
(1997) 02 BOM CK 0013
In the Bombay High Court
Case No : Criminal Appeal No. 69 of 1993

Shri Suresh Sahare	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 14-02-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 21, 27

Citation : (1997) 99 BOMLR 225

Hon'ble Judges : S.B. Mhase, J; A.A. Desai, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.S. Mhase, J.—This appeal is directed against the judgment and order of conviction passed by the Additional Sessions Judge, Nagpur, in Sessions Trial No. 643 of 1991 dated 25th February, 1993 convicting the appellant u/s 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing the appellant to suffer rigorous imprisonment for ten years and to pay a fine of Rs. One Lac, in default to suffer rigorous imprisonment for one year.

2. The accused-appellant was found with 150 ml. grams of heroin while his search was being taken by P.W. 7 Shri Shewane, Head Constable, after complying with the procedure required to be followed while effecting the personal search of a person on 19.5.1991 at about 5.30 p. m. at Siddharth Nagar, Nagpur and, therefore, the prosecution u/s 21 of the N.D.P.S. Act of 1985.

3. The submission made by the learned Counsel for the appellant does not raise any question pertaining to the non-compliance of the provisions of the N.D.P.S. Act. According to the learned Counsel, the defence of the appellant is of total denial and it is submitted on behalf of the appellant that the police called him directly to the Crime Branch, Narcotic Cell, Nagpur and put him behind bars and later on prepared false papers and falsely implicated in the present case. In order to substantiate the said submission, the learned Counsel Shri Quazi firstly

submitted that there is no corroboration to the test money of P.W. 7 Shri Shewane, who is a Head Constable, and, therefore, his testimony may not be relied on. Secondly, it is submitted that the identity of the contraband articles examined by the Chemical Analyser (P.W. 4) was not established by the prosecution, because, according to the learned Counsel, there is a discrepancy in the evidence of P.W. 3 and P.W. 6 on the point of giving delivery of the contraband articles to P.W. 3 on 20.5.1991 and the said articles being deposited with P.W. 4 Chemical Analyser on 21.5.1991 and thereby posing a question that where was the contraband articles for one day. On the basis of this, it is being submitted that the prosecution has falsely implicated the appellant.

4. The first contention raised by the appellant that in the absence of corroboration to the test money of P.W. 7, the appellant-accused cannot be convicted, is without any merit. If the testimony of the police officer is found to be trustworthy and not tainted, then the evidence of the said police officer can be accepted and the conviction can be based on the said uncorroborated evidence. In the present matter, on a proper scrutiny of the evidence of P.W. 7 Shri Shewane, we find that after the receipt of the information by P.W. 7 he effected the entry in the register and thereafter he sent a copy of the information to the Assistant Commissioner of Police and on getting instructions from him, he proceeded to effect the personal search of the appellant. While effecting the personal search, the purpose of the search was disclosed to the appellant and the panchas. The appellant was informed that the appellant is entitled to have a search in the presence of the Gazetted Officer and/or the Magistrate and when the appellant declined to have a search before the Gazetted Officer and/or the Magistrate, P.W. 7 has proceeded to effect a search of the appellant wherein he found that the match box, which was found in the hand of the appellant, contained 5 packets of lined papers containing 30 ml. grams of heroin in each packet. The sample from the said packets was taken and it was sealed in accordance with law and thereafter the panchanama was prepared at the spot and the copy of the panchanama was also given to the appellant and thereafter the appellant was taken to Pachpaoli Police Station where, after filling the form of chemical analysis, etc., a complaint was lodged. The learned Counsel tried to point that in Exhibits 33 and 34, namely the chemical analysis form and the report prepared by P.W. 7 at about 9.30 p.m. on 19.5.1991, the crime number is 561/91. According to the learned Counsel, if the crime was registered on 20.5.1991 at about 00.05 a. m., then how the crime number mentioned about could appear on Exhibits 33 and 34 and thus it was tried to be persuaded by the learned Counsel that all these documents are prepared at the police station and implicated the appellant. It is pertinent to note that from the evidence it is clear that in the night of 19.5.1991 at about 10 p.m. Shri Jadhav, Police Station Incharge, received the property in this case from P.W. 7. Not only that but all the documents were received by the Incharge Officer. Only the formal F.I.R., which is Exhibit 16, was prepared at 00.05 a.m. and, therefore, it shows that after having effected the personal search of the accused, P.W. 7 came to the Police Station

