
(2008) 01 BOM CK 0115

In the Bombay High Court

Case No : Criminal Appeal No. 265 of 2006

Premnarayan Prabhulal Mina and Gopal Lingeshyam Kolhapure	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 31-01-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 22, 55, 8

Citation : (2008) 01 BOM CK 0115

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

Bench : Single Bench

Advocate : S.S. Jadhav, No. 1 and J.R. Shaikh, No. 2, for the Appellant; D.R. Adhav, APP, for the Respondent

Final Decision : Allowed

Judgement

V.R. Kingaonkar, J.—Challenge in this appeal is to judgment rendered by learned Special Judge, Jalgaon, in Special Case No. 4 of 2005. By the impugned judgment, both the appellants have been convicted for offence punishable u/s 8 read with Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS Act"). They are each sentenced to suffer rigorous imprisonment for ten (10) years and to pay fine of Rs. one (1) lac, in default to suffer rigorous imprisonment for six (6) months.

2. The prosecution case, in brief, is that P.I. Mr. Gaware was attached to Muktainagar Police Station on May 2, 2005. He received secret information on mobile phone to the effect that appellant No. 2 Gopal was transporting bundles of ganja in a truck vehicle bearing registration No. MP-09/KD-0323. That truck vehicle was reportedly coming from Khamgaon and was to go to Barhanpur through Muktainagar. In pursuance to the secret information, PI Mr. Gaware organized for raid. He called two panchas by deputing Police Constable Bhosale. He also called a photographer, weighing scale, weights and articles required for preparing sample packets. He disclosed intention to carry out the raid to the

panchas and other members of the police party. They went to a place on the road, situated near a hotel styled as "Hotel Shree" and waited there. At about 2243 hours, they noticed the truck vehicle which was coming from Muktainagar township. The truck vehicle was intercepted. Appellant No. 1 Premnarayan was found driving the truck vehicle whereas appellant No. 2 Gopal was found sitting in the cabin of the driver. Both of them were informed about intention to carry out search of the truck vehicle. They were asked as to whether they wanted to search persons of the members of the raiding party. They declined to exercise such option. The search of the truck vehicle revealed load of five (5) bundles (gunny bags), which contained ganja. The ganja was weighed. In all 150 kilograms (kgs.) ganja was found in the five bundles. Thereafter, 100 grams of ganja was collected separately at two places and two separate sample packets were prepared. The sample packets were affixed with paper labels signed by panchas and were sealed at the spot. The photographer clicked photographs of the event from the commencement of the search till the seizure was effected. A Panchanama was drawn and all the five bundles were seized. The sample packets were lateron produced before the Muddemal Clerk. A report was lodged by PI Mr. Gaware and, therefore, offence was registered against both the appellants. One of the sample packets was forwarded to the office of the Assistant Chemical Analyser, Aurangabad, for analysis. The report of Assistant Chemical Analyser revealed that the sample comprised of flowering, tops, leaves and stalks of ganja. Both the appellants were chargesheeted for the offence of having illegal possession of contraband ganja without any permit or licence.

3. The appellants denied truth into the accusations. They pleaded not guilty to the charge (Exh-5). Their defence is one of simple denial. They asserted that they were not engaged in transporting of the bundles of ganja and have been falsely implicated in the criminal case. According to them, there were other 2-3 passengers in the truck vehicle. They suggested that those 2-3 passengers alighted on seeing the police party and had fled away. They further contended that they had no knowledge whatsoever regarding the ganja which was being carried in the truck vehicle.

4. At the trial, the prosecution examined in all five witnesses in support of its case. The prosecution also adduced certain documentary evidence. The learned Special Judge was pleased to accept case of the prosecution. The learned Special Judge came to the conclusion that the huge quantity of ganja was found in the truck which was intercepted in the relevant night and that both the appellants were having possession thereof. Consequently, both of them were convicted and sentenced as stated before.

