

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 4 OF 2014**

Bim Lama
27 years of age,
son of Balbahadur Lama,
r/o Chayanam,
Tehsil Okhalduaga, Nepal.
Currently held at the Central Jail
at Aguada, Goa.

... **Appellant**

Versus

- 1] State of Goa through Public Prosecutor,
New High Court Building
Altinho, Panaji, Goa.
- 2] Narcotic Police Station at
Panaji Goa.

... **Respondents**

Ms. Prema Matkar, Advocate for the appellant under Legal
Aid.
Mr. S. R. Rivankar, Public Prosecutor for the respondents.

Coram : C. V. BHADANG, J.

Date : 13th July, 2015.

ORAL JUDGMENT :

By this appeal the appellant is challenging the judgment and order dated 3rd September, 2013 passed by the learned Special Judge (NDPS Court), Mapusa, in Special Criminal Case No.14/2009. By the impugned judgment, the appellant has been convicted for the offence punishable under Section 20 (b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the Act', for short), and has been sentenced to undergo rigorous imprisonment for ten years and to pay a

fine of Rs.1,00,000/- and, in default thereof to undergo further rigorous imprisonment for a period of one year. The period of detention already undergone, is directed to be set off.

2] The prosecution case may briefly stated thus,

That on 17th January, 2009 at about 14.20 hrs., P.S.I. Punaji Gawas (PW-6) then attached to the Anti Narcotic Cell had received a specific reliable information that a male, native from Nepal, aged 20 to 25 years, fair complexioned of medium built, wearing long sleeves black colour T-shirt (bearing No.42 on chest at left side), and brown colour corduroy pant, will be coming near Cafe Looda Shack, Bar and Restaurant at Anjuna, Bardez-Goa, along with Charas, to be delivered to the prospective customers. It was the specific information received that the said person would be so coming at about 14.00 hrs. to 14.30 hrs. PW-6 reduced the information into writing and the copy of the same was sent to the Dy. S. P., Anti Narcotic Cell, Mr. Naresh Mahamal. PW-6 Punaji Gawas then secured the presence of two panchas namely Nitesh Valvoikar (PW-3) and one Ramakant Dabholkar. PW-3 Nishant happens to be a clerk working in the Health Department. Thereafter, PW-6 along with the panchas and other police staff had proceeded towards Cafe Looda Shack, Bar and Restaurant at about 13.50 hrs. The jeep was parked at a distance about 100 mts. from Cafe Looda Shack. The

members of the raiding party then separated into two groups and they concealed their presence by dispersing around Cafe Looda Shack. At about 14.10 hrs. one person of the description as received earlier, was seen coming towards Cafe Looda Shack, on foot. He was carrying one black colour bag in his right hand. According to the prosecution the said person is none other than the appellant before the Court. On seeing this, PW-6 along with panchas and other members of the raiding party proceeded towards him. P.S.I. Punaji Gawas introduced himself and the other members of the raiding party to the appellant. On enquiry the appellant gave his name as Bim Lama, resident of Nepal. PW-6 P.S.I. Punaji Gawas then explained the appellant about the information received and his intention to carry out personal search / search of the bag, which the appellant was carrying. The appellant was also apprised about his right to be searched in the presence of a Gazetted Officer or a Magistrate. However, the appellant declined the offer. The search of the members of the raiding party was also offered to the appellant-accused, which was also declined. In the meantime, P.C. Vaibhav Mathkar brought the jeep to the raiding spot. It is the material prosecution case, that thereafter the search of the black colour polythene carry bag was carried out, in which two packets packed with brown colour sticky tape were found. On opening, one packet was found containing greenish black colour sticky substance in circular shape (comprised of 70 pieces)

wrapped in transparent polythene. In the second packet, which was packed with a brown colour sticky tape, five auto pressed polythene packets containing greenish black colour sticky substance of different sizes, were found. The 70 pieces found in one of the packets and also the five auto pressed polythene packets, were weighed and they were found 1.870 kgs. The substance found was put in the black colour polythene carry bag and thereafter they were put in the white colour cloth tied with a jute thread and labeled and sealed under the signature of the panchas and PW-6 Punaji Gawas. The appellant put his thumb impression on the same. Further, according to the prosecution cash of Rs.900/- was also found on personal search of the appellant, comprised in one currency note of Rs.500/- and four currency notes of Rs.100/- denomination each. The cash found was also sealed separately. A panchnama of the entire proceedings was drawn. After completion of the proceedings the raiding party returned to the police station. The muddemal was handed over to LHC Ashwini Desai PW-7. Thereafter, on the basis of complaint filed by PW-6, an offence at Crime No.2/2009 was registered under Section 20 (b) (ii) (C) of the Act and intimation under Section 57 of the Act and arrest card of the appellant were sent to the Dy. S. P. The Investigating Officer recorded the statements of the witnesses and a sketch map of the spot, Exh.37, was prepared. On completion of the investigation, a charge sheet came to be filed against the appellant for the offences as aforesaid.

