
(2009) 09 BOM CK 0050
In the Bombay High Court
Case No : Criminal Appeal No. 47 of 2008

Yuvraj Tek Bahadur Khatri	Vs	APPELLANT
The State of Goa		RESPONDENT

Date of Decision : 15-09-2009

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 57, 8

Citation : (2009) 09 BOM CK 0050

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

Bench : Single Bench

Advocate : Marvin D'Souza, for the Appellant; C.A. Ferreira, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—The appellant herein is the accused who takes exception to the Judgment dated 15-9-2008, of the learned Special Judge, Mapusa, convicting and sentencing him u/s 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic substances Act, 1985(Act, for short).

2. The accused was charged and tried with the allegation that on 16-5-2007 at about 19.15 hours near G.M.C. bus stop at Bambolim, Goa, the accused was found in illegal possession of 1.120 kgs of charas which the accused could not account for, thereby committing an offence punishable u/s 8 r/w Section 20(b)(ii) (C) of the said Act.

3. The raid was conducted, as per the version of the prosecution, on the basis of prior information. In support of the case, prosecution examined seven witnesses including a lady P.S.I. Ms. Gupta who conducted the said raid.

4. On the other hand, the case of the accused was that a false case was filed against him and he was taken away at about 9.00 to 9.30 hours by one lady and three persons from a room belonging to one Dattaram Narve. In support of his case the accused examined himself, the said DW2/Dattaram Narve and one DW3/

Vishnu Kumar Rokaya who was working along with the accused as a helper in the business of the said Dattaram Narve of preparing and selling fast food items.

5. The learned Special Judge after assessing the evidence produced came to the conclusion that oral and documentary evidence produced by the prosecution was convincing and that there was nothing on record which could create a doubt regarding the presence of the accused at the said spot of the raid. The learned Special Judge further held that the version of the Raiding Officer i.e. P.S.I. Gupta was fully corroborated by independent witness i.e. PW3/Arun Signapurkar who was a Government servant, and, therefore it assumed importance. The learned Special Judge further held that the substance found with the accused was attached by following strict procedure of law, and was forwarded to the laboratory, where it was confirmed to be charas and the contemporaneous documents supported the case of the prosecution to the fullest extent. The learned Special Judge further held that minor discrepancies recorded during cross-examination of the witnesses would not erode the credibility of the said witnesses, and the depositions given by the witnesses were found to be reliable and convincing. As regards the plea taken by the accused, the learned Special Judge found it to be an after thought as it was taken at a late stage, and as such, would not affect the case of the prosecution, and, therefore proceeded to convict the accused under the said Section and sentenced the accused to suffer R.I for a period of ten years and fine of Rs. 1,00,000/-, and in default, directed the accused to undergo further imprisonment for a term of six months.

6. Shri Marvin D'Souza, the learned Counsel appearing on behalf of the accused has broadly submitted that the accused had taken a specific defence in this case that he was arrested from his residence and had proved the same by examining witnesses apart from the fact that the contradictions brought in the evidence of the prosecution witnesses would make the case of the prosecution unbelievable, and that of the accused probable. On the other hand, Shri C.A. Ferreira, the learned Public Prosecutor submits that the facts submitted by the defence witnesses show that they were not at all probable nor reliable in as much as no details as to the house number or the premises where the business was carried on were given either by the accused or the said witnesses. Learned Public Prosecutor further submits that charas were seized from the possession of the accused, and, thereafter they were forwarded to the laboratory where the seals were found to be intact and when the said charas were analyzed by the Senior Scientific Officer, namely PW1/Shri Kaissare they were confirmed to be the same. Learned Public Prosecutor further submits that the difference in weight found by the Scientific Officer of about 5 gms, would make no difference since otherwise he had found the seals intact.

7. Shri M. D'Souza, learned Counsel on behalf of the accused has tried to pick holes in the case of prosecution. Before we consider the submissions in that regard, it is necessary to refer to the narration of facts as given by PW7/PSI Gupta who at the relevant time was attached to ANC Police Station, Panaji,

where PW4/P.I. Shri Shirodkar was working as Officer-in-charge of the said Police Station.

