

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.226 OF 2017

IN

CRIMINAL APPEAL NO.43 OF 2017

KALLUMAL JAIDMAL KUKAREJA alias KALLU)
MAMA)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.M.M.Khokhawala, Advocate for the Applicant.

Ms.V.S.Mhaispurkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 29th MARCH 2017.

P.C. :

1 This is an application for suspension of sentence and releasing the applicant/ accused on bail during pendency of his appeal filed by him before this court. The applicant/ accused has been convicted of offence punishable under Section 8(c) read with 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (NDPS Act) and he has been sentenced to suffer

rigorous imprisonment for 10 years and to pay fine of Rs.1,00,000/-, in default to undergo simple imprisonment for 3 months.

2 I have heard the learned advocate appearing for the applicant/ accused at sufficient length. He argued that the applicant/ accused was on bail during pendency of the trial and he has not misused his liberty. He is an old man. It is further argued that evidence of PW7 PI. Shirke shows that endorsement of the applicant/ accused was taken on the consent form at Exhibit 41 in Hindi, whereas the consent form at exhibit 41 reflects that endorsement is in Marathi. It is further argued that evidence of the prosecution witnesses is discrepant and inconsistent. There is inconsistency regarding the spot of the incident as PW7 PI. Shirke had deposed that the incident took place in a populous commercial and residential area whereas informant PW3 Shivdas has deposed that there was no commercial or residential complex nearby the spot of the incident. PW5 Chavan has stated that upon being asked, whether he wants

to sign on the seized property, the applicant / accused refused, whereas PW7 PI. Shirke deposed that the applicant / accused signed on muddemal packets. It is further argued that though PW7 PI. Shirke has deposed that list of Magistrates and Gazetted Officers was with PW5 Chavan at the time of the raid, but PW5 Chavan has denied this fact and has stated that he was not having such list. It is further argued that seized contraband was weighed with the polythene bag and weight was just 110 gms. In every probability, if contraband was actually weighed, then it might have been less than 100 gms. It is argued that as per evidence of the Investigator, contraband was black in colour whereas, the Chemical Analysis has said it to be greenish brown in colour. The applicant / accused was produced along with contraband before the superior officer as seen from the evidence of PW3 Shivdas and that of PW5 Chavan. PW3 Shivdas has stated that applicant / accused was produced before DCP Shri Rao whereas PW5 Chavan has deposed that the applicant/ accused was produced before Sr.PI. Koyande. With this, the learned advocate for the applicant/ accused has prayed for releasing the applicant/ accused on bail.

3 The learned APP opposed the application by contending that mandatory provision of NDPS Act were followed and ultimately the applicant/ accused came to be convicted of the crime in question. She further argued that no question in cross-examination were put to the witness regarding weighing with the plastic bag.

4 I have carefully considered the rival submissions and also perused the record made available. Exhibit 41 is the option given to the applicant/ accused in view of his statutory right under Section 50 of the NDPS Act. PW7 P.I. Shirke has deposed that the applicant/ accused had given endorsement on that option in Hindi. Perusal of the option at Exhibit 41 shows that in Hindi language the applicant/ accused was made aware of his right to be searched in presence of the Magistrate or Gazetted Officer. PW5 Chavan has deposed about this. There is evidence of prosecution witness regarding giving option to the applicant/ accused regarding his statutory right to be searched in presence of

the Magistrate or Gazetted Officer. He has admitted that the applicant/ accused cannot read and write in Marathi language. In chief-examination this witness has deposed about making the applicant/ accused aware about his right. He has not stated in his chief-examination that endorsement on the option was written in the language used by the applicant/ accused. He has deposed that the applicant/ accused has declined to exercise his right to be searched in presence of either the Magistrate or the Gazetted Officer. In the wake of this evidence, the document at exhibit 41 will have to be viewed and appreciated. The document at exhibit 41 shows that the applicant/ accused was made aware of his right of being searched in presence of the Magistrate or the Gazetted Officer. Then, there is an endorsement made by PW5 Chavan in Marathi language. It is contemporaneous record made by PW5 Chavan about compliance of Section 50 of NDPS Act and refusal by the applicant/ accused to exercise this right. The endorsement in Marathi written by PW5 Chavan is to the effect that he had communicated the applicant/ accused his right to have searched himself in presence of the Magistrate or Gazetted Officer but the

applicant/ accused has refused to exercise his right of being searched before these authorities. Hence, this contemporaneous record cannot be considered to doubt the version of prosecution case only because PW7 P.I. Shirke has stated in her cross-examination that endorsement of the applicant/ accused on the option form at exhibit 41 was taken in Hindi language. Infact, PW7 P.I. Shirke was not concerned with explaining the right to the applicant/ accused and to record what the applicant/ accused says about it. This job was certainly done by PW5 Chavan. Moreover, one will have to keep in mind that the crime in question had allegedly took place in the year 2007 whereas prosecution witnesses were examined in the year 2012 and 2013. Some concession to lapse of memory will have to be given to them in the light of judgment of Hon'ble Apex Court in the matter of **Bharwada Bhoginbhai Hirjibhai V/s. State of Gujarath**¹.

5 In the light of the fact that *prima facie* it is seen that this statutory right of the applicant/ accused under Section 50 of the NDPS Act was complied by the prosecution, whether the

¹ AIR 1983 Supreme Court 753

members of the raiding team were having list of Magistrate or Gazetted Officers or not, pales into insignificance.

6 The contraband was seized and weighed along with the plastic pouch in which it was kept in the pocket of the pant of the applicant/ accused when he came to be apprehended near Byculla Railway Station. At this preliminary stage, it cannot be said that the weight of plastic pouch can be more than 10 gms. Ultimately, it is a matter of common knowledge that plastic pouch cannot weight 10 gms. Whether the area was populous or not is also not a decisive factor for commission of offence of conscious possession of the contraband. Similarly, producing the accused before the superior officer will have to be construed in the light of the fact that prosecution witnesses entered in the witness box after about five years from the incident. There is positive evidence of PW3 Shivdas on this aspect.

7 Nature of the crime is relevant consideration for releasing the applicant/ accused on bail. In the case in hand, the

applicant/ accused was found to be in possession of 110 gms of *charas* – a narcotic substance and considering this nature of offence which is already proved atleast by one court i.e. the trial court, I am not inclined to release the applicant/ accused on bail.

Therefore the order :

- i) The application is rejected.
- ii) Hearing of the appeal be expedited in the category of jail appeals.
- iii) The applicant/ accused is permitted to file private paper book, if he so desires.

(A. M. BADAR, J.)