
(2014) 03 BOM CK 0174
In the Bombay High Court
Case No : Criminal Appeal No. 196 of 2011

Mir Muradali Khurshid Ali

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-03-2014

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 20(b)(ii)(c)

Citation : (2014) ALLMR(Cri) 1558

Hon'ble Judges : Sadhana S. Jadhav, J

Bench : Single Bench

Advocate : H.E. Mooman, Advocate for the Appellant; P.P. Shinde, A.P.P, Advocate for the Respondent

Final Decision : Allowed

Judgement

Sadhana S. Jadhav, J.—The appellant herein is convicted for the offence punishable u/s 20(b)(ii)(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 and is sentenced to suffer R.I. for 12 years and to pay fine of Rs. 1,00,000/- in default to suffer R.I. for one year in N.D.P.S. Sessions Case No. 40 of 2009 by the Special Judge, N.D.P.S. Act, Pune, vide judgment and order dated 12.1.2011. Hence, this appeal. Such of the facts, which are necessary for the decision of this appeal are as follows:--

On 11.10.2009, APT Yashwant Nalawade of Crime Branch, Pune, received a secret information to the effect that between 1.00 a.m. and 2.00 a.m. one person would bring Ganja for sale in a vehicle i.e. Tata Sierra bearing No. MH-06-A-9321 near old P.M.T. Bus. It was also informed that the said vehicle would come through Kondhwa-Katraj Road. A.P.I. Nalawade had transmitted the said information to P.I. Kekani. Panchas were called and the police staff along with panchas proceeded towards the said spot i.e. old P.M.T. Bus Stand. The raiding staff saw Tata Sierra proceeding on Kondhwa- Katraj Road. Raid was effected at 1.45 a.m. The driver of the said vehicle disclosed his name as Mirmurad Ali

Khurshid Ali. The accused had allegedly agreed to be searched by the police officer i.e. P.I. Kekane. A written consent was obtained. During the search of the vehicle, the raiding party found gunny bags containing the greenish leaves. The raiding party tested the contents of the ten gunny bags with a Detection Kit. It was revealed that the said leaves were the contraband Ganja. 251 kgs. & 100 grams of Ganja was found in the said gunny bags. The accused and the muddemal property was taken to the police station. The seized muddemal property was deposited with the Muddemal Clerk. Crime No. 3153 of 2009 was registered against the driver of the vehicle. After completion of investigation, charge-sheet was filed. The case was registered as N.D.P.S. Sessions Case No. 40 of 2009. The prosecution examined five witnesses to bring home the guilt of the accused.

2. P.W.-1 Anil Pimpalkhare was the panch for seizure. He was a driver by profession. On 11.10.2009, he was called by A.P.I. Nalawade at Crime Branch, Pune. He has deposed before the Court that the vehicle was raided. The driver had disclosed his name as Mir Muradali Khurshidali i.e. the present appellant. According to P.W.-1, they found gunny bags inside the vehicle containing greenish wet leaves/Those leaves were tested with the help of a Detection Kit. Those leaves were of Ganja. During personal search, they found one mobile handset and amount of Rs. 250/-. The total weight of Ganja was 251 kgs. And 100 gram.

It is elicited in the cross-examination that P.W.-1 was working as a panch for police since 2-3 years. The Crime Branch had called him for the first time. Normally he worked as a panch for Vishrambaug Police it is further elicited that neither the panchas nor the police staff had been to Katraj Police Chowky on that day. In the cross-examination, it is further clarified by the witness that Nalawade and Kekane were not in their uniforms. He has further deposed that each group was of five persons. He has specifically admitted that he had not seen the vehicle while coming, but had seen it only when it stopped near the Depot. He has further deposed that as soon as the police opened the gunny bags, they were sure that it was Ganja. He has further stated that only driver was in the vehicle. The driver did not try to run away. He had shown certain documents to the police. In the course of enquiry, P.W.-1 had learnt that the vehicle was of Panvel passing.

3. P.W.-2 Vishal Gavli was the Police Constable attached to Bharati Vidyapeeth Police Station. He had carried the sealed packets to the Chemical Analyzer. He was cross-examined. He has deposed before the Court that the police had not recorded his statement. Sample packets were given to him at about 10.30 a.m. at Katraj Police Station. Dnayanoba Sanap and Anil Pimpalkhare were not present when the samples were given to him. All the gunny bags were brought to the police station. According to him, Ibrahim Aaba Patel was in charge of Katraj Police Chowky. He was attached to Katraj Police Station. He had carried the sample packets to the C.A. on 11.10.2009. The report of the Regional Forensic

Science Laboratory of State of Maharashtra is at Ex. 11 which shows that the samples were sent along with a covering letter dated 16.10.2009 and they were received on 16.10.2009.

