
(2022) 04 BOM CK 0119

In the Bombay High Court

Case No : Criminal Appeal No.745 Of 2016, 37, 69 Of 2017

Shaikh Masood Shaikh Aziz And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 26-04-2022

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 15, 20(b)(ii)(c)
Code Of Criminal Procedure, 1973 — Section 313
Evidence Act, 1872 — Section 114

Citation : (2022) 04 BOM CK 0119

Hon'ble Judges : R. G. Avachat, J

Bench : Single Bench

Advocate : Joydeep Chatterji, G.L. Deshpande, Satej S. Jadhav, Govind A. Kulkarni

Final Decision : Allowed/Dismissed

Judgement

R. G. Avachat, J

1. This group of three appeals is being decided by this common judgment and order since common questions of facts and law arise therein. Moreover, the challenge in all these three appeals is to a judgment and order dated 25/11/2016, passed by Additional Sessions Judge, Vijapur in Special (NDPS) Case No.2/2014, whereby the appellants herein have been convicted for offence punishable under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) and, therefore, sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.1,00,000/- each. In default of payment of fine, they are directed to undergo simple imprisonment for one year.

2. Facts giving rise to the present appeals are as follows :-

Those were the days of Maharashtra State Legislative Assembly elections. The Election Commission had, therefore, constituted squad/s (team of officials) for checking of vehicles with a view to avoid malpractice/s at election. P.W.1 Anil

Khoche was the head of the squad. He along with the squad members was assigned duty to check vehicles moving on Aurangabad-Nagar Road. It was on 2/10/2014 at 3.45 p.m. The informant noticed an autorickshaw (No. MH-20/W-3537) approaching from Pune side towards Aurangabad. The autorickshaw was, therefore, intercepted. The appellants were travelling therein. Appellant Shaikh Moinoddin (Criminal Appeal No.37/2017) was driving the autorickshaw. On search of the autorickshaw, two yellow colour polythene bags were found. The bags were opened to find therein 12 brown colour packets each containing 2 Kgs. Ganja. The informant, therefore, telephonically approached Gangapur Police Station and reported the matter. P.W.12 Vijaykumar Sonawane (Police Inspector) attached to Gangapur Police Station along with some of his staff and two other persons to act as panch witnesses came to the spot. 25 gms. Ganja from each of the brown packets was collected for examination by Chemical Analyser. The seizure panchanama in that regard was drawn vide Exh.66. The informant lodged the F.I.R. (Exh.67). The seized samples were sent to CSFL. The C.A. report (Exh.114 & 115) indicates the seized articles (samples) were of Ganja. Investigation was made so as to ascertain to whom the Ganja belonged and wherefrom it was obtained. Involvement of two more persons in this crime was found. Statements of the persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellants and two more persons were proceeded against by filing the charge sheet.

3. The learned Judge of the Special Court framed the charge (Exh.51). All of them pleaded not guilty. To bring home the charge, prosecution examined 12 witnesses and relied on number of documents. On appreciation of the evidence in the case, the learned Special Judge convicted the appellants as stated hereinabove. The other two were acquitted. The State has not preferred any appeal against their acquittal.

4. Learned Advocates Mr. Chatterji and Mr. Jadhav for appellants in Criminal Appeal No.745/2016 and Criminal Appeal No.69/2017 respectively would submit that the C.A. Reports (Exhs.114 & 115) indicate the sample contained greenish, brownish, leaves, flowering tops, seeds and stalks put in parcel. Relying on Apex Court judgment in case of E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau [AIR 2008 SC 1720], it was submitted that, when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance/s, for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration. The learned Advocates meant to say that the actual contents of Ganja was smaller in quantity and the appellants were, therefore, liable for lesser punishment.

