
(1993) 08 BOM CK 0082

In the Bombay High Court

Case No : Criminal Appeal No. 173 of 1991

Niranjan Ishwarlal Joshi and another

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 05-08-1993

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 21, 8

Citation : (1994) CriLJ 300

Hon'ble Judges : S.P. Kurdukar, J;M.F. Saldanha, J

Bench : Division Bench

Advocate : Mrs. Ponda and Abad Ponda, for Prakash Naik and J.A. Barday, for the Appellant; D.A. Nalawada, Assistant Public Prosecutor, for the Respondent

Judgement

1. This appeal which has been preferred by the original accused Nos. 1 and 2 and is directed against their conviction for offences under the Narcotic Drugs and Psychotropic Substances Act raises certain features that require not only observations but a few directions which we propose to set out during the course of the judgment. Having regard to the seriousness of the offences that are the subject matter of the prosecution under the N.D.P.S. Act and more importantly, to the grave consequences that flow from convictions under that Act we do consider that utmost diligence be displayed at all stages of the investigation and that this degree of care should manifest itself even in the conduct of the prosecution. While the law requires that the evidence to pass the rigorous test of absolute scrutiny before a serious charge of the present type can be established, it is imperative that due steps be taken to ensure that these prosecutions do not unnecessarily fail or go-by default resulting in a miscarriage of justice.

2. The appellants before us alongwith three other persons were put on trial before the learned Additional Sessions Judge, Greater Bombay, on the allegations that a seizure of 2 Kgs. of Heroin at about 17.40 hours on 18-7-1990 at the Balwas Hotel gate at Balasis Road, Bombay, within the jurisdiction of the Nagpada Police Station, implicated them in charges under the N.D.P.S. Act. P.I.

Pathan alongwith some of the other members of the Police force were patrolling the area on the evening of that day when it is alleged that an informant conveyed to them a message that two persons were selling Heroin near the gate of the Balwas Hotel. Pursuant to this, the raiding party divided into two groups, and it is alleged that the informant in fact pointed out the persons concerned who were standing near the hotel gate, each one of them holding a bag in his hand. The raiding party apprehended the two accused, opened the bags and on finding that there was a relatively large quantity of Gard Powder in the Plastic bags in question, the Police Constable was sent to the Police Station to bring the weighing scales, sealing equipments etc. as also to fetch two panchas. On arrival of the panchas, the Police after following the requisite procedure as prescribed under the Act effected a seizure of the two consignments which weighed 1 Kg. each. These were seized under a panchanama after drawing representative samples and the Police Party thereafter took the two accused persons to the Police Station. The information was recorded as required there, after which the F.I.R. was taken down, the accused were placed under arrest and the investigation commenced. The samples were subsequently sent to the Chemical Analyser and the Analysis report indicated that the samples contained Heroin and that they were covered u/s 2(16)(a) of the N.D.P.S. Act. It has come on record that the accused were handed over by the Nagpada Police Station to the Narcotics Control Bureau who in turn completed the investigations. The investigation appears to have taken a curious turn because the Narcotics Control Bureau then arrested a third person at Kandiwali and thereafter took into custody two more persons one of them a Police Constable from the Kandiwali Police Station and the second one a retired head Constable who was supposed to have been incharge of the stores of that Police Station. The Narcotics Control Bureau proceeded on the footing that a consignment of 3 Kgs. of Heroin that has been seized in the course of a raid and deposited in the stores of that Police Station as un-claimed in so far as no arrest had been made in that connection and which was ordered to have been destroyed had through the medium of the last three mentioned persons come into the hands of the present appellants. It was on this basis that the five persons were originally put on trial before the Court but the prosecution itself made an application for discharge of the original accused Nos. 3 to 5 on the ground that there was no material to proceed against them. They were accordingly discharged and the charge was framed only against accused Nos. 1 and 2 who are the present appellants.

