
(2009) 04 BOM CK 0074

In the Bombay High Court

Case No : Criminal Miscellaneous Application No. 31 of 2009

Sher Singh

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 04-04-2009

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20

Citation : (2009) 04 BOM CK 0074

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : J.P. D'Souza, for the Appellant; Winnie Coutinho, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—By the present application, the accused who has been convicted and sentenced u/s 20(b)(ii)(C) of N.D.P.S. Act, 1985, for having been found in possession of 18.760 kgs. of charas on 11-2-2005 at 00.10 hours, seeks for setting aside the said Judgment and a remand to the trial Court to take additional evidence by recalling for further cross-examination panch witness Shri Shekhar @ Vilas Mahadik/PW3 and the Investigation Officer Shri Raju Raut Dessai/PW5.

2. It appears that the trial of the accused was conducted by another advocate and so was the appeal filed. The controversy centers around a document styled as "property seizure memo", a copy of which was not furnished to the accused at the time of the trial, and which otherwise is not shown was required to be furnished, and which was only required to be fed into a computer for the records of the State Crime Record Bureau and which in turn is forwarded to National Crime Record Bureau.

3. The case of the accused is that the said document is found referred to in the station diary extract/Exh.41 brought on record by the said Investigation Officer

but it was suppressed from the Court, and as such escaped the notice of the then Counsel of the accused till it came to light when the present Counsel after filing of the appeal by the previous Counsel, came in possession of the same under the Right to Information Act. As per the accused, the said panch witness Shri Shekhar @ Vilas Mahadik has stated in his evidence that the panchanama and the seizure report were prepared at the spot and signed by both the panchas and likewise he had stated that some typing work was done at the spot and that he did not recall if some typing work was done, and not signed by him. According to the said panch witness Shri Shekhar/PW3, he returned to Panaji and got down from the jeep at Panaji ANC Police Station outskirts and then left for his residence. The contention is that Shri Dessai/PW5 had stated that he had handed over the seal to Dy.S.P. Anand Virnodkar/PW4 along with the letter at the Police Station, and this fact has been confirmed by Virnodkar/PW4 and in case the said document was prepared at the site of seizure then it could not have contained the F.I.R. number, etc. Further, it is the contention of the accused that the said document belies the case of the prosecution on various material aspects such as safe custody of the alleged articles, possibility of use of the seal subsequent to the alleged raid and prior handing it over to the Dy. S.P.Virnodkar/PW4, if at all. It is also contended that the signatures of the panchas on the said "property seizure memo" raises various questions on the presence of panchas and it does not rule out the possibility of the panchas signing the document at the Police Station and this is more so because the panch witness Shri Shekhar/PW3 has categorically stated that he got down from the jeep at Panaji ANC Police Station outskirts and left for his residence, and if that be so his signature could not have appeared on the said "property seizure memo" of the same date i.e. 11-2-2005. It is also stated that the other panch witness Shri Francis Fernandes who was not examined is a stock police witness as admitted by him and found reflected in Judgment dated 9-9-2005 of the Judicial Magistrate, First Class, Mapusa, in C. C. No. 95/2003/D/B.

4. Opposing the application, in the reply filed by Shri Raju Raut Dessai/PW5 it is stated that the present application is an attempt to fill in the lacuna by way of an afterthought. As far as the said document is concerned, it is stated that at no point of time the said document was ignored or was not referred to, and that the said document was not mandatory to be given to the accused, and what was given was the seizure report. As regards the date, time, place and crime number on the said document, it is stated that the same were filled in at the Police Station. It is stated that the panchanama and the seizure report were prepared at the spot and signed by both the panchas and the typing was also done at the spot and in case the panch witness stated that he did not recall if any typing work was done that could only be attributed to the lapse of his memory, and, the seal was also fixed at the spot.

