
(1991) 02 BOM CK 0053
In the Bombay High Court
Case No : Criminal Appeal No. 935 of 1988

Mainuddin Kasim Mulla	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 01-02-1991

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 2, 20, 21, 22

Citation : (1991) 3 BomCR 626 : (1991) CriLJ 1699 : (1991) 1 MhLj 592 : (1991) MhLj 592

Hon'ble Judges : M.S. Vaidya, J; M.L. Dudhat, J

Bench : Division Bench

Advocate : N.V. Pradhan, for the Appellant; S.R. Patil, Assistant Public Prosecutor, for the Respondent

Judgement

M.S. Vaidya, J.—The appellant in this case was convicted on 6th July 1988 by the learned Sessions Judge, Sangli in Sessions Case No. 6 of 1986 of offences punishable under sections 20(b) and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and was sentenced cumulatively to suffer R.I. for ten years and to pay a fine of Rs. 1,00,000/- in default to suffer further R.I. for one year. Having felt aggrieved by the conviction and sentence awarded to him, the appellant has preferred this appeal.

2. According to the prosecution story, P.W. 1 P.S.I. Abhyankar of the prohibition and excise department, who was working at Sangli in the year 1986, had received on 13th February 1986 at about 10.30 a.m. an information at Miraj that some people were dealing in narcotic drugs in Mali Galli at Miraj. He was accompanied by one P.S.I., Miraj and also one Inspector, whose name he has not disclosed, at that time. Panchas were then called and the raiding party had travelled in a police jeep up to the Darga known as Miraj Darga. The jeep was parked there and the raiding party had proceeded towards a lane called Mali Lane. It is alleged that the appellant was noticed standing on a public street and further, that on seeing the party arriving, he had appeared confused. On

suspicion, therefore, a personal search of the said person was taken in the presence of panchas. One packet containing about 250 grams of Heroin and the other packet containing Madat (Opium) were found on his person in the pockets of his trouser and shirt respectively. Samples weighing 5 grams each were collected on the spot out of the seized articles and the original packets as well as the samples packets were allegedly sealed under a wax seal and the labels signed by the panches. P.S.I. Abhyankar had then, lodged his complaint at his own office. He had produced along with the complaint one panchnama Exhibit 10, which was drawn on the scene of offence for seizing the articles. The appellant was taken in custody and was produced before Judicial Magistrate First Class, Miraj at about 8.30 p.m. who had remanded him to the magisterial custody. Finally, the appellant, was released on bail on 15th February 1986. The samples, which were collected on the scene of offence itself, were then sent to chemical analyser on 10th March 1986 with a letter, Exhibit 12 of even date, with P.W. 3 Constable Chand. In course of time, the reports of the chemical analyser (Exhibits 15 and 16) were received reporting that one of the sample articles contained Heroin and the other contained Opium. The investigations were conducted by P.W. 4 Inspector Jadhav, but the charge-sheet was submitted finally on 15th January 1987 by Inspector Bhosale.

3. The case came up before the learned Sessions Judge on 19th May 1988 for framing of the charge, and charge vide Exhibit 1 was framed against the appellant for offences punishable under S. 8(c) read with Sections 20(b) and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The appellant pleaded not guilty and a defence of total denial. He had applied on 16th June 1986, vide Exhibit 6, even before the commencement of the trial, that the Court should call for certain record from High Court Appeal No. 777 of 1987 in which the appellant was an accused. In particular, he had called for the documents such as panchnamas and F.I.R. drawn by the officials for the purposes of that case. The said application was rejected by the learned Sessions Judge. Thereafter, again on 18th June 1988 the appellant had applied, vide Exhibit 13, to the Sessions Court for permission to place on record certified copies of a panchnama and a F.I.R. which he wanted to call for, and had applied for calling one Shri Yadav, Superintendent of central excise, Kolhapur, as a defence witness. No orders on the application were passed till the prosecution evidence was concluded on 24th June 1988. Thereafter, the said application was rejected and the certified copies produced by the appellant were taken on record at Exhibits 20 and 21. The contention of the appellant before the trial Court was that the officers of the central excise and customs department as well as those of the State's prohibition and excise department had falsely implicated him in two different cases for offences allegedly committed on 13th February 1986 and that the evidence in both the cases was not quite consistent with each other. He had submitted that both the cases were false and that, therefore, he was entitled to an acquittal.

