

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.662 OF 2011

1) RUDRABAHADUR DIKBAHADUR KHATRI)
2) TIKARAM NARBAHADUR THAPA)...APPELLANTS

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Megha Bajoria, Appointed Advocate for the Appellant.

Mr.P.H.Gaikwad-Patil, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 18th SEPTEMBER 2018

JUDGMENT :

1 By this appeal, appellants/accused are challenging the judgment and order dated 3rd May 2011 passed by the learned Special Judge for the Narcotic Drugs and Psychotropic Substances Act (NDPS Act hereinafter), Greater Mumbai, in NDPS Special Case No.96 of 2010, thereby convicting both appellants/accused

of offences punishable under Section 8(c) read with 20(b)(ii)(c) of NDPS Act and sentencing them to suffer rigorous imprisonment for 10 years and to pay fine of Rs.1 lakh, in default to undergo rigorous imprisonment for 2 years, by each of them.

2 Facts leading to the prosecution of appellants/accused can be summarized thus :

- (a) On 14th January 2010 PW5 Mohd. Yakub Mulla, Assistant Police Inspector, attached to Anti Narcotic Cell of Ghatkopar received information that two persons (appellants) are coming near Clipwala Compound, Andheri, Mumbai, for selling *charas* to their customers in between 2.00 and 2.30 p.m. That information came to be recorded in the Information Register as well as the Station Diary. It was communicated to superior officers telephonically. It was also communicated to PW4 Vilas Chavan, Police Inspector, Unit In-charge of Ghatkopar Anti Narcotic Cell. PW5 Mohd. Yakub Mulla, Assistant Police Inspector, was then directed to organize the raid under supervision of PW4 Vilas Chavan,

Police Inspector. Accordingly, two panch witnesses including PW6 Salim Shaikh were summoned. They were informed about purpose of summoning them. Panch witnesses took search of police officers as well as the police vehicle. PW5 Mohd. Yakub Mulla, Assistant Police Inspector, took search of panch witnesses. Nothing objectionable was found in the search so conducted. Accordingly, pre-trap panchnama was prepared and by official vehicles, members of the raiding party including the panch witnesses proceeded to Clipwala compound, Andheri, Mumbai. The trap was arranged under supervision of PW4 Vilas Chavan, Police Inspector.

- (b) According to the prosecution case, at about 14.20 hours, both appellants/accused came at the Clipwala compound. Their movements were found suspicious. Each of them was carrying plastic bag with him. Members of the raiding team including PW4 Vilas Chavan, Police Inspector, encircled both appellants/accused. They were made aware about the

information received by the raiding party. Both the appellants/accused were apprised about their right as envisaged by Section 50 of the NDPS Act separately. The right of getting searched in presence of the Gazetted Officer or the Magistrate was informed to them orally as well as in writing. Both the appellants/accused declined to exercise such right.

- (c) According to the prosecution case, PW4 Vilas Chavan, Police Inspector, instructed PW5 Mohd. Yakub Mulla, Assistant Police Inspector, to take plastic bags from hands of appellant/accused no.1 Rudrabahadur Khatri. It was opened. It was found to be containing greenish brown substance in the form of a slab. It was tested by the field testing kit and was found positive for presence of *charas*. That substance was found weighing 1 kg 250 gms. Two samples each weighing 25 gms were drawn from the said bulk quantity. Those samples marked as “A1” and “A2” along with the bulk quantity marked as “A” came to be

packed, sealed and labelled separately. Thereafter, plastic bag carried by appellant /accused no.2 Tikaram Thapa was taken by PW5 Mohd. Yakub Mulla, Assistant Police Inspector. It was also found to be containing greenish brown substance in the form of slab. It was tested by the field testing kit and was found to be positive for presence of *charas*. It was weighed and found to be weighing 1 kg 250 gms. Two samples each of 25 gms were drawn and marked as "B1" and "B2". Bulk was marked as "B". Those samples and bulk were packed, sealed and labelled separately. Signatures of both appellants/accused were taken on packets of sealed contraband. Seal of the Anti Narcotic Bureau was also affixed thereon. Spot Panchnama came to be drawn and a copy of that panchnama was supplied to both appellants/accused.

