

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO. 257 OF 2001

Shaikh Baba s/o Shaikh Sandu,
age 40 years, occ. Labourer,
R/o Harsool, Aurangabad

...Appellant

VERSUS

The State of Maharashtra

...Respondent

Mr. U.P.Giri, advocate (appointed) for appellant
Mrs. R.K.Ladda, APP for Respondent/State

CORAM : INDIRA K. JAIN, J.

**DATE OF RESERVING
THE JUDGMENT : 13.04.2016
DATE OF PRONOUNCEMENT
OF JUDGMENT : 18.04.2016**

ORAL JUDGMENT :

This appeal takes an exception to the judgment and order, dated 13.6.2001 passed by the learned Special Judge (NDPS), Aurangabad in Special Case No. 309 of 1999. By the said judgment and order, original accused no.1 is convicted of the offence

punishable under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to suffer rigorous imprisonment for one year with fine of Rs.500/- and default clause.

2] For the sake of convenience, appellant is referred in his original status as an accused as he was referred before the Special Court.

3] The gist of prosecution case, as would be necessary to decide the present appeal, may be stated as under :-

(i) On 29.6.1999 work of construction was undertaken by Public Works Department through contractor in the premises of Central Jail, Aurangabad. Some outside labourers were engaged by the contractor to carry out the said work. Accused Shaikh Baba was one of the labourers engaged by the contractor for construction of work. Before the labourers could enter the gate of the jail, their search was taken by jail Hawaldars.

(ii) PW 3-Ramrao Uchegaonkar and PW 5-Motiram Rathod, Hawaldars were on duty at the southern gate of jail. They were taking search of the

workers who were to enter the jail through southern gate. Accused no.1 was to enter the jail through southern gate. When his turn came, Hawaldar Uchegaonkar suspected him. Accused was looking frightened. On inquiry, it was found by Hawaldar Uchegaonkar that accused was possessing ganja. He reported the same to Senior Jailor PW 8-Dnyanoba Gutte. Mr. Gutte personally interrogated the accused and immediately sent report in writing to City Chowk police station for necessary action.

(iii) PW 1-Murlidhar Bahule, Police Sub-Inspector was attached to City Chowk police station at the relevant time. On receipt of report from Mr. Gutte, P.S.I. Bahule informed his superior officer Assistant Commissioner of Police. He called Special Executive Magistrate PW 4-Mr. Shashikant Bombale for conducting raid.

(iv) Then P.S.I. Bahule along with PW 6-Syed Salimoddin, Panch, another panch Adil Khan, Police staff and Special Executive Magistrate visited Central Jail, Aurangabad. Accused was caught hold by Hawaldar Uchegaonkar. P.S.I. Bahule told the accused

purpose of the raid. Special Executive Magistrate Mr. Bombale offered search of the raiding party members to the accused and then personal search of accused was taken by the raiding party members. In search, ten packets of ganja were found with the accused. Measurement scale was brought from Jail canteen. Those packets were weighed. The weight of ganja was found 85 grams. A sample of 25 grams was taken. The packets were seized and sealed in the presence of panch witnesses on the spot. Thereafter along with seized ganja, accused P.S.I. Bahule came to City Chowk police station and lodged complaint on behalf of the State.

(v) On the basis of complaint, crime was registered against the accused. In the course of investigation, it was revealed that a convict Ramesh Jatwe who was undergoing life imprisonment in jail had given Rs.150/- to accused Shaikh Baba for purchase of ganja and Shaikh Baba purchased ganja from accused no.2 Habiba Begum. Accused no.2 was then arrested. Statements of witnesses were recorded. On completing investigation, charge sheet was submitted

to the Special Court.

4] Charge of the alleged offence was explained to accused vide Exh.13. They pleaded not guilty and claimed to be tried. Their defence was of total denial and false implication.

5] Prosecution examined in all eight witnesses in support of its case. On evaluation of evidence of prosecution witnesses, Trial Court came to the conclusion that charge was established against accused no.1 and convicted and sentenced the appellant as stated herein before. Hence this appeal.

