
(1993) 08 BOM CK 0041
In the Bombay High Court
Case No : Criminal Appeal No. 263 of 1992

Samsher @ Sham Kasim Khan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 17-08-1993

Acts Referred:

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

Citation : (1994) 3 BomCR 312

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

Bench : Division Bench

Advocate : S.R. Chitnis, for the Appellant; N.M. Kachare, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

M.F. Saldanha, J.—We need to commence this judgment with the observation that it is seldom that we have come across such scrupulous observance of the manifold requirements specified in the Act, as we have noted in this case. The appeal concerns a conviction u/s 21 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter for the sake of brevity referred to as "the N.D.P.S. Act"). It is alleged that P.S.I. Shri A.P. Shinde, who is attached to the Vigilance Branch, Pune City dealing with drug-offences, received certain information to the effect that a person by the name of Samsher @ Sham Kasim Khan was alleged to be involved in the act of selling contraband drugs at the Ota in front of House No. 729 in Bhavani Peth at Pune. P.S.I. Shinde (P.W. 4) immediately made a note of the information that had been divulged to him in the Information Register, a copy of which has been produced at Exhibit 18. Significantly enough, this information not only indicates the name of the accused, but it also incorporates an elaborate description of his clothes, his face, his hair and ends with a definite indication of where the contraband in question has been kept by him. P.S.I. Shinde thereafter prepared a report to his superior officer through which he sought permission to effect a raid. This report is

countersigned by the Inspector of Police. Thereafter since the spot in question was within the jurisdiction of the Khadak Police Station, P.S.I. Shinde prepared a written report addressed to the Inspector of Police of that Police Station on the basis of which the requisite entry was to be made in the police station diary.

2. P.S.I. Shinde thereafter sent for two Panchas and went through the procedure of reciprocal searches. He put together a raiding party and thereafter equipped himself with the weighing scales, sealing material and other paraphernalia that is required for conducting raids of this type and the entire raiding party, along with the Panchas, proceeded in a Government Jeep to the Khadak Police Station. P.S.I. Shinde (P.W. 4) gave his report to the Station House Officer who, in turn, made an entry in the station diary on the strength of that report. The raiding party thereafter proceeded to Bhavani Peth and apprehended the Accused. They asked him whether he desired to be searched in the presence of a Gazetted Officer, which the Accused is alleged to have declined. The prosecution alleges that a polythene bag was recovered from the left side pocket of the shirt of the Accused and that this bag was found to contain Gard powder. The packet in question was searched and the weight was noted as 2 gms. and 100 m.gms. The search of the Accused also revealed that a cash amount of Rs. 100/- was recovered from his possession. A panchanama was drawn up and the contraband recovered was duly sealed with labels on which signatures of the Panchas were obtained. The prosecution alleges that the Accused was informed of the charges under which he was being placed under arrest and that a carbon copy of the panchanama was also handed over to him. The raiding party thereafter went to the Khadak Police Station where the formal First Information Report was taken down. The contraband that had been seized was thereafter handed over to the Muddemal Clerk and after the requisite covering letter was prepared, it was despatched on the same day through Police Constable Katke (P.W. 3) to the Chemical Analyser. On completion of the investigation, the Accused was put up for trial before the learned Additional Sessions Judge, Pune. The Accused denied the charge and contended that he had been falsely implicated. The learned trial Judge accepted the prosecution evidence and convicted the Accused u/s 21 of the N.D.P.S. Act and awarded him a sentence of rigorous imprisonment for ten years and to pay a fine in the sum of Rs. 1,00,000/-, in default, to suffer simple imprisonment for one year. It is against this conviction and sentence that the present appeal has been directed.

3. We have heard Shri Chitnis, learned Counsel appearing on behalf of the appellant-Accused, as also Shri Kachare, the learned A.P.P. appearing on behalf of the State. Shri Chitnis has commenced his arguments by contending that the investigation in this case is sham and that the Investigating Officer, P.S.I. Shinde, has fabricated the various documents in order to inspire confidence in the Court. Shri Chitnis contended that even though this is a grave offence wherein the Accused is visited with a heavy sentence of rigorous imprisonment for ten years and a fine in the sum of Rs. 1,00,000/- that the entire prosecution case hinges on the evidence of a Police Inspector supported by a Panch. Shri Chitnis further

contended that if one were to minutely scrutinize the record, which otherwise appears near perfect, that there are sufficient tell-tale circumstances on record on the basis of which it will be very clear that a definite attempt has been made to prepare documents and to create an impression in the mind of the Court that this is a virtually shut case. Towards this end, Shri Chitnis took us through the evidence of P.S.I. Shinde (P.W. 4) and he stated that if one were to scrutinize the very first register, which is Exhibit 18 and in which the entries at the Vigilance Branch are made, that one will notice that all the entries are in the handwriting of P.S.I. Shinde himself and none of these have been countersigned by the superior officer except on the last page.

