
(2008) 01 BOM CK 0108
In the Bombay High Court
Case No : Criminal Appeal No. 496 of 2006

Mohan Mohite

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 22-01-2008

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 20, 50, 52(3), 57

Citation : (2008) BomCR(Cri) 781

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : J.V. Deshpande, for the Appellant; D.R. Adhav, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

V.R. Kingaonkar, J.—This appeal arises out of Judgment rendered by Special Judge, Jalgaon, in Special Case No. 5 of 2005. By the impugned Judgment, appellant - Mohan has been convicted for offence punishable u/s 8 read with Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (For short "the N.D.P.S. Act") and sentenced to suffer rigorous imprisonment for 10 (ten) years and to pay fine of Rs. 1,00,000/-(Rs. One Lac) in default to suffer rigorous imprisonment for two and half years.

2. The prosecution case is that on 6th July 2005, Police Inspector -Dnyandeo Gaware, who was then attached to Muktainagar Police Station, received a secret information to the effect that one person was waiting for arrival of someone by side of road at village Kurha and there were six bags of ganja by his side. P.I. Mr. Gaware instructed Head Constable Mr. Pachpande, attached to Kurha outpost, to keep vigil on the activities of said person. He gave information to the Dy.Superintendent of Police, Bhusawal about the proposed raid. He thereafter called for panchas, a Photographer and arranged for proper illumination at place of the raid. He also called for P.S.I.Mr. Pawar and other staff members.

He narrated to them about gist of the secret information received by him. They all proceeded to village Kurha in a Police jeep vehicle. When they reached at the spot near the Kurha-Dhupeshwar road, at about 7:30 p.m., they found the appellant standing by side of six bundles (Gathode). The members of Police party immediately encircled him. They nabbed him. He was asked as to whether he wanted to take search of the members of the Police party and panchas. He was also asked whether his search need to be taken by anyone else. He declined to exercise the option. The six bundles were opened in presence of panchas. The bundles contained "ganja" of different quantity in the range of 19 kgs to 34 kgs. The ganja was weighed at the same place. The weight of ganja was 155 kgs. Two sample packets were prepared of 100 gms each by collecting ganja from the stock. The remaining ganja was filled in the same bundles, which were closed after stitching them by a bodkin and string. The two sample packets were pasted with paper labels signed by panchas and P.I.Mr. Gaware. They were sealed. A seizure panchnama was drawn. The appellant was produced before the station house Officer of Muktainagar Police Station alongwith the seized ganja. P.I.Mr. Gaware lodged F.I.R. Thereupon, P.S.I.Pawar registered crime against the appellant. The information of search and seizure was forwarded to the higher Officer. One of the sample packet was forwarded to the office of Assistant Chemical Analyzer, Aurangabad. The Assistant Chemical Analyzer, Aurangabad gave report that the sample contained greenish flowering tops, pieces of greenish leaves, seeds and stalks. He reported that it was "ganja" as described u/s 2(iii)(b) of the N.D.P.S. Act. The appellant was charge-sheeted for the offence punishable u/s 20(b) of the N.D.P.S. Act.

3. At the trial, charge was framed at Exh. No. 3, which the appellant denied. His defence is of simple denial. He denied truth into the accusations. He asserted that he has been falsely implicated in the criminal case. He denied his conscious possession of the six bundles, which were allegedly seized in the relevant evening.

4. The prosecution examined in all 7 (seven) witnesses in support of its case. The learned Special Judge accepted the prosecution case on basis of material placed before him. He, therefore, convicted and sentenced the appellant as stated at the outset.

5. Mr. Deshpande, learned Advocate for the appellant would submit that the appellant was not found in conscious possession of the six bundles of ganja. He would submit that the prosecution case suffers from ring of truth in view of the alleged story, particularly, to the effect that the appellant was awaiting for someone to arrive at the place for a considerable time. It is argued that the search and seizure is vitiated due to illegality committed by PW-P.I.Mr. Gaware in conducting the same. It is argued that non-compliance of provisions of Section 52(3) and Section 57 of the N.D.P.S. Act would vitiate the trial. It is contended that mere forwarding of report to the higher authority, viz., Deputy Director of Narcotic Control Bureau, New Delhi cannot be regarded as compliance of Section

57 of the N.D.P.S. Act. He argued, therefore, that the appellant deserves benefit of reasonable doubt and should be acquitted of the charge. Mr. Adhav, learned A.P.P. supports the impugned Judgment.

6. Before I proceed to scrutinise the prosecution evidence, it is important to note that PW-P.I. Mr. Gaware had received secret information that the six bundles lying by side of the appellant were containing ganja. The distance between Muktainagar and village Kurha is approximately 35 kms. The secret information was received by PW-P.I. Mr. Gaware at about 18:10 Hrs. in the evening of 6th July 2005. The prosecution case is that panchas were called, Police party members were called, Photographer was called and Head Constable Mr. Pachpande was instructed to arrange for battery lights at the spot. He was asked to keep vigil at the spot. Thus, PW-P.I. Mr. Gaware made all the arrangements before proceeding to the spot. The Police party left the Police Station at 18:50 Hrs. and reached the spot at 19:30 Hrs. Throughout the said period, the appellant is said to have remained at the spot in the proximity of the six bundles containing ganja. He made no attempt to flee during the relevant period nor even when the Police party arrived at the spot.