4. The learned Sessions Judge did not find favour with the defence of the

appellant and, relying upon the evidence adduced before him by the prosecution, he proceeded to hold the appellant guilty of the offences and convicted him thereof as stated at the outset. The sentence was also awarded as stated above.

5. The learned advocate for the appellant contended that the learned Sessions Judge had committed a serious error in not appreciating the worth of the defence evidence and in placing reliance upon the evidence of the prosecution witnesses for holding the appellant guilty of the offences. He submitted that not only that the said evidence was weak but also that the statutory formalities prescribed under the Narcotic Drugs and Psychotropic Substances Act, 1985 were not complied with. He submitted that in the circumstances stated above, the rejection of defence evidence had caused prejudice to the appellant at the trial. Contending that the guilt was not brought home to the appellant, the learned advocate submitted that the appellant should be found not guilty of the offences in question and that after acquitting him, he be set at liberty.

6. The learned A.P.P. submitted that the evidence was quite satisfactory and that the evidence which was sought to be led in defence was, in a way, not relevant at all for the purposes of the present case inasmuch as the same pertained to a raid which was allegedly organised, in point of time, after the raid which was in question in the present case. He submitted that the conviction and sentence awarded should be maintained, but he pointed out that though the learned Sessions Judge had convicted the appellant of two distinct offences, one for possession of Opium and another for possession of Heroin, he had erred in awarding only one sentence for the two offences. He submitted that the appeal should be dismissed.

7. The conviction awarded by the learned Sessions Judge for offences punishable under Sections 20(b) and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 are obviously wrong on the basis of the plain averments of the prosecution. The prosecution case was that the appellant was found in possession of Opium (Madat) and Heroin. The expression "Opium" is defined in S. 2(xv) of the Narcotic Drugs and Psychotropic Substances Act to mean the coagulated juice of the Opium poppy and any mixture, with or without any neutral material, of the coagulated juice of the Opium poppy. It excludes from the definition any preparation not containing more than 0.2 per cent of Morphine. In the present case, the prosecution case is that the Morphine contents of the Opium were 1.02%. Therefore, the article which was analysed by the chemical analyser did fall within the scope of the definition of Opium stated above. The punishment for contravention of provisions pertaining to Opium is prescribed by S. 18 of the Narcotic Drugs and Psychotropic Substances Act and not either by S. 20(b) nor by S. 22 of the Narcotic Drugs and Psychotropic Substances Act. Secondly, "Heroin", i.e., diacetylmorphine, is an "Opium derivative" within the meaning of the term as defined in S. 2(xvi) and is, therefore, a "manufactured drug" within the meaning of Section 2(xi)(a) of the Narcotic Drugs and Psychotropic Substances Act. The punishments for contravention of provisions

regarding manufactured drugs and preparations are prescribed by S. 21 of the Narcotic Drugs and Psychotropic Substances Act and not by S. 20(b) or S. 22 thereof. We have noticed that in many cases wrong sections are applied to the offences which are punishable under the various provisions of the Narcotic Drugs and Psychotropic Substances Act. We wish to emphasize that while framing the charge for an offence in such cases, it is necessary to study very carefully the several definitions which are given in S. 2 of the Narcotic Drugs and Psychotropic Substances Act, and then, to find out the corresponding provisions under which the contravention of provisions of the Act relating to those substances are made penal. If that is not done, various procedural defences and the defences founded on the contentions regarding prejudice caused to the convicts are raised in appeals and they are required to be dealt with at length. It is necessary that the Additional Sessions Judges and the Sessions Judges trying the cases under the Narcotic Drugs and Psychotropic Substances Act take adequate care that is indicated above.

8. In the present case, however, we are satisfied that no prejudice was caused to the present appellant because of the use of wrong sections in the charge or in the final order of conviction because, it was not even the contention on behalf of the appellant that the appellant was not aware of the fact that he was being tried for the possession of articles such as Opium and Heroin. Therefore, no arguments founded on the basis of any prejudice caused to the appellant in that context deserve to be sustained in the present case.

