
(1993) 01 BOM CK 0053
In the Bombay High Court
Case No : Criminal Appeal No. 613 of 1991

Matlub Khan Rehmat Khan

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 21-01-1993

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 8

Citation : (1993) 2 BomCR 226 : (1993) 95 BOMLR 624 : (1993) CriLJ 3624 : (1993) 2 MhLj 956

Hon'ble Judges : M.F. Saldanha, J;A.D. Mane, J

Bench : Division Bench

Advocate : T.H. Sardar, for the Appellant; D.A. Nalawade, Assistant Public Prosecutor, for the Respondent

Judgement

M.F. Saldanha, J.—The appellant before us, the original accused No. 2 in Sessions Case No. 689 of 1988 assails the correctness of his conviction u/s 8(c) read with Sub-Sections 29 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. It was alleged that he, along with original accused No. 1 came to be apprehended in room No. 48, plot No. 53, at Chunabhatti at about 11.20 a.m. on 23-1-1988. The Malwani Police Station, on receipt of information that brown sugar was being sold at this particular place, sent a raiding party under P.S.I. Rajadhyaksha. On reaching the spot two panchas were sent for and the party entered room No. 48. It is alleged that the two accused were found seated in that room and that they stood up when the party came in. The prosecution alleges that the two accused were engaged in the act of preparing small packets of brown sugar out of the bulk of the material that was in a pot which was found in front of them. Ten small packets of approximately 4 grams each were found there and it is also alleged that a roll of silver paper apart from several empty packets were also found. All this material was seized by the police under a panchanama and the representative samples were drawn and these were sent for chemical analysis. The report indicated that traces of heroin were detected in all except one of the samples. The investigations also reveal that the room in which

the accused had been apprehended belonged to one Usman. His name appears in the FIR, but no further action seems to have been taken to trace him out. The two accused were placed on trial before the learned Special Judge and they faced a dual charge namely that of being in possession of brown sugar and of preparing it for sale. On completion of the trials, the learned Special Judge accepted the prosecution evidence and convicted both the accused who were awarded a sentence of rigorous imprisonment for 10 years and to pay a fine of Rs. 1 lac, each in default rigorous imprisonment for two years. The present appeal has been filed only by original accused No. 2 who is in custody.

2. Mr. Sardar, the learned counsel appearing on behalf of the appellant, has taken us through the evidence that is on record. He has assailed the manner in which the prosecuting authorities have gone about their job and he was submitted that several serious procedural breaches have been committed by them. To start with, Mr. Sardar demonstrated that even though it is the prosecution case that specific information was received at the police station to the effect that brown sugar was being prepared for sale in room No. 48, that the relevant entry made at the police station which is Exh. 6/A, is silent in respect of all these material particulars. That apart, Mr. Sardar submits that since this is a case where the charge is one of possession that the seizure if any, ought to have been done in the presence of a Magistrate or a Gazetted Officer or at least that the accused should have been offered the opportunity of being taken before one of these officials. We have heard Mr. Sardar with regard to this aspect of the matter and to our mind, they are not of much consequence, for the reasons that we shall indicate presently. It is true that certain special procedures are prescribed by law in respect of the investigation of offences under the Narcotic Drugs and Psychotropic Substances Act and there is valid justification for this, but at the same time the defence cannot be permitted to make a fetish of the requirement and contend that every minor breach would vitiate the entire proceeding. Such lapses may be quite inconsequential particularly in a case, where the remaining material on record overwhelmingly establishes the offence. The charge in the instant case arises out of a two-fold accusation against the accused, the first of them being that the accused were found in possession of contraband and the second being that the accused were involved in preparing the contraband for sale. If either of these or both of them had been established the conviction u/s 21 of the Act would be sustainable.

3. We have perused the evidence of the material witnesses in this case, the first of them is the Police Constable PW 1 Baburao Chikode who refers to the information received by him and who was present at the time of the raid. It is his case that when the raiding party entered the room the accused were found seated and that they stood up when the police entered the place. It is true that, this witnesses quite categorically mentions that the accused were present in the room and that a pot containing the contraband was found in front of them and he also refers to the silver paper and the ten packets of brown sugar. He is however, silent about the crucial aspect of the matter namely the question as to what

exactly the accused were found doing inside that room. The evidence stops short by stating that they were merely seated there and that they stood up. In his cross-examination he has sought to improve upon the earlier statement by trying to suggest that the accused threw the packets down when they stood up, the implication being that the packets were in the hands of the accused. He is categorical that nothing was in the hands of accused No. 2 and it is also clear that this is a distinct improvement because he has admitted that in his police statement he has not indicated this very material act that he attributes to the two accused. The general tenor of his evidence with regard to what transpired on that day, is quite satisfactory apart from these infirmities. Hence, in our considered view, though this evidence would be good enough to justify the seizure of the contraband, it is still insufficient to fasten the culpability to the accused u/s 21 of the Act.

4. The learned trial Judge has discarded the evidence of PW 2 Subhash Gupte who was the Panch. He has been candid enough to admit that his relations with the police are quite good and that he has acted as a Panch witness in 7 or 8 cases of the Malwani Police Station. Apart from his admission, a scrutiny of his evidence and his cross-examination would indicate that even though there are no serious indications in his deposition, the fact still remains that he has given evidence exactly along the lines of PW 1 namely that he mentions the presence of the two accused but does not attribute any overt act whatsoever to either of them. This evidence therefore, again may justify the seizure of the material but in our considered view, would not be good enough to fasten any guilt on the accused No. 2.