- (d) The First Information Report (FIR) in respect of the incident came to be lodged by PW1 Kashaba Galande, Police Naik, and accordingly Crime No.24 of 2010 came to be registered.

Seized muddemal property came to be deposited in the godown of the Anti Narcotic Cell and the same was received by PW2 Dinkar Desai, Police Naik – Store Keeper. Special report was then submitted by PW5 Mohd. Yakub Mulla, Assistant Police Inspector to PW4 Vilas Chavan, Police Inspector and copies thereof were sent to the superior offices. Sample packets of seized muddemal bearing numbers “A1” and “B1” were carried by PW7 Gangadhar Sawant, Police Constable, to the Forensic Science Laboratory, Kalina, for chemical analysis. The chemical analysis of the seized samples was conducted by PW3 Sandeep Chetti, Scientific Officer. The same was found to be *charas*. On completion of routine investigation, appellants/accused were charge-sheeted.

- (e) The learned Special Judge framed Charge for offences punishable under Sections 8(c) read with 20(b)(ii)(c) and under Section 29 of the NDPS Act against appellants /accused. They pleaded not guilty and claimed trial.

- (f) In order to bring home the guilt to appellants/accused, the prosecution has examined in all seven witnesses and relied on contemporaneous documentary evidence. Defence of appellants/accused was that of total denial.
- (g) After hearing the parties, the learned trial court was pleased to convict appellants/accused of the offence punishable under Section 8(c) read with 20(b)(ii)(c) of the NDPS Act and they both came to be sentenced as indicated in the opening paragraph of this judgment.

3 I have heard Ms.Megha Bajoria, the learned advocate appointed to represent appellants/accused at the costs of the State. She vehemently argued that the entire evidence adduced by the prosecution is discrepant and untrustworthy. Presence of the prosecution witnesses is shown at the Anti Narcotic Cell Store and at other places at the same point of time. The search and seizure was not effected by following the mandatory provisions of

law. There are material contradictions in the evidence of official witnesses and documentary evidence. Appellants/accused are therefore entitled for acquittal. As against this, the learned APP supported the impugned judgment and order and the resultant sentence.

4 I have carefully considered the rival submissions and also perused the record and proceedings including the oral as well as documentary evidence adduced by the prosecution.

5 Now let us examine whether the prosecution has proved that each appellant/accused was in conscious possession of *charas* – a narcotic drug in commercial quantity, in contravention of provisions of NDPS Act and Rules made thereunder. In order to demonstrate the fact that each of the appellant/accused was found in possession of 1 kg 250 gms of *charas* at about 2.10 p.m. of 14th January 2010, at footpath near Clipwala compound, Mumbai, the prosecution has heavily relied on evidence of PW5 Mohd. Yakub Mulla, Assistant Police Inspector, PW4 Vilas Chavan,

Police Inspector, PW1 Kashaba Galande, Police Naik and the First Informant as well as panch witness PW6 Salim Shaikh. Congruous evidence of PW5 Mohd. Yakub Mulla, Assistant Police Inspector, PW4 Vilas Chavan, Police Inspector and PW1 Kashaba Galande, Police Naik, shows that PW5 Mohd.Yakub Mulla, Assistant Police Inspector, had received information on 14th January 2010 to the effect that two persons named as Rudrabahadur Khatri and Tikaram Thapa (appellants) are coming near Clipwala compound, Mumbai, for selling *charas* brought from Nepal. It is in evidence of PW5 Mohd.Yakub Mulla, Assistant Police Inspector, that he got that information recorded in the Information Register as well as the Station Diary. Contemporaneous documents i.e. extract of the Information Register is at Exhibit 39 where as the Station Diary entry in respect of receipt of information regarding possession of *charas* by appellants/accused their apprehended arrival at Clipwala compound is at Exhibit 40. PW5 Mohd.Yakub Mulla, Assistant Police Inspector, has categorically deposed that on receipt of secret information regarding possession of the contraband by