6] Heard Shri U.P.Giri, learned counsel for the appellant and Smt. R.K.Ladda, learned Additional Public Prosecutor for the respondent/State. After giving anxious consideration to the facts and circumstances of the case, submissions made on behalf of the learned counsel for parties, reasonings recorded by the Trial Court and evidence on record, for the below mentioned reasons this Court is of the opinion that prosecution could prove the guilt of accused beyond reasonable doubt and no interference is warranted in the present appeal.

7] It is not in dispute that on 29.6.1999 work of construction was going on in Harsool Central Jail and some outside workers were engaged by the contractor to carry out the said work. Accused Shaikh Baba does not dispute his presence at the relevant time and the fact that he was one of the outside workers is also not seriously challenged. In order to establish possession of contraband i.e. ganja with the accused, prosecution placed reliance on the evidence of PW 3-Uchegaonkar, PW 5-Motiram Rathod, PW 8-Senior Jailor Gutte, PW 1-Complainant Bahule, PW 4-Special Executive Magistrate Mr. Bombale, PW 6-Syed Salimoddin and PW 7-Ramesh Jatwe.

8] It is categorically stated by Hawaldars Uchegaonkar and Rathod that on 29.6.1999 at about 9.00 a.m. when they were on duty at the southern gate of jail and taking search of workers who were to enter jail through southern gate, they found behaviour of accused Shaikh Baba suspicious and on inquiry ganja was found in his possession. It is stated by Hawaldar Uchegaonkar that he informed about the same to Senior Jailor PW 8-Mr. Gutte. It is stated by PW 8-Mr. Gutte that he personally verified the information and sent report in writing to City Chowk police station. The said report is at Exh. 38.

9] On receiving report Exh. 38, P.S.I. Bahule intimated Assistant Commissioner of Police. P.S.I. Bahule called Special Executive Magistrate and panch witnesses. Along with them, he came to the place of occurrence i.e. Central Jail. It appears from the evidence of P.S.I. Bahule, Special Executive Magistrate and panch witness Syed Salimoddin that search of the raiding party was offered to accused and then personal search of accused was taken. Evidence of Special Executive Magistrate Mr. Bombale makes it crystal clear that there was compliance of the mandatory provisions of search and seizure under Section 50 of the Narcotic Drugs and Psychotropic Substances Act and no infirmity was left in the procedure at the time of conducting raid. The evidence of complainant PSI Bahule, Special Executive Magistrate Mr. Bombale and panch Syed Salimoddin is consistent throughout and through their evidence prosecution could establish that on 29.6.1999 accused Shaikh Baba was found in possession of 85 grams of ganja without license or permit.

10] Commenting upon seizure panchanama (Exh. 28) and the evidence of panch witness, Special Executive Magistrate and complainant, learned counsel for appellant submitted that evidence on search and seizure is deficient as it does not fulfill the mandatory

requirements of Section 50 of the Narcotic Drugs and Psychotropic Substances Act and further in the absence of corroboration from independent witnesses reliance cannot be placed on the testimony of the Government officers. In support, the learned counsel for appellant placed reliance on the decision of this Court in Gangaram Rama Gundkar and another vs State of Maharashtra [2002 CriLJ 2578]. Para 17 of this judgment reads as follows : -

“17. It was observed in Chand Mohd. v. State of Punjab (1997 Cri LJ 810 at p. 812):

In the present case, there is no reliable and credible evidence on the record to show that ASI Banarsi Dass had made any genuine effort to call for independent public witnesses to witness the search of the appellant or the bag which he was allegedly carrying, particularly when he had ample time, means and opportunity to procure the presence of independent public witnesses to witness the search. This serious omission on the part of the Investigating Officer, in itself, is enough to cast a grave suspicion as regards the alleged recovery of the poppy husk from the possession of the appellant.

In the present case, the presence of independent witnesses was actually procured. Still they were not cited as panchas on the panchanama and were not examined as prosecution witnesses.

