
(1989) 06 BOM CK 0009
In the Bombay High Court
Case No : Criminal Appeal No. 752 of 1987

Wilfred Joseph Dawood Lema

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 26-06-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 103, 165, 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 22, 27, 41, 42

Citation : (1990) CriLJ 1034 : (1990) 2 RCR(Criminal) 297

Hon'ble Judges : H.H. Kantharia, J;D.N. Mehta, J

Bench : Division Bench

Judgement

H.H. Kantharia, J.—This is an appeal, preferred from jail, by the appellant accused, (hereinafter referred to as "the appellant") challenging his conviction for being found in possession of narcotic drug viz. crude heroin which is popularly known as "smack" or "brown Sugar" or "gard-powder" u/s 8(c) read with Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act") and sentence of ten years rigorous imprisonment and a fine of Rs. 1,00,000/-, in default to undergo further rigorous imprisonment for two years inflicted on him by the learned Additional Sessions Judge, Greater Bombay, Bombay by his judgment and order dated June 2, 1987 in Sessions Case No. 381 of 1986.

2. The relevant facts giving rise to the appeal are as under :

On February 2, 1986, the staff of the Palton Road Police Station, dealing with the offences under the Act, were on patrolling duty. They arrived near the Bombay Dyeing building along the Heradia Road in Ballard Pier area at about 11.20 a.m. The appellant was noticed there smoking cigarette. On seeing the police he started running away but was apprehended within a short distance. His personal search taken in the presence of panch witnesses revealed that he was in possession of 15 plastic vials containing brown powder. One paper tube a piece of

foil used in cigarette packets, a coin of ten paise and cash of Rs. 5,037/- were the other items recovered from him. All these articles were packed, sealed and labelled on the spot and taken charge of by the police. The appellant and the seized articles were taken to Palton Road Police Station. Police Naik 5308 Vishnu Chavan lodged the first information report (Exh. 6). Out of the fifteen vials two were sent to Chemical Analyser, Suresh Kamtikar (P.W. 3), whose report (Exh. 11) showed that the brown powder was crude heroin.

3. In order, to prove its case the prosecution examined four witnesses at the trial Vishnu Chavan (P.W. 1) and Bhimdev Rathod (P.W. 4) were the members of the patrolling party who had apprehended and searched the appellant. Sayyed Ali Sayed Gafoor (P.W. 2) was the panch witness in whose presence the appellant was searched and articles found in his possession were taken charge of under a panchanama. And Suresh Kamtikar (P.W. 3) was the Assistant Chemical Analyser who had analysed the samples of the brown powder recovered from the appellant.

4. The defence of the appellant was that he is a Tanzanian national and was a sea-man and that on the day in question he was arrested at the Seamen's club and taken to the police station where his personal search was taken. His wallet containing money was taken away by the police and he was asked to go. He told the police that as his money was taken away he could not go. He was then put in a lock-up and beaten up and ever since thereafter he is in custody. He adduced no defence evidence.

5. Now, the evidence of Vishnu Chavan (P.W. 1) and Bhimdev Rathod (P.W. 4) who were the members of the patrolling party shows that they along with Police Naik 15403, Police Constable 9434, Police Constable 17930 and Head Constable 13126 left the Palton Road police station at about 10.45 a.m. on June 2, 1986 for patrolling as they were the special staff dealing with the offences under the Act. When they arrived at Ballard Pier near Bombay Dyeing building, Heradia Road, the appellant was seen sitting on the foot-path and smoking a cigarette. On seeing them, he started running away. They, however, surrounded and apprehended him. He could not give any satisfactory reply to the queries made with him. There was a plastic bag in his hand. Immediately, one member of the patrolling staff was sent to fetch panch witnesses in order to take search of the appellant. In the presence of the panch witnesses, the appellant was searched when it was revealed that in the plastic bag there were 15 small plastic bottles (vials) which contained brown powder. There were a tube made of paper, a silver paper of cigarette packet and a ten paise coin in his left hand. During his personal search an amount of Rs. 5,037/- was recovered. Since the powder in fifteen vials had a peculiar smell, the members of the patrolling party thought that it was the powder popularly known as "Gard". Therefore, two vials were separately packed and a packet of the remaining thirteen vials was separately made. The cash was also put in a separate packet. The paper tube, the cigarette packet paper, coin of ten paise were also kept in a separate packet. All the

packets were sealed and labelled on the spot with signatures of the panchas on them. Their evidence further shows that thereafter they came to the Palton Road Police Station along with the appellant and the articles. They also deposed that two out of the fifteen vials were sent to the Chemical Analyser in a sealed packet.