appellants/accused, he had given that information to PW4 Vilas Chavan, Police Inspector and Unit In-charge and had also communicated the information telephonically to the Deputy Commissioner of Police and Assistant Commissioner of Police as well as the Senior Police Inspector of the Anti Narcotic Cell. This part of evidence of PW5 Mohd.Yakub Mulla, Assistant Police Inspector, is duly corroborated by evidence of PW4 Vilas Chavan, Police Inspector and PW1 Kashaba Galande, Police Naik. Evidence on this aspect adduced by PW5 Mohd.Yakub Mulla, Assistant Police Inspector and which is corroborated by contemporaneous documentary evidence is not at all shattered in the cross-examination of this witness.

6 It is seen from evidence of PW4 Vilas Chavan, Police Inspector, that on receipt of secret information regarding possession of the contraband, he had secured presence of two panch witnesses including PW6 Salim Shaikh for laying down the trap and apprehending the accused persons. PW6 Salim Shaikh has corroborated this version of PW4 Vilas Chavan, Police

Inspector, and has stated that in pursuant to the request of the police, he assisted the police for effecting raid as panch witness. Evidence of PW6 Salim Shaikh, panch witness, coupled with evidence of official witnesses goes to show that they had taken personal search of each other and had not found anything incriminating. Similarly, it is also seen from the evidence on record that even vehicles which were to be used for effecting raid by laying down the trap were also searched in presence of PW6 Salim Shaikh, panch witness and nothing incriminating was found in both the vehicles. The proceedings were recorded in pre-trap panchnama Exhibit 46 which is again corroborating the evidence of panch witness as well as official witnesses.

7 It has come in evidence of PW1 Kashaba Galande - Police Naik, PW4 Vilas Chavan - Police Inspector, PW5 Mohd.Yakub Mulla - Assistant Police Inspector and PW6 Salim Shaikh – panch witness that after conducting necessary formalities and by taking all necessary articles including seal and field testing kit with them, the raiding party proceeded towards the spot as per

the information received by PW5 Mohd.Yakub Mulla, Assistant Police Inspector. There, as seen from the evidence on record, a trap was laid and after sometime and precisely at about 2.10 p.m. of 14th January 2010, both appellants/accused came to the footpath near Clipwala compound. They were carrying plastic bags in their hands. The official witnesses as well as the panch witnesses testified the fact that both appellants/accused were encircled by the team of Anti Narcotic Cell and panch witnesses. PW4 Vilas Chavan, Police Inspector, disclosed his identity to appellants/accused persons and the purpose of accosting them was also disclosed to them by divulging the secret information received by the Anti Narcotic Cell. Thereafter, as deposed by PW4 Vilas Chavan, Police Inspector, he explained both appellants/accused about their right as envisaged by Section 50 of the NDPS Act to get themselves searched in presence of the Magistrate or Gazetted Officer. However, after appraisal of the right under Section 50 of the NDPS Act, both appellants/accused declined to exercise that right. This part of evidence of PW4 Vilas Chavan, Police Inspector, is gaining corroboration from evidence

of another eye witness PW5 Mohd.Yakub Mulla, Assistant Police Inspector. PW1 Kashaba Galande, Police Naik, has also spoken about making appellants/accused aware about their statutory right by PW4 Vilas Chavan, Police Inspector. Similar is the evidence of PW6 Salim Shaikh, panch witness. This evidence adduced by the prosecution is gaining corroboration from the documentary evidence in the form of intimation letters Exhibits 34 and 35 by which right of the accused persons under Section 50 of the NDPS Act came to be conveyed to both appellants/accused persons.