4. Shri Chitnis thereafter submitted that the Court should scrutinize the nature of the entry which is very unusual. Even if the information were to reach the Police Department about the nefarious activities going on in a particular area, according to Shri Chitnis it is too much to accept that an elaborate description of the Accused, which is almost as good as a photographic version, would be conveyed to the Police Inspector and that he, in turn, would record all this in such minute details. This itself, according to Shri Chitnis, indicates that the entries must have been made after the return to the Police Station when the Accused was standing before the Police Officer concerned and the description of his clothes, his face and his hair was freely available. As regards this head of criticism, all that we need to note is that even though P.S.I. Shinde (P.W. 4) has been cross-examined at the trial rather minutely that this aspect was never put to him as otherwise he would probably have been able to explain how and under what circumstances the entry in question contained such elaborate particulars. In the absence of affording the Police Officer an opportunity of explaining, which the defence ought to have done, it would not be open to follow this line of argument at the appellate stage because the situation is rendered highly speculative in so far as we need to observe that it is not only this document but all the stages of investigation which display the minutest observance of details. If an elaborate description was conveyed, it is to the credit of the Police Officer that he took the trouble to record it correctly. We do notice that this description tallies entirely even with what is mentioned by the Panchas in their evidence. Under these circumstances, there is really no ground on which any doubt can be cast with regard to Exhibit 18. The only answer to Shri Chitnis's contention that the entries are too good to be true is that unfortunately it has been often demonstrated that truth is stranger than fiction.

5. Coming to the report that has been submitted by P.S.I. Shinde (P.W. 4) to his superior officers, we notice once again that Investigating Officer has taken the trouble to set out in detail all the particulars that were communicated to him and he has followed the letter of the law almost faultlessly. There is an endorsement of the Police Inspector on the same report granting sanction for the raid to be conducted. Shri Chitnis submitted that if the Police Officer were to be that dutiful and that cautious with regard to the observance of every detail, that there is no explanation for his having not indicated the time when this report was put up by

him. He has mentioned the fact that the information reached him at about 11 a.m. and it is true that the report put up by P.S.I. Shinde does not contain any reference to time. In our view, however, this aspect is totally insignificant and inconsequential. The report in question was not the First information Report. It was only a communication to the Senior Officer in the Police Department, who was in that very building, and under these circumstances the non-mention of the time in that report is not of any consequence whatsoever.

6. While dealing with the communication addressed to the Khadak Police Station, which is at Exhibit 19, Shri Chitnis was critical of the contents of this document. He pointed out to us that P.S.I. Shinde (P.W. 4) admits that he scribed this document at the Vigilance Branch itself before leaving that place. If this is so, Shri Chitnis questions as to how and under what circumstances could P.S.I. Shinde mention in that report that he called the Police Constable at the Khadak Police Station, asked him, in turn, to call the Station House Officer outside and instruct the Station House Officer, Khadak, to take charge of the report and to make the necessary entry in the station diary. Shri Chitnis stated that P.S.I. Shinde could not have anticipated what was to be the scene when he reached the Khadak Police Station or, for that matter, that he would find the Police Constable outside and ask him to call the Station House Officer to whom he would hand over his report. This itself, according to Shri Chitnis, indicates that the document is a total fabrication. We find it difficult to accept this argument for the simple reason that the general tenor and calibre of the evidence do inspire complete confidence and the criticism advanced by learned Counsel has a ready answer in so far as the raiding party was on its way to apprehend the Accused who was alleged to have been peddling drugs on open places. Time was, therefore, of the essence and the entire operation would have failed if the raiding party had delayed at different stages and reached there after he had disposed of the contraband and had left that place. Under these circumstances, P.S.I. Shinde (P.W. 4) was fully justified in having written out the report to the officer in-charge of the Khadak Police Station and there was nothing strange or unusual in his having anticipated that the Police Constable, who would normally be on duty outside, could be called from the vehicle itself to summon the Station House Officer to the vehicle so that the report could be handed over to him with the minimum loss of time. This simple and very routine procedure is the normal one which would have been followed and if the P.S.I. recorded that sequence in anticipation, in our considered view, he cannot be faulted under any circumstances. We need to observe here that the prosecution has brought on record Exhibit 20, which is an entry at the Khadak Police Station. This entry very clearly states that the report reached them at 12-05 hours and that the Station House Officer did make the entry in the station diary. That document fully and completely corroborates the version of P.S.I. Shinde (P.W. 4) that he had dropped the report at the Khadak Police Station on the way before conducting the raid.