3] The learned Special Court framed charge Exh.5 against the appellant for the offence under Section 8 (c) read with Section 20 (b) (ii) (C) of the Act, to which the appellant pleaded not guilty and claimed to be tried. The defence of the appellant is one of total denial and false implication.

4] At the trial the prosecution examined in all seven witnesses and produced contemporary record of the investigation. The appellant neither entered into the witness box, nor examined any defence witnesses.

5] The learned Special Court found that the prosecution has proved the possession of the contraband Charas with the appellant and quantity being commercial quantity, the appellant came be convicted under Section 20 (b) (ii) (C) of the Act and the appellant has been sentenced accordingly.

6] I have heard Miss. Prema Matkar, the learned counsel for the appellant and Mr. Rivankar, the learned Public Prosecutor for the respondent – State. With the assistance of the learned counsel, I have perused the evidence and also the impugned judgment.

7] It is submitted on behalf of the appellant that the prosecution has not examined any independent witness. With reference

to the evidence of PW-3 Nitesh, it is submitted that there are material discrepancies in his evidence, which renders his evidence unreliable. It is submitted that the prosecution has not examined the second panch Ramakand Dabolkar. The learned counsel has taken me through the evidence of PW-3 and PW-6 in order to point out that the evidence of this witness is contradictory on material aspects. It is submitted that there is no reliable evidence to show that in fact the services of PW-3 Nitesh were requisitioned as a panch. It is submitted that the movement order, which PW-3 has admitted, having been issued, is not produced on record. It is submitted that PW-6 has also admitted that there was no letter sent by him to Director of Health Services requisitioning the services of some employee to act as a panch. It is submitted that PW-6 has stated in his evidence that the letter was not so written as it was a holiday. It is therefore submitted that the evidence of PW-3 which would show that he came from office, would be rendered unreliable. The learned counsel would also submit that PW-6 has stated that PW-3 was contacted on his mobile number. It is submitted that PW-6 had no reason to be in possession of the mobile number of PW-3, in as much as PW-6 has admitted that he was not knowing any of the panchas prior to raid. It is also submitted that the evidence of PW-3 shows that the driver brought the jeep subsequently to the spot where the search was allegedly taken and there is no evidence to show that an offer was made to the

appellant, to take search of the jeep and the driver. This has caused prejudice to the appellant. It is therefore submitted that the conviction cannot be sustained. The learned counsel alternatively submitted that the appellant has no financial ability to pay the fine. It is submitted that the sentence of imprisonment of one year, in default of fine is too harsh and that may be appropriately reduced.

8] On the contrary, it is submitted by Mr. Rivankar, the learned Public Prosecutor that, so called discrepancy pointed out would not be material and it cannot strike at the veracity of the evidence of these witnesses. It is submitted that PW-3, who is a Clerk in the Health Department is an independent witness. It is submitted that the evidence of PW-3 Nitesh taken together with the evidence of PW-6, is sufficient to hold that the recovery of the contraband Charas from the appellant is proved. It is submitted that the Special Court has considered all these aspects and on appreciation of evidence, had rightly convicted the appellant. It is submitted that the examination of the second panch is not mandatory and the non examination of the second panch would have no bearing. It is submitted that the impugned judgment does not call for any interference.

9] I have considered the rival circumstances and the submissions made and I have carefully gone through the evidence of the

prosecution evidence and the impugned judgment. I do not find any case for interference in the conviction is made out.

10] The prosecution has examined PW-1 Mahesh Kaisare, who is a Senior Scientific Officer and PW-2 Sushant Naik, who is a Scientific Assistant. The report of the expert is thereon record, which would show that the contraband Charas was found in the samples sent for analysis and there is no challenge to this aspect. The submissions on behalf of the appellant are mainly based on the evidence of PW-3 and PW-6. Before advertng to the said submissions, it may be mentioned that PW-3, who was a clerk working in the Health Department would be an independent witness in this case, as there is nothing which has come in the cross-examination of this witness to show that he was either an interested witness or was a stock witness. It has come in the evidence of this witness that, this was the only time he had witnessed a raid. It may also be mentioned that the non-examination of the second panch would also be immaterial. It is trite that evidence has to be weighed and not counted. The Court has to see whether the evidence of the witness is such as would inspire confidence and if the evidence is found to be cogent and reliable, there is no necessity to multiply the evidence on same point. Thus, the non-examination of the second witness would not be material in this case.