6th August, 1993

3. The learned trial Judge thereafter proceeded with the trial against the original accused Nos. 1 and 2. It was the defence of the accused that they have been falsely implicated and it was also sought to be suggested that the Police Department being sympathetic to persons of its own cadre, had not only applied for the discharge of the original accused Nos. 3 to 5 but that it was for the same reason that the contraband had been foisted on the present accused who had nothing to do with it, that they have been framed in order to exonerate the

members of the Police Department and consequently, unjustifiably implicated. The learned trial Judge rejected the defence and convicted accused Nos. 1 and 2 for the offences u/s 8(c) read with Section 21 of the N.D.P.S. Act and sentenced each of them to rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/- in default rigorous imprisonment for three years. The Appellants have thereafter preferred the present appeal assailing the correctness of the convictions and sentences.

4. Mrs. Ponda, Learned Counsel on behalf of the appellants has commenced her submissions by pointing out to us that like all similar cases, the evidence before the Court can broadly be subdivided into two categories; the first of them being the larger sector consisting of the evidence of various members of the raiding party and the second one, undoubtedly the smaller but more important sector namely the evidence of the independent witnesses namely the panchas. It is true that as contended by Mrs. Ponda, that this is a case where the accused are punishable by virtue of the act of possession and therefore, every thing hinges on the all important aspect of seizure. If the prosecution succeeds in establishing that the contraband was seized from the possession of the appellants, the C.A. report having indicated that the samples taken therefrom come u/s 2(16)(e) of the N.D.P.S. Act, a conviction will follow straight-way. Mrs. Ponda, therefore, submitted that irrespective of what may be the position in law with regard to the offences under several parallel statutes that as far as the N.D.P.S. Act is concerned, that the Court should refuse to accept that the prosecution has established its case, however, good evidence of the raiding party members may be unless and until it finds support from independent corroboration through the evidence of panchas. Mrs. Ponda, does not dispute the position that in proceedings under the Bombay Prohibition Act and some other statutes, that even if the panchas are unbelievable or turn hostile, if there is sufficiently cogent, reliable and credible evidence before the Court to establish the commission of the offence, that a conviction can follow. But it is her submission that we are here dealing with a category of cases where a minimum sentence is 10 years rigorous imprisonment and fine of Rs. 1,00,000/- and that therefore, the rule of prudence would require that the Court cannot record a conviction unless there is some reliable independent corroboration. As far as this principle is concerned, we need to observe and to re-observe as we have done in earlier cases also, that we expect the Narcotics Control Bureau and those of the authorities invested with the duty of investigating this class of offences to act with a very high sense of responsibility in the matter of choosing the panchas. We have come across cases where the Department has been alive to this responsibility and has chosen persons whose whereabouts are not unknown after a short period of time, as also persons who are not straightway amenable to all sorts of influences from the other side and who have come before the Court and honestly and correctly deposed to what had happened. Mrs. Ponda's contention, as far as the present case is concerned, is that the prosecution deliberately picked up the panchas straightway and that these persons curiously enough have

projected an impression before the Court that they are in fact paragons of virtue and that the prosecuting authorities are the wrong-doers, who have fabricated the panchanama and asked for their signatures at the Police Station and that they refused to be a party to such illegalities. The sum-total of this state of affairs is that the evidence of the two panchas will have to be discarded totally. The question then arises is as to whether the Court would be well advised in basing a conviction on the material before it which essentially consists of the depositions of different members of the raiding party de hors any independent corroboration. In our considered view, though it is always desirable to look for independent corroboration, this Court cannot close its eyes to what has been happened in trials of this type. It would be difficult to conclude that where a pancha becomes scarce or where he turns hostile, that he has done this of his own volition and the defence has no hand in it. We would prefer not to observe anything further than this except to record that as a result of such a mischievous state of affairs, by default, the accused persons should not be permitted to get an unfair advantage. It is under these circumstances that the Court though on guard, will have to scrutinise the prosecution evidence far more rigorously and find out on the basis of a very minute and rigorous examination as to whether that material is absolutely credible and strong enough to sustain a conviction. We are conscious of the consequences of convictions under the Act and it is from this angle, that we have examined the record of the present case.