7. Coming to the prosecution evidence, it may be mentioned that PW-1 - Subhash is the panch witness. He is inhabitant of village Pimpri-Akarut. He was called at Police Station, Muktainagar, in the relevant evening. His version purports to show that he was called by the Police at Kurha Outpost in the relevant evening. He states that the Police enquired with him as to whether he would act as panch witness for the intended raid for seizure of ganja. He states that they together went in Police jeep vehicle at village Kurha. According to him, the appellant was sitting at the place with six bundles. The appellant was asked whether he desired to search persons of the members of Police party but he declined. He states that the Photographer took photographs of the six bundles. Thereafter, the ganja was taken out of the bundles, which were opened. His version shows that one sample packet of ganja was prepared. He corroborates recitals of the spot-cum-recovery panchnama (Exh.8). His cross-examination shows that he had been to village Muktainagar for purchases of vegetables. His village is situated at distance of about 6 (six) kms. from Muktainagar. He admits that he accompanied Police Constable Bhosale on his motorcycle and went to Muktainagar Police Station. He further admits that on the relevant day, there was weekly Bazar at village Kurha. He does not say that two sample packets of 100 gms each were prepared at the spot.

8. At this juncture, I shall examine testimony of PW-6 -Head Constable Mr. Pachpande. His version purports to show that P.I. Mr. Gaware instructed him that one person was standing on Dhupeshwar road with six bundles and he shall keep vigil over the said person. His version purports to show that because it was rainy season, arrangements for illumination with help of batteries were made at the spot. He made the arrangements for proper illumination of the spot. After sometime, he reached the spot when P.I. Mr. Gaware had arrived alongwith

others. He states that samples were collected from the six bundles and thereafter the ganja was weighed. He admits, unequivocally, that P.I. Mr. Gaware informed him to take Police Constable Surdas with him to the spot. His version reveals that Police Constable Thakur was instructed to make arrangement of light. He made arrangement of rechargeable torches. Police Constable Thakur required about half an hour to make such arrangement. The testimony of PW-Head Constable Mr. Pachpande shows that the Kurha Police Station is at a distance of half km. from the spot. His version does not show, however, that he personally kept vigil at the spot till arrival of the Police party headed by P.I.Mr. Gaware. He only states that he had received such instructions. Thus, there appears no evidence on record to show that the appellant was kept under surveillance of Police till arrival of the Police party headed by PW-P.I.Mr. Gaware.

9. This takes me to consider version of PW5-P.I. Mr. Gaware. He states that he received the secret information at about 18:10 Hrs. on 6th July 2005 while he was at Muktainagar Police Station. He orally informed the Superintendent of Police, Jalgaon about the information and obtained permission to carry out the raid. He also informed Deputy Superintendent of Police, Bhusawal, about the proposed raid. He took entry (Entry No. 53) at the station diary. His version reveals that Constable Bhosale was deputed to call panch witnesses. As a matter of fact, there is no reason as to why independent panchas were not called at Kurha when it was a Bazar day and Head Constable Mr. Pachpande could make necessary arrangement for panchas. The version of PW-P.I.Mr. Gaware shows that he called for kit containing sealing material, weights, needle, thread etc. He also arranged for illumination at the spot. He called for Photographer. Needless to say, he was sure that the culprit would not flee till the Police party would reach the place of incident.

10. The testimony of PW-P.I. Mr. Gaware reveals that he informed the appellant that he is a gazetted Officer. He further states that he informed the appellant that he was authorised to search and effect seizure. He further deposed that he informed the appellant that if the latter intended to have the search or seizure in presence of any other gazetted Officer, then the option may be exercised. The recitals of the seizure panchnama do not show giving of such option to the appellant by PW-P.I.Mr. Gaware. It appears from version of PW-2 Shaikh Firoz that he had carried the camera alongwith the Police party and took photographs. The photographs (Exh.10) are corroborated by him. The versions of PW-P.I.Mr. Gaware and the Photographer would show that the photographs were taken right from the first step. I mean to say, even before the bundles were opened, the first thing done was to have photographs of the appellant and the six bundles. The entire episode narrated by PW-P.I. Mr. Gaware appears to be somewhat dramatised, overblown and unnatural. It does not stand to reason that a person having contraband narcotic substance would stand at the same place notwithstanding probability of raid by the Police. It does not stand to reason that he was immobilised for a considerable time since at least from 6:00 p.m. to 7:30 p.m. at the same place. The prosecution evidence gives a feeling that the pre-

arranged trap was laid with certainty about the success. There is exaggeration made by PW-P.I.Mr. Gaware regarding option given to the appellant for having search in presence of another gazetted Officer. Indeed, provision of Section 50 of the N.D.P.S. Act is not attracted when personal search of accused is not carried out. Obviously, it was not necessary to give such option to the appellant. Still, however, an attempt is made to show that such option was made available to him. The panch witness did not say that such option was made available to the appellant. Secondly, according to panch witness -PW-Subhash, only one sample packet was prepared whereas, the version of PW-P.I.Mr. Gaware shows that two sample packets of 100 gms. each were prepared after collecting small quantity from each of the six bundles. The arrangement for emergency lights, the arrangement for taking photographs, the arrangement to ensure that the appellant would not go away from the place and such kind of acts give a tinge of inherent unnatural episode of seizure of ganja bundles from the appellant.