8. As stated by PW7/P.S.I. Gupta, on 16-5-2007 at about 11.35 hours, she had received a specific and reliable information that one Nepali person by name Yuvraj aged about 25 years, thin built, fair complexion, wearing orange white and black checks shirt and black pant would be coming near G.M.C. bus stop, Bambolim at the National Highway No. 17 road to deliver drugs i.e., charas to his prospective customers between 16.00 hours to 16.15 hours, and that she reduced the said information in writing and copy of the same was forwarded by her to Dy. S.P., ANC, PW5/Shri Dinraj Govekar for his information, at his office. She identified her signature at point "B" on the forwarding letter, and also on the copy of the information produced at Exh.34, and thereafter she secured the presence of two panch witnesses, namely PW3/Arun Signapurkar and Shri Sagar Naik, by sending a request letter to the Mamlatdar, and also personally requested on phone to depute two employees from the Office of the Mamlatdar and requested them to act as panch witnesses who agreed accordingly. She further stated that both the said witnesses were the employees of the Office of the Mamlatdar and were working as Talathis, and they brought a letter from the Mamlatdar deputing them as witnesses which was produced earlier through PW4/P.I. Shirodkar as Exh.32. In fact, letter of request to the Mamlatdar was produced at Exh.31, and the memorandum of the Mamlatdar deputing the said two witnesses was produced at Exh.32.

9. As regards the above aspect, learned Counsel on behalf of the accused submits that the version of PW7/P.S.I. Gupta that she had received the prior information at 11.35 a.m. could not be believed because there is no mention to the information having been received at 11.35 a.m. in the letter Exh.34 sent to the PW5/Dy. S.P. Shri Govekar, and if she had received the said information at 11.35 a.m., PW3/Arun Signapurkar would not have reached the Police Station at around 11.30 hours or PW6/Constable Warrang would not have stated that the information was received at around 11.00 a.m. The statement of PW7/PSI Gupta is that she received the said information on 16-5-2007 at 11.35 hours and it can be seen that the same was recorded at the same time on the station diary at Exh.44. PW3/Arun Signapurkar has stated having gone to the Police Station at around 11.30 hours and so also PW6/Constable Warrang has stated that the information was received around 11.00 hours. To my mind, none of the two said statements made either by PW3/Arun Signapurkar or PW6/Constable Warrang can be considered as inconsistent with the statement made by PW7/PSI Gupta who should have better known the exact time she received the information and which she also recorded on the station diary. The timings given by the other two witnesses are by approximation, and in no way they conflict with the timing given by PW7/PSI Gupta, and on that count her version which is corroborated by a contemporaneous record cannot be rejected.