5. The learned A.P.P. relied on a three judge judgment of the Hon'ble Apex Court in case of Hira Singh & anr. Vs. Union of India & anr. Vs. Union of India & anr. (Criminal Appeal No.722/2017, decided on 22/4/2020) to submit that the judgment relied on by the learned Advocates for the appellants no longer holds the field. When the judgment relied by the learned A.P.P. was brought to the

notice of the learned Advocates for the appellants, they came with a stand of it being a case of unconscious possession. According to them, it is for the prosecution to prove the appellants to have been found in conscious possession of the contraband. According to them, the polythene bags were found in the back portion of the autorickshaw. The appellants were not in the know of existence of the bags much less the contents therein. In support of their claim, the learned Advocates have relied on following three judgments :-

(1) State of Punjab Vs. Balkar Singh & anr. [Criminal Appeal No.1144/1997]

(2) Avtar Singh & ors. Vs. State of Punjab Appeal (Crl.) No.2082/1996

(3) Tirupati s/o Rajmalu Walal Vs. The State of Maharashtra [Criminal Appeal No.494/2006]

6. The learned Advocate Mr. Kulkarni for the appellant in Criminal Appeal No.37/2017 would submit that the contraband articles were not produced before the Court.

When the entire operation was subjected to video-shooting, the Compact Disc (CD) thereof was not placed on record. When 25 gms. Ganja from each of the packets was seized or collected, it should have been more than 200 gms. The seizure panchanama suggests only 200 gms. of Ganja was taken as a sample. According to learned Advocate, this appellant was driving the autorickshaw. He was, therefore, not in the know of what was placed in the autorickshaw as luggage.

The learned Advocates for the appellants, therefore, urged for allowing the appeals.

7. The learned A.P.P. would, on the other hand, submit that, the defence of conscious possession is an afterthought. According to her, when the appellants were found in possession of contraband articles, it was for them to show to have not been in conscious possession thereof. The learned A.P.P. reiterated the reasons given by the trial Court in support of the impugned judgment and order. She ultimately urged for dismissal of the appeals.

8. Considered the submissions advanced. Perused the evidence and the citations relied on.

9. It is not in dispute before this Court that the flying squad headed by P.W.1 Anil Khoche had intercepted the autorickshaw at Tong Vasti on Nagar Aurangabad Road. The appellants were in the autorickshaw. On search of the autorickshaw, two polythene bags containing 12 brown packets were found. On further search, the packets found to have contained Ganja like substance. P.W.1 Anil Khoche, therefore, contacted Gangapur Police Station and reported the matter. P.W.12 P.I. Vijaykumar Sonawane accompanied by his staff and panch witnesses came to the spot. He too inspected the autorickshaw. 25 gms. Ganja from each of brown packets was separated as a sample for analysis. The same was seized under the

panchanama Exh.66. The total separated Ganja for sampling purpose was stated to be 200 gms. The same appears to be mistake in calculation. It is also true that the CD containing video-shooting of the entire exercise was not placed on record. The defence of the appellants before this Court is only that the prosecution has failed to prove them to be in conscious possession of the contraband - Ganja.

10. It is true that, it is in evidence of P.W.11 Dnyaneshwar and P.W.12 Vijaykumar that the polythene bags were found in the back portion of the autorickshaw (behind the appellants in Criminal Appeal No.745/2016 and Criminal Appeal No.69/2017). Before the trial Court, it was not the case of any of the appellants to have been unaware of the existence of the polythene bags in the autorickshaw much less the contents thereof. In their examination under Section 313 of the Code of Criminal Procedure, none of them disowned the polythene bags with contents therein. Their stand is of having been falsely implicated. Even it was suggested to some of the prosecution witnesses that abandoned polythene bags with Ganja therein were foisted against them. It is reiterated that there is voluminous evidence on record in the nature of independent witnesses to prove the appellants were travelling in the autorickshaw wherein the polythene bags were. It is not a case of the prosecution that any fourth person was there in the autorickshaw and after having intercepted the same, he fled. It is to be presumed that, a luggage found along with the passengers travelling in a transport vehicle like autorickshaw, the luggage belongs to passenger concerned unless contrary is shown.

11. Reliance on the judgment of the Apex Court in Balkar Singh (supra) is quite distinguishable on facts. Firstly, it was an appeal from acquittal. The recovery was effected from a field in village Lohgarh. The respondents belonged to different villages. 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 respondents at the place from where the bags of poppy husk was recovered itself was taken as possession of these bags by the police. In the fairness, the police should have conducted further investigation to prove that these accused were really in possession of these articles.

