

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 3 OF 2016**

Shri Caitan Fernandes, son of Mathais
Fernandes, Age 50 years, Indian National,
R/o H. No. 535, Bowtawado, Assagao,
Bardez, Goa. (Presently undergoing
sentence at Central Jail Colvale) Appellant

Versus

State, through P.P., High Court of Bombay at
Panaji-Goa. Respondent

Shri Jos Peter D'Souza with Shri Sergio De Santana Pinto,
Advocates for the Appellant.

Shri S.R. Rivankar, Public Prosecutor for the Respondent.

CORAM:- C.V. BHADANG, J.

DATE:- 5th APRIL 2018.

ORAL JUDGMENT:

This criminal appeal can be disposed of on a short
count, as the learned Counsel for the appellant has restricted
the submission, i.e. for conversion of the conviction under
Section 8(c), read with Section 22(c) of the Narcotic Drugs and
Psychotropic Substances Act, 1985 (Act, for short) to one under
Section 8(c), read with Section 22(b) of the said Act.

2. The brief facts necessary for the disposal of the
appeal may be stated thus:

That the appellant (accused no. 1) along with one Jehan Mistri, who was the accused no. 2 (since discharged), was chargesheeted for the offence punishable under Section 8(c), read with Section 22(c) of the Act, before the learned Special Judge at Mapusa in Special Criminal Case No. 5/2014.

According to the prosecution, in a raid conducted in the night intervening between 29.08.2013 and 30.08.2013 from 22:00 hours to 1:30 hours, in front of the Electricity Department office, near St. Michael's Church, Cumbarwado, Anjuna, Bardez, Goa, the appellant was found in illegal possession of 15.5393 grams of MDMA, which is a commercial quantity.

3. At the trial, the prosecution examined in all seven witnesses, including PW-2, Shri K.M. Varshney, who was working as the Deputy Director in CFSL, Hyderabad. PW-2, Shri K.M. Varshney, had analysed the substance, which was recovered from the personal search of the appellant and had found it to be MDMA. He proved the examination on report dated 19.11.2013 at Exhibit-C/38.

4. The learned Special Judge by the impugned judgment dated 02.11.2015, found the appellant guilty of the

offence under Section 8(c), read with Section 21(c) of the Act and sentenced him with rigorous imprisonment for a term of twelve years and to pay a fine of Rs.1,50,000/- and in default to suffer simple imprisonment for two years. The period of detention, already undergone, from 30.08.2013, has been set off under Section 428 of the Code of Criminal Procedure (Code, for short).

5. I have heard Shri D'Souza, the learned Counsel for the appellant and Shri Rivankar, the learned Public Prosecutor for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned judgment.

6. Shri D'Souza, the learned Counsel for the appellant has restricted his challenge and has submitted that the conviction under Section 22(c) of the Act, cannot be sustained in view of the evidence of PW-2. It is submitted that as per the Entry No. 134 of the schedule annexed to the Act, the commercial quantity in relation to MDMA is 10 grams and above. It is submitted that a small quantity is 0.5 grams and below. The learned Counsel has referred to the evidence of PW-2, Shri K.M. Varshney in which, PW-2 has stated that the

powder along with the autopress polythene cover, together weighed 15.5393 grams. It is submitted that PW-2 has not ascertained the weight of the powder independently i.e. without polythene cover. It is further submitted that as per PW-2, he has not carried out any quantitative analysis, due to non-availability of standard sample of known purity. It is submitted that there is reasonable doubt whether, the quantity seized from the appellant, is commercial quantity and the benefit of any such doubt, has to go to the appellant. He, therefore, submits that at the highest, the appellant could have been held guilty of having found in possession of variable quantity of the contraband, where the maximum punishment prescribed is ten years and with fine, which may extend to one lakh rupees. It is submitted that the appellant is in custody from 30.08.2013 i.e. for approximately for 4 years and 8 months. He therefore submits that the conviction may appropriately be modified and the appellant be let off on the imprisonment already undergone.