6. These two witnesses of the prosecution were cross-examined at length on behalf of the defence. But I find no material worth the name that is brought out in the cross-examination to shake their credibility. On the contrary, both of them reiterated in the cross-examination what they had stated in the examination-in-chief. The only grievance which Mr. Patil, learned Advocate appearing on behalf of the appellant, made against the evidence of these witnesses is that there was no reason for the appellant to have started running away on seeing the policemen in plain clothes and that these officers should have produced on record the station diary showing that they had left the police station for patrolling. He also made a grievance that the police officer who had drawn the panchanama was not examined and that the labels put on the packets of seized articles did not appear to have been written on the spot. Mr. Patil has of course made some legal submissions as to the failure on the part of investigating agency in not following some of the provisions of the Act with which I shall deal little later. Suffice here to say that there is no substance in any of the arguments of Mr. Patil about the evidence of the witnesses. About the first contention of Mr. Patil that there was no reason for the appellant to have started running away on seeing the policemen in plain clothes all that can be said is that it would depend upon the subjective attitude of the appellant as to how he must have felt on seeing five to six persons approaching him in a certain manner. The manner in which the appellant is said to have started running, as deposed by the witnesses, suggests that he had a guilty conscience and was apprehensive that he may be apprehended by the persons who were approaching him. Therefore, nothing can be said against the witnesses who deposed that on seeing them the appellant started running away. Whether or not, the station diary entry showing that the members of the patrolling party had left Palton Road Police Station is produced in the court, the fact remains that they had actually gone for patrolling which is also admitted by the appellant except saying that he was apprehended at the Seamen's club. And nothing turns of whether the station diary in question is shown to the court or not. About the labels being not written on the spot, it appears that after writing the labels the figures were filled in afterwards showing the crime report number etc. which would not weaken the prosecution case in any manner. It is no doubt true that the Police Naik 15403 who had written the panchnama was not examined but that also does not weaken the prosecution case because Police Sub-Inspector Rathod (P.W. 4) has deposed that he identified the handwriting of P.N. 15403.

7. This evidence gets a complete corroboration from an independent witness Cafoor (P.W. 2) who deposed that he is a businessman selling items of cutlery on the footpath near Bombay Dyeing building. He was at the relevant time at his stall when called to act as a panch. He deposed that after being called to act as a

panch witness, he went to the scene of offence where he was told that personal search of the appellant was to be taken and during the, search one plastic bag of white colour was found in the right hand of the appellant. The said bag contained fifteen small bottles which were also of white colour with red corks and the same contained some powder. He also deposed that a small pipe, a sheet of cigarette packet paper and a coin of ten paise were found in the left hand of the appellant. His evidence shows that from a leather wallet of the appellant which was found in the right side pant pocket, a sum of Rs. 5,037/- was recovered. He stated in clear terms the manner in which all the articles found with the appellant were taken charge of under a panchanama and that his signatures were obtained on the labels and the panchnama (Exh. 8). This witness" was also subjected to a searching Cross-examination for and on behalf of the appellant. However, I do not find that the witness has been in any way shaken. The criticism levelled against him by Mr. Patil is that he is a hawker doing business on the footpath and has admitted that he had no licence to carry on such business and on many occasions his goods were taken away by the police as well as the staff of the Bombay Municipal Corporation which shows that he was doing business at the mercy of the police and therefore was a pliable witness. I am not able to persuade myself to agree with the submission of Mr. Patil for the simple reason that merely because the witness is a licenceless hawker he does not lose his respectability and character of an independent witness. There is nothing on the record that he had reasons to oblige the police. He has in fact deposed that the police used to take away his goods which goes to show that he was not a friend of the police and had no reason to oblige them. On the contrary, he would react to the attitude of the police towards him and refuse to oblige them. It is no use condemning a witness who earns his honest livelihood by hawking the footpath only because he has no licence to do such business. There is no such universal rule that a poor man always tells lies and obliges the police, his problem of hawking without licence notwithstanding. It is pointed out that he stays at 77, Perusibaba Darga, Palton Road and, therefore, was likely to be friendly with the police. This argument is stated only to be rejected because all who stay on Palton Road cannot be friendly with Palton Road Police and that police cannot influence all of them. I see no reason to discard the evidence of this witness simply because he is a hawker doing business without a licence. There is nothing on the record to show that he is either a police agent or a person interested in obliging the police and has been acting as a professional panch. I have not the slightest hesitation in accepting his evidence as an independent and, respectable witness. And I strongly feel that in a case like the present one even if no independent witness but only police officers are examined to prove the prosecution case, that by itself will not be fatal to the prosecution but it would warrant a very very careful and cautious scrutiny of the evidence of police officers.