5. Mrs. Jadhav and Mr. Shaikh, learned Counsel for the appellants would submit that the evidence of prosecution is unreliable. They would further submit that neither of the appellants could be convicted for having "conscious possession" of the bundles found in truck vehicle. They would further submit that PW PI Mr. Gaware failed to carry out effective investigation and there are loopholes in the

prosecution case. They would point out that the sample packets were deposited with the incharge of muddemal room (malkhana), but did not bear separate seal of the malkhana. It is argued that there is flagrant violation of Section 55 of the NDPS Act.

Hence, the learned Counsel urged to allow the appeal and set aside the impugned judgment of conviction and sentence. As against this, learned APP Mr. Adhav supports the impugned judgment.

6. Before I proceed to scrutinize the evidence of prosecution, it is significant to note that the truck vehicle was intercepted in the night at about 10.45 p.m. on the public road. The truck vehicle was stopped immediately after PW5 P.I. Mr. Gaware signalled the driver. The secret information was allegedly received on mobile phone of PW5 P.I. Mr. Gaware. The nature of secret information purports to show that the truck vehicle was coming from Khamgaon in order to proceed towards Barhanpur. Admittedly, neither of the appellants is inhabitant of Khamgaon or Barhanpur. Appellant No. 1 Premnarayan hails from Indore whereas appellant No. 2 Gopal hails from Akola. The police did not carry out any investigation as regards loading of the said bundles in the truck vehicle. No investigation was carried out to locate the place where the bags were loaded in the truck vehicle. No statement was recorded in order to pin-point at whose instance, bags were loaded in the truck.

7. In the above background, I shall proceed to examine the prosecution evidence. The testimony of PW1 Gajanan reveals that he attended the seizure panchanama (Exh-13). His version reveals that the truck vehicle was intercepted near "Hotel Shree" in the relevant night. His version shows that five gunny bags containing ganja were found in the goods truck. They were unloaded. The ganja was weighed with help of scale and weights. He corroborates recitals of the seizure panchanama (Exh-13). According to him, appellant No. 1 was driver of the truck vehicle whereas appellant No. 2 was sitting by side of the driver in the cabin. His cross-examination reveals that about 13 kilometres away from Muktainagar, there is interjection and the High Way road coming from Khamgaon goes towards Barhanpur. So also, it has come in the evidence of PW5 P.I. Mr. Gaware that for going to Barhanpur, a vehicle is not required to pass through Muktainagar and it can be directly driven by the High Way between Khamgaon and Barhanpur. He admits, unequivocally, that there is a police chowki on the High Way, opposite to a Sugar Factory, and there are police officials on duty at the chowki. He admits thus:

It is true to say that from that police chowki itself, there is a main road approaching towards Barhanpur (M.P.) and it is a first approach way to M.P. It is true to say that if a person wants to go to Barhanpur from Khamgaon, he need not come to Muktainagar, unless he has some work at Muktainagar.

There is absolutely nothing on record to show that the appellants had any tangible reason to drive the truck vehicle through Muktainagar though the direct

road (High Way) was available and they could have by-passed to travel through Muktainagar. The prosecution story goes further as if the appellants had some reason to enter the township of Muktainagar and immediately, without stopping anywhere, cross the locality and reach near the hotel. It is admitted by PW Gajanan that another panch is his friend since childhood. He also admits that he signed the seizure panchanama as per instructions of PW P.I. Mr. Gaware. He was knowing PI Mr. Gaware since the time of the posting of the later at Muktainagar Police Station. He was also knowing Police Constable Bhosale since about 3-4 years. In other words, he is well acquainted with the police.