and thereafter lodged the complaint, which was recorded at 00.05 a.m. This is at the mid-night hours of 19.5.1991 and 20.5.1991 and, therefore, appearance of the said crime number at Exhibits 32 and 34 cannot be said to be a discrepancy and much more a material discrepancy so as to infer that the appellant has been falsely implicated. Nothing has been brought about in the cross-examination of the prosecution witnesses making the search carried out by P.W. 7 as doubtful so as to infer the false implication of the accused-appellant in the present case. We do not find that there is any material discrepancy so as to disbelieve P.W. 7 and, therefore, we rejected the said contention raised by the learned Counsel.

5. The second submission, which was made by the learned Counsel, is to the effect that the evidence of P.W. 6, who was Incharge of the Malkhana of Pachpaoli Police Station, shows that on 20.5.1991, he handed over the sealed parcel of the contraband articles to the carrier P.W. 3 Umare to take the same to Chemical Analyser office for analysis. It is being pointed out by the learned Counsel that the evidence of P.W. 6 is not consistent with the evidence of the carrier P.W. 3 Umare, who has stated that on 20.5.1991, as there was no stamp of P.S.I. on chemical analysis form, he returned the property to Malkhana and again on 21.5.1991, he carried the property to Chemical Analyser and thus it was being submitted on the basis of this evidence that the possession of the property for one day is doubtful. We are not impressed by the said discrepancy in the evidence because it does not materially prejudice the defence of the accused-appellant. Apart from that, be the evidence as it is, the evidence of P.W. 4 Chemical Analyser, who received the property on 21.5.1991 in a sealed condition from the Police Constable in Crime No. 561 of 1991, found that the seals of the property were intact and there was no damage to the seals in question and, therefore, if the property intended to be analysed has been received by the Chemical Analyser intact having the seals as they were shown in the panchanama and the covering letter, there cannot be any prejudice to the accused-appellant because it will prove that the property, which was attached from the personal search of the accused-appellant, has been received by the Chemical Analyser P.W. 4, who has analysed it and has found that the sample contained 40 to 60 per cent of heroin and, therefore it falls u/s 2(xvi)(e) of the N.D.P.S. Act and, therefore, we hold that even accepting the discrepancy in the evidence for a moment for the sake of argument, there as no prejudice caused to the appellant-accused as the property received by P.W. 4 Chemical Analyser was intact and the seals of the property were not damaged and/or disturbed in any way.

6. The last submission made by the learned Counsel is that the appellant was possessed of only 150 ml. grams heroin in 5 packets and which is much less than the notified small quantity that is less than 250 ml. grams and hence the appellant be given a benefit of Section 27 of the Act. It is pertinent to note that in the cross-examination of the witnesses, nothing has been brought about to point out that the appellant possessed the said contraband material for the purposes of his personal consumption. Even though the panchas have not

