

(2000) 03 BOM CK 0012

In the Bombay High Court

Case No : Criminal Appeal No. 677 of 1998

Mohammed Salim Mohammed Issak Shaikh

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 30-03-2000

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 50, 8, 80

Citation : (2001) ALLMR(Cri) 361 : (2000) 102 BOMLR 243

Hon'ble Judges : Vishnu Sahai, J;P.V. Kakade, J

Bench : Division Bench

Judgement

Vishnu Sahai, J.—The Appellant aggrieved by the judgment and order dated July 31, 1998 passed by the Special Judge, (N.D.P.S.), for Greater Bombay, in N.D.P.S. Special Case No. 21 of 1996 convicting and sentencing him to undergo 10 years R.I. and to pay a fine of Rs. 1 lakh, in default to suffer 6 months R.I. for the offence punishable u/s 21 read with 8(c) of the N.D.P.S. Act, 1985 has come up in appeal before us.

2. In short the prosecution case runs as under.

On 29.10.1995 at about 2 p.m. while P.I. Subahsh Salvi P.W. 2 was on duty at Narcotic Cell, Azad Maidan Unit, he received an information from an informant that one Salim Shaikh (Appellant) was likely to go to Mandvi Post Office between 3.30 and 4.30 p.m. to deliver charas to his customers. P.I. Salvi reduced the said information in writing in the information book and sent its extract to his superiors. Thereafter he completed the formalities to conduct the raid. Two panchas were called. (One amongst them viz. Chotelal Mishra has been examined as P.W. 4). Thereafter he collected material like drug identification kit, portable typewriter etc, and along with the public panchas. A.P.I. Arvind Wadhankar P.W. 1, P.S.I. Sawant and Ors. left in two vehicles for Mandvi Post Office at about 3 p.m. and reached there at about 3:15 p.m. At about 4.15 p.m. he and others noticed a person whose description was in conformity with the information

received by him. The said person, who was carrying a cloth bag in his right hand, stood in front of Mandvi Post Office. After watching his movement for some time P.I. Salvi P.W. 2 and others surrounded him. P.I. Salvi P.W. 2 asked him his name which he furnished as Mohammed Salim Mohammed Issak Shaikh, told him about the information which he had received, informed him that he wanted to search him and if he so wanted he could have his search taken before a Gazetted Officer or a Magistrate, which he declined. Thereafter the polythene bag which he was carrying was searched. In it two bags; one weighing 3 kgs., and the other 2 kgs., were found. Samples were taken out from the said bags and they were found to be charas. Thereafter Mohd. Salim Mohd Isaq Shaikh (the Appellant was arrested.

A panchanama of seizure was prepared on the spot. It was concluded at 5.50 p.m. Thereafter along with the Appellant and the seized charas P.I. Salvi P.W. 2 and others proceeded to the office of Narcotic Cell at Azad Maidan.

3. The F.I.R. of the incident was lodged on the same day at 6.30 P.M. by A.P.I. Arvind Wadhankar P.W. 1 at the office of Narcotic Cell, C.B., C.I.D., Azad Maidan Unit, Bombay and on its basis a case u/s 8(c) read with 29 of the N.D.P.S. Act was registered against the Appellant,

4. The investigation of the case was conducted in the usual manner. During the course of it the charas recovered from the Appellant was sent to chemical analyst, who confirmed vide his report that it was charas.

On completion of investigation the Appellant was charge-sheeted.

5. The Appellant was put up for trial for offences punishable u/s 29 read with 8(c) and 21 read with 80 of the N.D.P.S, Act in due course. He pleaded not guilty and claimed to be tried. His defence was of denial.

During trial in all the prosecution examined 5 witnesses. Three out of them viz. P.I. Salvi P.W. 2. A.P.I. Arvind Wadhankar P.W. 1 and public panch Chotelal Mishra P.W. 4 were examined as witnesses of fact.

The learned trial Judge believed their evidence and convicted and sentenced the Appellant in the manner stated in para 1.

Hence this appeal.

6. We have heard learned Counsel for the parties and perused the entire material on record. In our opinion, this appeal deserves to be partly allowed inasmuch as we feel that the sentence in default of payment of fine is excessive.

7. Mr. A.R. Khan, learned Counsel for the Appellant urged that the conviction of the Appellant cannot be sustained because:

(a) The public panch Chotelal Mishra P.W. is a professional panch and it would not be safe to sustain the conviction of the Appellant on the testimony of two police witnesses viz. P.I. Salvi P.W. 2 and A.P.I. Arvind Wadhankar P.W. 1; and b) The

mandatory provisions contained in Section 50(1) of the N.D.P.S. Act have not been complied with.

