

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 357 OF 2015

- 1] Issak Nabab Shah,
Age : 27 years,
R/o : Navnath Nagar,
Rahata, Taluka : Rahata,
District : Ahmednagar
- 2] Mohasin Shabbir Shaikh,
Age : 27 years, Occu.: Fabrication Work,
R/o : Ward No.2, Shrirampur,
Taluka : Shrirampur,
District : Ahmednagar

[At present both the appellants
are in Yeroda Central Prison,
Pune, Taluka and District : Pune

**.. Appellants
(Orig. Accused
Nos. 1 and 2)**

VERSUS

The State of Maharashtra,
Through the Police Inspector,
Rahata Police Station,
Rahata, Taluka : Rahata,
District : Ahmednagar

**.. Respondent
(Orig. Complainant)**

Mr. Rajendra S. Deshmukh, Advocate for the appellants
Mr. N.T. Bhagat, A.P.P. for the respondent/State

CORAM : M.T. JOSHI, J.
RESERVED ON : 17/02/2016
PRONOUNCED ON : 16/03/2016

JUDGMENT :

Heard both sides.

2. The present appellants, who are convicted by the learned Additional Sessions Judge cum Special Judge, Kopargaon vide judgment and order dated 20/03/2015 passed in Sessions Case No. 66 of 2012 for the offences punishable under section 8(c) and 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "**N.D.P.S. Act**") have preferred the present appeal.

. They were sentenced to suffer rigorous imprisonment for a period of 10 years each and to pay a fine of Rs.1,00,000/- on both the counts jointly.

3. The prosecution case is as under:-

. On 23/08/2012, PW7 - Police Inspector Suresh Varhade of Rahata Police Station received a secret information at 6:20 pm that a car of Honda City make bearing no. MH-03-J-949 would be proceeding from Nagar to Manmad road with ganja therein being carried by two persons for the purposes of sale. The secret informant also told

about the clothes worn by those persons. Accordingly, the Investigating Officer prepared the FIR and forwarded the same to the Sub Divisional Police Officer of Shrirampur.

. On the oral order of the Sub Divisional Police Officer, preparation for conducting the raid by calling two panch witnesses was made. Thereafter, the police party and the panch witnesses proceeded to the place and more particularly at Geet-Ganga hotel on the said road. At about 7:10 pm, they found that the said car was proceeding by the road. Accordingly, the police officials stopped the said vehicle by giving signal. The present appellants were seen in the car. The Investigating Officer disclosed his identity and the identity of the members of the raiding party and expressed his desire to search the car. Upon enquiry, the appellants told their names and addresses. The Investigating Officer told both the appellants that if the appellants may require, the search can be carried in presence of a Gazetted Officer and if

asked for, the said arrangement can be made.

. Accordingly, a notice in this regard in duplicate was prepared. Both the appellants expressed that there would be no need of search in presence of any Gazetted Officer and the Investigating Officer himself may carry the activity. They accordingly passed the endorsement on the notice and, thereafter, the search was carried.

. Appellant no.1 - Issak stated that the ganja was kept under the seat in a polythene bag. Accordingly, the ganja was recovered from that place. It was weighed and found to be 6 kg and 300 gm. The ganja was seized in the light of electric bulbs. Separate sample packets of 50 gm each were made. Those were sealed with the signatures of the panch witnesses according to the rules.

. The appellants came to be arrested and the samples were sent for chemical analysis, which proved to be ganja and the chargesheet came to be

filed.

4. Before the learned Special Judge, in all 7 witnesses were examined. PW1 - Police Head Constable - Laxman Bhosale, PW5 - Police Head Constable - Ashok Gaikwad are the members of the raiding party. PW3 - Police Head Constable Rajendra More had carried the written report sent by the Investigating Officer to the Sub Divisional Police Officer, Shrirampur, as detailed supra. PW4 - Ashok Dhobal is the panch witness of seizure of the ganja. PW6 - Sachin Malve is the eye witness to the incident while PW7 - Suresh Varhade is the Investigating Officer.

5. PW4 - Ashok Dhobal, the panch witness did not support the prosecution case, however, relying on the testimony of the other witnesses including PW6 - Sachin Malve - the eye witness, the learned Additional Sessions Judge cum Special Judge came to the conclusion that the appellants were carrying the contraband in their car and, therefore, the conviction, as detailed supra came to be recorded.

6. Mr. Rajendra Deshmukh, learned counsel for the appellants took me through the record. He submits that despite the independent panch witness refusing to support the prosecution case, the learned Special Judge wrongly relied on the prosecution case. He further submits that there is no compliance of the provisions of section 50 of the N.D.P.S. Act and the trial is therefore vitiated.

. He also commented on the deposition of the witnesses and more particularly eye witness PW6 – Sachin Malve, who was claimed as the eye witness. He submits that his evidence would show that he is not a trustworthy witness and, therefore, he wanted that the appeal be allowed.

7. On the other hand, learned A.P.P. submits that there was compliance of the provisions of section 50 of the N.D.P.S. Act. Merely because the panch witness has turned hostile, finding other reliable evidence, the learned Special Judge has rightly come to the conclusion that the prosecution

has proved its case beyond reasonable doubt.

8. On the basis of this material, following point arises for my determination:-

I) Whether the trial is vitiated ?

