

(2018) 03 BOM CK 0050
In the Bombay High Court
Case No : CRIMINAL APPEAL NO. 795 OF 2010

SHAIKH MOHAMED SHABIR

APPELLANT

Vs

UNION OF INDIA AND ANR

RESPONDENT

Date of Decision : 20-03-2018

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 8(c) ,9(A), 22(c),
25(A), 29, 31, 31(A) , 50, 90, 25, 67
Indian Penal Code, 1860 — Section 120B

Citation : (2018) 03 BOM CK 0050

Hon'ble Judges : A.S.GADKARI, J

Bench : Single Bench

Advocate : Taraq Sayed, R.B. Amroliya, V.S. Mhaispurkar

Final Decision : Disposed Of

Judgement

1] The appellants namely Shaikh Mohamed Shabir, Shaikh Yunus Shaikh Hasan, Pratap Narayan Gaunekar and Suresh Kumar Narmada Prasad

Pandey are the original accused Nos.1, 2,3, and 4 respectively in NDPS Special Case No.27 of 2006. The appellants hereinafter will be referred to as

per their original accused numbers in the said Special Case before the Trial Court for the sake of convenience and brevity.

2] The appellants have been convicted for the offences punishable under Sections 8(c) read with 22(c) read with 29 of the Narcotic Drugs and

Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act' for sake brevity) by the learned Special Judge for NDPS, Greater

Mumbai by its Judgment and Order dated 17th August 2010.

3] The appellant No.1/accused No.1Â Shaikh Mohamed Shabir has been convicted for the offence punishable under Sections 8(c) read with 22(c)

read with 29 and 31 of the NDPS Act (in view of his previous conviction under NDPS Act he has been additionally charged under Section 31(A) of

the NDPS Act) and is sentenced to suffer rigorous imprisonment for 15 years and to pay fine of rs.1,50,000/Â on each count, in default of payment of

fine to further undergo simple imprisonment for one year by further Order dated 21st August 2010 (passed below Exhibit 184) by the learned Special

Judge for NDPS Greater Mumbai. It is directed that the substantive sentences imposed upon the appellant No.1/accused No.1 to run concurrently.

By the said Judgment and Order, the appellant No.2/accused No.2Â Shaikh Yunus Shaikh Hasan, appellant No.3/accused No.3Â Pratap N.

Gaunekar and appellant No.4/accused No.4Â Suresh Kumar N. Pandey have been convicted for the offence punishable under Sections 8(c) read

with 22(c) read with 29 of the NDPS Act and are sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/Â by each

of them on each count, in default of payment of fine to further undergo simple imprisonment of one year.

By the said Judgment and Order, the Trial Court was pleased to acquit original accused No.5, Harish M. Patel for the offence punishable under

Sections 8(c) read with 22(c) read with 29 and 9(C) read with 25(A), 25 of NDPS Act and 120Â?B of the Indian Penal Code.

4] Heard Mr. Taraq Sayed, the learned Counsel appearing for the appellants, Ms. R.B. Amrolia, the learned Special P.P. for respondent No.2Â? Union

of India, and Ms. V.S. Mhaispurkar, the learned APP for respondent No.2Â?State.

5] The prosecution case in brief is as under:Â?

(i) On receipt of specific confidential information that, the contraband was stored/ was being manufactured at shop No.4, Tirupati Housing Society,

near Aashirwad Hotel, Shivaji Nagar, Appa Pada, Kurar Village, Malad (East), Mumbai, the Investigating Agency on 29.8.2005 in the presence of

two independent panchÂ?witnesses conducted raid at the said place. During the search at the said premises, the officers of the Investigating Agency

found accused Nos.1 to 4 present therein and were engaged in tableting of Methaqualone powder with the help of tableting machine. During further

systematic search of the premises, the officers of the Investigating Agency recovered 65 Kgs of Methaqualone powder and 4.5 Kgs of Mandrax

tablets. The said items were tested with the Field Testing Kit, which indicated

that the said powder was Methaqualone powder and the samples of Mandrax tablets found to be positive for Methaqualone. The Investigating Agency thereafter drew two samples of Mandrax tablets and two samples each of 5 gms of Methaqualone powder. The Investigating Agency recovered total three H.D.E.P bags containing white coloured powder of Methaqualone weighing 65 Kgs, one white coloured polythene bag containing Mandrax tablets weighing 4.5 Kgs., 40 punches with words embossed on them as "BOSS", 19 dyes, one Maruti Car and one Pulsar motorcycle from the scene of offence.

(ii) The personal search of all accused persons was taken at the spot after appraising them about their legal right, as contemplated under Section 50 of the NDPS Act. The aforesaid articles were seized under the panchanama dated 29.8.2005 prepared at the spot. The tableting machine was separately seized and removed from the place of offence under panchanama dated 4.10.2005 and was deposited in the warehouse.