8. We have considered the above said submissions of Mr. Khan and are constrained to observe that we do not find any merit in them.

9. We would first like to take up submission (a).

Mr. Khan took us through the evidence of Public Panch Chotelal Mishra P.W. 4 and invited our attention to his cross-examination contained in paras 8 and 9. He pointed out that a perusal of para 8 would show that he admitted that he had acted as a Public Panch in 7 cases. He urged that a perusal of para 9 would show that before proceeding for the raid he had disclosed to the officers that he had acted as a panch in the above cases in Girgaum Court. Mr. Khan urged that the conduct of the prosecuting agency in selecting him as a panch. in the said factual matrix, casts a shadow of doubt on the credibility of the raid and seizure. He urged that, this circumstance simpliciter is sufficient to give benefit of doubt to the Appellant. To substantiate his submission he invited our attention to a Division Bench decision of this Court, Mohd. Hussain Babamiyan Ramzan Vs. State of Maharashtra, . He urged that a perusal of paras 7 and 8 of the said decision shows that the public panch was habitual and consequently this Court reversed the conviction and sentence in a case u/s 21 read with 80 of the N.D.P.S. Act.

10. The learned Additional Public Prosecutor on the other hand placed reliance on para 7 of the decision of this Court in Deepak Ghanshyam Naik Vs. State of Maharashtra, wherein this Court has laid down that a panch being a habitual panch would not ipso facto render his evidence worthless.

11. We have examined the said decisions. In our view it would be wrong to urge that in the decision cited by Appellant's counsel the conviction and sentence was ipso facto set aside on the ground that the panch was habitual. A perusal of para 9 of the judgment in the said case would show that the conviction was also set aside because the possibility of samples being tampered with could not be excluded and hence this Court concluded in para 9 thus:

9 ...The prosecution, therefore, has failed to establish, by good and reliable evidence, that the samples which were taken out from the material which seized from the two accused contained Heroin.

12. We wish to point out that the circumstance that the public panch is a habitual panch would certainly weigh with the Court if it finds that the evidence of police witnesses is not free from blemish. In that situation the circumstance that the Public Panch was professional would certainly be an impediment in the way of the Court in confirming a conviction in a case under the N.D.P.S. Act.

In the instant case we find the situation to be converse. We have gone through the evidence of the two police witnesses of fact viz. P.I. Salvi P.W. 2 and A.P.I. Arvind Wadhankar P.W. 1 and find it beyond reproach. They were subjected to

hardly any cross-examination and nothing could be extracted therefrom which could in any manner render their veracity to be doubtful.

13. For the said reasons, in our view, submission (a) canvassed by Mr. Khan fails.

14. We also do not find any merit in submission (b) viz. that the mandatory provisions contained in Section 50(1) of the N.D.P.S. Act were not complied with.

Mr. Khan does not dispute that the evidence of P.I. Salvi P.W. 2 and A.P.I. Arvind Wadhankar P.W. 1 clearly shows that the provisions of Section 50(1) of the N.D.P.S. Act were complied with. He also does not dispute that in their cross-examination no question was put to them that the said provisions were not complied with.

In such a factual matrix, merely because the Public Panch Chotelal Mishra P.W. 4, in the examination in chief, stated that the Appellant was only asked whether he wanted to be searched before a Magistrate and was not asked if he wanted to be searched before a Gazetted officer, it would be wrong to conclude that there has been an infraction of the provisions contained in Section 50(1) of the N.D.P.S. Act. As a matter of fact even the Public Panch Chotelal Mishra P.W. 4 was not suggested in his cross-examination that no offer to be searched was made to the Appellant by P.I. Salvi P.W. 2.

15. For the said reasons we do not find any merit in submission (b) either.

16. Finally Mr. Khan urged that since the cross-examination of prosecution witnesses is sketchy, the case be remanded for retrial. We regret that we do not find any merit in this contention. If we were to accede to it we would be opening flood gates and in practically every appeal wherein the odds are pitted against the appellant such prayer would be made.

17. This leaves us with only one question viz. that of sentence. So far as the substantive sentence is concerned it is the minimum enjoined by the law and consequently cannot be reduced. So far as the sentence of 6 months R.I. in default of payment of fine is concerned the same, in our view, in the facts of this case, is excessive and warrants to be reduced to one month's R.I.

18. In the result this appeal is partly allowed. Although we confirm the conviction, the substantive sentence and the sentence of fine imposed on appellant for the offence u/s 21 read with 80 of the N.D.P.S. Act but we reduce the sentence in default of payment of fine from 8 months R.I. to one month's R.I. The Appellant is in jail and shall serve out his sentence.