II) Whether the prosecution has proved that on 23/08/2012 at Rahata, the present appellants were found illegally carrying 6 kg and 300 gm of ganja from the car ?

My finding to the point no.I is in the negative, to point no.II is in the affirmative. The appeal is therefore dismissed for the reasons to follow.

R E A S O N S

9. It is the prosecution case that immediately after stopping of the car, the Investigating Officer orally as well as in writing communicated to the appellants that if they wished, their search would be carried in presence of a Gazetted Officer and the

necessary arrangement in this regard would be made. Both the appellants however communicated in writing that the presence of the Gazetted Officer is not required and the Investigating Officer himself may carry the search.

10. As regards the compliance of the provisions of section 50 of the N.D.P.S. Act, Mr. Deshmukh, learned counsel for the appellants relies on the ratio of **"Narayan S/o Vikram Pawale Vs. State of Maharashtra"** 2015 ALL MR (Cri.) 1895.

11. In that case, there was no record to show that offer as required under section 50 of the N.D.P.S. Act was given to the accused. There was also no independent evidence to corroborate the case.

12. In the present case, what we find is that there was no personal search of any of the appellant but there was search of the car. Therefore, the learned A.P.P. has rightly relied on the ratio of the judgment delivered by this Court on 10/07/2015

in Criminal Appeal No. 182 of 2015 (**Kashinath Raghunath Murambe Vs. The State of Maharashtra**).

. In that case taking survey of all the authorities on the issue, it was held that when no personal search of the accused is carried, and only the vehicle was searched, mandatory provisions of section 50 of the N.D.P.S. Act would not be applicable.

13. In that view of the matter, there is no force in the submission that the trial is vitiated due to the non-compliance of section 50 of the N.D.P.S. Act.

14. As regards the factual matrix, it is true that the panch witness has turned hostile and the second panch is not examined by the prosecution. However, besides the members of the raiding party, we have the statement of PW6 – Sachin Bhausaheb Malve, the eye witness to the incident.

. According to this witness, he was conducting hotel Shivsai at Pimpale shivar on the

Nagar – Manmad road i.e. the place of the searching of the car. In the evening of the incident, he saw that the police had detained one white colour vehicle of Honda make. He arrived at the spot and found that two persons were apprehended. The police had taken search of the car in his presence. During the search, one polythene bag containing green coloured leaves was found. The said bag was seized. He identified both the appellants in the Court as the inmates of the said car.

. During cross-examination, he admitted that during the relevant period his hotel Shivsai was closed for 15 days due to agricultural works. It can however be gathered from the cross-examination that his field is adjacent to the said hotel and at that time of detention of the car, he was working in his field with 2-3 persons. He was watering his chilli crop at that time. Therefore, merely because his hotel was closed during the relevant period, it would not mean that his presence at the spot was un-natural.

. During cross-examination, he candidly admitted that as he was running his hotel, he had contacts with police. This would not take us to dis-believe his entire version. There are certain inconsistencies between the statement of other prosecution witnesses. PW5-PHC-Ashok Gaikwad has deposed that balance was not available in the police station. Prosecution case however is that the scale was arranged. He has also deposed that there was a crowd of customers in the hotel Shivsai and there was dark when the party reached there.

. It can however be gathered that there are Shivsai as well as Geet-Ganga hotels in the vicinity and this would not take us to disbelieve the prosecution case in entirety though both these hotels are not visible from one point.

15. It was further argued by Mr. Deshmukh, learned counsel for the appellants that the muddemal clerk was not examined, ownership of the car is not investigated and the fact that the appellants did

not rush away from the spot would show that they were not aware that ganja was kept in the car.

16. It is to be noted that each and every witness is not required to be examined. The prosecution has fully proved that the present appellants were the occupants of the car and had conscious possession of the contraband as detailed supra.

17. Mr. Deshmukh, learned counsel for the appellants relied on the ratio of "**K. Mohanan Vs. State of Kerala 2000 (10) SCC 222.**"

18. In that case, there was no cogent evidence to show that the accused was having knowledge about the contents of the packet, which was transported by him. In that case, inter-alia, the panch witness was proved to be the professional panch witness and there was no independent witness to the incident. Further, the Crime branch on its own carried the investigation without any intimation to the regular police station. The accused was not the owner of

the vehicle. The evidence on record would show that the driver was not questioned about the ownership of the vehicle. It was not enquired as to whether he was working for the transport agency and no enquiry was further made to find out as to whether somebody have hired his services.

. Taking into consideration all these facts, it was observed that in absence of any evidence to show that the accused was having knowledge of the contents of the packet, he was acquitted.

19. In the present case, it is found that the Investigating Officer has made enquiry with the appellants and the appellant no.1, on his own gave the location of the bag and told about the contents of the same. Ratio of "**K. Mohanan Vs. State of Kerala**" (cited supra) therefore would not be applicable in the present case.

20. Similar is the ratio in the case of "**Mir Muradali Khurshid Ali Vs. The State of Maharashtra**" 2014 ALL MR (Cri.) 1558, relied on by

Mr. Deshmukh, learned counsel for the appellants.

21. In that view of the matter, the following order:-

22. Criminal Appeal is hereby dismissed.

23. The appellants being in jail, to serve the remainder of the sentences.

[M.T. JOSHI]
JUDGE

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