
(1999) 08 BOM CK 0009
In the Bombay High Court
Case No : Criminal Appeal No. 92 of 1992

Jaitun Alikhan Irani and another

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 26-08-1999

Acts Referred:

Bombay Prohibition Act, 1949 — Section 83

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(b), 20(b)(i), 29, 41, 41(2)

Citation : (1999) 08 BOM CK 0009

Hon'ble Judges : S.S. Parkar, J

Bench : Single Bench

Advocate : S.L. Kapse, for the Appellant; D.S. Mhaispurkar, Assistant Public Prosecutor, for the Respondent

Judgement

S.S. Parkar, J.—Appellants convicted and sentenced under the provisions of Narcotic Drugs and Psychotropic Substances Act have appealed against the order of their conviction and sentence recorded by the Additional Sessions Judge, Pune in Sessions Case No. 141 of 1991 on 30th January, 1992.

2. Prosecution case briefly stated is as follows :

The information was received that the appellants were selling ganja in area known as Irani Vasti at Shivaji Nagar Railway Station, Pune and, therefore, PW 5 PSI Devane called his subordinates and informed about the same and reduced the said information in writing at Exhibit 15. Thereafter he prepared the report Exhibit 16 and sent to his superior who was Police Inspector. Pursuant thereto PI gave the direction to PSI Devane to conduct the raid. Two Panchas were called, PW 3 and PW 4, one of whom is lady panch. The panchas were disclosed about the said information and thereafter the raiding party including one lady constable went to the house of the appellants along with the necessary articles required for the purpose of weighing, sealing and labelling the muddemal articles and samples. PSI had also entered the information about the proposed raid in the

Station Diary at Sr.No. 45. The raiding party went to the house of the appellants in a jeep. After tracing the house of the appellants, the raiding party entered the house of the appellants. Both the appellants were found in the house one of whom i.e. Appellant No. 2 Nasim opened the door. Appellants were told about the information and their intention to search the house of the accused which was permitted by the appellants. Offer was made to the appellants for the personal search of the raiding party which was declined. The appellants were also asked whether they wanted their house to be searched in the presence of a Gazetted Officer or a magistrate which was also declined by the appellants. During the course of the search the raiding party found a green iron box under the iron stand which was locked. The same was opened with the help of the key which was given by Jaitun-Appellant No. 1. The said iron box contained 20 plastic packets containing ganja, each weighing 1/2 kgs. Thus, the entire contraband weighed 10 kgs. The PSI removed one sample of 100 gms. from one packet which was properly sealed and labelled with the signature of panchas. Remaining property was kept in the iron box with lock which was sealed and labelled with the signatures of the panchas. A detailed panchanama (Exh. 12) was prepared with the signatures of the panchas. The police party came back to the Deccan Gymkhana Police Station where PSI Devane filed FIR (Exh. 18) along with report Exhibit 19. The case was registered under CR No. 288 of 1990 and the Muddemal property was handed to the custody of the Muddemal Clerk in the presence of PI. The report in respect of the seizure and arrest of the accused was prepared at Exhibit 20. The PSI then recorded the statements of the witnesses. The sample packet was sent along with the Head Constable Chaudhari to the office of the C.A. The muddemal property was handed over to the Property Clerk at the Police Station along with the letter copy which is Exhibit 9. The CA, after analysing the sample, came to the conclusion that ganja was detected in the said sample. The CA report is at Exhibit 21. The charge-sheet came to be filed on 21-11-1990 against both the appellants u/s 20(b) read with section 29 of the N.D.P.S. Act and u/s 66(1)(b) read with section 83 of the Bombay Prohibition Act in the Court of JMFC, Pune. The case was committed to the Sessions Court on 19-2-1991.

3. On 20-12-1991 the charges were framed and read out to the appellants who pleaded not guilty. The defence of the appellants was of total denial. According to them the police called them in the police station on the ground that their husbands were arrested by them and, therefore, they went to the police station and a false case came to be lodged against them.

4. On behalf of the prosecution five witnesses were examined. PW 1 is D. J. Bhanvalkar, the Muddemal Karkun; PW 2 is D. P. Chaudhari. Police Head Constable who carried the sample to the CA for analysis; PW 3 is M. V. Rokade, Panch and PW 4 is I.S. Mohommed, another panch. Lastly PSI Devane who investigated the case and who was the complainant was examined as PW 5.

