
(1991) 02 BOM CK 0014

In the Bombay High Court

Case No : Criminal Appeal No's. 777 of 1987 and 3 and 4 of 1988

Mainuddin Kasin Mulla

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-02-1991

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29, 41(2), 42(1), 43

Citation : (1991) 2 BomCR 586 : (1991) 93 BOMLR 825 : (1991) 1 MhLj 1089 : (1991) MhLj 1089

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

Bench : Division Bench

Advocate : N.V. Pradhan, in Cri.A. No. 777/87, for the Appellant; A.S. Baxi in Cr.A. Nos. 3/88 and 4/88 and B.R. Patil, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

M.S. Vaidya, J.—These three criminal appeals arise out of convictions and sentences awarded by the learned Additional Sessions Judge, Sangli on 3rd September, 1987 in Sessions Case No. 60 of 1986. Appellant in Criminal Appeal No. 3 of 1988 was accused No. 1, appellant in Criminal Appeal No. 4 of 1988 was accused No. 2 and the appellant in Criminal Appeal No. 777 of 1987 was accused No. 3 in all the said trial. Accused Nos. 1 and 2 were convicted of offences punishable u/s 8 read with section 20 and u/s 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. On each count they were sentenced separately to suffer R. I. for ten years and to pay a fine of Rs. 1,00,000/- each, in default to suffer further R.I. for two years. Accused No. 3 was convicted of offences punishable u/s 8 read with section 20 and section 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and he was also sentenced separately to suffer R.I. for ten years and to pay a fine of Rs. 1,00,000/-, in default to suffer R.I. for two years on each count. The learned Additional Sessions Judge had directed that the substantive sentences awarded

to the aforesaid accused persons should run concurrently.

2. The prosecution case was as follows :

P.W. 4 Yadav was the Superintendent of Central Excise and Customs at Kolhapur invested with the necessary power under the Narcotics Drugs and Psychotropic Substances Act to detect and investigate into the offences under the Act and to prosecute the culprits appropriately. The district of Sangli was within his jurisdiction. On 13th February, 1986 he had received an information that accused No. 3 Mainuddin was habitually possessing, storing and selling narcotic drugs at his residential house and a godown in the building known as ``Shams Manzil'' in Mali Lane at Miraj. This information was received at or about 9.00 a.m. or 9.30 a.m at Kolhapur and immediately thereafter he proceeded with some office subordinates to Miraj in a Government vehicle. After reaching Miraj, he collected two panchas P.W. 1 Vyankatesh Kulkarni and one Shamrao Ganesh Shinkar and proceeded, at about 12 noon, to Mali Lane. When they reached near the ``Shams Manzil'' they found accused No. 3 standing in front of a closed door which was chained and locked Superintendent Yadav, therefore, asked accused No. 3 to whom the room belonged and when he had received the answer in the affirmative, he had disclosed his identity as the customs officer and had declared his intention to take a search of that room. When accused No. 3 was requested to open the lock of the door of the room and when he (accused No. 3) had expressed his inability to do so, Superintendent Yadav gave some jerks to the lock and managed to get the door opened. After offering accused No. 3 a personal search of the panchas, he entered the room to find therein accused No. 2 Mehboob sitting on the floor in the midst of loose Ganja, wrapped paper packets containing Ganja, a weighing scale, some weights and measures etc. The Ganja found there weighed about 22kgs. The articles were then seized and attached and were properly sealed under a panchnama (Exhibit 18). According to the prosecution , accused No. 3 Mainuddin was then questioned about the whereabouts of his residence. It is alleged that accused No. 3 led them to his residence. After adopting the aforesaid procedure, a search of the said house is alleged to have been taken. A kettle containing some loose Charas pieces, loose Ganja and loose Madat (Opium) were found in the kettle alongwith two scales and some weights. Those articles were seized under a separate panchanama (Exhibit 19). According to the prosecution, accused No. 2 disclosed tot he members of the raiding party that he was in the employment of accused No. 3 for making small packets of Ganja. The raiding party then came out of the house and found accused No. 1 Narayansingh standing on the road at a short distance of about 10 feet from the residence of accused No. 3 Mainuddin. On suspicion, it is alleged, his personal search was taken and in one nylon satchel, which was in his hand, the raiding party had found 33 small packets and 5 big paper packets, all containing Ganja. The currency of Rs. 135/- was allegedly found on the person of accused No. 1 Narayansingh and a cash to the tune of Rs. 751/- was said to have been found on the person of accused No. 2 Mehboob. The said articles also were seized after adopting the usual procedure and panchanama