10. Learned Counsel further submits that the station diary Exh.44 shows that the

panch witnesses arrived at 15.05 hours but according to the panch witness himself he had gone to the Police Station around 11.30 hours, and since the panch witness has not stated that they had reached the Police Station at 15.05 hours the panch witness ought not to be believed. As far as this aspect is concerned, the panch witness PW3/Arun Signapurkar did state that a phone call was received by the Mamlatdar, Panaji from PW7/P.S.I. Gupta with a request to depute two employees as panch witnesses, and the Mamlatdar Shri Narurkar had requested him orally that he should attend the Police Station for acting as a witness, and accordingly he had gone to the Police Station at around 11.30 hours and met PW7/P.S.I. Gupta. Thereafter, he stated that P.S.I. Gupta told them that she had received the information about the Nepali person by name Yuvraj Katri who would be coming near Bambolim bus stop etc., and thereafter they proceeded to Bambolim in a Police jeep at about 15.30 hours and reached Bambolim at about 15.45 hours. PW3/Arun is silent on the letters -Exhs.31 and 32 which letters have otherwise been produced through the said PW4/P.I. Shirodkar and to which reference has also been made by PW7/P.S.I. Gupta. It is also submitted that the said two letters were produced only in the re-examination of the said P.I. Shirodkar, and after he had made certain statements in cross-examination that he could not recollect whether any written information was sent by him or whether the panchas had come along with the said memorandum. In my view only because PW3/Arun stated that he had been to the Police Station at around 11.30 hours is not sufficient to disbelieve him since he has also stated that they had left the Police Station at about 15.30 hours. It is more than probable that on telephonic call he had been to the Police Station at around 11.30 hours and had either continued to be there till 15.30 hours or had returned to his Office and gone back at 15.30 hours. There is nothing strange in the evidence of P.I. Shirodkar in case he initially did not recollect about the said two letters Exhs. 31 and 32 which have been produced, and it is quite probable also that the said memorandum was sent by the Mamlatdar through some other person other than the said PW3/Arun or PW3/Arun had forgotten about it. The said two letters Exhs.31 and 32 corroborate the version of PW4/P.I. Shirodkar and PW7/P.S.I. Gupta that in addition to a telephonic call a written requisition was also made and both the panch witnesses had attended the Police Station to go and witness the search. PW3/Arun has categorically stated that he had been to the Police Station at 11.30 hours and then left the Police Station at around 15.30 hours, and only because the said letters were not produced through him is no reason to doubt his veracity. Next, it is pointed out by learned defence Counsel that PW3/Arun referred to one Narulkar as the Mamlatdar but the memorandum Exh.32 has been signed by D. M. Redkar as Mamlatdar and PW7/PSI Gupta has stated that she did not remember the name of the Mamlatdar. Learned Counsel on behalf of the accused submits that in case PW7/PSI Gupta had phoned the Mamlatdar she would have remembered his name. The learned Public Prosecutor submits that there are several Mamlatdars in the Office of the Mamlatdar and one including in charge of Civil Supplies. Be that as it may, only because PW3/Arun stated that Mamlatdar Narulkar had requested him to attend

the Police Station or because PW4/PI Shirodkar stated that he did not know whether Mr. Narulkar or Mr. Redkar were working as Mamlatdars would not be sufficient to disbelieve the version of PW3/Arun more so because a written record-Exh.32 is produced and which shows that PW3/Arun was indeed deputed to act as a panch.

11. PW7/PSI Gupta further stated that she introduced both the panchas to the members of the raiding party which consisted of PW4/PI Shirodkar, lady Constable Ashwini Naik, Constable Parab, Constable Hari Naik, Constable Warrang, Constable Kankonkar, all of ANC Police Station, and she took along with her the seal of ANC Police, Panaji, Goa, with 3 Ashoka Emblem, Constable Parab carried the typewriter and Constable Hari carried the kit box and along with the members of the raiding party proceeded in a jeep to Bambolim at about 15.30 hours and reached there at about 15.45 hours, and parked the vehicles at about 100 meters away, hidden in the lane and alighted from the vehicle and went near the bus stop which is at the side of National Highway No. 17 and concealed their presence and about 16.05 hours they saw the Nepali person of stated description walking from National Highway No. 17 road towards Margao road with a blue colour polythene bag in his right hand and as the information tallied with the description of the said person, she informed the panchas and the members of the raiding party that that could be the person as per the information, and they surrounded him and she introduced herself and then the members of the raiding party and the said person gave his name as Yuvraj, s/o Tek Bahadur Khatri, r/o of Nepal, and then told him about the information she had received for which his personal search was required and the search of the bag and that he would be searched by P.I. Shirodkar, and before commencing the search she requested P.I. Shirodkar to give offer to the accused that he had a right to be searched in the presence of a Gazetted Officer or a Magistrate of his choice, and accordingly P.I. Shirodkar gave the offer to the accused which offer the accused declined. She stated that P.I. Shirodkar had told the accused that he had a right to search the raiding party members and the panchas which offer he declined.

12. Learned Counsel on behalf of the accused submits that PW7/P.S.I. Gupta was a lady P.S.I. and the accused person was a male, and therefore as a male could not be expected to search a female. Learned Counsel submits that the panchanama has been routinely written. Learned Public Prosecutor submits that this submission is hypothetical, and, in my view, it appears to be so. In case the accused had accepted the offer then PW7/P.S.I. Gupta certainly could have made arrangements for a female to search her to the satisfaction of the accused.

