
(2007) 09 BOM CK 0134
In the Bombay High Court
Case No : Criminal Appeal No. 378 of 2005

Hanamantu Badawat

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 26-09-2007

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29, 50, 52A, 53

Citation : (2007) 09 BOM CK 0134

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : R.M. Daga, for the Appellant; A.S. Sonare, APP, for the Respondent

Final Decision : Allowed

Judgement

C.L. Pangarkar, J.—This is an appeal by accused No. 1 who was convicted by the Special Judge under the Narcotic Drugs And Psychotropic Substances Act u/s 20 and 29 of the N. D. P. S. Act and he was sentenced to 10 years rigorous imprisonment and fine of Rs.1 lac. The appellant hereinafter shall be referred to as accused No. 1.

2. On 22.03.03 Police Constable Sunil Kherde was on duty. He was given a job of checking vehicles passing by the road at Kamptee outpost. He stopped vehicle bearing No. KA-01-M/1762 and when he had a look inside he found that it was filled with gunny bags. He, therefore informed his superior officer i.e. Police Inspector Shri Dabhade of Panchpaoli police station. Inspector Dabhade asked Sunil P.C. to detain the car till he reaches there. He reduced the information in writing, took entry in the station diary. He also informed his superior officer A. C. P. Giri. A. C. P. Giri instructed P. I. Dabhade to take action according to law. Shri Dabhade sent the information in writing to his Superior Officer A. C. P. Giri. Dabhade called two panchas and after taking weights and sealing material he went to the place. After taking entry in the station diary Police Inspector reached there, at about 13.20 hours. There were two persons besides the driver in the

said car. Police Inspector made enquiry with those persons and they disclosed their names. The investigating officer communicated the reason for visiting the spot and apprised them of their right u/s 50 of the N. D. P. S. Act in respect of the search to be taken of their person. They permitted the search to be taken by the Police Inspector. The investigating officer and the persons following him gave their own search. The search of the Maruti Car resulted in the recovery of 5 gunny bags filled with Ganja. The weight of first gunny bag was 41 Kgs., the second gunny bag 43 Kgs., third gunny bag 42 Kgs., fourth gunny bag 33 Kgs. and fifth gunny bag 40 Kgs. Thus total 200 Kgs. of Ganja was found in 5 gunny bags in possession of accused No. 1 and 2. The samples were taken from the said gunny bags, they were sealed in presence of the panchas. Gunny bags were also sealed and Panchanama to that effect was drawn. The investigation revealed that Mohamad Jakir Hussain accused No. 3 had lent Maruti Car to accused No. 1 and 2 for transportation of Ganja. The investigation further revealed that one Nazir Hussain and his wife were the owners of the car and they had given the car to accused No. 3 Jakir Hussain. The seized articles were sent to the Chemical Analyser. Chemical Analyser reported that the sample contained Ganja. Hence charge sheet against the accused Nos. 1 to 3 was filed by the police. Learned Sessions Judge framed charge against the accused and after recording the evidence found the accused No. 1 and 2 guilty and he acquitted accused No. 3. Both the accused No. 1 and 2 had preferred two appeals namely Appeal No. 378 of 2005 and Appeal No. 402 of 2005. Criminal Appeal No. 402 of 2005 has abated since accused No. 2 i.e. the appellant Dashrath has expired.

3. I have heard the learned Counsel for the appellant/accused No. 1 and the learned Additional Public Prosecutor for the State. have perused the record.

4. Shri Daga the learned Counsel for the appellant accused No. 1 contended that the appeal can be disposed of on a very short question. He submitted that the property in question was never produced before the Court and there is total non compliance of Section 52A of the N. D. P. S. Act. He submitted that this non compliance itself is sufficient to acquit the accused. Section 52A of the Act reads thus:

Disposal of seized narcotic drugs and psychotropic substances

1. The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constrains of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

2. Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer

empowered u/s 53 the officer referred to in Sub section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity mode of packing, marks numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in Sub section (1) may consider relevant to the identify of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

[c] allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

3. Where an application is made under subsection (2) the Magistrate shall as soon as may be, allow the application.

4. Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974) every court trying an offence under this Act, shall treat the inventory , the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under Sub Section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

Thus what Section 52A mandates is preparation of inventory and certification thereof by the Magistrate. In the instant case admittedly no inventory was prepared and if prepared the same is not placed on record before the Court. Learned Sessions Judge in para 12 of his judgment observed that only samples of Ganja were produced before the Court and not the bags actually containing the Ganja that were allegedly seized. It is thus clear that the property in question is not produced before the Court at all. The production of such property before the Court could have been dispensed with had the inventory been drawn and copy thereof been produced. No witness therefore has identified the property that is allegedly seized. The penalty under the act is very severe. Law is well established. Higher the penalty stricter the proof. This Court in an unreported decision in Criminal Appeal No. 414 of 2006 (Shiva Narayan Mohite and Ors. v. State of Maharashtra) at Nagpur decided on 06.06.2007 has held as follows:

In Jitendra's case (supra) the Apex Court dealing with the case under the N. D. P. S. Act held that in the trial under the N. D. P. S. Act it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband were seized from the possession of the accused and the best evidence would have been the seized materials which ought to have been

produced during the trial and marked material objects. The Apex Court also found unsustainable the finding of the High Court that the non production of the contrabands before the Court was not fatal to the prosecution. In my opinion, the ratio laid down by the Apex Court in Jitendra's case (supra) is squarely applicable in the present case. Non production of the contraband before the trial court has caused serious prejudice to the accused and moreover the prosecution has not given any reason for non production of best evidence before the trial Court. In my opinion, non production of the contrabands before the trial court is fatal to the prosecution case. On this ground only the accused are entitled to be acquitted.

This Court therefore relied on a decision of the Supreme Court in Jitendra and Anr. v. State of M. P. 2004 SCC 2028 and held as above.

5. In the instant case the facts are identical. I, therefore, do not deem it necessary to discuss rest of the evidence at all. The learned Sessions Judge has surprisingly ignored the decision in Jitendra's case though it was cited before him. In view of the decision in Jitendra's case rendered by the Supreme Court and the decision of this Court cited supra it has to be held that the prosecution has failed to prove the seizure of Ganja from the accused. In the result the appeal must succeed. Appeal is allowed. Accused No. 1 Hanamantu stands acquitted of the offence with which he stood charge. He be released forthwith if not required in any other case. Fine if paid be refunded.