5. After considering the entire evidence on record the learned Additional Sessions Judge, Pune by his judgment and order dated 30th January, 1992 convicted the

appellants u/s 20(b) read with section 29 of the N.D.P.S. Act and sentenced each of them to RI for five years and to pay a fine of Rs. 50,000/- in default to suffer SI for six months. They were also convicted u/s 66(1)(b) read with section 83 of the Bombay Prohibition Act, however, no separate sentence was awarded under the said provision. The said order of conviction and sentence is appealed from by both the accused.

6. Mr. Kapse, learned Advocate appearing on behalf of the appellants contended that there is non-compliance of section 50 of the N.D.P.S. Act inasmuch as the appellants were not told about their right to be searched in the presence of a Gazetted Officer or a Magistrate. That is not factually correct. The evidence of PW 5 Complainant does show that the appellants were asked whether they wanted their house to be searched in the presence of Gazetted Officer or a Magistrate. However, the said offer was declined and the same is corroborated by the mention thereof in a contemporaneous document which is panchanama Exh. 12.

7. Mr. Kapse then contended that the identity of the sample sent to the CA is not established as the sample sent to the CA was not returned. He relies on the decision of the Division Bench of this Court in the case of Mainuddin Kasim Mulla Vs. The State of Maharashtra, . Perusal of the said judgment shows that in that case samples sent to the chemical analyser were never secured back and never produced before the Court for identification. That is not so in the instant case and, therefore, the ratio of that case, in my opinion, would not be applicable to the present case. Mr. Kapse sought to rely on the cross-examination of PW 1 who is Asst. PSI Bhanvalkar and who acted as Muddemal Karkun. In the cross-examination he says that the samples sent in khaki envelop to CA is not before the Court. However he stated that on the basis of CR number he identifies the sample packet. Earlier in para 2 in the course of examination-in-chief, he does say that the muddemal property and the sample packet now shown to him were the same. The said paragraph also indicates in bracketed portion that the sample packet was shown to the defence counsel and witness which contained CA seal and the same was opened in the open Court. Moreover evidence of PW 4 I.S. Mohammed who was the panch witness also shows that the label shown to him in the Court bore his signature so also the label affixed on the sample with seal. This witness does identify and confirms that the sample packet sent to the CA bore his signature which was produced in the court at the time of the trial and he confirms his signature on the paper in which the sample was wrapped and also the label affixed on the sample with seal. This does not leave any manner of doubt that the sample which was sent to the CA was secured back and was produced in the court. The decision, therefore, relied on by Mr. Kapse will not be applicable in this case.

8. All the procedure laid down in sections 41 to 57 has been duly complied with. The PI is an authorised officer under sections 41 and 42 of the Act who in turn had authorised the PSI PW 5 to carry out the raid and file complaint. Since, the

raid was carried out on the basis of prior information, PSI had recorded the same and sent a copy thereof to the Police Inspector who in turn had authorised PSI to carry out the raid in question. Mr. Mhaispurkar has brought to my notice the notification of the Maharashtra Government issued on 19-12-1985 under sub-section (2) of section 41 of the N.D.P.S. Act and another Notification dated 14th November, 1985 under sub-section (1) of section 42 of the N.D.P.S. Act whereby all the officers of the Police Department of and above the rank of Inspector of Police posted in any part of the State of Maharashtra are authorised officers u/s 41(2) and all officers of and above the rank of Head Constable in the State of Maharashtra are authorised officers under sub-section (1) of section 42 of the N.D.P.S. Act.

9. In the aforesaid circumstances, I find no flaw in the order of conviction recorded by the trial Court. Mr. Kapse then urged that in view of the fact that the appellants are ladies having young children, they should not be sent back to the jail at this stage. He further contends that the appellants are not in a position to pay the amount of fine which is imposed by the trial Court. He also submitted that both the appellants are sisters and if both of them are made to go to jail now, the children would suffer.

10. It is true that the provision does not lay down any minimum sentence. The maximum substantive sentence laid down u/s 20(b)(i) is five years and maximum fine which may extend to Rs. 50,000/-. The trial Court has awarded the maximum sentence. In my view, the ends of justice would be met if each of the appellants is sentenced to RI for one year and to pay a fine of Rs. 10,000/- in default to suffer further RI for three months.

11. In the result, the appeal is partly allowed. While the order of conviction is confirmed, each of the appellants is sentenced to suffer RI for one year and to pay a fine of Rs. 10,000/- in default to suffer further RI for three months. If the fine is paid in excess of the sum of Rs. 10,000/- the said excess fine shall be refunded to them.