13. That the accused was informed that he had a right to be searched in the presence of a Gazetted Officer or a Magistrate is a fact which is otherwise corroborated by P.I. Shirodkar as well as by PW3/Arun.

14. PW7/P.S.I. Gupta stated further that the accused was asked to hand over the bag which he was holding which he did and which was of blue colour and contained white colour polythene bag, self knotted and on releasing the knot she

noticed that it contained bundles of black colour sticky substances in different shapes and sizes wrapped in transparent polythene packets which she suspected to be charas, and informed the panchas and the members of the raiding party. She further stated that the same were weighed and found to be 1.120 kgs. which bundles were put back in white colour polythene and in turn kept in blue colour polythene bag in which they were found initially. She further stated that the said blue colour bag was then folded and wrapped in cream colour cloth and tied with jute thread and sealed at five places, with a seal carried by her and a paper label disclosing the details and signatures of both the panchas, P.I. Shirodkar, herself and the accused and was then pasted on the cloth parcel which was marked as Exh.1. PW7/P.S.I. Gupta further stated that P.I. Shirodkar then conducted the personal search of the accused at her request during which one I.D card in the name of the accused with photograph was found which card was attached under panchanama for further investigations, and she told the accused that the possession of charas was illegal and he was liable to be arrested, and as the accused did not have any documents, the accused was taken in custody. She further stated that once again P.I. Shirodkar gave offer to the accused to search the raiding party members and the panchas but he declined. She further stated that the weighing, packing and sealing was done by Constable Hari Naik, as per her directions on the spot. She further stated that the panchanama commenced at 16.10 hours and concluded at 19.15 hours on the spot, and that a seizure report was prepared showing the details of the property seized and the copies of the seizure report and the panchanama were handed over to the accused under acknowledgement, and thereafter a letter addressed to the Director, F & DA, Panaji was prepared at the spot and the seal impression was affixed on it, and after completion of sealing formalities, the seal bearing impression Anti-Narcotic Cell, Panaji, Goa-3 was forwarded to Dy. S.P. ANC, along with a covering letter through PW6/Constable Warrang for safe custody, and thereafter they returned back to the Police Station where she lodged the complaint on behalf of the State against the accused and she handed over the attached property to P.I. Shirodkar along with the covering letter and then she forwarded the intimation u/s 57 of the said Act to higher authorities and after recording the statements and receiving the report, she filed a charge-sheet.

15. As far as the seal is concerned, PW6/Constable Warrang has confirmed that a letter addressed to F & DA, Panaji was prepared and the seal was affixed on it and after that, a letter was prepared for handing over the seal and the said letter was handed over to him along with the seal with instructions to hand it over to Dy S.P., and accordingly he left the spot on a private motor-cycle and handed over the seal and letter to PW5/Dy. S.P. Govekar and obtained an acknowledgement and then came back to the Police Station. The only discrepancy pointed out in his evidence is that he has referred to seven seals when otherwise it is the case of PW7/PSI Gupta that only five seals were put on the seized article. It could be that he was mistaking seven seals put on some other sample in some other case and it is not unusual for witnesses to mix up

facts. Only because he made a reference to seven seals instead of five is no ground to discard his evidence. PW5/Dy. S.P. Shri Govekar confirmed about receiving the intimation sent by PW7/PSI Gupta, the seal sent to him through Constable Warrang as well as the intimation u/s 57 of the Act, and, therefore it is but obvious that the seal was sent, soon after sealing of the seized article to Dy. S.P. Govekar to be retained by him.