8 It has come in evidence of prosecution witnesses namely PW4 Vilas Chavan - Police Inspector, PW5 Mohd.Yakub Mulla - Assistant Police Inspector, PW1 Kashaba Galande - Police Naik and PW6 Salim Shaikh – panch witness that both appellants/accused were carrying plastic bags in their hands. It is case of the prosecution that contraband *charas* came to be seized from the plastic bags held in their hands by appellants/accused. The narcotic drug was not recovered from personal search of

appellants/accused persons. Section 50 of the NDPS Act has application in case of personal search of a person. It does not extend to search of a vehicle or container or a bag. Therefore, though the prosecution has adduced evidence in respect of compliance of provisions of Section 50 of the NDPS Act by apprising both appellants/accused about their right of getting searched in presence of the nearest Magistrate or Gazetted Officer, the compliance of this provision was not actually necessary.

9 Evidence of prosecution further reflects that on instructions of PW4 Vilas Chavan, Police Inspector, PW5 Mohd.Yakub Mulla, Assistant Police Inspector, took bags from hands of both appellants/accused persons. Initially, as seen from evidence of PW5 Mohd.Yakub Mulla, Assistant Police Inspector, and that of PW4 Vilas Chavan, Police Inspector, plastic bag from appellant/accused no.1 Rudrabahadur Khatri was taken and it was found to be containing greenish brown substance in the form of slab. It was tested by the field testing kit and was found positive for presence of *charas*. That substance was found

weighing 1 kg 250 gms. The panch witnesses as well as official witnesses deposed that two samples each weighing 25 gms were drawn from that slab and those samples as well as the remaining bulk came to be packed, sealed and labelled separately. Samples were marked as “A1” and “A2” whereas the bulk was marked as “A”. In similar way, PW5 Mohd.Yakub Mulla, Assistant Police Inspector, had taken the plastic bag carried in his hand by appellant/accused no.2 Tikaram Thapa. It was also found to be containing greenish brown substance in the form of slab which tested positive for *charas*. That substance was found weighing 1 kg 250 gms. The same process was repeated and two samples each weighing 25 gms were drawn from that slab. Those samples as well as the remaining bulk came to be packed, sealed and labelled separately. Samples were marked as “B1” and “B2” whereas the bulk was marked as “B”. Despite searching cross-examination of prosecution witnesses namely PW4 Vilas Chavan, Police Inspector, PW5 Mohd.Yakub Mulla, Assistant Police Inspector, PW6 Salim Shaikh, panch witness and PW1 Kashaba Galande, Police Naik, nothing could be brought on record which

could lead to disbelieving the prosecution case regarding possession of greenish brown substance weighing 1 kg and 250 gms by each of appellants/accused.

10 It is seen from evidence of PW1 Kashaba Galande, Police Naik, that after laying down the trap and effecting raid which resulted in seizure of the contraband, he lodged FIR Exhibit 14 on 14th January 2010 itself, which has resulted in registration of Crime No.24 of 2010 against appellants/accused persons.

11 Evidence of PW2 Dinkar Desai – Store keeper of the Anti Narcotic Cell shows that on 14th January 2010, at about 9.30 p.m, he received muddemal of the subject crime at the instance of the Senior Police Inspector. That muddemal was delivered to him by PW5 Mohd.Yakub Mulla, Assistant Police Inspector. Similar is the evidence of PW5 Mohd.Yakub Mulla, Assistant Police Inspector, who has deposed that he had submitted the muddemal of the subject crime with the Store keeper of the Anti Narcotic Cell. The Station Diary entry at Exhibit 18 reflects receipt of

muddemal of the subject crime by the Stores of the Anti Narcotic Cell. Exhibit 17 is the request letter addressed by PW5 Mohd.Yakub Mulla, Assistant Police Inspector, to the Senior Police Inspector, in-charge of the Stores of the Anti Narcotic Cell for getting the muddemal deposited. This letter duly contains endorsement by PW2 Dinkar Desai regarding receipt of muddemal including packets of samples and bulk in sealed condition. Extract of Muddemal Register at Exhibit 16 also proves the fact of receipt of muddemal in Crime No.24 of 2010 by the Stores of the Anti Narcotic Cell in sealed condition. Though it is attempted to suggest that this evidence regarding receipt of muddemal at 9.30 p.m. by the Store keeper of the Anti Narcotic Cell is not acceptable and in consonance with other evidence on record, there is nothing on record which belies evidence of the prosecution that the muddemal came to be deposited in the Anti Narcotic Cell Stores at 9.30 p.m. of 14th January 2010.

