
(2015) 08 BOM CK 0204

In the Bombay High Court

Case No : Criminal Appeal No. 1184 of 2013 and Criminal Application No. 581 of 2015

Jeevan Pandurang Bhegade (In Jail)

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 03-08-2015

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2(iii)(b), 2(iii)(c), 20(b) (ii)(C), 27(b)(ii)(C), 50

Citation : (2015) ALLMR(Cri) 4145

Hon'ble Judges : A.R. Joshi, J

Bench : Single Bench

Advocate : Ayazkhan, for the Appellant; Anamika Malhotra, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.R. Joshi, J—Heard learned counsel for the appellant. Also heard learned APP for the State on this appeal preferred by the appellant challenging conviction in the matter of offence punishable under section 27(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act").

2. The impugned judgment and order was passed by a Special Judge (NDPS Act) Pune in Special NDPS SC No. 10 of 2011 on 21.9.2013 sentencing the present appellant/original accused No. 1 to suffer rigorous imprisonment (RI) of 15 years and also directed him to pay a fine of Rs. 1,00,000/- (Rupees One Lakh), in default to suffer further RI for six months. By the said impugned judgment and order, original accused No. 2 was acquitted of the charges. Apparently, there is no appeal preferred by the State challenging the acquittal of the co-accused.

The case of the prosecution in nut-shell is that:

3. On 7.1.2011 Police Inspector PW No. 6 one Milind Gaikwad attached to Anti-Terrorism Squad Office, Pune (for short ATS Pune) received a secret information

regarding Narcotic Contraband Ganja kept in bags in one house of one person by name Jeevan Bhegade. In the information, the name of one Ganesh Wanjare was also mentioned as associate of said Jeevan Bhegade. As per the procedure the said information was reduced into writing by said PW No. 6 and copies were sent to higher officials. Thereafter, two panch witnesses were called and detail trap procedure panchnama was conducted and thereafter the raiding party including PW No. 1, PW No. 4, PW No. 5 and PW. No. 6 left the ATS office and reached Talegaon-Dabhade, near Ghorwadi railway station area. The address of the place was also specifically mentioned in the information received by the ATS Officer, PW No. 6. It is also the case of the prosecution that on the spot, enquiries were made as to finding the house of the present appellant. As such after ascertaining the house property, the police party and panchas entered the house after it was opened by the present appellant. On asking, he gave his name. Along with him original accused No. 2 was also present. Both the accused were apprised as to the right u/s. 50 of the NDPS Act, as to whether they wanted their search to be taken in presence of a Magistrate or a Gazetted Officer. They were also told by PW No. 6 that he himself was the Gazetted Officer.

4. Apparently, a contemporaneous record was prepared by the ATS Officer PW No. 6 as to apprising both the accused of their right u/s. 50 of the NDPS Act and giving of their consent for not availing said right and allowing the police party to take search of their person. Thereafter, personal search of the accused persons was conducted during which nothing objectionable was found with the present appellant. Apparently, cash of Rs. 400/- was found with accused No. 2. It was the case of the prosecution that on asking, accused No. 2 stated that it was the amount received by him from the business in narcotic contraband Ganja.

5. Also, according to the case of the prosecution, during search conducted in the said house, which was consisting of five to six rooms, in one of the rooms five gunny bags were found, they were containing different quantities of Ganja. Without going into much details, as to how much was the bulk found in each of the bags, suffice it to say that the total Ganja was about 97 kilograms. According to the police party, it was the narcotic contraband Ganja. Requisite samples were drawn. Total ten samples, each weighing 25 grams, were prepared. The samples of narcotic contraband Ganja were taken in a polythene pouches and in turn the polythene pouches were kept in a paper envelope and the packets were labeled and sealed with signatures of panchas. Total ten packets were prepared on the spot i.e. five packets for sending to the Chemical Analyser and other five packets as representative samples.

6. Thereafter, during house search various weighing equipments and weights and measures were found. They were taken charge of in different sealed packets. As such total 20 packets were prepared i.e. five bulk contraband gunny bags, ten samples and five other packets containing weights, balances and polythene bags etc. After completion of search and seizure, panchnama was concluded at about 18.00 hours. According to the case of the prosecution, panchnama was started at

about 13:30 hours. This time is significant, mainly the timing of the conclusion inasmuch as according to the panch witnesses the panchnama was over and they came back to the ATS office at about 16.30 hours. This aspect shall be dealt with, in detail, while appreciating the case of the prosecution so far as the substantive evidence of both panchas is concerned.