9. The prosecution examined at the trial P.W. 1 P.S.I. Abhyankar and P.W. 2 Sarode to prove how the raid was organised, how the appellant was apprehended in Mali Lane, and further, how he was found in possession of two packets of the substances which were then categorised as Heroin and Madat (Opium). Both of them told and panchnama (Exhibit 10) and FIR (Exhibit 8) stated that the samples of the two Muddemal articles which were allegedly seized from the appellant were collected separately in two packets on the scene of offence itself. It is also stated that the samples weighed about 5 grams each. Both the witnesses have stated that the original packets which were found with the appellant as well as the sample packets were then sealed under the labels signed by the panchas and the wax seals. The letter Exhibit 12 dated 10th March 1986 proved that out of the Muddemal, only two sample packets were sent to chemical analyser. The chemical analyser's reports Exhibits 15 and 16 did prove that the samples contained Heroin and opium respectively. P.W. 1 P.S.I. Abhyankar and panch Maruti were shown before the Court Muddemal articles No. 1 and 2 only and they had identified those articles as the articles found on the person of the accused. The learned Sessions Judge had erroneously felt that the aforesaid evidence was enough to hold the appellant guilty of the offences for possession of Opium and Heroin. It appears that the sample articles which were sent to the chemical analyser were never secured back by the concerned officials and were never produced before the Court. The list of the Muddemal articles, which was before the trial Court, is at Exhibit 4 and it showed only the two packets as

Muddemal articles No. 1 and 2. This clearly means that the sample packets or the covers in which the samples were collected were never returned to the Court for facilitating the identification of the sample packages at the hands of witnesses like P.S.I. Abhyankar and panch Sarode. In order to establish a clear-cut link between the seized articles and the report of the chemical analyser stating that the analysed articles were contraband articles, it was absolutely necessary to have identified before the Court, as a substantive piece of evidence, the packets in which the samples were collected and were sent to the chemical analyser. But for that, the sealing of the samples on the scene of offence under the wax seals as well as the labels signed by the panchas had become totally redundant. The labels signed by the panchas are affixed on to the sample articles usually to enable the panchas to identify those articles before the Court with reference to their own signatures. In some cases, we have also noticed that the officer in whose presence the seals were made also had countersigned such seals to assure the Court that the articles identified by the panchas were the same articles which were sealed on the scene of offence itself. In the present case, as the packets containing the samples were never brought before the Court and as they were never got identified before the Court, it was not established beyond reasonable doubt that the articles which were analysed by the chemical analyser were, indeed, the samples collected from the articles which were allegedly seized from the appellant on the scene of offence. The learned Sessions Judge committed a serious error in commencing the trial without ascertaining that the articles sent to chemical analyser were not before the Court at all for facilitating the identification thereof at the hands of the concerned witnesses. He committed a more serious error in jumping, in the absence of the evidence of the type as aforesaid, to the conclusion that the appellant was satisfactorily proved to be guilty of the offences of possession of Opium and Heroin. We wish to emphasize that hereafter, in every case under the Narcotic Drugs and Psychotropic Substances Act which is triable in the Sessions Court or in the Court of Additional Sessions Judge, adequate precaution must be taken to ensure that the Muddemal articles which were sent to chemical analyser are secured in the custody of the Court before the commencement of the trial and are made available to the prosecution for facilitating the identification thereof at the hands of appropriate witnesses. This would, of course, exclude the cases in which the prosecuting agency has neglected to bring before the Court the aforesaid articles, in which case, it is needless to say, the benefit would go to the accused. It so happens, many a time, that the sample sent for analysis gets exhausted in the office of the chemical analyser in the process of analyses. In such cases, it is desirable that the packages bearing the seals or the other identification marks made at the time of collection of the samples are preserved by the office of the chemical analyser and are secured by the prosecution agency for being produced before the Court for facilitating the identification thereof. We insist that the lower Courts should take adequate care in this respect.

10. In view of the fact that the samples sent in the present case were never

secured back in the trial Court for facilitating identification, and further, in view of the fact that the entire link leading to the possible conviction for the appellant for the offences in question was not established, we are constrained to hold that the guilt for the offences of possession of Opium and Heroin is not brought home to the appellant. The appeal would, therefore, succeed and the appellant would, therefore, be entitled to an acquittal.

11. In view of this conclusion, we do not think it necessary to go into the merits and demerits of the other points raised by the learned advocate for the appellant.

12. In result, we allow the appeal, set aside the conviction and the sentence awarded to the appellant and proceed to acquit him of the charges levelled against him. We direct that he be set at liberty forthwith, if not required in any other case.

13. Appeal allowed.