On behalf of the appellant, reliance is placed on the decision of the Rajasthan High Court in the case of **Ramavtar and Shambhulal and others Vs. State, 2011 CRI. L.J. 69**. It is submitted that in the said case, there was recovery of one kilogram of charas. The evidence was that the weight of the contraband was taken along with the gunny bag and as such, it

was found that the weight of the contraband charas, cannot be taken as one kilogram, which is a commercial quantity and in that view of the matter, the conviction was accordingly modified.

7. Shri Rivankar, the learned Public Prosecutor, in all fairness, did not dispute that the Chemical Analyser had failed to ascertain the weight of the contraband, separately i.e. without the polythene cover. He, therefore, submitted that this Court may pass appropriate order as may be deemed fit.

8. I have carefully considered the circumstances and the submissions made. As noticed earlier, the commercial quantity of MDMA as per Entry No. 134, is 10 grams and above, while the small quantity is upto 0.5 grams. Thus, anything in excess of 0.5 grams and lesser than 10 grams, would be a variable/intermediate quantity, which is governed by Section 22(b) of the Act. A perusal of the evidence of PW-2, Shri K.M. Varshney clearly shows that the Chemical Analyser had stated about the weight of Exhibit-I with polythene cover as 15.5393 grams. This aspect is also clear from the report of the Chemical Analyser at Exhibit-C/38, wherein the weight of the quantity with polythene cover is shown as 15.5393 grams.

There is nothing to show that at any point of time, the weight of the contraband, without the polythene cover was ascertained. It is evident that the weight of the polythene cover cannot be taken into consideration, while ascertaining the weight of the contraband to see whether, it is a case of possession of commercial quantity of contraband or not. It has also come in the evidence of PW-2, Shri K.M. Varshney that he has not carried out any quantitative analysis for MDMA. In such circumstances, the learned Counsel for the appellant appears to be right in contending that the appellant cannot be held guilty of having found in possession of commercial quantity of MDMA. However, the fact remains that according to PW-2, Shri K.M. Varshney the powder tested positive for MDMA. There is no evidence on record to show the weight of the polythene cover or to ascertain the weight of the powder.

9. In the case of **Ramavtar** (supra), the accused were found in possession of one kilogram of charas and the evidence of the Chemical Analyser was that the weight included the weight of the gunny bag. In such circumstances, it was found that the quantity found cannot be said to be a commercial quantity and the conviction was accordingly modified.

10. In my considered view, the benefit of doubt, as to the weight of the contraband, has to go to the appellant/accused. I, therefore, find that, at the highest, the appellant could be found guilty of having found in possession of variable quantity of MDMA. As indicated earlier, the learned Counsel for the appellant has restricted his submission for conversion of the conviction to one under Section 22(b) of the Act.

11. Before parting with the final order, it is necessary to mention that there was a lapse on the part of the Chemical Analyser in obtaining the weight of the contraband, without the polythene cover. No attempt was made by the prosecution to place on record the weight of the contraband separately. There was also no attempt made to get this clarified. Be that as it may, in the given circumstances and on the basis of limited submission advanced on behalf of the parties, I find that the conviction needs to be converted to the one under Section 22(b) of the Act. The offence under Section 22(b) of the Act is punishable with rigorous imprisonment for a term which may extend to 10 years and with fine. Considering the fact that the appellant is in custody from 30.08.2013 and has completed approximately four years and eight months of the punishment, the following order is passed:

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) The conviction of the Appellant for the offence punishable under Section 22(c) of the Narcotics Drugs & Psychotropic Substance Act, 1985 is modified to one under Section 22(b) of the said Act.
- (iii) The Appellant is sentenced to suffer imprisonment for the period already undergone and to pay a fine of Rs.50,000/- and in default to suffer imprisonment for three months.
- (iv) The Appellant shall be set at liberty, subject to deposit of the fine, if not required in connection with any other offence.
- (v) The Criminal Appeal is disposed of in the aforesaid terms.

C. V. BHADANG, J.