12. While on facts in Avtar Singh's case (supra), the appellants therein were held to have not been in conscious possession of the contraband article. It has been observed :-

"The word 'possession' no doubt has different shades of meaning and it is quite elastic in its connotation. 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 Section 15 may not be warranted. At best, they may be abettors, but, there is no such charge here. True, their silence and failure to explain the circumstances in which they were traveling in the vehicle at the odd hours, is one strong circumstance that can be put against them. A case of drawing presumption under Section 114 of the Evidence Act could perhaps be made out then to prove the possession of the accused, but, the fact remains that in the course of examination under Section 313 Cr.P.C, not even a question was asked that they were the persons in possession of poppy husk placed in the vehicle."

13. While in the case of Tirupati Walal (*supra*), the facts were that the appellants therein were travelling in an Ambassador Car. Eight (8) cushion sheets were artificially prepared by pressing the ganja with some mechanical device.

. . . . Needless to say, the passengers of the car vehicle had no reason to suspect that the seats were artificially crafted by using compressed sheets of ganja.

14. In the present case, it is reiterated that, no fourth person was travelling in the autorickshaw. One of the appellants Shaikh Moinoddin Siddiqui was driving the autorickshaw in his capacity as a driver. There is nothing in the evidence to indicate that all the appellants were in league to transport the contraband – Ganja. The appellant Shaikh Moinoddin Siddiqui, therefore, needs to be given benefit of doubt on the ground to have not been shown to have knowledge of the contents of the polythene bags. It is further reiterated that, the defence of conscious possession has been raised at the last minute of hearing of appeal, that too on realising that the earlier defence of the contraband to have been in smaller quantity not acceptable. For all these reasons, no exception to the impugned judgment of conviction and resultant order of substantive sentences can be taken exception to so far as regards appellants Shaikh Masood Shaikh Aziz and Shaikh Sajid Shaikh Nisar in Criminal Appeal No.745/2016 and 69/2017 respectively. Their appeals, therefore, fail.

15. It appears that, both the appellants Shaikh Masood Shaikh Aziz and Shaikh Sajid Shaikh Nisar in Criminal Appeal No.745/2016 and 69/2017 respectively have been behind the bars for little over 7 ½ years. The minimum sentence prescribed for the offence proved is not less than ten years. The amount of fine prescribed is also of Rs.1,00,000/-. The fine has not been paid, might be due to financial constraints. This Court is, however, inclined to reduce in-default

sentence from one year to one month. With this, the appeals stand disposed of in terms of the following order :

ORDER

(i) Criminal Appeal No.37/2017 filed by Shaikh Moinoddin Ameeroddin Siddiqui is allowed. The judgment and order of conviction and sentence, dated 25/11/2016, passed by learned Additional Sessions Judge, Vaijapur in (NDPS) Special Case No.02/2014 is hereby quashed and set aside so far as the appellant Shaikh Moinoddin Ameeroddin Siddiqui is concerned. Conviction of the appellant Shaikh Moinoddin Ameeroddin Siddiqui for the offence punishable under Sections 20(b) (ii)(c) of the Narcotic Drugs and Psychotropic Substances Act is set aside. The appellant Shaikh Moinoddin Ameeroddin Siddiqui be set at liberty forthwith, if not required in any other case. Fine amount, if paid, be refunded to him. The vehicle autorickshaw bearing No.MH-20/W-3537 and the Cellcon mobile phone belonging to the appellant Shaikh Moinoddin Ameeroddin Siddiqui be returned to him.

(ii) Criminal Appeal No.745/2016 and 69/2017 filed by Shaikh Masood Shaikh Aziz and Shaikh Sajid Shaikh Nisar respectively are dismissed. Conviction and sentence recorded by by learned Additional Sessions Judge, Vaijapur in (NDPS) Special Case No.02/2014, by judgment and order dated 25/11/2016 is confirmed. However, in-default sentence of simple imprisonment for one year is reduced to simple imprisonment for one month each.