

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE**

CRIMINAL APPEAL NO.1115 OF 2012

Amol Maruti Karande
Age 22 years,
R/o.Kalaj, Tal.-Phalatan
District – Satara
(At present in Kolhapur
Central Prison)

... **Appellant**

V/s.

The State of Maharashtra
[Through Police Station Lonand,
Taluka Khandala, District Satara
(Cri.No.3 of 2011)]

... **Respondent**

.....

Mr.Vijay Killedar, Advocate for the Appellant
Ms.Anamika Malhotra, APP for the Respondent/State.

....

CORAM : ABHAY M. THIPSAY J.

DATED : 29TH JANUARY, 2015

JUDGMENT :

1. This appeal is directed against the Judgment and Order dated 12th January, 2012 passed by the learned Judge of the Special Court under the Narcotic Drugs and Psychotropic Substances Act in Sessions Case (NDPS) No. 3 of 2011 convicting the appellant, who was the sole accused therein, of an offence punishable under section 20(b) and (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (Hereinafter, for brevity, 'NDPS

Act') and sentencing him to suffer Rigorous Imprisonment for ten years and to pay a fine of Rs.1,00,000/-, in default to suffer Simple Imprisonment for six months.

2. The prosecution case as put forth before the trial Court was as follows :

On 14th February, 2011, Avinash Shilimkar (PW7) Assistant Police Inspector attached to Lonand Police Station received information that a person by name Amol Maruti Karande, - the appellant who is a Resident of Kalaj, had stored *ganja* in his house and was selling it unauthorizedly. API-Shilimkar made an entry in respect of the receipt of this information in the Station House Diary. He then reported the matter to Deputy Superintendent of Police – Jamdade and the Tahsildar – Gurav. Thereafter, Shilimkar ordered constable Shaikh to call a photographer. He also asked constable Kadam (PW1) to call two panchas. After making arrangement for proceeding to Kalaj, the Police Party and the panchas – Govind Mohite (PW2) and Dashrath Jathar (PW3) proceeded to Kalaj. Near the '*Datta Mandir*', they met Nayab Tahsildar Hirave. Hirave was also taken along with them by the Police Party and the panchas, who went ahead and parked the vehicle near the temple of God '*Khandoba*'. The Police Party and the panchas proceeded further by walking. They went to 'the bungalow of the accused' and from the western side of the bungalow went in front of the '*house situated on the rear side of the bungalow*'. There was a tin shed in front of the

house. One person was found sitting in the house. He was called outside and asked his name. He gave the same as Amol Maruti Karande. When the Police Party and the panchas entered inside the house, they found three gunny bags 'fully loaded by *ganja*', inside. There was also one half-loaded bag near the three bags. These bags were opened and found to be containing *ganja*. The photographs of the house from inside were taken. The *ganja* was weighed and was totally found to be weighed 104 kg. Samples of the *ganja* from all the four bags were taken. The packets containing samples were sealed on the spot and the four bags containing *ganja* were also sealed. Panchanama was drawn. Thereafter, the said Amol Maruti Karande- the appellant and the muddemal property was brought to the police station. Appropriate entries were made in the Station Diary. Popat Kadam (PW1) lodged FIR. A case was registered and further investigation was carried out. The seized substances supposed to be *ganja* was sent to the Chemical Analyzer for analysis. On receipt of report that it was *ganja*, a charge sheet came to be filed against the appellant (hereinafter referred to as, 'the accused') alleging commission of offences punishable under Section 22 and 27 of the NDPS Act read with Section 8 thereof.

3. The charge that came to be framed against the accused was, however, in respect of the offences punishable under section 20(b) and 22 read with Section 8(c) of the NDPS Act.

4. During the trial, the prosecution examined seven witnesses. The first is Popat Kadam – Police Head Constable attached to Lonand Police Station at the material time, who has been referred to earlier while narrating the prosecution case. The second witness – Govind Mohite and third witness – Dashrath Jathar are, as referred to earlier, acted as the panchas. The fourth witness Balasaheb Sutar is a carpenter, who runs a saw mill. He is the one who had weighed the *ganja* that came to be seized. The fifth witness – Rahid Sayyad and the sixth witness – Raju Tandale are photographers, whose assistance was taken in the course of investigation. As aforesaid, the seventh and last witness is API-Shilimkar.

5. I have heard Mr.Vijay Killedar, learned counsel for the appellant and Ms.Anamika Malhotra, Additional Public Prosecutor for the respondent/State. With their assistance, I have gone through the entire evidence adduced during the trial. I have also carefully gone through the impugned judgment.