(Exhibit 20) was drawn. After completing the raid as aforesaid, the party left Miraj at about 7.30 p.m. alongwith accused No. 1 Narayansingh and accused No. 2 Mehboob, for going to Kolhapur. After reaching Kolhapur, P.W. 4 Superintendent Yadav had interrogated accused No. 1 Narayansingh and had recorded his statement, duly signed by accused No. 1 Narayansingh, vide Exhibit 30. On the next day, that is 14th February 1986, similar statement of accused No. 2 Mehboob also was recorded. Only accused Nos. 1 and 2 were arrested at about 4.45 p.m. on 14th February, 1986. According to the prosecution, accused No. 3 Mainuddin was found on 6th March, 1986 and thereafter his statement Exhibit 32 also was recorded. Accused No. 3 also is said to have signed that statement. In the aforesaid three statements, the three accused persons are said to have admitted their guilt.

3. The samples of the Muddemal narcotic drugs were not taken at the time of the seizure. Therefore, on 21st July, 1986 they were collected in presence of two panchas, witness mate and one Mane. Three panchnamas Exhibits 24, 25, and 26 were then drawn to collect the samples of the articles seized under three different panchnamas Exhibits 18,19, and 20. The articles were then sent to the chemical analyser for analysis. The report of the chemical analyser (Exhibit 34) was received in course of time reporting that Ganja, Charas and Opium were detected in the said samples. After completing the investigation, a charge-sheet was submitted to Judicial Magistrate, First Class, Miraj for an offence punishable u/s 20 of the Narcotic Drugs and Psychotropic Substances Act.

4. Charge vide Exhibit - 1 was framed on 4th May, 1987 by the then learned Sessions Judge, Sangli charging the three accused persons under various heads. In the first place, accused Nos. 2 and 3 were charged for an offence punishable u/s 20 of the Narcotic Drugs and Psychotropic substances Act for possessing 22 kgs. of Ganja and 354 packets of Ganja weighing 1 kg. for the purpose of sale. Secondly, accused No. 3 alone was charged for an offence punishable u/s 20 of the Narcotic Drugs and Psychotropic Substances Act for possessing and selling narcotic drugs, viz., one packet of Charas weighing about 7 gms. 2 packets of Charas weighing about 24 gms., 3 pieces of Charas weighing 4 gms., Ganja weighing 100 gms., and Madat weighing 6 gms. Thirdly, accused No. 1 was separately charged of offence punishable u/s 20 of the Narcotics Drugs and Psychotropic Substances Act for possessing/selling 33 small packets of Ganja weighing 35 gms. and big Ganja packets weighing 25 gms. Lastly, accused Nos. 1 and 2 were charged for offence punishable u/s 29 of the Narcotic Drugs and Psychotropic Substances Act for being employees of or being in the service of accused No. 3 Mainuddin and abetting or being participants to a criminal conspiracy for commission on the offences committed by accused No. 3 u/s 8 read with section 29 of the narcotic Drugs and Psychotropic Substances Act.

5. All the accused persons pleaded not guilty to the charge. Their defence was of total denial. In particular, accused No. 3 Mainuddin had placed on record some documents showing that during the relevant period of the raid in question he was

shown by some other officer in the same department as a person arrested for another offence under Narcotic Drugs and Psychotropic Substances Act at some other point of time on the same day. It was contended that he was in the custody of that officer during the whole day and was, in fact, produced before a Magistrate at about 8.30 p.m. for the purpose of securing his remand. It was contended that the entire case was a big concoction for the purpose of implicating falsely the three accused persons. No defence evidence was adduced. None of the accused persons had entered the witness box to give evidence on oath.