16. As far as the seized article is concerned, P.I. Shirodkar has confirmed that the seized article was handed over to him under covering letter which he kept in his safe custody after making necessary entries in the muddemal register vide entry No. 7/07 and the same was forwarded to the office of the Scientific Assistant on 17-5-2007 during evening hours through Constable Morajkar, as he was busy in conducting another raid on 17-5-2007 during morning hours. He produced copy of the muddemal register to support his statement. PW2/Sushant Naik who works as a Scientific Assistant in the Office of SP. CID, CB has confirmed that he received a letter No. 1024 dated 16-5-2007 addressed to SP, Crime, CID and letter No. 1022 dated 16-5-07 addressed to the Director, F & DA, Panaji from P.S.I., ANC Police Station having specimen seal ANC, Panaji, Goa-3 with Ashoka Emblem and one sealed cloth parcel having five seals and marked as Exh.1 and stated to contain 1.120 kgs. of suspected charas in Crime No. 7/07. He confirmed that the seals on the cloth parcel were intact, readable and individually covered with a cello tape and tallied with the specimen seal provided on the letter addressed to the Director, F & DA, Panaji. He further stated that the sealed article was kept by him in his safe custody under lock and key and on 18-5-2007 vide letter No. 444 addressed to the Director, F & DA, Panaji, he personally handed over the said article in the Office of the Director.

17. The Senior Scientific Officer PW1/Shri Kaissare has confirmed having received on 18-5-2007 in the Office of the Directorate of F & DA, Panaji, the sealed cloth parcel marked as Exh.1 along with a covering letter, and letter bearing the specimen sealed impression. According to him, Exh.,1 was tied with jute thread both vertically and across and had a piece of paper pasted over it, and there were in all five seals on the cloth parcel and all were intact, individually covered with a cello tape and tallied with the specimen seal impression provided at Exh.8. He further stated that he opened the cloth parcel on 22-5-2007 and found to contain inside a blue colour polythene carry bag in turn containing another colourless transparent polythene carry bag containing a dark brown coloured substance in the form of five cylindrical shape pieces of different sizes and one squarish shape piece along with some small loose pieces of different shapes and sizes. He stated that the five cylindrical pieces were wrapped individually in two colourless heat sealed bags one inside the other and the squarish pieces along with loose pieces were placed in another. He deposed that the weight of the total substance with wrappings was 1.145 kgs. and the weight of total substance without wrappings was 1.008 kgs. He gave the details of various tests conducted by him and concluded that the substance analyzed by him from Exh.1 contained charas. He prepared his report which was taken on

record and marked Exh.9.

18. The evidence of PW4/P.I. Shirodkar, PW2/Sushant Naik and PW1/Kaissare leads only to one conclusion that from the time the article was seized from the possession of the accused and sealed, it had remained properly sealed and secured till it was opened by PW1/Kaissare and examined by him.

19. However, Shri D'Souza, the learned Counsel on behalf of the accused submits that the weight of the sample of the seized article as recorded by PW7/P.S.I. Gupta differs, in that PW7/P.S.I. Gupta had found it to be 1.120 kgs, while PW1/Kaissare found it to be 1.125 kgs. i.e. 5 gms. more, and, therefore the learned Counsel submits that the possibility that the seized article was tampered with cannot be ruled out. Learned Public Prosecutor submits that the difference in weight could be due to the fact that the seized article was weighed on different scales, and by PW1/Kaissare on an electronic scale the same being more sensitive in recording weight. The record does not show on what type of scale PW7/P.S.I. Gupta had weighed the seized article and the weight as found by PW1/Kaissare is 5 gms. more than earlier found by PW7/P.S.I. Gupta. This controversy was also raised before the learned Special Judge, and it was observed by him that the weighing machines used in the laboratory are normally sensitive and advanced, and, therefore there is possibility of some difference in weight as recorded by the Raiding Officer, and in the laboratory. The difference in weight is minimal i.e. only 5 gms. and it could be due to the fact that the seized article was weighed on different scales. The seized article had remained in proper custody from the time it was seized till the time it was examined and moreover the seals were found to be intact, and in this background much importance cannot be given to the said difference in weight so as to jump to the conclusion that the seized article was not free from being tampered with.

