

(1992) 01 BOM CK 0056
In the Bombay High Court
Case No : Criminal Appeal No. 196 of 1989

Shaikh Abdul Gani Moula Baksha

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 31-01-1992

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 17, 27, 50, 52

Citation : (1994) 4 BomCR 625

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

Bench : Division Bench

Advocate : Anjali M. Desai, for the Appellant; S.R. Parekh, Public Prosecutor, for the Respondent

Judgement

M.F. Saldanha, J.—The appellant in this case has appealed against his conviction and the sentence imposed on him for the offence punishable u/s 17 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Briefly stated, it is alleged that the appellant who is doing the business of cycle repairs was apprehended at Pimpri Chowk in front of Roxy Hotel, Pimpri, District Pune at about 1.45 p.m. and it is further alleged that 10 small paper packets containing gard powder were seized from his front shirt pocket. The packets collectively weighed 1.450 gms. and the appellant was placed under arrest for the reason that the analysis of the powder indicated that it was brown sugar or heroin. The appellant was thereafter charge-sheeted. The authorities forwarded the paper packets which had been seized under a panchanama and thereafter properly sealed, to the Chemical Analyser. The C.A. report at page 43 of the paper book indicates that on analysis, the contents of the 10 packets were found to contain heroin and pheonbaribitone. The appellant faced the trial and the learned Additional Sessions Judge, Pune found him guilty of the charge u/s 17 of the N.D.P.S. Act. The appellant had denied both knowledge and possession of the powder in question. It was his case that he is a simple cycle repairer, that the police knows him and that he had been falsely implicated.

2. Ms. Desai, learned Counsel appearing on behalf of the appellant, has taken us through the evidence in this case which consists of the depositions of P.S.I. Madhukar Kadam, Panch Nandkumar Barate who claims also to be a social worker, Police Constable Vijay Tilekar who had taken charge of the sealed packets and transmitted them to the Chemical Analyser and the Investigating Officer Rajendrasingh Hajare. We have perused the evidence carefully and it indicates that on receipt of certain information that a person by name Shaikh Baksha was alleged to have been selling gard powder in front of Roxy Hotel, P.S.I. Kadam caught hold of two Panchas and after observing the necessary formalities, proceeded to the spot for the purpose of apprehending the accused in question. According to P.S.I. Kadam he had sent A.S.I. Bangar to discreetly watch the place and observe as to whether the appellant was present there and on receipt of the information from A.S.I. Bangar the raiding party went to Pimpri chowk and apprehended the accused-appellant. According to P.S.I. Kadam the appellant was asked whether he desired to search the members of the raiding party, that he declined and that P.S.I. Kadam thereafter searched the accused-appellant and recovered 10 paper packets from his front shirt pocket. Since these packets were found to contain powder which appeared to be gard, the said 10 paper packets were seized under a panchanama which was drawn on the spot. The weight of the powder along with the papers in which it was enclosed collectively came to 1.450 gms. P.S.I. Kadam further states that the accused-appellant was placed under arrest on the spot, that he thereafter proceeded to the Pimpri Police Station, that he lodged his formal complaint which is at page 31 of the paper-book, that subsequently the contraband was sent for analysis and that on receipt of the C.A. report the accused-appellant was charge-sheeted.

3. Ms. Desai has in the first instance made a grievance of the fact that the deposition of P.S.I. Kadam as also the panchanama do not indicate that the appellant was offered an opportunity by the raiding party of being searched before a Magistrate or a Gazetted Officer. Ms. Desai submits that the raiding party not having followed this procedure which is the requirement u/s 50 of the N.D.P.S. Act, the entire prosecution is vitiated. Section 50 has been interpreted by various High Courts and it is well settled that the said section is directory and not mandatory and furthermore a Division Bench of this High Court has taken the view that the term if he so requires would indicate a situation whereby an accused insists on being searched before a Gazetted Officer. In our considered opinion, not having afforded the appellant an opportunity of being searched before a Magistrate or a Gazetted Officer would not therefore, vitiate the present proceeding.

