
(2002) 06 BOM CK 0102
In the Bombay High Court
Case No : Criminal Appeal No. 765 of 1998

Hasan Imam Inamdar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 06-06-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 36C
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29, 50, 54, 55

Citation : (2003) 4 MhLj 682

Hon'ble Judges : J.G. Chitre, J

Bench : Single Bench

Advocate : Gauri Jadhav, for the Appellant; K.V. Saste, APP, for the Respondent

Final Decision : Allowed

Judgement

J.G. Chitre, J.—Heard counsel for the parties in context with the evidence on record.

2. The appellant is hereby assailing the correctness, propriety and legality of the judgment and order passed by the Special Court for N.D.P.S. Cases in Special Case No. 137 of 1997.

3. The prosecution case in brief can be stated as mentioned hereunder.

P.I. Patel received the information on 9.12.96 at about 12.30 p.m. when he was present in Narcotic Cell of Azad Maidan Police Station. The information was that the person named Hasan Inamdar was likely to attend Hanuman Mandir at Hanuman Mandir Road, Khar for selling narcotic drug between 4.00/4.30 p.m. on the same day. As per the prosecution case, PI Patel reduced the said information in writing in information book and after drawing the extract of information personally delivered the same to Assistant Commissioner of Police as well as Deputy Commissioner of Police, Narcotic Cell. Thereafter panch witnesses were summoned. The information was disclosed to them as well as to Arvind Narayan

Wadhankar PSI and other staff members and after preparing pre-paid panchanama by giving security of police to panch witnesses, the raiding party proceeded to the said spot near Hanuman Mandir. The raiding party ambushed near the said spot and then the appellant came there, watch was kept on his activities and after 5-10 minutes he was caught. The members of the raiding party informed him that he was to be searched for recovery of narcotic drugs from his possession as per information. Prosecution case further discloses that as per the prosecution claim the appellant was informed that he was having a right to be searched before a magistrate or gazetted officer. He declined. PI Patel informed him that he was a gazetted officer. The appellant opted for being searched by the members of the raiding party. When the search was affected, 2.50 kg. of charas was found in a sabnam bag which was hanging on the shoulder of the appellant, in presence of panch witnesses. Samples were taken for chemical analysis. Thereafter a panchanama was drawn in English and after completing the panchanama, the members of the raiding party came with the accused and narcotic drug to Azad Maidan Police Station and it was handed over to the concerned police officer for custody. The sample was sent to the laboratory for chemical analysis. The report disclosed that the sample was containing charas. After completion of the investigation, a charge sheet was filed against the appellant and he was tried before the learned Special Judge and the trial ended in an order of conviction and sentence convicting the appellant for an offence punishable under provisions of Section 29 read with 20(b)(jj) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act" for convenience).

4. Mrs. Gauri Jadhav, counsel appearing for the appellant, vehemently submitted that in the present case the members of the raiding party did not follow the provisions of law at all and that resulted in serious miscarriage of justice. She pointed out firstly that when the evidence of PI Patel and PI Wadhankar was making it clear that the appellant was an illiterate person and was knowing only Marathi and Hindi, panchanama was drawn in English language. According to her submission, it was indirectly denying him the opportunity of knowing what was being written in the panchanama. She further submitted that the appellant has not been informed that he is having a right to be searched before a magistrate or gazetted officer and nothing has been reduced into writing for showing that such compliance has been made.

5. Shri Saste, counsel appearing for the prosecution, submitted that the raiding party officers did inform the appellant that he was having a right to be searched by a gazetted officer or a magistrate. Shri Saste submitted that drawing the panchanama in English does not cause any prejudice to the defence of the appellant because the said panchanama was read over and explained to the appellant as mentioned in the said panchanama. This Court is not at all impressed by the submission advanced on behalf of the State on these counts for the reasons stated hereunder.

6. When the appellant himself told the members of raiding party more particularly PSI Wadhankar that he was an illiterate person and was not knowing any language other than Marathi and Hindi, it was obligatory on the part of the investigating officers to draw panchanama in Marathi which is the language of the State. In fact all panchanamas should be drawn in Marathi in Maharashtra. This Court is at loss to understand the reason behind drawing the panchanama in English. Unless the accused insists for drawing the panchanama in English by showing the cause that he does not know any language other than English, panchanamas are not to be drawn in English. It is a matter of experience that even non Marathi speaking persons do understand Hindi may be in crude form. In such cases drawing panchanama in Hindi in Maharashtra is permissible. But otherwise the investigating officers should, as a matter of rule, draw the panchanamas in Marathi in Maharashtra which would enable the accused to know the said panchanama and understand the same. Not only that, the copy of the panchanama is to be given to the accused immediately after it is drawn. The reason is that he should know as to what has been written in the panchanama which is going to be used as corroborative piece of evidence, corroborative to the evidence of the pancha witnesses and the members of the raiding party. If the panchanamas are drawn in Marathi and they are read over to the accused immediately after panchanamas are drawn, the accused would be able to raise objection in respect of the sentences which are not keeping consistency with the things happened during the course of writing of the panchanama and the seizure. Failure in this context is surely to cause serious prejudice to the defence of the accused and as a result it is likely to end in miscarriage of justice. This aspect has to be kept in view while appreciating the evidence further in support of the order of conviction and sentence which has been recorded against the appellant.