7. With regard to the conduct of the raid itself, Shri Chitnis is critical of one aspect, namely, the fact that the P.S.I. alleges that he weighed the contraband

along with the polythene bag in which it was wrapped. By following such a procedure, it would not be possible to definitely ascertain as to what was the correct weight of the Gard powder in question, though this would not make any difference to the present case. The criticism of learned Counsel is justified in so far as in cases of this type what is very necessary is that the Investigating Officer must take the trouble to ensure that the powder is weighed separately and that this is done without mixing up the weight of the powder, the container, etc. Though in the present case it does not assume much significance there are instances where the contraband in question is in an extremely small quantity and where such a faulty procedure would make all the difference. It is, therefore, advisable for the Department to bring to the notice, particularly of the cells which are dealing with these cases and to the Police Stations in general, that this precaution requires to be observed. Regardless of the various heads of criticism canvassed by learned Counsel, we do find that the evidence of P.S.I. Shinde (P.W. 4) inspires complete confidence. He has been cross-examined at considerable length and we have noted that in his examination-in-chief, he has recounted all the steps taken by him with regard to this investigation and a perusal of his evidence would indicate that this is one of the few cases in which the compliance required under the N.D.P.S. Act when it comes to observance of procedure is near perfect. P.S.I. Shinde (P.W. 4) requiring to be commended.

8. While dealing with the evidence of the Panch, Sarjerao Jadhav (P.W. 1), Shri Chitnis submitted that P.S.I. Shinde (P.W. 4) had inadvertently admitted the fact that he was also a Law Graduate and that he had qualified from the Symbiosis College, Pune. Panch Sarjerao Jadhav works as a peon in this very college and, therefore, Shri Chitnis submitted that this ground was sufficient to completely disqualify the status of Sarjerao Jadhav. Learned Counsel contended that Sarjerao Jadhav would not come within the category of a totally independent person, that he is obviously a person of P.S.I. Shinde's acquaintance and a man of his confidence. In the cross-examination, Sarjerao Jadhav was asked as to whether he has functioned as a Panch before and he has admitted that he has done so in one or two cases. When these questions were put to P.S.I. Shinde, he had answered that he did not remember whether he had used the services of Sarjerao Jadhav (P.W. 1) in one of the earlier investigations until he was confronted with a copy of the Panchanama in question. On the basis of this material, Shri Chitnis has assailed the status of Sarjerao Jadhav and contended that he is virtually a puppet of the Investigating Officer and the Court must discard his evidence.

9. We have had occasion to carefully scrutinize the deposition of Panch Sarjerao Jadhav because the evidence of an independent Panch is crucial in a prosecution of the present type. Shri Sarjerao Jadhav has stated that he had been to the office of the Commissioner of Police, Bombay at 11.00 a.m. when he was asked to function as a Panch. Shri Chitnis pointed out to us that Sarjerao Jadhav has not indicated any plausible indication or explanation as to why even though he was employed at the Law College that he made a trip to the office of the Police

Commissioner on that day. Significantly, the defence has not called into question, in the course of cross-examination, the presence of Panch Sarjerao Jadhav at the Police Commissioner's office on the morning of 25-9-1991. We do accept the fact that it may be rather inconvenient for the defence Counsel to have ventured this question but at the same time if the defence desired to attack this aspect of Sarjerao Jadhav's evidence on the ground that he was not picked up from that place, they ought to have assailed his evidence when he stated in the examination-in-chief that he had gone to the office of the Police Commissioner on that day. In the absence of doing this, it is taken that the defence has not really assailed the Pancha's presence at that place. Under these circumstances, there was nothing unusual for the officer to have called him to act as a Panch, particularly since he happens to be an employee at the Law College, his whereabouts were known and, furthermore, that in this status he would not be one of those Panchas who would either vanish from the area or come under the influence of the Accused as invariably happens. That choice appears to be a good one because Sarjerao Jadhav gave evidence which is extremely credible. He recounted in complete detail without missing out anything as to what exactly transpired on that day, what were the procedures that were followed and the manner in which the Panchanama had been prepared. He has withstood the cross-examination without a blemish. Under these circumstances, there is no ground whatsoever on which his evidence can be discarded.

10. We have on record a certificate from the Chemical Analyser at page 23 which, in terms, indicates that the samples sent to the Chemical Analyser, on analysis, revealed that the material comes within the definition of section 2(xvi) (e) of the N.D.P.S. Act. The prosecution has examined the Muddemal Clerk who took charge of the sealed contraband packet in question and who handed the same over on the same day to Pandurang Katke (P.W. 3) for being carried to the Chemical Analyser. The prosecution again deserves to be complimented for the promptness with which this action was taken in so far as the raid had been conducted on that very afternoon and without any delay whatsoever on the same day, the sample has been sent for analysis. The report is dated 30-11-1991 and, as indicated by us earlier, states in terms that the seals were intact, the description of the sample tallied with that of the Panchanama and, under these circumstances, there can be no dispute about the fact that, on analysis, the material was found to come within the definition of section 2(xvi)(e) of the N.D.P.S. Act.

11. The learned trial Judge, on the basis of this record, has held that the charge of possession and dealing with Gard, which are punishable u/s 21 of the N.D.P.S. Act, has been established. On a complete review of the material before us and on a consideration of the submissions canvassed by the two learned Counsel, in our considered judgment, the findings of the trial Court do not require any interference with and are accordingly confirmed.

12. In the result, the appeal fails and stands dismissed.

(The Registrar to forward copies of this judgment to the Director General of Police for necessary action).