5. Mrs. Ponda, to start with, drew our attention to the evidence of P.W. 2 Babu Abdul Khan who is the first pancha. This man has completely summer saluted in the witness box. He has refused to take oath and he has told the learned trial Judge that he is not prepared to state anything false after taking oath. He makes a bold statement that he has been acting as a pancha since the days of the British regime i.e. for 45 years now. We did for this purpose incidentally look at the age of the honourable gentleman which is given as 52 years and this only goes to shown the calibre of the person whom the Police had picked up to act as a pancha in a very serious case of the present type. This is not one of those stray seizure where a batch of Police straightway seized the contraband. This is a case where two Senior Police Officers of the rank of the Senior Inspector of Police, a Sub-Inspector and Constable were all present at the time when the information was received and having regard to the knowledge that it was a serious matter under the N.D.P.S. Act we would certainly have expected something better. Mrs. Ponda has also taken us through the evidence of P.W. 3 Babu Mustaffa Shaikh who has fortunately not out done his colleague but has come to very close to his performance. His evidence is virtually in shambles. Both these panchas were declared hostile and cross-examined and the sum-total of this evidence is that it would not be of any assistance to the prosecution. We thereafter have no record the evidence of P.W. 1 P.S.I. Mandar Vasant Dharmadhikari. We must observe that in sharp contrast to the performance of the panchas that as far as the evidence of this P.S I. is concerned, that it is of a very high calibre. Apart from that, we have carefully taken note of the systematic manner in which the officer

has carried out his duties as also the manner in which he has deposed before the Court and we need to observe incidentally, that there was a reference in the endorsement made by the Assistant Commissioner of Police concerned at the Police Station, that the superior authorities had commended him for his performance. We would like to say the same thing in so far as this is one of the few cases in which we do find that the Officer has acted very correctly and very systematically. He is the seizing Officer and he has deposed very clearly before the Court about the manner in which the information was received. The raiding party divided itself into two groups, apprehended the two accused, examined the contraband on the spot, weighed it furnished representative samples, thereafter sealed it and he has immediately recorded not only the information in the requisite register but has also taken down the F.I.R. and proceeded absolutely in consonance with the requirements of law. This evidence in our considered view is near perfect and cannot be faulted in any manner. Mrs. Ponda however did advance a submission that this is a very unusual case in which the entire effort was in order to shield some in members of the Police Force who were responsible for the pilferage of certain amounts of heroin that had been unclaimed at the Kandiwali Police Station and in these circumstances that one is to only expect a near perfect record since it was well planned. We are unable to accept this submission or to attach any significance to this for one very simple reason.

6. The learned A.P.P. Mr. Nalawade and very rightly so has drawn our attention to the fact that the seizure was made within the jurisdiction of the Nagpada Police Station and a large amount of heroin namely two Kgs. was seized in this case and the police authorities therefore handed over the matter to the Special Investigating Agency namely the Narcotics Control Bureau. It was in the course of the subsequent investigations that the suspicion arose with regard to the involvement of the material involved in the Kandiwali Police Station. If this was so, it would be absolutely absurd for the defence to contend that the present raid and the seizure was planned and plotted out in relation to that incident to save those policemen. Incidentally, those accused were arrested at a subsequent point of time and the present incident is of 18th July, 1990. It was not even to the knowledge of the Officer of the Nagpada Police Station in July 1990 that something was missed at Kandiwali Police Station.

7. The F.I.R. which is at page 35 recounts in details what PW 1 P.S.I. Dharmadhikari had deposed to and the Panchanama in this case which is at page 32 of the record does inspire complete confidence in so far as to indicates that a contemporaneous memorandum was drawn up at the time of seizure regarding the fact that one Kg. of contraband had been recovered from each of the two accused. We also have supportive evidence from PW 4 who is a Police Constable Gujaba Namdeo Waghmare who incidentally was the constable who was sent to the Police Station to bring the weighing scales, sealing material etc. Further support to the prosecution evidence is available from PW 5 Sub-Inspector Pawar. He was also a member of the raiding party and his evidence corroborates what PW 1 P.S.I. Dharmadhikari has deposed to. As regards the evidence of Sub-