7. It is true that both PSI Wadhankar and PI Patel had stated that the appellant was informed that he has a right to be searched before a magistrate or gazetted officer but that has not been conveyed to him, informed to him, as section 50 of the NDPS Act indicates. He has to be told that he has a right to be searched before the gazetted officer or magistrate and that should find place in the panchanama at least because that is the document which happens to be recorded immediately thereafter. In this case, the panchanama has been recorded in English when the appellant happens to be illiterate and knows nothing other than Marathi and Hindi. The improper sentences in the evidence in respect of compliance of provisions of Section 50 are not protecting prosecution. Same is the case in respect of the evidence of the pancha witnesses. Therefore, this aspect would be creating a serious dent on the merit of the prosecution case so far as the present appeal is concerned.

8. If these two infirmities in the prosecution case are taken together with non-compliance of provisions of Section 50, the prosecution case fails more miserably. In this case, the seized articles have not been produced before the officer incharge of the nearest police station as required by Section 55 of the NDPS Act. There is no evidence on record to show that the seals of such an

officer have been impressed on the samples along with the seal of the officer in-charge of the raiding party. There was no necessity of taking him back to Azad Maidan Police Station and depositing the articles there in Azad Maidan Police Station. This assumes importance in view of the fact that when the article have been produced before the Court they were out of shape and the nature of the substance was changed. Some of the bags were having the contents which were not found to be identifiable. All the bags were found sealed bearing the signature of panch witnesses. The Special Judge was required to put an endorsement to that effect. It means that the situation must have been horrible. Does it create a sense of guarantee in the judicial mind? When the section is clear, the Courts are conscious in seeing that the members of the raiding party follow the provisions of law scrupulously. Any deviation, any faltering, any infirmity in it and avoidance of following any provisions of law would result in drawing the adverse inference against the prosecution.

9. This leads to another important aspect of the matter. When that was the state of affairs of the samples where is the guarantee that the samples were kept in proper custody and were protected from tampering with before they were dispatched to the officer of Chemical Analyser. In this context, it would be important to mention the observations of the Supreme Court in the matter of *State of Punjab Vs. Baldev Singh, etc. etc.*, wherein the Supreme Court has observed:

"There is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the Court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair."

10. The Supreme Court further held that:

Whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, own way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and

particularly the safeguards provided therein were duly complied with, it would not be permissible to out short a criminal trial."

The presumption u/s 54 of the Act can only be raised if the prosecution has established that the accused was found to be in possession of contraband in the search conducted in accordance with the mandate of Section 50 and illegal search cannot entitle the prosecution to raise the presumption u/s 54 of the Act.

11. Section 36-C provides that the provisions of Code of Criminal Procedure, 1973 shall apply to proceedings before the Special Court for the offences which are to be tried by that Court. The entire structure of the NDPS Act provides that as far as possible the provisions of the Code of Criminal Procedure are to be followed. Had the Investigating Agency been particular to follow the provisions of Cr. P. C. and NDPS Act scrupulously, there would not have been the grounds available for the defence counsel to attack the order of conviction and sentence passed against the appellant. Had those provisions been followed scrupulously the samples would not have come before the Court without labels and in a shabby condition shantching out the snatching from the prosecution evidence.

12. The learned trial Judge has not considered the evidence in proper way and by noticing the infirmity on material points as mentioned in the above discussion. Therefore, the trial Court has landed in error in recording the finding of conviction which resulted in sentence against the appellant.

13. The failure of compliance of important provisions of law if taken together wholly, has resulted in failure of justice. Therefore, it cannot be said to have been proved that the appellant was found in possession of the said sabnam bag which was containing 2.5 kgs of charas. Thus, the appeal will have to be allowed and it stands allowed by passing the following order.

14. The appeal stands allowed. The order of conviction and sentence passed by the trial Court is set aside. The appellant stands acquitted and he be set at liberty if not required for any enquiry, investigation, proceeding or trial. No interference in respect of the order of disposal of the property passed by the trial Court.

15. Parties to act on an ordinary copy of this judgment duly authenticated by the Private Secretary of this Court.