5. The other material evidence in this case and most important evidence to our mind, is that of P.S.I. Rajadhyaksha at Exh. 26. He had led the raiding party and it is quite obvious that he knew what to expect when he reached that place. For some mysterious reason this officer does not take the Panchas with the raiding party, and according to him, he was patiently waiting outside the room until PW 1 went in search of two Panchas and returned with them. He states that the raiding party heard some conversation inside the room. Even that conversation would have been quite material, if it indicated any activity concerned with the handling or selling of this material or preparing it for sale. He does not however, disclose to the Court the nature of the conversation which he is supposed to have overheard. On pushing the door open, he states that the two accused were found seated and that they stood up. He even goes to the extent of saying that, he enquired of the accused as to what they had to say about the contraband and that they could not give any satisfactory explanation. The accused did not make any admission at that point of time in relation to or in respect of any connection between them and the contraband. The officer was thereafter, busy with seizing the brown sugar, as well as sealing it, etc. and he seems to have omitted to take cognizance of the most important aspect of the investigation namely to look for clues on the basis of which the accused could be credited with some activity in relation to that contraband or possession thereof. He has admitted that no

personal search was carried out as far as the accused were concerned. We are further of the view that, had the prosecution made some elementary effort to establish that there were traces of the powder on the hands or on the person of the accused, or that there was any other secondary evidence to connect them with the activity of either possessing it or preparing it for sale, that the prosecution could have most certainly sustained the present conviction. It is true that the analysis of the material indicates that all the samples except one small one did contain traces of heroin. The fact that the accused were found in that room would bring them dangerously close to being linked with that material, but it was still essential for the prosecution to have produced that last bit of evidence in order to conclusively link them up with the contraband.

6. Mr. Sardar has submitted and quite justifiably, that, in the present case, even if the prosecution has established that the material was found in the room, in the light of the admission that the room belonged to Usman and that the present accused have nothing to do with those premises, cannot even bring them within the ambit of deemed possession. He submits that admittedly no recovery has been made from the person of the accused nor is there any secondary evidence to indicate that they were in any manner connected with the contraband that was seized. Under these circumstances, it is his contention that the accused have been wrongly implicated and in any event, that they have been wrongly convicted.

7. Mr. Nalawade, the learned A.P.P. has submitted that the facts of the present case speak for themselves. He contends that the Court ought to take note of the fact that the room was closed and that only the two accused were present in that room. He has drawn our attention to the fact that the accused have not offered any valid explanation whatsoever for their presence in the premises and that it would be too far-fetched to de-link them completely from the contraband that was found virtually inches away from their person. Mr. Nalawade was at pains to point out to us that the information received by the police was regarding the fact the brown sugar was obtained in bulk and that it was thereafter being repacked in small packets for purposes of sale. This is fully established by the Panchanama which indicates that the larger quantity of powder was in a pot and that as many as 10 packets had already been prepared and that the material namely the empty packets and silver paper were found at that place. It is his contention that this Court would be justified in drawing an irresistible inference from the fact that the accused were present alone in the premises in the proximity of all this material, that they could not have been doing anything other than being engaged in the activity of packing that contraband. A suggestion has been put to some of the witnesses that a third person who was present had escaped from that place, obviously with the intention of indicating that if at all anybody was generally dealing with any contraband that he was the person. It is also true that the accused have contended that they were arrested by the police outside the premises and that the allegation of being in possession of the material has wrongly been foisted on them. It would be difficult to accept this charge because,

the police have not in the present case, tried to make any false statement that any contraband of any quantity whatsoever was found on the person of any of the accused or for that matter that it was recovered from them. The highest that can be said in the light of the arguments of the learned A.P.P. is that there is a possibility that the accused were in fact, indulging in this activity, but there are also many other possibilities which the Court must take into account. We cannot lose sight of the fact that the charge which the accused are facing is one u/s 21 of the Narcotic Drugs and Psychotropic Substances Act which entails a minimum sentence of 10 years rigorous imprisonment and a minimum fine of Rs. 1 lac. It is for good reason that the law has prescribed heavy sentences and in such a situation, it is equally important that the standard of proof must pass the most rigorous test of scrutiny before the accused could be held guilty. It is an equally well settled principle of criminal jurisprudence that if a reasonable doubt does arise, that the accused must be given benefit of that doubt. As indicated by us earlier, this is a case where the prosecution has come very close to establishing its case but still has to prove beyond reasonable doubt that the material on record justifies either possession or preparation for sale in respect of the contraband, which unfortunately it has failed to do. Having regard to this position, we are unable to uphold the findings recorded by the learned Special Judge.

8. The appeal accordingly succeeds. The conviction and sentences awarded to the appellant are set aside. The fine, if paid, by him, is directed to be refunded. Since the accused is in custody, it is directed that he be set at liberty forthwith, if not required in connection with any other offence.

9. As indicated by us, the present appeal has been preferred only by original accused No. 2. The case of accused No. 1 is undoubtedly similar, but in the absence of an appeal preferred by him, this Court is unable to consider his case. We however, direct that the Jailor shall bring to the notice of accused No. 1 the result of the appeal preferred by accused No. 2. We have pointed out to Mr. Sardar learned counsel representing accused No. 2 that it does appear to us that the accused No. 1 being a poor person, has possibly not filed any appeal and that he should bring it to the notice of accused No. 1 that the appeal preferred by the co-accused has been allowed by this Court, so that it shall be open to him to appeal if he so desires.

Appeal allowed accordingly.

10. Appeal allowed.