

(2014) 07 BOM CK 0014
In the Bombay High Court
Case No : Criminal Appeal No. 361 of 1993

The State of Maharashtra

APPELLANT

Vs

Fatambi Noor Mohammed Pathan

RESPONDENT

Date of Decision : 17-07-2014

Acts Referred:

Bombay Police Act, 1951 — Section 37(1)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29,
42(1), 42(2)

Citation : (2014) ALLMR(Cri) 3921

Hon'ble Judges : V.K. Tahiramani, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : A.S. Pai, A.P.P, Advocate for the Appellant; Avinash B. Patil i/b S.M. Gorwadkar, Advocate for the Respondent

Judgement

V.K. Tahiramani, J.—The appellant-State of Maharashtra has preferred this appeal against the judgment and order dated 8.4.1993 passed by the learned Additional Sessions Judge, Malegaon, Nashik in Sessions Case No. 57 of 1991. By the said judgment and order, the learned Additional Sessions Judge acquitted the respondents-accused of the offence under Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "N.D.P.S. Act") and under Section 37(1) of the Bombay Police Act. Prosecution case, briefly stated, is as under:

PW-2 PSI Pathan was attached to Malegaon City Police Station. At the relevant time, he was working as Reader in the office of the Sub-Divisional Police Officer, Malegaon (SDPO). On 8.4.1991 he was in the office of the SDPO Shri. Sahay. At that time, PW-8 Police Inspector Rathod of Malegaon City Police Station was also present there. At that time, secret information was received that respondent No. 1 residing in Room Nos. 334 and 338 HUDCO colony as well as other respondents used to bring brown-sugar (heroin) from Dhulia and they used to sell it in Malegaon city. Then SDPO Shri. Sahay, Police Inspector Rathod and PW-2 PSI Pathan came to City Police Station. Panchas were called and raid was conducted

in the premises of respondent No. 1. They found respondent Nos. 1 and 3 were present in room No. 334. Brown-sugar was found in the room as well as on their person. Samples of brown-sugar were collected. In Room No. 338, Respondent No. 2-Anjum Pathan, Respondent No. 4-Liyakatkhani and Respondent No. 5-Fakira were found in the room. Brown-sugar was found in the said room as well as on their person. Samples of brown-sugar were taken in sealed cover. Brown-sugar came to be seized under panchnama. Thereafter, complaint came to be lodged. After completion of investigation, charge sheet came to be filed.

2. Charge came to be framed against the respondents-accused under sections 21 and 29 of the N.D.P.S. Act and under Section 37(1) of the Bombay Police Act. The respondents pleaded not guilty to the said charge and claimed to be tried. The defence of the respondents was that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge acquitted the respondents as stated in para 1 above. Hence, this appeal.

3. We have heard the learned A.P.P. for the Appellant-State and the learned advocate for the respondents. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, the judgment delivered by the learned Sessions Judge and the evidence on record, for the below mentioned reasons, we are of the opinion that the learned Sessions Judge has rightly acquitted the respondents-accused and the present appeal deserves to be dismissed.

4. To support the contention that the respondents deserve to be convicted, the prosecution is relying on the evidence of PW-2 PSI Pathan and PW-8 Rathod. PSI Pathan has stated that on 8.4.1991, he was present in the office of SDPO Shri. Sahay. At that time, PW-8 PI Rathod of Malegaon Police Station was also present there. At that time, secret information was received that all the respondents residing in Room Nos. 334 and 338 in HUDCO colony are selling brown-sugar in Malegaon City. PSI Pathan stated that thereafter he, SDPO Sahay and PI Rathod came to City Police Station. They called panchas. Thereafter raid was conducted on Room Nos. 334 and 338. They found respondent Nos. 1 and 3 were present in room 334. Brown-sugar was found in the room as well as on their person. Samples of brown-sugar were collected. In Room No. 338, Respondent No. 2-Anjum Pathan, Respondent No. 4-Liyakatkhani and Respondent No. 5-Fakira were found. Brown-sugar was found in the said room as well as on their person. Samples of brown-sugar were taken in sealed cover. Brown-sugar came to be seized under panchnama. The evidence of PW-8 PI Rathod is on similar lines as that of PW-2 PSI Pathan.