4. P.W.-3 Ibrahim Aaba Patel. He was attached to Bharati Vidhyapeeth Police Station as Property Clerk on 11.10.2009. On that day, muddemal was deposited with him by A.P.I. Nalawade in Crime No. 3153 of 2009. Ten packets were also deposited with him along with ten gunny bags and Tata Sierra Vehicle. He had taken entry in the property register. The certified copy of the property register is at Exhibit 16. According to him, on 16.10.2009, he had handed over ten sample packets to P.C. Gawali to be carried to the office of C.A.

It is elicited in the cross-examination that muddemal was given in his custody on 11.10.2009 at 1.00 p.m. The muddemal property was not sealed in his presence. It was kept in the property room of the Police Station along with other properties. Sample packets were sent to the Court on 18.6.2010. It was specifically deposed by him that the gunny bags containing the contraband were not sent to the Court and that he was not present when the samples were handed over to the constable. In answer to the Court question, the witness has stated that the description of the muddemal was written in the property register as per the panchnama. It is also admitted that the property register does not bear the signature of P.W.-3 nor he has signed the sample packets. He has specifically admitted that neither P.S.I. Kendre nor Nalawade was the Station House Officer on that day. Only on the basis of the entry in the register, the witness has stated that the muddemal was sent to C.A. On 16.10.2009. According to him, samples were in the property room for six days and during the said period, he was not directed to send muddemal. While sending the samples to C.A. His signature was not obtained on the sample packets.

5. P.W.-4 Yashwant Nalawade was attached to the Crime Branch on 10.10.2009 when he had received a secret information about a person carrying contraband Ganja in white Tata Sierra vehicle and who had to pass through Kondhwa Katraj Road. He has deposed before the Court that in respect of steps taken by him, while carrying investigation.

It is elicited in the cross-examination that at the time of raid, the police staff and police officers of Unit No. 2 of Crime Branch had accompanied him. That they had not taken help from the police of Bharati Vidhyapeeth Police Station or Katraj Police Chowky. He was not able to specifically state as to whether Kendre was P.S.I. of Katraj Police Chowky. According to him, P.I. Wakode was in charge of Bharti Vidhyapeeth Police Station. He had stopped outside the Bharti Vidhyapeeth Police Station for some time. He had not signed on any register at Bharti Vidhyapeeth Police Station before raid. He has given evasive answers in respect of the time when the panchas were called. P.W.-4 has specifically admitted that separate panchnama was not made while taking personal search of the accused. It is also admitted by him that the time of recording the consent was not mentioned in the letter at Ex. 27. He has also stated that no instructions

were given to the driver to open the door of the vehicle. According to him, in every gunny bag, there were green leaves. Each gunny bag was opened from the top. On label, signature of the accused was not obtained. Entry of the search and seizure was not taken at the Crime Branch. The accused was brought at the Crime Branch at 5.00 a.m. P.W.-4 had personally handed over the sample packets at Bharti Vidhyapeeth Police Station. However, he could not state the exact time when he deposited the muddemal. P.W.-4 also could not specifically give the name of the person from whom he had brought the electronic balance. Weighman was not called. P.W.-4 has admitted in his cross-examination that he never informed the A.C.P. or I.O. That one person from the vehicle ran away.

6. P.W.-5 Bharat Kindre was attached to Bharti Vidhyapeeth Police Station as P.S.I. On 11.10.2009, Crime No. 3153/2009 was registered at Police Station and the investigation of the said crime was handed over to P.W.-5. He had given custody of seized. muddemal to the Muddemal Clerk. He had sent sample packets to C.A. through Constable Gavai. After completion of investigation, he had filed charge-sheet against the accused.