supported the prosecution, still the defence did not put up any defence to said witness or P.W. 7 Shri Shewane in order to prove that the said contraband heroin was with the appellant for personal consumption. No other attending circumstances, which may lead to a plausible inference of personal consumption, have been brought on record. Not only that, but in a statement recorded u/s 313 of the Code of Criminal Procedure, the accused-appellant has not stated that he was possessed of those contraband heroin for the purpose of personal consumption. On the contrary, when he was asked whether he wanted to examine himself on oath or anybody else as a defence witness, the appellant replied in the negative. He was further asked whether he wish to say anything more, he only replied that a false case is filed against him and the police had taken him from his house and thus it is apparent that the plea of possession of a contraband heroin for the purpose of personal consumption was not taken in the trial Court. In fact, Section 27 of the N.D.P.S. Act provides for a lesser punishment in the circumstances found under Clauses (a) and (b) of Sub-section (1) of Section 27. However, Sub-section (2) lays down a rule of evidence that in case where it is shown that a person is in possession of a small quantity of a narcotic drug or psychotropic substance, the burden of proving that it was intended for the personal consumption of such person and not for sale or distribution, shall lie on such person. Therefore, whenever it is shown that a person is possessed of a small quantity, then the said person is entitled to take a plea of the personal consumption of the said contraband drug or substance and not for sale or distribution. However, the burden to prove that the possession of the contraband drug or substance with the accused is for personal consumption and not for sale or distribution is on accused and/or the person found in possession of the contraband drug or substance. Therefore, in order to raise a plea of possession of a contraband drug or substance for personal consumption and not for sale or distribution. the pre-condition is that the quantity found with the person or accused was a small quantity as provided in the said section and thereafter the plea can be raised. The burden to prove the said plea is again on accused person. Even though the said burden cannot be said to be as high and as a strict as required to be proved by the prosecution that is proof beyond shadow of doubt, the accused is under an obligation to probabilities from the evidence and a material that is either from the prosecution evidence and/or by leading a defence evidence that the possession of the said contraband drug or substance is/was for personal consumption and not for sale or distribution. The accused shall discharge said burden by preponderance of probability. Therefore, law requires raising of a plea and to prove the fact of possession of the contraband drug or substance for personal consumption and not for sale or distribution either by pointing out any attending circumstance from the prosecution evidence and/or by tendering the defence evidence. In the present matter, as stated above, the appellant has not raised any plea in a statement u/s 313 of the Code of Criminal Procedure and has not brought up and has not pointed out any attending circumstance from the prosecution evidence, which may lead to the plausible inference of a possession of 150 ml. grams heroin with

the accused-appellant for personal consumption and not for sale or distribution and, therefore, the only fact on record is that the accused appellant is possessed of a small quantity. On going through the ratio in the case of Gaunter Edwin Kircher Vs. State of Goa, Secretariat Panji, Goa, the accused-appellant is required to point out the attending circumstances after raising a plea of personal consumption. However, as observed above, there is no plea and there is no material on record to hold that the accused-appellant possessed the contraband heroin for personal consumption and, therefore, the benefit of Section 27 of lesser punishment cannot be granted.

7. We further tried to scrutinize the matter with the help of the learned Counsel as to whether the additional statement of the accused-appellant u/s 313 of the Code of Criminal Procedure can be recorded allowing the accused-appellant to raise a plea of possession of a contraband heroin for personal consumption and not for sale or distribution. We find that Section 313 of the Code of Criminal Procedure applies for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him and, therefore Section 313 of the Code of Criminal Procedure requires to point out to the accused every incriminating circumstance against him. In the-present matter, there is no defect in the statement recorded u/s 313 of the Code of Criminal Procedure and, therefore, it is not a case where some incriminating circumstance, which is on record, has not been put up on Section 27 of the N.D.P.S. Act. We, therefore, hold that it was for the accused-appellant to raise the said plea by way of his defence and to rely in support of the said plea on the attending circumstances available from the prosecution evidence and/or to lead a defence evidence. We hold that in order to give the said benefit to the accused-appellant, the additional statement u/s 313 of the Code of Criminal Procedure cannot be recorded at an appellant stage and/or the matter cannot be remanded for recording the said statement. It is for the accused-appellant to avail of benefit of Section 27 of the N.D.P.S. Act on proving of the fact of small quantity being found with him to raise a plea of personal consumption and not for sale or distribution and further to discharge the burden proving the said fact by attending circumstances or by defence witness. We, therefore, hold that the benefit of Section 27 cannot be availed of by the accused-appellant or cannot be given to him only on proving of the fact that the accused-appellant was found with the small quantity of the contraband drug or substance in the absence of a specific plea being raised before the trial Court and thereafter the burden to prove the said plea is being discharged by the accused-appellant either by pointing out attending circumstances from the prosecution evidence or by leading the defence evidence and we, therefore, hold that the accused-appellant is not entitled to avail of any benefit of Section 27 of the N.D.P.S. Act. We reject the said submission made by the accused-appellant.

8. In the result, there is not substance in the appeal. Appeal fails and the same is dismissed.