6. When the evidence of the prosecution witnesses was being recorded before the learned Additional Sessions Judge, accused No. 3 Mainuddin had produced before the learned Additional Sessions Judge the documents, Exhibits 54(1) and 54(2), being the xerox copies of a remand report dated 13th February 1986 in C.R. No. 42 of 1986, and a charge sheet submitted in course of time in the context of that offence. A prayer was made to the learned Additional Sessions Judge to examine Inspector Jadhav of the Central Excise Department who claimed to have conducted the aforesaid raid and to have taken the remand for accused No. 3. The learned Additional Sessions Judge passed at Exhibit 57 a carefully worded order directing that Inspector Jadhav should be examined as a Court witness in view of the facts brought on record by accused No. 3. Accordingly, Inspector Jadhav was examined as a Court witness. The prosecution evidence consisted of the evidence of P.W. 4 Superintendent Yadav and P.W. 1 ? Vyankatesh Kulkarni on the point of conduct of the raid itself and for proving the three panchanamas Exhibits 18, 19 and 20 P.W.3 Mate was examined for proving the panchanamas Exhibits 24, 25 and 26 under which the samples were collected and P.W. 2 Surendra Nargunde was examined to prove certain seized documents allegedly produced by one Rafik, a brother of accused No. 3, in the context of the residential house of accused No. 3. He proved panchnama Exhibit 22. For proving the occupation of accused No. 3 in a room in Shams Manzil. P.W. 5 Shashuddin and P.W. 6 Mahamadgous were examined, but both of them had turned hostile. P.W. 7 Baliram was examined to prove the residential address of accused No. 3 and P.W. 8 Baban Koli, an employee of water supply department, also was examined on the same point.

7. The learned Additional Sessions Judge first summed up in his judgment the sum and substance of the evidence given before him by P.W. 1 Kulkarni and P.W. 4 Superintendent Yadav. Both of the witnesses had, in a sense, stated the prosecution story as stated at the outset so far as it pertained to the conduct of the raid and the seizure of the Muddemal articles first, in the godown in Shams Manzil, then at the instance of accused No. 3, and then, from the person of accused No. 1 Narayansingh on the street. Thereafter, the learned Additional Sessions Judge referred to the evidence of Court witness Inspector Vishnu Hanmanta Jadhav who had told that on 13th February, 1986 he had conducted a raid in Mali Galli at Miraj at about 10 a.m. and had got accused No. 3 Mainuddin with some contraband articles. He had stated that accused No. 3 Mainuddin was

arrested by him on the same day at about 11.50 a.m. and, after keeping him in his custody till the evening. He had produced accused No. 3 before the Judicial Magistrate, First class, Miraj at about 3.30 p.m. on the same day for seeking his remand. The learned Additional Sessions Judge found that the recitals in the remand report Exhibit 54(1) submitted to the Judicial Magistrate in First Class, Miraj were fully corroborative of the facts stated by the witness. The charge sheet Exhibit 54(2) showed, further, that as per the averments in the charge sheet accused No. 3 was remanded from time to time upto 6th March, 1986. The learned Additional Sessions Judge believed the evidence of the Court witness despite the criticism. made thereof by the learned Additional P.P. before him and concluded that the prosecution in this case had failed to prove beyond reasonable doubt that accused No. 3 Mainuddin was physically present on the spot in the course of the raid allegedly conducted by P.W. 4 Superintendent Yadav which was the subject matter of the present case. The learned Additional Sessions Judge also found that no substantive reliable evidence was adduced by the prosecution before him to prove beyond reasonable doubt that the room in Shams Manzil was taken on rent by accused No. 3 Mainuddin and was in his possession at the relevant point of time. He considered the various documents produced before him and came to the conclusion that the residential premises which were allegedly raided upon were proved to be the premises in which accused No. 3 was living. On considering the other evidence he held that the contraband articles as alleged were proved to have been found in the custody of accused Nos. 1 and 2 and that it was established that accused Nos. 1 and 2 were working for accused No. 3 Mainuddin. In consonance with these findings, the learned Additional Sessions Judge arrived at his decision and convicted all the three appellants-accused and proceeded to award them the sentences as stated at the outset.

8. While attacking the order of conviction, it was first submitted by Shri Pradhan, Advocate for appellant-accused No. 3 and the other learned Advocate appearing for the other appellants that the conviction of accused Nos. 1 and 2 for offence punishable u/s 29 and that of accused No. 3 for offence punishable u/s 25 was not warranted at all because there was never any charge framed against them for the aforesaid offences. The contention has substance in it. The learned Additional Sessions Judge would have done well, if at all he was of the opinion that such offences were established against the appellants, to amend the charge suitably and to have given them an opportunity to meet the same.