(iii) The residential premises of all accused persons were searched in the presence of panch-witnesses and incriminating documents were recovered from their houses by effecting respective panchanamas. During the course of investigation, it was revealed that, Methaqualone powder was manufactured in a factory by name M/s Sinmak Chemicals, situated at W-194 B, M.I.D.C. Industrial area, Talaja. The said factory was also searched in the presence of panch-witnesses on 29.8.2005 and during the search 242.400 Kgs of Anathranilic Acid, 50.700 Kg of Acetic Anhydride and 1240.300 Kgs of other chemicals were recovered. It were used for manufacturing the Methaqualone powder. During the course of investigation, the role of accused No.5 Harish M. Patel surfaced on record and therefore he was also arraigned as an accused in the present crime.

(iv) During the course of investigation, the officers of N.C.B. recorded the statements of accused Nos.1 to 4 under Section 67 of NDPS Act, which revealed the entire plot of manufacturing the said Mandrax tablets by the accused persons. During the course of search of accused No.4 Suresh Kumar Pandey, a copy of Leave and Licence Agreement (Exhibit-75/11) pertaining to the said shop No.4 was seized. The said agreement is executed between Subhash Yadav (PW No.15) as landlord and accused No.4-Suresh Kumar Pandey pertaining to the said shop No.4. After

completion of investigation, the respondent No.1 Investigating Agency submitted complaint before the Trial Court against the accused persons under

Section 8(c) read with Section 22(c) read with 29 and under Section 9(A) read with 25 (A) of the NDPS Act for the allegations that, the accused

persons by making conspiracy with each other were found manufacturing and were found in possession of 65 Kgs of Methaqualone powder and 4.5

Kgs of Mandrax tablets in contravention of the provisions of Section 8(c) of the NDPS Act and also found manufacturing and possessing the

controlled substances such as Acetic Anhydride and Anathranilic Acid in contravention of NDPS (Controlled Substances) Order, 1993 issued by the

Central Government in exercise of powers conferred by Section 9A of the NDPS Act, 1985.

(v) The learned Trial Court framed charge against the accused persons below Exhibit 9. The same was read over and explained to the accused

persons to which they pleaded not guilty and claimed to be tried. The plea of the accused persons were recorded below Exhibits 10 to 14. The

defence of the accused persons is of total denial. The prosecuting agency in support of its case examined in all twenty-five witnesses. The learned

Trial Court after recording the evidence and after hearing the parties to the said case, has convicted the appellants/accused as stated hereinabove by

the impugned Judgment and Order dated 17th August 2010.

6] Mr. Taraq Sayed the learned Counsel for Appellants submitted that, there is no evidence on record mainly to connect the accused No.1 Shaikh

M. Shabir and other accused persons with the said Shop No.4 wherein the Investigating Agency conducted raid and it is alleged that the accused

persons were found manufacturing the said Mandrax tablets and were in possession of it. He submitted that, no documents of letting out the said

premises is brought on record by the prosecuting agency. That purported documents which have been produced by the prosecuting agency are

doubtful and therefore the appellants cannot be connected with the said premises. He therefore submitted that in absence of any sufficient and cogent

evidence, the appellants cannot be held guilty for an offence for possession of the said contraband. He submitted that the Trial Court has disbelieved

the prosecution case in all other aspects than possession of the contraband and the conviction is solely on the basis of alleged possession of

contraband. He further submitted that the prosecution has failed to prove exclusive possession/ownership of the appellants over the said shop No.4

and therefore it cannot be inferred that the appellants were having lawful possession of the said premises. In support of his contention with respect to

ownership and possession of the premises, he relied upon the following decisions of the Supreme Court and this Court:Â?

(i) Bashir Shaikh Vs. State of Goa 1991(1) Bom. C.R. 266.

(ii) Matlub Khan Rehmat Khan Vs. The State of Maharashtra 1993(2) Bom. C.R. 226.

(iii) Rubyana alias Smita Sanjib Bali Vs. The State of Maharashtra. 1996 (3) Bom. C.R. 410.

(iv) Om Prakash @ Baba Vs. State of Rajasthan 2009(10) SCC 632 : 2009 AIR (SCW) 6385)

He further submitted that Subhash Yadav ((PWÂ15) owner of the said shop No.4 is a got up witness and in fact he is the owner of the said premises.

He submitted that the said witness was a chanceÂwitness examined by the prosecution. He submitted that Mr. Ajit Patil (PWÂ24) was in fact in his

Office at Ballard Pier on the day and time of the said raid and he was not present at the scene of offence and therefore his evidence is not reliable.

Mr. Sayed, the learned Counsel, thereafter would contend that, as the Chemical Analyzer has not given any percentage about purity in concrete

proportion and has also not given percentage of Methaqualone in the seized quantity of contraband,Â it cannot be construed that the entire quantity

was Methaqualone powder and therefore Section 22(c) of the NDPS Act cannot be applied, but Section 22(b) of the said Act will only have

application to the present crime which deals with 'quantity lesser than commercial and greater than small quantity'. In support of his contention, he

relied upon the following decisions of the Hon'ble Supreme Court and this Court:Â?

(i) E. Micheal Raj Vs. Intelligence Officer, N.C.B. 2008 AIR SCW 2365.