8. Suresh Kamtikar (P.W. 3), Assistant Chemical Analyser, Government of Maharashtra, is a formal witness. He had analysed two vials sent to him by the police and on analysing the same he found that the samples contained crude

heroin. He was not even cross-examined on behalf of the defence. It is pointed out that the quantity of the powder examined by him was very small. That, however, will not make any difference, for, it is not the ease of the appellant that he was found in possession of small quantity for his personal consumption and he should be punished u/s 27 of the Act. The appellant here is given the minimum punishment for being found in possession of brown sugar, small quantity apart.

9. Now I shall deal with the legal points raised by Mr. Patil. His first submission is that the police had not followed the procedure laid down in Section 50 of the Act inasmuch as they did not inform the appellant that he had a right to be searched in the presence of a Gazetted Officer or a Magistrate and that the appellant should have been searched in the presence of a Magistrate. Section 50 of the Act reads as under :-

"50. Conditions under which search of persons shall be conducted. - (1) when any officer duly authorised u/s 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female."

I do not think that there is any substance in the argument of Mr. Patil, for, the appellant would have been searched in the presence of the nearest Gazetted Officer or the nearest Magistrate only if he had so requested the police. It is not the case of the appellant that he had desired and had so expressed himself that he would like to be searched in the presence of a Gazetted Officer or a Magistrate. Therefore, the police was not bound to take him before a Gazetted Officer or a Magistrate for being searched. According to Mr. Patil since the appellant was a foreign national and knew little of English the police should have told him that he had a right u/s 50 to be searched in the presence of a Gazetted Officer or a Magistrate. I find no merit in the submission of Mr. Patil because there is nothing in section 50 of the Act to suggest that the police officer taking a search of a foreign national is duty bound to inform him that if he so desired he shall be searched in the presence of, a Gazetted Officer or a Magistrate. The appellant whose further statement u/s 313 of the Criminal Procedure Code was recorded in this court, seems to be understanding English but does not seem to be speaking English fluently. All that, however, makes no difference and there is

nothing wrong if the police had not told him that he had a right to be searched in the presence of a Gazetted Officer or a Magistrate because law does not cast any such obligation on the police.

10. Mr. Patil then urged that the police also did not observe the mandatory provisions of sections 52 and 57 of the Act inasmuch as the appellant was not informed the grounds of his arrest and the police who arrested him did not make a full report of the particulars of, such arrest or seizure to his immediate official superior within forty-eight hours.

11. Let us first deal with section 52, the relevant portion of which reads as under :

"52. Disposal of persons arrested and articles seized.- (1) Any officer arresting a person u/s 41, Section 42, Section 43 or Section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2)

(3)

(4)"

This provision of law envisages that an officer who arrests a person should, as early as possible, inform him the grounds of his arrest. In other words, the arrested person should immediately know why was he arrested. With regard to this aspect of the matter, this court recorded additional evidence of Police Sub-Inspector Rathod. He deposed that after arresting the appellant, he had informed him the grounds of his arrest. It is no doubt true that P.S.I. Rathod had made no note anywhere to the effect that he had so informed the appellant. It is also true that he had neither in the examination-in-chief nor in cross-examination in the trial court stated that he had performed this part of his duty. However, just because the investigating officer had not made any entry anywhere about the discharge of this particular duty, does not mean that his evidence is false. It is also pertinent to note that neither the public prosecutor nor the defence advocate appearing in the Sessions Court had asked this witness any question seeking clarification whether or not he had informed the grounds of his arrest to the appellant. Therefore omission on the part of the investigating officer to depose in the Sessions Court to that effect will not render him liable to be condemned as untruthful witness. If the defence had any grievance about the evidence of P.S.I. Rathod in this Court on this aspect of the matter, he should have been cross-examined to shake his credibility. Nothing of that sort was done. At any rate, there is no evidence even now on record to doubt the veracity of the witness in this regard. I am, therefore, inclined to accept the evidence of P.S.I. Rathod given in this Court.