9. Apart from this technical contention, the main point of argument of all the three Advocates appearing on behalf of the appellants was that according to P.W. 1 Kulkarni (panch) and P.W. 4 Superintendent Yadav, accused No.3 Mainuddin was the first person found standing in front of Shams Manzil and, though the members of the raiding party consisted of officers in uniform, accused No. 3 Mainuddin himself had admitted before them that the room in front of which he was standing and the door of which was locked from outside, was his room. It was submitted that if at all according to the prosecution accused No. 3 was a

hardened criminal, he would have never remained at that place on seeing the officers in uniform coming to that place and even if it was assumed that he had no opportunity to disappear from that place, he would not have disclosed to the officers that the room which was under lock and key was his room especially when accused No. 2 Mehboob was allegedly in the said room indulging in making small packets of Ganja. It was, further, pointed out that according to both of the aforesaid prosecution witnesses, the panchanamas which were drawn in the course of the raid were allegedly signed by accused No. 3 Mainuddin also. It was submitted, not without force, that if at all accused No. 3 was already in the custody of Court witness Inspector Jadhav since 10.30 a.m. in the morning, the very contention that accused No. 3 Mainuddin was available there and he had signed the panchanama falls to the ground. It was further contended, and that too not without considerable force, that if the nexus of the alleged offences was thus shaken at its root, It was certainly not reasonable to assume that the panchanamas which were drawn in the course of the raid were really truthful, and further, that the witness like P.W. 4 Superintendent Yadav and P.W. 1 Kulkarni were deposing before the Court the truth or the whole truth. It was very rightly submitted that the learned Additional Sessions Judge has totally, ignored this aspect, and this weakness in the prosecution evidence, and had proceeded to hold that P.W. 1 Kulkarni and P.W. 4 Superintendent Yadav were reliable witnesses, at least in respect of the finding of the Muddemal articles along with accused Nos. 1 and 2 in the manner told by them. The most important factor, in this context, was that though accused No. 3 Mainuddin was supposed to be the principal offender in the context of the present case, he was not at all arrested on the same day and, it is in the evidence on record, that he was not available for arrest till 6th March 1986. The learned Additional Sessions Judge has overlooked that the prosecution had failed to explain this delay in the arrest of the accused No. 3 Mainuddin, the principal offender in the case, when according to them the room and the residential premises became known to the raiding party only at the instance of accused No. 3. It was rightly submitted, therefore, that when there was every reason to suppose that evidence of Superintendent Yadav P.W. 4 and Kulkarni P.W. 1 was not reliable for the aforesaid reason, the same could hardly be relied upon for holding that the rest of the part of the prosecution story was truthfully narrated by them and was, therefore, acceptable. We are in agreement with the submissions advanced by the learned Advocates for the appellants.

10. On perusal of the judgment of the learned Additional Sessions Judge, it is seen that he was deeply impressed by the three statements of the accused persons recorded by P.W. 4 Superintendent Yadav in the course of investigation. The statement of accused No. 1 Narayansingh is at Exhibit 30 and that of accused No. 2 Mehboob is at Exhibit 31. Both were recorded on 14th February 1986, that is, on the second day of the day of incident, while both of them were in custody. As the arrest of the accused No. 3 Mainuddin itself was delayed, his statement Exhibit 32 came to be recorded only on 6th March 1986. The learned

Additional Sessions Judge devoted considerable energy to decide whether or not, the aforesaid statements could be lawfully proved and could be admissible in evidence. He came to the conclusion that they were admissible in evidence. We need not go into the details of the arguments discussed by the learned Additional Sessions Judge as to whether or not, the said statements were admissible in evidence and could be lawfully proved, because, even if it is assumed that they were admissible in evidence and could lawfully proved, we are of the view that the said statements made before an authority could hardly be natural and truthful, in the peculiar circumstances of this case. When there is reason to suppose, as was argued by the learned Advocates for the appellants, that the evidence of P.W. 4 Superintendent Yadav was of doubtful value in view of the circumstances discussed in the foregoing paragraphs of this judgment, it is still more doubtful whether or not, the statements purported to have been recorded by him could be trusted without any reasonable doubt about their veracity. It is significant to note here that even according to the prosecution, the accused persons were hardened criminals. It is difficult to suppose, in the circumstances of the case, that such persons would voluntarily make incriminating statements only because they were apprehended by raiding party. The aforesaid statements do not inspire any confidence in them and we are not inclined to rely upon them for the purpose of supporting the finding of guilt against the appellants.