6. Though a number of contentions about the truth of the prosecution case have been raised by the learned counsel for the appellant, the main contention that is advanced is that there was no evidence at all to show that the place from where the *ganja* in question came to be seized was belonging to the accused , or was in his possession.

7. In this case, the information that was received by PSI - Shilimkar was to the effect that 'one person by name Amol Maruti Karande, R/o.Kalaj had stored *ganja* illegally in his house and was selling it unauthorizedly'. This is seen from the evidence of Shilimkar (PW7) itself. The information received was duly communicated by Shilimkar to the Sub-Divisional Police officer vide Exh.18. It is clear from the perusal of Exh.18 that the address of the house of Amol Karande was not given by the informer. In other words, the information, that had been received, did not provide the address of the house where *ganja* had been illegally stored. The question that arises is, how, in that case, the police party reached exactly at that place. I have meticulously examined the evidence from this angle and I find that there is absolutely no evidence that any member of the police party had asked anyone about the house of Amol Karande. As a matter of fact, the panch witness - Govind Mohite (PW2) categorically stated that the police party raided the house of the accused *directly and without asking anybody*. It is nobody's case - and certainly does not appear in evidence - that the house of Amol Karande i.e. of the accused was already known to any member of the raiding party. That, there should be no information about the address of the bungalow where *ganja* had been illegally stored, but that, the police should still reach exactly at that place without making any inquiries with anyone and without even claiming that the accused and/or his bungalow was already known to them, cannot be accepted. This,

therefore, casts a doubt as to whether the things had indeed happened the way they have been spoken about by the members of the police party.

8. Admittedly, the bungalow in question did not belong to the accused. The bungalow belongs to somebody else. Popat Kadam (PW1) stated in his evidence that the bungalow is in the name of Bayadabai Agoni. Dashrath Jathar (PW3) - another panch, who was serving as Talathi in village Kalaj, at the material time, also stated that there was no land in the name of the accused at village Kalaj. Avinash Shilimkar (PW7), in his evidence, stated that the house, which was raided by the police, is, in the name of one Bhagat. Shilimkar has supported this by producing the extract of the record maintained by the Grampanchayat. Shilimkar also stated that the said Bhagat was the relative of the accused. Thus, admittedly, the place from where the ganja was seized does not belong to the accused, but to somebody else - Bhagat. The said Bhagat is neither an accused, nor has been examined as a witness.

9. The admitted position that the place from where the ganja was recovered belonged to somebody else and not the accused; and that the owner/occupier of the said is neither a witness, nor an accused, is itself fatal to the prosecution case.

10. There is substance in the contention advanced by the learned counsel for the appellant that when such is the case, the

accused cannot be said to have been found in possession of the *ganja* in question.

11. The learned counsel for the appellant has placed reliance on a decision of this Court in ***Antony Sauri Pilley v. State of Maharashtra***, reported in **1993 CRI.L.J. 1502** to support his contention that merely because the accused was found in a room containing *ganja*, liability could not be fastened upon him in the absence of proof of his exclusive possession of said premises. In that case, as appearing from the facts reflected in the judgment, the accused before this Court was allegedly found in possession of *ganja*. The case was that the members of the raiding party went to the hut of the accused, which was in *zopadpatti* and called out the accused, who emerged from the hut. The hut was, thereafter, searched and a gunny bag containing 4 kg. of *ganja* was found inside. The appellant before the High Court was convicted by the trial Court and had appealed to the High Court. This Court held that no evidence was brought before the Court in order to indicate that the premises, from where the gunny bag was allegedly recovered, belonged to the accused; and that, therefore, the accused could not be said to have been in possession of the said *ganja*.

12. In this case, not only there is no evidence that the premises in which *ganja* was allegedly found, belonged to the

accused, but there is positive evidence to show that it **did not** belong to the accused. Even otherwise, there is nothing to show that the accused was alone in the premises at the material time.

13. Under these circumstances, just because the accused was found to be sitting in the house at the time when the raiding party visited the same, he cannot be held to be in possession of the *ganja* that was allegedly found there. There is no evidence as to where the accused was staying. There is no evidence as to *when* the accused had entered inside the premises and since when he was there. There is no evidence to show that from *where, when* and *by whom* the *ganja* in question had been brought into the house. The fact that the owner of the house was not questioned about the *ganja* being there and at any rate, is neither a accused in the case nor has been examined as a witness, is strange and creates a serious doubt about the truth of the prosecution version.

14. Even if the discrepancies in the prosecution case are ignored and even if it is accepted that some *ganja* was found in a house belonging to one Bhagat, where the accused was sitting, still that, by itself, would not indicate that the accused was in possession of the said *ganja*.