(ii) Omprakash Deepak Kanojia Vs. The State of Maharashtra & Anr. in Cri.Application No.16 of 2008 in Cri. Appeal No.19 of 2008 dated 4.4.2008.

(iii) Chandran Krishnan Vs. Union of India & Ors ,In Cri. Application No.316 of 2009 in Cri.Appeal No.246 of 2009 dated 4.9.2009.

(iv) Oluwole Mutiat (ss) Vs. Union of India & Anr 2009 (1) Bom. C.R. (Cri) 652.

(v) Okoke Paul Obi Vs. R.S. Poddar, Superintendent of Customs & Anr. 2011(1) Bom.CR (Cri) 593.

The learned Counsel for the appellants lastly submitted that, the Prosecuting Agency has falsely filed the case against the appellants by planting

contraband in the said premises. He therefore prayed that, the present appeals may be allowed and the appellants may be acquitted from the charges

framed against them.

7] The learned Special P.P. per contra, vehemently opposed the appeals and by pointing out relevant documents on record submitted that the

prosecution has proved the guilt of the appellants beyond reasonable doubt. She submitted that all appeals may therefore be rejected by maintaining

the conviction and sentences of the appellants.

8] The evidence on record reveals that, on 29.8.2005, the Investigating Agency conducted search at the residential premises of accused No.4 Suresh

Kumar Pandey at Tirupati Housing Society, Kurar Village Malad (E) in presence of panchâ witness Shri Mohammed Shafiz Ahmed Khan (PW No.4)

and seized an agreement having title "Conducting Agreement" (Exhibit 75/11) executed between Subhash Yadav (PW No.15), the owner of the

said shop No.4 and Sanjay Pande (Sanjay @ Suresh Pandey). The evidence on record further discloses that, the said agreement is dated 18.7.2005

and is signed by accused No.1 Shaikh M. Shabir as witness No.2 to the execution of the said agreement. There is one more document dated 18.7.2005

executed on stamp paper of Rs.50/- between Subhash Yadav (PW No.15) and Sanjay Pandey/Suresh Pandey accused No.4 on record at Exhibit 119.

The said document was also seized during the house search of accused No.4. The Exhibit 75/11 is a copy of Exhibit 119. This document i.e. Exhibit

119 is duly signed by all the concerned and as stated earlier, has been further signed by appellant No.1 Shaikh M. Shabir as a witness. The evidence

on record undoubtedly establishes the fact that the conductor of the shop owned by Subhash Yadav (PW No.15) is none other than accused No.4

Suresh Kumar @ Sanjay Pandey.

Shri Subhash Yadav (PW No.15) in his testimony has categorically admitted that, he is knowing accused No.1 Shaikh M. Shabir and accused No.4

Sanjay @ Suresh Kumar Pandey and he has let out Shop No.4 to Sanjay @ Suresh Kumar Pandey (accused No.4) for the business of powder

coating.

Thus the prosecuting agency has proved beyond reasonable doubt the fact that the said premises i.e. Shop No.4 was taken on rental basis by the

accused No.4 Suresh Kumar Pandey from Subhash Yadav (PW No.15) by executing the agreement dated 18.7.2005 and by making agreed

payment in that behalf.

9] As far as the contention of the learned Counsel for the appellants about the absence of Chemical Analyzer's report

pertaining to percentage of Methaqualone powder is concerned, Shri Shailendra Srivastav, Assistant Chemical Analyzer (PW No.14) in his evidence

has stated that, the entire powder was positive for the test of Methaqualone. The Chemical Analyzer's Report is at Exhibit 62/A on record. It is

categorically stated that, white tablets marked "BOSS" on both sides answers the test for Methaqualone as covered under NDPS Act.

As far as white powder is concerned, it also answers test for Methaqualone positively. The evidence on record clearly indicates that the said samples

were in pure form and there was no mixture in it. Therefore the contention of the appellants that, in absence of any percentage of Methaqualone

powder in the contraband, the appellants would be covered under Section 22(b) of the NDPS Act, has not substance in it and cannot be accepted.

As noted earlier, the entire quantity of contraband seized by the Investigating Agency was in its original form without having any mixture in it and

there was no need of mentioning about any percentage of the Methaqualone powder in it by the Chemical Analyzer in his report.

10] The evidence on record clearly establishes the fact that, on the day and time of incident when the raid was conducted by the Investigating

Agency, the appellants were present at the spot/scene of offence and were in possession of the 65 Kgs. of Methaqualone and 4.5 Kgs. of Mandrax

tablets. The prosecution has proved the said fact beyond reasonable doubt by leading sufficient and cogent evidence in that behalf.

11] In view of the above and after perusal of the entire record, I am of the opinion that the Trial Court has not committed any error while convicting

and sentencing the appellant Nos.1 to 4 for the charges framed against them.

I find no merit in all the appeals and the appeals are accordingly dismissed.

12] In view of dismissal of appeals, Criminal Application No.1444 of 2011 does

not survive and the same is also disposed off.