11. When the evidence of the star prosecution witnesses, viz P.W. 4 Superintendent Yadav and P.W. 1 Kulkarni, suffers from the aforesaid inherent weaknesses, the question is whether or not, the statutory formalities prescribed by the Narcotic Drugs and Psychotropic Substances Act were proved to have been performed by P.W. 4 Superintendent Yadav. P.W. 4 Superintendent Yadav, who was himself presumably a Gazetted Officer empowered u/s 41(2) of the Narcotic Drugs and Psychotropic Substances Act, had told in his deposition that his Kolhapur office had received the information in connection with this offence at Kolhapur, and further, that the said information was reduced to writing in the said office. He had told also that he had got the information verified and had decided to conduct the raid. According to him, the information was received on 13th February 1986 at about 9 or 9.30 a.m. and that he had left for the raid soon thereafter. Surprisingly enough, this alleged piece of writing was not produced before that trial Court for perusal. This reduction to writing of the aforesaid information was supposed to be in compliance with section 42(1) of the Narcotic Drugs and Psychotropic Substances Act, because, according to P.W. 4 Superintendent Yadav, the information was that accused No. 3 Mainuddin was possessing storing and dealing with the narcotic drugs near the building known as Shams Manzil in Mali Galli at Miraj. In other words, to be more specific, information was not to the effect that somebody was committing the offence on a public street so as to bring the facts of the case within the purview of section 43 of the Narcotic Drugs and Psychotropic Substances Act. Therefore, it was necessary for the prosecution to prove to the satisfaction of the Court that the information which was allegedly received by the office of P.W. 4 Superintendent

Yadav was, in fact, reduced to writing and what was the nature thereof. Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act requires that the official taking down any information in writing under sub-section (1) of that section should forthwith send a copy thereof to his immediate official superior. P.W. 4 Superintendent Yadav did not tell that he had complied with the aforesaid requirement of law. In respect of accused No. 1 Narayansingh, who was allegedly found on a public place accidentally after the searches of the godown and the residential house of accused No. 3 were over, the case would fall within the purview of section 43 of the Narcotic Drugs and Psychotropic Substances Act and in his case the provisions of section 50 of the Act would be applicable. The aforesaid section requires that if an officer empowered u/s 41 or authorised u/s 42 and 43 were to take a search of a person, he should take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate and that the Gazetted Officer or the Magistrate before whom such person is brought should, if he sees no reasonable ground for the search, forthwith discharge the person but, otherwise should direct that a search be made. No compliance with the aforesaid provision has been proved by the prosecution evidence. Section 57 of the Narcotic Drugs and Psychotropic Substances Act requires that whenever any person makes any arrest or seizure under the aforesaid Act, he shall, within 48 hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. In the present case, P.W. 4 Superintendent Yadav did not prove that any such report was made. Thus, when the prosecution evidence of P.W. 4 Superintendent Yadav and P.W. 1 Kulkarni as regards the alleged raid itself was of doubtful value, the non-compliance with the aforesaid statutory provisions, which are meant for providing a safeguard to the accused persons, goes to the root of the case and reduces further the weight of the prosecution evidence.

12. In view of the aforesaid discussion, it is not necessary to go into the rest of the prosecution evidence. The learned Assistant P.P. could hardly support the convictions of the appellants in the face of the considerations discussed above. In the light of the aforesaid discussion, we hold that the prosecution evidence regarding the raid and the complicity of the accused persons in connection with the Muddemal allegedly seized in the raid is far from satisfactory and is, in our view, not sufficient to warrant their convictions for the offences of which they were convicted by the learned Additional Sessions Judge. Accordingly, we find them not guilty of the aforesaid offences.

13. In result, Criminal Appeal Nos. 777 of 1987, 3 of 1988 and 4 of 1988 succeed. The appeals are allowed. The convictions and the sentences awarded to the appellants in the aforesaid three appeals are set aside. It is directed that they be set at liberty forthwith, if not required in any other case, and the amounts of fine, if any paid by them, shall be refunded to them. Their bail bonds shall stand cancelled.