Inspector Pawar, Mrs. Ponda has pointed to the Court that he has indicated that the plastic bags in which the powder was packed were opened and that the powder was looked at before the Panchas were called. Mrs. Ponda, therefore, submits that it has come in the evidence that the contraband was infact handled by the members of the raiding party and that the bags had been opened and that under these circumstances, the aspect of tampering cannot be ruled out. We are required in this context to take an over-all view of this case and it was perfectly reasonable and justified when the two accused were apprehended, for the Police Officers concerned to first ascertain as to what exactly was found in their possession. If the material in question was absolutely innocuous, there would be no question of effecting any seizure and under these circumstances, to my mind, a mere visual or cursory examination of the powder would not vitiate the prosecution. The material was not seized. It was not taken charge of, it remained in the hands of the accused until the Panchas came and under these circumstances, mere opening of the packets in our considered view would not be of any consequence.

8. The prosecution has also examined two more Police Officers namely P.S.I. Raghunath Anant Pawar and P.S.I. Bhikaju Yeshwant Padwal. As far as the former is concerned, his evidence once again is identical to that of the earlier witnesses and fully corroborates their version. P.S.I. Padwal who was effectively the Investigating Officer, is the officer who had written to the Kandiwali Police Station with regard to the alleged loss of certain quantities of heroin from the stores of that Police Station and he has also produced the letter dated 27-7-1990 that was received in reply. The Kandiwali Police Station has totally denied any knowledge of such seizures and they have also pointed out in reply to the query from the Investigating Officer that the records of that Police Station do not indicate any such quantities of heroin having either been seized or having been kept in the stores of for that matter any loss or pilferage of that material. We need to record in passing that the alleged seizure is supposed to be of the year 1984. We are concerned in this case with an offence that has occurred in July 1990 which is six years later, and it is therefore, too remote in point of time to even allege any nexus between that incident and the present one. In any case, it does not concern us in so far as the police authorities of that Police Station have denied the correctness.

9. Mrs. Ponda did advance a contention that admittedly in the present instance, the raiding party was led by the Senior Police Inspector who incidentally is a Gazetted Officer namely P.I. Pathan. The prosecution has not examined this officer. Mrs. Ponda contends that the evidence of the other Police Officers who are subordinate to him was merely supportive, that he was the main witness and that an adverse inference must be drawn against the prosecution for having dropped this witness. On the facts of the present case, where other members of the raiding party who have themselves not only participated but have also been instrumental in the investigation, have been examined, to our mind, the non-examination of P.I. Pathan is not fatal. We do however need to observe that

persons incharge of the prosecution before the Trial Court particularly in serious offences of the present type should be more particular with regard to the examination of all material and important witnesses and should not allow lacunae of the present type, however, inconsequential they may be, to occur.

10. Mrs. Ponda, also raised a contention that the informant in the present case who according to the deposition of two of the prosecution witnesses was accompanying them and was present right up to the time when he pointed out the two accused, ought to have been examined for the additional reason that he is an independent person and was therefore very necessary. As far as this aspect is concerned, it is quite obvious that the informant even if he was around the place when he pointed out the accused would never have been willing to come forward as a witness and if he were brought to the Court as an unwilling witness, he would have probably added to the list of hostile witnesses and under these circumstances, to our mind, no useful purpose would have been served by following such a procedure. In any event, where the prosecution is in a position to establish its case through its own material without having resort to any such interested agencies, we do not see why the prosecuting authorities should even want to damage their case by seeking to include such persons as prosecution witnesses.

11. We have as indicated earlier examined the record of this case virtually threadbare and we have also carefully considered the submissions both on points of facts and on points of law advanced by the two learned counsel before us who represents the defence and the prosecution. In our considered view, the material before the trial Court does fully and completely establish the commission of offences punishable under sections 8(c) read with Section 21 of the N.D.P.S. Act. The learned Trial Judge was justified in recording a conviction against the two appellants. We see no reason why the convictions awarded to the two appellants should be interfered with and under these circumstances, the appeal fails and stands dismissed.

12. Appeal dismissed.