5. The learned advocate for the respondents submitted that it is the prosecution case that secret information was first received in the office of SDPO Shri. Sahay. He submitted that when information is received and raid is conducted pursuant to the said information, then Sections 42(1) and 42(2) of the N.D.P.S. Act have to be complied with. Section 42(1) of the Act inter alia states that when an officer has reason to believe from personal knowledge or information given by

any person. It has to be taken down in writing. Section 42(2) states that when any information is taken down in writing, a copy thereof shall be sent within 72 hours to the immediate official superior.

6. Mr. Patil submitted that there is no cogent and convincing evidence to show that the information was taken down in writing and thereafter, it was conveyed to the immediate official superior. In this connection, he has drawn our attention to the cross-examination of PW-2 PSI Pathan wherein PSI Pathan has stated that it is true that when secret information was received in the office, it was also received by SDPO Shri. Sahay. At that time, it was not reduced into writing. PSI Pathan has further stated that the information was oral and that information was not reduced into writing. This clearly shows non-compliance of Section 42(1) of the N.D.P.S. Act.

7. On going through the evidence, we also find that there is noncompliance of Section 42(2) of the N.D.P.S. Act. In this connection, we would like to refer to the evidence of PW-8 PI Rathod. PW-8 PI Rathod has stated that on 8.4.1991 he went to the office of Assistant Superintendent of Police Shri. Sahay for some official work. At that time, PSI Pathan (PW-2), SDPO/ASP Shri. Sahay and he was present. In his presence, information was received that all the respondents are dealing in "Gard" i.e. brown-sugar. He then came to the City Police Station along with SDPO Shri. Sahay and PSI Pathan. He then called for panchas. Then the information was entered into a diary and the information was submitted to the A.S.P. by wireless. Thus, it is seen that when the information was received in the office of SDPO Shri. Sahay, it was not reduced into writing. PW-8 PSI Rathod further states that thereafter information was transmitted to the ASP by wireless. Section 42(2) states that the information has to be conveyed to the immediate official superior. The evidence of PW-8 PI Rathod as well as PW-2 PSI Pathan shows that when secret information was received, SDPO Shri. Sahay was present. The rank of SDPO is equivalent to the rank of ASP. That means the information was received in the presence of SDPO Shri. Sahay, in such case, the information ought not to have been transmitted to the ASP by wireless as Shri. Sahay was present when the information was received, but it ought to have been sent to the immediate official superior of ASP Shri. Sahay. The immediate official superior of Shri. Sahay would be Deputy Superintendent of Police. This has clearly not been done in the present case. The evidence of PW-8 PI Rathod clearly shows that when he reached the office of ASP Shri. Sahay, ASP Shri. Sahay, PSI Pathan and informant were already present there. The informant gave information orally. The information was given to Shri. Sahay Saheb. They were all present there. Police Inspector PW-8 Rathod has clearly stated in his cross-examination in paragraph 8 that the information was not written down by ASP Shri. Sahay. This again shows noncompliance of Section 42(1) of the N.D.P.S. Act. The evidence of PI Rathod shows that the information was given to ASP Shri. Sahay, in which case, the copy of the information had to be given to the immediate official superior of ASP Shri. Sahay which has not been done in the present case. The trial Court has taken this fact into consideration and has

acquitted the respondents-accused.

8. It has been held by the Supreme Court in the case of State of Punjab Vs. Balbir Singh, that "provisions of Sections 42(1) and 42(2) are mandatory. In this view of the matter, search and seizure carried out in violation of the provisions of Sections 42(1) and 42(2) of the N.D.P.S. Act, would be illegal. In such case, the trial Court was right in holding that the conviction cannot be sustained. The view taken by the trial Court is a reasonable and possible view and hence, no case is made out for interference. In the result, the appeal is dismissed.