ensure that they understand the meaning of their impugned right.

13. It was urged on behalf of the prosecution that the provision of section 50 of the said Act would not be applicable to this case as there was search of baggage which resulted in finding of contraband, and it was not personal search of the concerned person. In support of this argument, the prosecution sought to rely upon the Supreme Court ruling in the case of Kalema Tumba Vs. State of Maharashtra and Another, . However, the perusal of the facts of the said case shows that it would not be applicable to the present set of facts because the search of baggage of the accused involved in that case was of foreign national at the airport not in immediate physical custody of the contraband. As against this, the evidence on record has sufficiently shown that the gunny bags were allegedly held by Accused Nos. 1 and 2 and were kept near them when they arrived on the spot. Therefore, the submission of the prosecution that the provision of section 50 of the said Act would not be attracted in this case, is devoid of any merits.

14. We may note that there are also several peripheral infirmities in the prosecution evidence which have further weakened the case. For instance, if we peruse the panchanama Ex. 33A and F.I.R. Ex. 35 in juxtaposition, it is found that the contents thereof are totally identical, including the mistakes in the text. This aspect renders both the documents doubtful, especially when the panch witness has not supported the prosecution case.

15. For the aforesaid reasons, we hold that the conviction and consequent sentence of appellant Nos. 1 and 2 cannot sustain in law and, therefore, their appeal deserves to be allowed.

16. We have also perused the entire evidence regarding the accused who were acquitted by the learned trial Judge. Suffice it to say that we concur with the findings recorded by the learned trial Judge so far as accused Nos. 3 to 7 are concerned as there is no conclusive evidence to bring home the guilt against them. Therefore, we have no hesitation to note that the appeal against the acquittal has no merits and, therefore, it deserves to be dismissed.

17. In the result, in view of the foregoing discussion, Criminal Appeal No. 673 of 1996 is hereby allowed and the conviction and sentence of accused No. 1 Dharmaveer Lakhram Sharma and accused No. 2 Taher Hussein @ Papa Haji Chotu passed in Special Case No. 13 of 1994 by the Special Judge, Greater Bombay, dated 4th September 1996 is hereby set aside and the appeal is allowed. Accused Nos. 1 and 2 be set at liberty forthwith, if not required in any other case. The fine amount, if paid, be refunded.

18. Criminal Appeal No. 14 of 1997 preferred by the appellant-State against the order of acquittal of accused Nos. 3 to 7 in Case No. 13 of 1994 i.e. the present respondent No. 1 Dr. Ahesan Abdul Raheman Ansari, respondent No. 2 Abdul Hamid Mohideen Bapu, respondent No. 3 Usman Gani Abdul Aziz Shaikh, respondent No. 4 Rehman Zamir Shaikh and respondent No. 5 Mahesh Zaverilal Dediya stands dismissed.