In Jayakrushna Parida v. State of Orissa (1997 Cri LJ 2179) (Orissa) certain provisions of NDPS Act were not followed and the order of conviction and sentence was passed on the uncorroborated evidence of the Investigating Officer which was illegal on vital aspects. For this reason, it

was held that the uncorroborated testimony of the Investigating Officer could not be accepted as it was in the present case also, as discussed already, the mandatory provisions were not complied with. The corroboration to the evidence of the Investigating Officer is sought to be made during the evidence of panch Bhaskar Pakhare who cannot be treated as a witness free from the influence of police. There is no corroboration from independent witnesses as stated above. The testimony of the Investigating Officer i.e. P.S.I. Kharode is, therefore, liable to be rejected on this count. “

11] This Court has gone through the authority referred by the learned counsel for the appellant. In this case raid was effected between sunset and sunrise. Contraband article ganja was not submitted immediately by raiding officer to the in charge officer of police station and it was retained by the raiding officer for few days. So it was held that possibility of tampering with seized article was not ruled out and in the absence of independent corroboration accused could not have been convicted.

12] In the case on hand, raid was conducted at 9.00 a.m. PW 6-Syed Salimoddin is an independent panch witness. He has no reason to grind an axe against the accused. Incident occurred at the entrance gate of Central Jail. The Jail officers, Special Executive

Magistrate and police officers all had no reason to implicate the accused. Their evidence is most natural, believable and consistent throughout. No omission or contradiction could be elicited in their cross-examination.

13] The only evidence which appears to be doubtful in the present case is of PW 7-Ramesh Jatwe who was a convict and undergoing life sentence in the same jail. He was examined to show that he has given Rs.150/- to accused Shaikh Baba for purchase of ganja and so accused brought ganja to give it to convict. PW 7-Jatwe does not support the prosecution to the extent that he has given Rs.150/- to the accused for purchase of ganja. However, on raid he states that on the day of incident he was called by police on the gate of jail and inquired from him whether he was acquainted with accused no.1. The evidence of PW 7-Jatwe is not helpful to prosecution to show that accused brought ganja to give it to PW 7-Jatwe. Even if the evidence of PW 7-Jatwe is kept out of consideration there is voluminous evidence on record on possession of ganja and relying upon the evidence of PW 1-complainant Bahule, PW 3-Uchegaonkar, PW 5-Motiram Rathod, PW 6-Syed Salimoddin and PW 8-Mr. Gutte, Trial Court has rightly concluded that guilt of the accused is proved beyond reasonable doubt.

14] Prosecution has also examined PW 2-Mr. Chandegaonkar, Assistant Chemical Analyser. The evidence of this witness shows that on 7.7.1999 a sample of ganja was received by him from City Chowk police station and after examining the said sample it was found that ganja was detected in the sample. Accordingly, Chemical Analyser's report (Exh.22) was issued. This report indicates that weight of sample was 22 grams. Referring to Chemical Analyser's report (Exh.22) learned counsel for appellant submitted that as per the evidence of complainant and other witnesses weight of sample was 25 grams which is negated by Chemical Analyser's report showing it as 22 grams and therefore, evidence of prosecution witnesses on sample is doubtful. This alleged deficiency of 3 grams has been explained by PW 2-Mr. Chandegaonkar in his evidence. He stated that at the time of seizure sample was wet and when it was sent to his office it was in dry condition. He also stated that since sample dried minor deficiency in the weight of sample is possible. The explanation given by an expert witness is found satisfactory. It removes the anomaly of 3 grams between the weight mentioned in Chemical Analyser's report and in panchanama. The evidence of PW 2-Chandegaonkar and Chemical Analyser's report (Exh.22) duly proved by him confirms that the packets which were seized from the accused were

containing ganja, a contraband article under the Narcotic Drugs and Psychotropic Substances Act.

15] Needless to state that once recovery of contraband is proved, onus shifts on the accused to show that he had no knowledge when he was carrying the contraband. No explanation is offered by accused in the present case. His defence is of simple denial which is not enough to rebut the presumption.

16] In the above circumstances, this Court finds that appeal has no substance and merits. Hence the following order.

ORDER

- (i) Criminal Appeal No. 257 of 2001 is dismissed.
- (ii) Bail bonds of the appellant/accused stand cancelled.
- (iii) Appellant shall surrender to his bail forthwith to serve out the remaining sentence.

[INDIRA K. JAIN, J.]

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