In the cross-examination, P.W.-5 has admitted that in the course of investigation, he had recorded the statements of police witnesses only. He had not gone to Hyderabad along with the accused when the accused was in a police custody. He had not prepared seizure memo. It is also admitted that the Depot where the incident took place is at a distance of 150 mrs. from Katraj Police Chowky. However, he was not in charge of Katraj Police Chowky on that day, in fact, he was not the officer in charge of Katraj Police Chowky. According to him, sample packets were deposited on 11.10.2009 at Bharti Vidhyapeeth Police Station. He had sent muddemal to C.A. after six days. Since he had bandobast and other investigations, there was delay in sending the samples to C.A. He had filed charge-sheet on 20.12.2009. it is admitted that he had not weighed the 10 gunny bags independently. He had not recorded the statement of weigh-man and had neither recorded the statement of the weighman nor recorded the statement of Kekane Saheb. It is admitted that Shri Kekane was in the raiding party. However, P.W.-5 was not a member of the raiding party. He had received the arrest panchnama of the accused along with other relevant papers. He has denied the suggestion that when the vehicle was apprehended, some documents were found in the vehicle and on the basis of the said documents, it was revealed that the driver is the resident of Hyderabad. In answer to the Court question, P.W.-5 had not made enquiry about the vehicle No. MH-06-A-9321. P.W.-5 has candidly stated that the number plate was false. He had not checked the engine and chassis number of the vehicle.

7. In the present case, the prosecution has mainly adduced the evidence to the effect that the present appellant was driving the vehicle in question and that huge contraband was found in the said vehicle. Although P.W.-5 has stated that the number plate was not original, there was no enquiry to that effect. It is an admitted position that the present appellant is not the owner of the vehicle. In

fact, the Investigating Officer ought to have conducted investigation to ascertain the identity of the owner of the vehicle which could have been done even from the R.T.O. The recital of the first information report would show that when the vehicle was apprehended, they had found that the Insurance Policy which stated the registration number as AP 29C-0805 and the address was Mr. K. Mahesh, Plot No. 143, L.B. Nagar, Hyderabad, Andhra Pradesh. One document which was Andhra Pradesh Transport Department Certificate of registration. The other documents were pertaining to the registration of the vehicle as R.T.O. No. MH-06-A-9321 Chassis number and engine number was mentioned. They had also seized a cell phone in the possession of the appellant. The Investigating Officer had not checked the cell details in the said cell-phone in order to ascertain the identity of the persons whom the appellant had contacted. The investigating agency has neither tried to contact K. Mahesh of Hyderabad. The recitals of the first information report also do not indicate as to whether the driver was questioned about the ownership of the said vehicle. However, it is not the case of the prosecution that the appellant was the owner of the vehicle. There is no enquiry in respect of the profession of the appellant to find out as to whether it was first time when he was driving the said vehicle. There is no enquiry as to whether he was working with any transport agency and neither any enquiry as to the person who must have hired his services. It was incumbent upon the prosecution to enquire into all these issues in order to fasten the liability on the present appellant under the provisions of the N.D.P.S. Act.

8. In the case of Avtar Singh and Others Vs. State of Punjab , the Hon"ble Apex Court held "that the driver of the truck vehicle and the persons who were found sitting on gunny bags containing poppy husk could not be attributed "conscious possession" of such bags unless there was proof of the concern of those persons with the goods. The relevant observations of the Apex Court may be reproduced as below.

Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three appellants--one of whom was driving the vehicle and other two sitting on the bags, were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence that the appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be the custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. For instance, if they are labourers engaged merely for loading and unloading purposes and there is nothing to show that the goods were at least in their temporary custody, conviction under S. 15 may not be warranted. At best, they may be abettors, but, there is no such charge here.

True, their silence and failure to explain the circumstances in which they were travelling in the vehicle at the old hours, is one strong circumstance that can be put against them.

9. The judgment of the Apex Court (cited supra) was followed in the case of-

(1) Premnarayan Prabhulal Mina and Gopal Lingeshyam Kolhapure Vs. The State of Maharashtra

(2) Tirupati Walal Vs. The State of Maharashtra

(3) Rupsing S/o. Gopal Barela v. State of Maharashtra 2009 ALL MR (Cri) 357.

(4) Shivaji Gaonkar Vs. State .

10. Upon perusal of the records and proceedings, it is clear that the prosecution has not adduced any cogent and convincing evidence to arrive at a conclusion that the appellant, who happened to be the driver of the vehicle, was having knowledge about the contents of the bags which were being transported by him. There is nothing on record to indicate that the appellant was in conscious possession of the contraband as there has been no enquiry in respect of the owner/ownership of the truck. The insurance policy of the said vehicle was drawn in the name of Mr. K. Mahesh. In all probability, he happened to be the owner of the said vehicle. Hence, the appellant herein deserves to be acquitted by extending to him the benefit of doubt. The appellant has been in jail since 11.10.2009 and has undergone 4-1/2 years. Hence, the Appeal is allowed. The Judgment and order passed by the Special Judge, N.D.P.S. Act, Pune, in Sessions Case No. 40 of 2009 dated 12.1.2011 is hereby quashed and set aside. The appellant be released forthwith if not required in any other case.