5. Shri J. P. D'Souza, learned Counsel on behalf of the appellant/accused submits that the said document, namely "property seizure memo" was not in the know of the accused and his advocate at the time of the trial or at the time of

filing of the appeal and came to light only after an application under RTI was filed by him. Learned Counsel submits that the said document creates a serious doubt on the veracity of the prosecution as nobody knows where it was made. He further submits that in case it was made at the spot, the F.I.R. number could not be there which shows that it was prepared thereafter and thus belies the case of the prosecution that the panch did not go to the Police Station. In support of his submission, learned Counsel has placed reliance on the case of Abdul Sattar v. State of Goa 1992 SCC (Cri) 973 and has further submitted that after a remand was ordered by the Hon''ble Supreme Court, the case of Abdul Sattar v. State of Goa (supra) resulted in acquittal vide Judgment dated 21-7-1992 by a Division Bench of this Court in Criminal Appeal No. 27 of 1987 which earlier had ended in conviction by Judgment dated 15-6-1988 reported in 1988 (2) Crimes 812. Reliance has also been placed on the cases of Umesh v. State of Rajasthan 2004 (3) Crimes 488 and Iliyas Varisbhai Shaikh v. State of Gujarat & 12007(2) Crimes 90(Guj.). Learned Public Prosecutor has left the matter to the Court.

6. Admittedly, the said document is not a document which is required to be given to the accused and was not relied upon by the prosecution along with other documents though an inadvertent statement came to be recorded in the station diary. The contention that it was suppressed from the Court cannot be accepted since otherwise also, there is no practice of giving a copy to the accused of such a document. Copies of panchanama and seizure report, prepared at the spot were given, to the accused. As stated by the I.O., the said document is prepared with a view to maintain certain records of the Department and those of National Crime Bureau. The present application is nothing but an attempt to conduct a roving and fishing inquiry by recalling the said two witnesses. This is so, because Shekhar/PW3 has already deposed that the panchanama and seizure report were prepared at the spot and though some typing work was done at the spot he did not recall if any writing work was done which was not signed by him. The I.O. has stated that the document was prepared at the spot and only certain details were filled in at the Police Station. If that be so, the contention that the said document belies the case of the prosecution cannot be, prima facie, accepted. There is no controversy as regards the handing of the seals. No doubt Section 391 of the Code (Code of Criminal Procedure, 1973) gives powers to the appellate Court to take additional evidence either by itself or direct it to be taken by the Court of Sessions or by a Court of Magistrate but certainly this is not a case to exercise such powers. The case of Abdul Sattar v. The State and so also the other cases cited, stood on their own facts. In the case of Abdul Sattar v. The State (supra) the only independent witness was examined as PW1 and it was contended on behalf of the accused that he was not present at the time of the search and this contention was supported by two letters written by authorities concerned showing that he was on traffic duty elsewhere at the time of the search. The High Court by Judgment dated 15-6-1988 had refused to look into the said two documents on the ground that the said PW1 was thoroughly examined but the Hon''ble Supreme Court felt that the said two documents were

relevant and an opportunity ought to have been given to cross-examine and impeach the veracity of the said PW1, and as such the matter was remitted to the High Court, by the Hon''ble Supreme Court for further cross-examination of the said PW1, and, if necessary to examine the authors of the said two documents.

7. Be that as it may, and as already stated, in the present case, it is nobody''s case that the document styled as property seizure memo was not prepared at the site of seizure. The only independent witness examined has stated that he did not recall if any writing work was done at the spot which was not signed by him and this cannot mean that the said document was prepared at the Police Station. The Investigation Officer has on affidavit stated that the said document was prepared at the place of seizure and only date, time, place and crime number were filled at the Police Station. In the light of the statements made by the panch witness and the categorical assertion of the Investigation Officer that it was prepared at site but was completed with certain details at the Police Station, in my view, no case is made out for recalling for further cross-examination either of the said two witnesses. The fact that the other panch who was not examined was a panch witness who had stood in many cases including in cases of ANC Police Station was an information which was otherwise available to the accused and on the basis of the same the Investigation Officer could have been cross examined .8. In the light of the above, in my view, this is not a fit case to order for further cross-examination either of Shri Shekhar @ Vilas Mahadik/PW3 or Shri Raju Raut Dessai/PW5.

Application therefore is dismissed.