7. Apparently, in this case, on the same night between 7 to 8th January of the raid, the bulk and the sample packets were sent to ATS Kalachowky office, Mumbai and all the said packets were lodged at ATS Kalachowky Police Station under the control of the officers of that police station. On 10.1.2011 the sample packets which were subsequently sent to the Chemical Analyst (CA) were brought back to Pune from ATS Kalachowky Police Station. It was done by deputing PW 2 one Bhalchandra Kamble along with the requisite documents and authority letter. The samples were then sent to Chemical Analyst and CA report was obtained which mentioned that all the packets contain narcotic contraband Ganja and which falls under the definition of section 2(iii)(b) of the NDPS Act, 1985.

8. During the trial, total seven prosecution witnesses were examined. Out of them PW 1 and 6 are the police officers from the ATS Pune and who had taken part in the raid, search and seizure. PW No. 7 is the Investigating Officer who had carried the investigation after registration of FIR, after the raid was over. PW Nos. 2 and 3 are the police officials who dealt with the sample packets and also the bulk packets. PW 2 carried the sample packets from the ATS Mumbai to ATS Pune and then took the sample packets and also the bulk packets to Pune and the bulk was taken to the concerned Judicial Magistrate's Court at Pune for taking action under section 52-A of the NDPS Act, 1985. So far as drawing the representative sample which is the mandatory requirement prior to disposal of the bulk considering its vulnerability to theft and pilferage from the investigating agency. However, at this stage, it must be mentioned that though such steps were taken by taking the bulk contraband to the Magistrate and taking out the representative sample, the entire bulk was not destroyed but the part of the bulk was brought before the trial Court as by that time admittedly the gunny bags containing bulk contraband were partially eaten by some rats, rodents or white ants. The fact remains that the entire bulk was not destroyed and was also the entire bulk could not be produced before the Court as the contraband bags were not in full but were containing part of the substance which were seized and they were found in cut opened condition due to eating part of the gunny bags by the rodents.

9. During the arguments, the main thrust was on the authenticity of the sample packets which were sent to the CA and which show positive result for detection of Ganja.

10. Prior to discussing the substantive evidence of both the panch witnesses PW Nos. 4 and 5 and of the police officials PW Nos. 1 and 6, certain admitted position is required to be mentioned as under:--

"(i) Firstly, though it is argued that there is apparent non-compliance of Section 50 of the NDPS Act, 1985 as to the officer, who is a Gazetted Officer himself took the search and narrated so to the accused persons, in fact, considering the case of the prosecution the present matter cannot be considered as the case in which there was a seizure from the person of the accused. The entire case of the prosecution is that the contraband Ganja was found in five gunny bags kept in the room in which the present appellant and his associate original accused No. 2 were present. As such, in the opinion of this Court, there cannot be application or otherwise of Section 50 of the NDPS Act, considering that the search and seizure was from the room;

(ii) Secondly, so far as the connection of the appellant with the room which was searched, there is material produced before the Court by the Investigating Officer to the extent that the concerned house property was belonging to the father of the present appellant and said father by name Pandurang had earlier died and his death certificate was also brought on record. The relation of the present appellant as that of the son of Pandurang is also established during the trial. On this count, it is submitted by the learned counsel for the appellant that apart from the present appellant there were other legal heirs who represented the estate and the property of said deceased Pandurang and as such solely the present appellant cannot be held responsible as connected with the said room. This argument is required to be viewed in juxtaposition of the case of the prosecution and also the version of both the panch witnesses that the present appellant and his associate were found in the room. Once the relation of the present appellant is established with the owner of the room i.e. Pandurang, it is required to be accepted that the present appellant was responsible for whatever found in the room;

(iii) Thirdly, it is an accepted position that the Chemical Analyser is not examined in the present matter but the CA report is taken on record and marked as Exhibit 48 during the trial. Though it is so, it is to be ascertained by this Court, whether there was any link established between the material which is seized from the house and which was sent for chemical analysis. If the said link is not established, as has been done in the present case, whether or not the CA report is positive for presence of Ganja in the sample sent, is of no significance; and

(iv) Fourthly, register, admittedly, maintained at Kalachowky ATS Office, Mumbai is not produced before the Court or no officer from said ATS Mumbai has been examined during the trial. In the opinion of this Court, this was a vital link to establish that what was seized, was in fact kept in the safe custody at Kalachowky ATS Mumbai and the same material was taken back for sending it to Chemical Analyser at Pune."

11. Keeping in mind the above admitted position, now, the arguments advanced on behalf of the appellant are required to be considered.