12. That takes me to consider the other argument of Mr. Patil that the investigating officer had not made a full report to his immediate official superior about the arrest and search of and seizure from the appellant within forty-eight

hours and thus violated the provisions of Section 57 of the Act. Section 57 reads as under :

"57. Report of arrest and seizure.- Whenever any Person makes any arrest or seizure under this. Act, he shall within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior." The submission here is that there is nothing on the record to show that the investigating officer had made a full report to his immediate superior within forty-eight hours next after the arrest of the appellant or seizure of the articles. The additional evidence of the investigating officer recorded in this court shows that he had prepared a report of the arrest and search of the appellant and the seizure of articles from him and had submitted the same to the Senior Inspector and Assistant Commissioner of Police on 3-2-1986. The record shows that what P.S.I. Rathod had placed before the Senior Inspector of Palton Road Police Station and the Assistant Commissioner of Police was the Crime Report (Exh. A) on 3-2-1986. A perusal of the said Crime Report shows that all particulars as to the arrest and search of the appellant and the seizure of the articles from him were mentioned therein. The superior officers of P.S.I. Rathod had seen the said Crime Report and had put their signatures on it on 3-2-1986 and had even directed P.S.I. Rathod to carry out investigation in a certain manner. It is also impotent to note that the, first information report (Exh. 6) was also placed by P.S.I. Rathod before his immediate superiors and they seem to have gone through the same and signed it on 3-2-86. The first information report also gives all the details as to the arrest and search of the appellant and the seizure from him of the incriminating articles. In my judgment, in this manner, P.S.I. Rathod did comply with the provisions of section 57 of the Act or at any rate the said provisions of law were substantially complied with and therefore it cannot be said that the provisions of section 57 of the Act were violated by the investigating officer.

13. But assuming for the sake of argument that I am wrong in coming to a conclusion that the investigating officer did comply with the provisions of Sections 52 and 57 of the Act, even then this procedural irregularity will not vitiate the trial and the consequent conviction, of the appellant unless it is shown that prejudice was caused to him in his defence. It was held by the Supreme Court in *Khandu Sonu Dhobi and Another Vs. State of Maharashtra*, that :

"It is well established that where cognizance of a case has, in fact, been taken by the Court on a police report following investigation conducted in breach of provisions of S. 5A the result of the trial cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. The underlying reason for the above dictum is that an illegality committed in the course of investigation does not affect the competence and jurisdiction of the court to try the accused. Where the trial of the case has proceeded to termination, the invalidity of the preceding investigation would not vitiate the conviction of the accused as a result of the trial unless the illegality in the

investigation has caused prejudice to the accused."

In the case of Radhakishan Vs. State of U.P., it was observed by, the Supreme Court that (Para 5) :

"So far as the alleged illegality of the search is concerned it is sufficient to say that even assuming that the search was illegal the seizure of the articles is not vitiated. It may be that where the provisions of Sections 103 and 165, Code of criminal Procedure are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues".

Again, while dealing with a similar matter, a Division Bench of this Court (Goa) in Abdul Sattar v. State 1989 Cri LJ 430 ruled that (para 14) :

"The invalidity of a preceding investigation, illegality of a search or seizure does not vitiate the conviction of an accused unless such invalidity or illegality has caused prejudice to him."

It was further held in the said case that :-

"Even if the provisions of sections 41 to 58 of this Act are mandatory and were not complied with this procedural infirmity would not by itself vitiate the conviction of the accused when the recovery of narcotics from him is proved to be genuine and no prejudice could be said to have been caused to the accused by such infirmity."

I may point out here that Mr. Patil arguing the appeal on behalf of the appellant was unable to indicate even an iota of prejudice that could have been caused or was caused to the defence by the alleged procedural irregularity said to have been committed by the investigating agency. The position in law being what it is as enunciated by the Supreme Court and this Court, as stated above, I find no substance in the contentions raised by Mr. Patil.

14. Thus, reviewing and re-appreciating the entire evidence I am more than convinced that the prosecution has proved its case beyond all reasonable doubt against the appellant. He was, therefore, rightly convicted by the learned trial Judge but the conviction should have been u/s 8(c) read with section 21 of the Act which provides punishment for contravention in relation to manufactured drugs and preparations i.e. brown sugar in this case. The learned trial Judge made a minor error in convicting the appellant u/s 22 of the Act which provides punishment for contravention in relation to psychotropic substance and admittedly brown sugar is a narcotic drug and not a psychotropic substance.

15. In the result, the conviction of the appellant is confirmed but u/s 8(c) read with section 21 of the Act. The sentence of 10 years rigorous imprisonment and to pay We of Rs. 1,00,000/-, in default to further undergo rigorous imprisonment

for 2 years is confirmed. Appeal is accordingly dismissed.

16. Appeal dismissed.