20. There are also some other discrepancies being pointed out as regards the colour of the seized article and the cloth used for packing and sealing the seized article. As regards the colour of the seized article most of the witnesses have referred to it as black while PW1/Kaissare has referred to it as dark brown. In my view, much importance cannot be given to this description as colour perceptions differ from person to person. As far as the cloth used to pack the seized article is concerned most of the witnesses have referred to it either as cream, off-white or white while PW3/Arjun had referred to it as pink. Here again, these discrepancies cannot be given too much of weight so as to otherwise discard the evidence of PW3/Arjun who is but a Government servant, and as such an independent witness to the said raid conducted by PW7/P.S.I. Gupta. PW3/Arjun in the heat of cross-examination might have referred to cream colour as pink. It is to be noted that cross-examination is not always a contest which is fair and among equals. He would have no reason, or at least no reason is being pointed out, why he should have deposed against the accused and for the prosecution. He certainly could not be termed as a pliable witness as contended on behalf of the accused. There are bound to be some discrepancies in the evidence of the witnesses in relation to

various aspects of the case, and only because there are some discrepancies that is no reason to discard their evidence.

21. The case of the prosecution particularly as narrated by PW7/P.S.I. Gupta and PW4/P.I. Shirodkar is sufficiently corroborated by PW3/Arun who is an independent panch witness and against that we have the case of the accused also supported by three witnesses who say that that the accused was arrested at about 9.00 a.m. from his residence. This version was not suggested to PW4/Shirodkar, and came to be suggested for the first time to PW6/Warrang and PW7/P.S.I. Gupta. The learned Special Judge has considered this version to be an afterthought, and, therefore will not affect the case of the prosecution. That apart, this version of the accused lacks in many details and is otherwise vaguely stated in that DW2/Dattaram Narve has not even given his house number nor the number of the structure or the store room which he claims is adjacent to his house and where he serves chinese fast food to the customers. It is also pointed out on behalf of the prosecution that DW2/Dattaram Narve in case he was having any such business he would have registered his establishment but has produced no document in that regard.

22. The discrepancies which have been pointed out on behalf of the accused and which has been dealt with herein above are certainly not sufficient to discard the case of the prosecution particularly as narrated by PW7/PSI Gupta and by PW4/P.I. Shirodkar, and which has been corroborated in all material particulars by PW3/Arun who is a Government servant and an independent witness. Considering that, the conviction of the accused per se, could not be faulted. Their evidence is consistent, convincing and plausible.

23. However, it is seen that the accused has been convicted and sentenced u/s 20(b)(ii)(C) of the said Act i.e. for having found in possession of charas in commercial quantity. However, it can be seen from the evidence of PW1/Kaissare that the substance found with the accused consisted of (a) five cylindrical shape pieces of different sizes, (b) one squarish shape piece (c) along with some small loose pieces. The evidence of PW1/Kaissare does not show that he had taken any representative sample from the said loose pieces. He has stated that he had taken a representative sample of 1 gram from five cylindrical pieces and one squarish piece. The net weight of the total substance is 1.008 kgs. No weight was individually taken of the said five cylindrical pieces, one squarish piece or small loose pieces. It is quite possible that the cylindrical pieces and the squarish shape pieces if weighed was not one kg. or more, and, therefore in my view, the benefit that the accused was found with intermediate quantity could not be ruled out and that benefit could be extended to the accused, and consequently the conviction from Section 20(b)(ii)(C) can be reduced to Section 20(b)(ii)(B) of the Act. Consequently, the period of imprisonment of ten years will also be required to be reduced. Learned Counsel on behalf of the accused submits that since it is held that the accused was found with intermediate quantity the period of imprisonment could extend from six months to ten years, and since the accused

has suffered detention for a period of two years and four months the same be considered as the substantive period undergone by the accused. I am not inclined to accept the said submission. In terms of Section 20(b)(ii)(B) punishment for intermediate quantity which is more than small and less than commercial is rigorous imprisonment for a term which may extend to ten years and with fine which may extend to Rs. 1,00,000/-.

24. Considering the quantity which the accused was found, in my opinion, a period of R.I of five years would meet the ends of justice, the payment of fine remaining the same as ordered by the learned Special Judge. In other words u/s 20(b)(ii)(B) the accused shall now undergo R.I for five years and pay a fine of Rs. 1,00,000/-, and in default undergo further R.I. for a period of six months.

25. Accordingly, but for modification of conviction and sentence the appeal is hereby dismissed.