11. Clinching question is whether the appellant was found in conscious possession of the bundles containing ganja. He was standing at a public place. It is stated that he was in the proximity of the bundles of ganja. That would not be sufficient to indicate his control over the six bundles of ganja. The expression "conscious possession" would imply authority, control and the power to hold the article/substance etc. As per version of PW-Subhash, the appellant was sitting near the bundles whereas, the recitals of the panchanma (Exh.8) and version of PW-P.I.Mr. Gaware purport to show that he was standing near those bundles. One cannot be oblivious of the fact that it was weekly Bazar day. Many persons were available to act as panchas. Still, however, PW-P.I.Mr. Gaware procured the panchas at Muktainagar Police Station before he proceeded to the spot, situated at a distance of about 35 kms. It is in this background that the question of factual possession of the narcotic substance will have to be examined. The Apex Court in State of Punjab Vs. Balkar Singh and Another, held that act of an accused, who was allegedly sitting on the bags of poppy husk, by itself cannot be regarded as the act of "conscious possession". It is held that the Police could have conducted further investigation to prove that the incriminating document was found with the appellant. It is difficult to say that he was really the possessor of the said six bundles, which were found at the spot. So also, in "Avtar Singh and Ors. v. State of Punjab", the Apex Court had an occasion to consider the question of "conscious possession" in respect of narcotic drug. In the given case, bags containing poppy husk were seized from a vehicle, in which the accused were travelling. One of the accused was found driving the vehicle whereas, other two were found sitting on the bags. The Apex Court held :

The word possession no doubt has different shades of meaning and it is quite elastic in its connection. 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.

By applying the ratio of aforesaid two authorities, it will have to be said that the appellant was not found in conscious possession of the six bundles, which were found lying at the spot.

No further investigation was carried out in order to clinch the issue regarding actual possession and ownership of the six bundles in question. The version of PW-3-A.S.I. Choudhari is formal. So also version of PW-4 - Police Constable Ahire is formal. He carried the sample packets to office of the Chemical Analyzer on 8th July 2005. The version of PW-7 -P.S.I. Pawar corroborates the case of prosecution as regards the alleged search and seizure. His version is similar to that of PW-P.I. Mr. Gaware. The sample packet was forwarded to office of the Chemical Analyzer alongwith forwarding letter (Exh.14). The report (Exh.36) was received from office of the Assistant Chemical Analyzer and thereafter the charge-sheet was filed. It is admitted by PW-P.S.I. Pawar that he did not record statements of the villagers or any other person in the proximity of the spot wherefrom the bundles were searched. He did not enquire as to wherefrom the bundles were brought to the spot. He is an Investigating Officer. It is his duty to locate wherefrom those bundles were brought to the spot. No enquiry was made about ownership of the said bundles. It cannot be overlooked that for weekly Bazar, the mini trucks, carriers etc. are used in order to reach load of vegetables and other articles at the place of Bazar. An enquiry could have perhaps shown the identity of the transporter of the said bundles. That was not done. In this view of the matter, I have no hesitation in holding that the prosecution failed to prove conscious possession of the bundles of ganja with the appellant.

12. So far as compliance of Section 57 of the N.D.P.S. Act is concerned, it appears that PW-P.I. Mr. Gaware gave report about the search and seizure to the Director, Narcotic Drugs Control, Delhi on 7th July 2005. His version lends corroboration to the recitals of the report (Exh.29). A copy thereof was sent to the immediate superior Officer. Hence, it cannot be said that there is total non-compliance of provisions of Section 57 of the N.D.P.S. Act. Moreover, Section 57 of the N.D.P.S. Act is directory in nature and the non-compliance thereof per se is not fatal to the case of prosecution.

13. Considering totality of the circumstances and the evidence on record, I am of the opinion that the impugned order of conviction and sentence is unsustainable for the reason that the appellant was not found in conscious possession of the six bundles containing ganja. The prosecution evidence appears to be somewhat unnatural and rather of preconceived confirmation of the possible result regarding the alleged recovery. This being so, the impugned Judgment is unsustainable.

14. In this view of the matter, the appeal is allowed. The impugned order of conviction and sentence rendered by Special Judge, Jalgaon on 21.2.2006, in Special Case No. 5 of 2005 is set aside. The appellant is acquitted of the charge

levelled against him. He shall be set free, if not required in any other case.