15. I have carefully gone through the judgment given by the trial Judge. The learned Judge was pointed out some discrepancies in the evidence about minor aspects such as the

manner and time of calling the pancha witnesses, photographer, the person who was having the weight and measures, etc., but he was of the view that it need not be given much importance. It was also argued before the learned Judge that there was no evidence to show that the accused was residing in the said house and or was having conscious possession of the *ganja*. The learned Judge rejected this argument with the following reasoning :

“..... But the said argument cannot be accepted, because the ownership of the said house is not material, but the possession is material. P. w. Nos.1 to 5 and 7 are deposing on oath that when they went at that house, they found the accused sitting.If at all the said house is not in possession of the accused, then what purpose the accused had gone there and whey he was present there. These questions are not un-folded by taking the cross examination of all the witnesses.”

16. It was also argued before the learned Judge that the Investigating Officer had not investigated as to who was owner of the bungalow situated in front of that house. This argument was dealt with by the learned Judge by observing that “....said bungalow is not the scene of the offence”. It was also pointed out to the learned Judge that the Grampanchayat extract in respect of the said house was obtained, given in evidence (Exh.15) and that, it shows the names of the owners of the house as Rajendra and Maya. However, even this argument did not impress the trial Judge, who dealt with the same as follows :

“.....Here I would like to mention that said Grampanchayat Namuna No.15 is prepared for the fiscal purpose for assessing the Grampanchayat tax. it is not the conclusive proof to say that Rajendra and Maya only were the possessors of the said house. Therefore, this argument cannot be accepted.”

17. The reasoning of the learned trial Judge is not proper. It is not in accordance with law. In first place, the learned Judge overlooked the elementary principle that the burden of proving the guilt of the accused was on the prosecution and that, all the facts necessary to constitute the offence are necessarily required to be proved by the prosecution. Secondly, when the prosecution case was that the *ganja* was in a particular house, and when the accused was sought to be charged with the possession of the said *ganja*, it was necessary for the prosecution to have established that the said house was in possession of the accused. The observation of the learned Judge that, 'ownership of the house was not material, but the possession was material' is unfortunate and exhibits ignorance about the legal concept of possession. If a person other than owner is in possession of the immovable property, such fact would be required to be proved specifically. A casual visitor to the house certainly cannot be said to be in possession of the articles in the house and it was, in this context, that the other details would be required. These details were not required to be supplied by the accused as expected by the learned Judge, but were required to be supplied by the prosecution. The

learned Judge simply did not consider as to what prevented the Investigating Agency from investigating into the relevant aspects, such as, to whom the house belonged, who was in possession of the house, what the owner or occupier of the said house had to say in the context of the finding of the *ganja* in his house, etc. Similarly, the observations about the extract of Grampanchayat record 'not being conclusive proof of one Rajendra and one Maya and being possessors of the said house' are unfortunate, in as much as the accused was not required to conclusively establish that he was not possessing the house, where the *ganja* was allegedly found, but it was for the prosecution to establish that in spite of the Grampanchayat record showing to the contrary, the actual possession of the house was with the accused.

18. Not only the approach adopted by the learned Judge was clearly contrary to law, but he has also committed a impropriety by not following the law laid down by this Court in the aforesaid case of ***Antony Pilley*** (supra). The learned Judge observed that, 'to the instant case, this ratio is not applicable, because the house in which the accused was found sitting where the contravened articles like *ganja* were found'. If the facts in ***Antony's*** case as reflected from the judgment are examined, it becomes clear that in that case also the accused was found to be sitting in the hut, where the *ganja* had been found. Thus, though the principle laid down in the said case was squarely and

completely applicable to the facts of this case, the learned Judge refused to apply the said principle by simply saying that 'the ratio was not applicable', which is highly improper. The question as to how the police party reached exactly at the house, though the information was not with respect to the address where the house was located and *ganja* were allegedly found, did not bother the learned Judge. He did not still suspect that the things might not have happened the way it was being claimed by the prosecution witnesses.

19. The appreciation of the evidence, as done by the trial Court, is incorrect. This was a case where, certainly, there was a reasonable doubt about the guilt of the accused. The accused was entitled to have the benefit of said doubt and to be acquitted.

20. The Appeal is allowed.

21. The impugned judgment of conviction and the sentence imposed by the trial Court upon the appellant is set aside.

22. The appellant stands acquitted.

23. He be set at liberty forthwith, unless required to be detained in connection with some other case.

24. Fine, if paid, be refunded to the appellant.

(ABHAY M. THIPSAY J.)