8. So far as question of "conscious possession" is concerned, there is oral evidence of PW2 Baburao and PW5 PI Mr. Gaware. Significantly, PW2 Baburao Bhosale, Police Constable No. 2996, called for panchas and the photographer. His version reveals that inquiry was made with the driver (appellant No. 1) and also the passenger i.e. appellant No. 2 about possession. Both of them replied that there were some sheets loaded in the truck vehicle. So, the information was verified. It has come on record that the truck vehicle was loaded with tin-sheets. Thus, at the first blush, the appellants explained that the truck was carrying tin-sheets. The gunny bags were found during the course of search. The version of PW PI Mr. Gaware would show that the panchanama was drawn after the ganja was weighed and sample packets were prepared. He corroborates recitals of the seizure panchanama (Exh-13). His version shows that he lodged the FIR (Exh-39) at Muktainagar Police Station. He gave the sample packets and the muddemal in the custody of Muddemal Clerk ASI Choudhari. He forwarded the sample packets to the office of Chemical Analyser, Aurangabad alongwith a carrier and forwarding letter (Exh-40). The forwarding letter shows that one of the sample packets was sent in sealed condition. He also narrated as to how the report was forwarded to the superior officer. He admits that personal search of the appellants was not taken. His version reveals that the muddemal articles were not produced before the court during course of the trial. He states that he made due inquiry as to from where the truck was loaded. He did not record statement of the owner of the truck vehicle. Unless it is clear from the evidence that the appellants or either of them participated in the act of the loading of the bundles in the truck vehicle, it is difficult to say that they were in "conscious possession" of those bundles.

9. In order to prove "conscious possession" of the bundles of ganja, it was necessary for the prosecution to establish the direct control of the appellants over the articles. There is no evidence to show that they were the persons who loaded the said bundles and that they had the knowledge about the contents thereof. Mere fact that the bundles were found in the truck vehicle will not, by itself, show that the appellants were the actual possessors of those bundles. The investigation revealed that the truck vehicle was owned by one Dipti Saluja. The truck vehicle was lateron delivered to possession of her husband, being the Power of Attorney Holder. The statement of the owner of the truck vehicle was not recorded, nor any attempt was made to verify whether while loading the tin-

sheets, the bundles were also loaded in the truck vehicle.

10. The Apex Court in "Avtar Singh and Ors. v. State of Punjab ", 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 abetors, 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."

11. Considering the tenor of questions put to the appellants in their examination u/s 313 of the Code of Criminal Procedure, it can be said that general questions were put to them regarding the search and seizure carried out by PW PI Mr. Gaware. No specific question was put to them regarding the possession of the five bundles. They were not asked about loading of those bundles by them. Obviously, they had no opportunity to explain as to how the bundles were found in the truck vehicle. Both of them categorically stated that they were carrying only tin-sheets and not ganja in the truck vehicle.

12. In State of Punjab Vs. Balkar Singh and Another, , the Apex Court held that the fact that the accused were sitting on the poppy husk by itself would not lead to inference regarding their conscious possession. It is observed:

The respondent Balkar Singh is a resident of Village Bira Bedi in District Hisar while respondent Munish Chand is a resident of Farukhabad. The police did not make any investigation as to how these 100 bags of poppy husk were transported to the place of incident. They also did not adduce any evidence to show the ownership of the poppy husk. The presence of the respondents at the place from where the bags of poppy husk were recovered itself was taken as possession of these bags by the police. In fairness, the police should have

conducted further investigation to prove that these accused were really in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that place itself does not prove that they were in possession of these articles.

The fact situation in the present case also is somewhat akin to the fact situation mentioned above. The mere presence of both the appellants in the truck vehicle would not clinch the issue of "conscious possession". The investigation should have been carried out regarding the actual loading of the bundles, ownership of the bundles and the participation of either appellant in willful transportation of the bundles as possessor/s. In the absence of such evidence, I find it difficult to countenance the impugned judgment of conviction and sentence.

13. It is not necessary to elaborately discuss remaining evidence of the prosecution. The technical objection raised by learned Counsel for the appellants regarding non-compliance of Section 55 of the NDPS Act also does not require consideration in view of the foregoing discussion. It is manifest that the prosecution evidence falls short to prove that the appellants were in actual and conscious possession of the five bundles containing ganja. In this view of the matter, the charge fails and the appeal will have to be allowed.

14. In the result, the appeal is allowed. The impugned judgment rendered by the Special Judge, Jalgaon in Special Case No. 4 of 2005 is set aside. both the appellants are acquitted of the charge levelled against them for offence punishable u/s 8 read with Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985. They shall be set free, if not required in any other matter. The fine amount paid, if any, be refunded to each of them. The order regarding disposal of the muddemal property is, however, maintained.