12 The samples of seized muddemal were then carried to the Regional Forensic Laboratory to Kalina by PW7 Gangadhar

Sawant, Police Constable. His evidence shows that on 15th January 2010 he carried the sealed samples and delivered them to the Regional Forensic Laboratory, Kalina. This evidence is also gaining corroboration from contemporaneous documentary evidence placed on record by the prosecution. Evidence of PW2 Dinkar Desai, Store Keeper of the Anti Narcotic Cell makes it clear that on 15th January 2010 he delivered envelope marked as “A1” and “B1” to PW7 Gangadhar Sawant, Police Constable, for depositing the same with the Forensic Laboratory. The entry of this fact was taken in the Station Diary at Exhibit 20. It is, thus, clear that in sealed condition, sample packets marked as “A1” and “B1” were entrusted to PW7 Gangadhar Sawant, Police Constable, for reaching the same to the Forensic Laboratory, Kalina. PW7 Gangadhar Sawant, Police Constable, testified that he deposited the muddemal in sealed condition on the very same day at Forensic Laboratory, Kalina, which acknowledged the same. Exhibit 23 is the copy of letter on which there is acknowledgment regarding receipt of the muddemal by the Forensic Laboratory, Kalina.

13 At the Forensic Laboratory, samples marked as “A1” and “B1” came to be chemically analysed by PW3 Sandeep Chetti, Assistant Chemical Analyser. This witness has deposed about the tests undertaken by him for chemically analysis of seized samples. Evidence of this witness shows that he had conducted Fast Blue Test, Nigam Test, Para Amino Phenol Test and Thin Layer Chromatography test for the purpose of chemical analysis of the seized samples. He categorically deposed that he had prepared the data sheets during the course of chemical analysis of these seized substances. As per version of this witness, on the basis of several tests conducted by him on the seized samples, he came to the conclusion that the tested substance is *charas* and accordingly he prepared the Chemical Analysis Report Exhibit 24. This witness has proved the document at Exhibits 25 to 28 which are Chain of Custody Form, Data Sheet, Standard Report etc. There is nothing in cross-examination of this witness to dislodge his evidence regarding his opinion that the seized samples are that of *charas*. Thus, evidence of this witness goes to show that both appellants/accused were in possession of narcotic drug *charas*

weighing 1 kg and 250 gms on 14th January 2010. The muddemal articles before the court were duly identified by PW6 Salim Shaikh, panch witness, so also PW5 Mohd.Yakub Mulla, Assistant Police Inspector.

14 A vain attempt was made to show that there is non-compliance of provisions of Section 42 of the NDPS Act making the search and seizure suspect. The contraband came to be seized from appellants/accused persons in a public place. They were found to be in possession of the narcotic drug at the footpath near Clipwala compound of Mumbai, which is undoubtedly a public place. The search and seizure was not effected in any building, conveyance or in enclosed place but it was effected at the footpath in Mumbai. Therefore, there was no requirement to comply provisions of Section 42 of the NDPS Act.

15 In the result, the prosecution has successfully established the fact that appellants/accused persons were in conscious possession of narcotic drug – *charas* in commercial

quantity and this act of appellants/accused is punishable under Section 20(b)(ii)(c) of the NDPS Act. So far as quantum of sentence is concerned, the learned trial court has properly sentenced appellants/accused by awarding rigorous imprisonment of 10 years to both of them apart from direction to pay fine of Rs.1 lakh by each of them. No infirmity can be found in the sentence awarded to both appellants/accused which is minimum prescribed by the Statute. The appeal, as such, is devoid of substance, and therefore the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)