"(a) Firstly, it is submitted that both the panchas PW Nos. 4 and 5 were

amenable to the Investigating Agency, inasmuch as there was no explanation coming before the Court as to what was the occasion for the raiding party members to call these specific panchas who were found about one and half km or 2 kms away from the ATS office and from the place, that is apparently a tea stall, they were called to act as panchas. In this context, the substantive evidence of these panch witnesses is carefully gone through and which reveal that both the said panchas have acted as panchas in so many cases for the police. Moreover, the police official who called them to act as panchas was well known to them and knowing their names as there was no question of asking their names and requesting them whether they would be acting as panchas. Also, as mentioned earlier, it is the substantive evidence of panch witnesses that the panchnama of search and seizure was over and actually by the time of 16:30 hours they were free and were not on the spot. Counter to this, there is substantive evidence of PW No. 1 and 6 and also it is the case of the prosecution that the said search and seizure panchnama continued from 13:30 hours to 18:00 hours. In fact, this is a vital mitigating circumstance to the case of the prosecution considering the case that there were five gunny bags found in the room and samples were drawn; and

(b) Secondly, it is to be seen that according to the panch witness PW No. 5 the samples of 20 grams each were prepared on the spot and the said sample contraband was taken in polythene pouch and this was packed and sealed. There is no specific mention as to the use of any paper envelope in which apparently the said pouches were kept. By pointing out this, it is submitted on behalf of the appellant that reasonable doubt is created whether whatever seized and which samples were drawn on the spot were in fact sent for the chemical analysis, thus finding contraband Ganja as mentioned as per the definition of Section 2(iii)(c) of the NDPS Act. On this count, it is also seen that both the panchas have admitted that the samples which were sent for chemical analysis and which were returned back and then produced before the Court did not have any polythene pouches. This vital aspect indicate, further argued on behalf of the appellant that what was sent for chemical analysis were not packets which were prepared during the raid, as according to PW 1 and 6 initially the samples were taken in polythene pouches and when the remnant were brought before the Court no such polythene pouches were found. On this aspect, in the opinion of this Court, this discrepancy in the evidence should have been explained and brought before the Court by examining the CA as to whether the remnant samples were again packed and kept in some receptacle in which they were received But, unfortunately, in the present case CA is not examined. As such there is no explanation on the part of the prosecuting agency as to how the remnant packets of the samples did not contain any polythene pouch."

12. Apart from the above, as per the admitted position as to non-production of any godown register and non-examination of any officer from the godown from ATS Kalachowky Mumbai, there is a loss of valid link in between the samples kept at Kalachowky Police Station Mumbai and samples subsequently removed from that office by PW 2 on 10.1.2011. By pointing out this, it is also argued that

there is no possible explanation given by the Investigating Officer as to for what purpose the said bulk and the samples were deposited with ATS Kalachowky Mumbai when immediately after 2 days the sample packets were again withdrawn and brought to Pune for sending them to CA.

13. Also it is argued that according to both the panchas during the search and seizure what was found in the gunny bags was the leaves and grass. None of the panchas mentioned that there were any flowering or fruiting tops of the cannabis plant. By pointing out this, it is submitted that a reasonable doubt has been created as to whether really contraband Ganja was found in the said premises.

14. Considering the substantive evidence of PW 1 and 6 and also that of two panch witnesses and considering their vulnerability and their acquaintance with the police officials, in the opinion of this Court, it must be said that the prosecution has not produced the evidence of that standard which is required to establish the guilt of the accused beyond reasonable doubt. Needless to mention that standard of proof in the matter of establishment of the offence under the NDPS Act is much high, considering the minimum sentence of ten years and fine of Rs. 1 lakh. So far as the present matter is concerned, though accused No. 2 was acquitted, accused No. 1, present appellant is convicted and sentenced to suffer RI for 15 years and fine of Rs. 1,00,000/- is imposed on him.

15. In the opinion of this Court, as detailed earlier, it must be said that the trial Court had fallen in an error in accepting the evidence of the prosecution sufficient to establish the guilt of the appellant. Hence, the present appeal is required to be allowed and same is accordingly disposed of.

ORDER

"(A) The appeal is allowed;

(B) The impugned judgment and order in NDPS Special Case No. 10 of 2011 passed by the learned NDPS Special Judge, Pune dt. 21.9.2013, to the extent of the present appellant, is set aside;

(C) The appellant is acquitted of the offence under sections 20(b), (ii)(C) of the NDPS Act, 1985;

(D) The appellant be released from the jail custody, if not required in any other case or crime;

(E) Fine amount, if any, paid by the appellant, be refunded to him; and

(F) Criminal Application No. 581 of 2015 filed by the applicant/appellant for bail, during the pendency of the appeal, in view of the aforesaid order, has become infructuous and same is accordingly disposed of."