11] It was pointed out on behalf of the appellant that PW-3 has stated that after the jeep and motorcycle were parked at a distance of about 100 mts. from Cafe Looda Shack, the members concealed their presence. However, the driver of the jeep remained in the jeep. This according to the counsel for the appellant runs counter to the evidence PW-6, wherein he has stated that the members of the raiding party first separated into two groups and thereafter the members concealed themselves. Secondly, it was submitted that although PW-3 speaks about some black colour sticky substance, the evidence of some other witness is about recovery of some greenish colour substance. I have considered these aspects. The so called discrepancy in which PW-3 has stated that the members of the raiding party had concealed their presence and the evidence of PW-6 that the members of the raiding party first separated into two groups and then the members concealed themselves around the Cafe Looda Shack, is not such as to discard the evidence of these witnesses. The PW-3 has stated about some black colour sticky substance while PW-5 P. C. Abhay Palekar has spoken about some greenish black colour sticky substance. Such a discrepancy would hardly be significant, when both the witnesses have spoken about some blackish substance except that PW-5 said that the substance was greenish blackish. We then have the evidence of PW-6 Punaji Gawas. He has stated that he had telephoned PW-3 on his mobile requesting him

to act as a panch witness. Before that he had also sent a letter to the Director of Health Services at Panaji. He was knowing the telephone number of Nitesh. It appears that PW-6 has been cross-examined on this aspect, in which he has stated that about 2 to 3 days prior to the date of incident, PW-3 Nitesh called at police station (may be in connection with some other incident) to act as a panch and letter was addressed to his office. At that time i.e. two to three days prior to the raid in the present case, Nitesh had given his mobile number to PW-6. At that time P.I. Ashish Shirodkar had given a letter to the office of Nitesh. The witness said that he is not havin`g the letter. He further admitted that he does not have any movement order of Nitesh. He stated that normally any person deputed, gives the movement order to the police station. Again, he states that office deputed the person without any movement order. He then stated that on the date of raid, he did not send any letter to the Department for deputing Nitesh, since it was a holiday being Saturday. PW-3 Nitesh has stated that he does not know whether the Director was requested by Anti Narcotic Cell, orally or in writing. He stated that whenever any employee is deputed for official work, movement order is issued. Even when he was deputed, the movement order was issued. However, he had not carried the movement order to the Court. He denied the suggestion, that as there was no movement order issued in this case, he was not in possession of the same. He has

stated that he had shown the movement order to PW-6 upon coming to the police station and PW-6 had endorsed his reporting time on the copy of the movement order. Even assuming that there is slight variance in the evidence of PW-3 and PW-6, on the question of issuance of movement order, in my considered view, if the evidence of these witnesses is seen, as a whole the discrepancy does not strike at the root of the veracity of these witnesses. Even the discrepancy about the time in which PW-3 has stated that the appellant was seen “around 14.10 hrs.” and PW-6 saying that the appellant was seen at 14.20 hrs., would hardly be a discrepancy to discard their evidence. It is trite that the evidence of any witness cannot be appreciated on mathematical precision. It has to be appreciated on broad human probabilities. Even otherwise PW-3 has stated that it was “around”, 14.10 hrs. and the same cannot be so discrepant with the version of PW-6 that the appellant was seen at 14.20 hrs.

12] It is true that, PW-6 has admitted that the driver was sitting in the jeep and after making the offer to the appellant, the jeep was called near the spot of panchanam and after jeep came to the spot, no offer was made to the appellant to search the jeep or its driver. At the outset, it needs to be mentioned that the submission is not on account of any non-compliance of Section 50 of the Act, as the same would only

apply to the case of personal search. It does appear that in the earlier part of the evidence PW-6 has stated that an offer was made to the appellant, to take personal search of the members of raiding party. However, the appellant had declined. It is apparent that the driver is not member of the raiding party. It is true that ideally a formal offer could have been made to the appellant. The question is whether this part of the evidence would be such as to strike at the very root of the acceptability of the raid and the recovery. Such an offer to search personally the members of raiding party is given to the appellant in order to obviate the defence raised about possibility, as also a possible defence of planting. In this case there is no planting. I have given my anxious consideration to this aspect and I am unable to persuade myself to hold that on this count, the evidence can be discarded. There is consistent evidence of the witnesses PW-3, PW-5 and PW-6 to show that the appellant was carrying the polythene bag from which the contraband Charas was recovered. No other ground of challenge is raised.

13] I have carefully gone through the judgment and I do not find any reason to interfere with the same, except the sentence imposed in default of fine. The appellant is all along (even in the trial) represented by a counsel appointed on State expense. Thus, the appellant may not be able to pay the fine of Rs.1,00,000/-. In that view of the matter,

the sentence in default of payment of fine can be appropriately modified and reduced to six months imprisonment.

14] In the result, the following order is passed :

- i) The appeal is partly allowed to the extent of modification of sentence in default of payment of fine only.
- ii) The conviction and sentence as awarded to the appellant is hereby confirmed subject to the only modification that in default of payment of fine, the appellant shall undergo rigorous imprisonment for six months.
- iii) Order accordingly.

C. V. BHADANG, J.

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