4. The second submission advanced by Ms. Desai is that there is no compliance with the provisions of section 52 of the N.D.P.S. Act. It is her submission that this section specifically requires that a person who is being arrested for an offence under this Act should be informed of the grounds of such an arrest. Ms. Desai contends that nowhere is there a reference or a statement to the effect that the appellant was informed of the grounds under which he was placed under arrest.

She therefore submits that there is a breach of the provisions of section 52 of the Act. We are unable to uphold this grievance for the reason that the record very clearly indicates that the appellant in this case was searched, that he was found in possession of 10 packets containing gard powder, that the powder was analysed on the spot and since it was found to be gard powder that he was placed under arrest. It is quite implicit from the course of action followed by the Officers in this case that it was more than adequately communicated to the accused appellant that he was placed under arrest by virtue of his being found in possession of gard powder. Section 52 cannot be read to mean that the Police Officers in question were obliged to specifically inform the appellant in writing the grounds of his arrest as is the requirement under other statutes. All that is required under this section is that the accused concerned be made known of the reasons for which he is being taken in custody. In our considered opinion the circumstances and the manner in which the appellant was arrested in this case would constitute sufficient compliance with the provisions of section 52.

5. Lastly, Ms. Desai has submitted that even taking into account the overall quantity of the powder that has been seized, this Court will have to take cognizance of one important fact that the total quantity was extremely small. She has further drawn our attention to the evidence and the panchanama which conclusively indicate that the weight of 1.450 gms. constitutes the weight of the powder along with 10 paper packets in which it was enclosed. Ms. Desai therefore submits that if one were to exclude what must be the weight of 10 paper packets, the appellant in question would be clearly covered by section 27 of the Act in so far as the quantity concerned is extremely small. Mr. Parekh, the learned Assistant Public Prosecutor, has canvassed the submission that section 27 regardless of the smallness of the quantity would not apply. It is his two-fold submission that in the first instance, the appellant should have in the course of his defence specifically pointed out to the Court that he would be covered by section 27 of the Act which has not been done and secondly that it was not proved that the finding of the small quantity of the drug in question was because it was intended for personal consumption. Mr. Parekh, therefore, submits that section 27 of the Act would not apply to the facts of the present case.

6. We need to take cognizance of certain factors which are undisputed as far as the record of the present case is concerned. The first of these is that the appellant was arrested with a very small quantity of the drug and that strangely enough there is no evidence forth-coming alleging that he intended to sell the drug or that he was apprehended in the course of such sale. The other circumstance we have taken note of is that the panchanama is totally silent with regard to the recovery of any money from the person of the appellant. These two circumstances taken together would not therefore assist the prosecution in its contention that the appellant was dealing in the drug or that he intended to sell it. We would therefore have to go back to the position of holding that the appellant was merely found in possession of a drug in a very small quantity. The fact that it was packed in 10 different paper packets of different quantities could

also mean that if it was intended to be consumed, it was to be consumed in those different quantities and that could be the reasonable hypothesis and consequently we would be inclined to accept that situation. In this view of the matter even though it has not been specifically pleaded by the appellant that section 27 of the Act would apply to the present case, in our judgment, he would be entitled to the benefit of that section.

7. In this view of the matter while affirming the conviction of the appellant this Court modifies it to one u/s 27 of the N.D.P.S. Act in place of the original conviction u/s 17 of the N.D.P.S. Act. The sentence of 10 years R.I. and a fine of Rs. 1,00,000/-, in default further R.I. for six months imposed by the learned Additional Sessions Judge is set aside and in its place it is directed that the appellant be sentenced to suffer R.I. for one year. It is pointed out to us that the appellant has been in custody since 18-3-1988, and that the fine has not been paid. Considering the fact that he has already undergone his sentence we direct that he be released from custody forthwith if not required in any other case. Appeal partly allowed.