

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.810 OF 2013

Mangalsingh @ Mangesh Chatur Singh
Onavale.

Aged 47 years,
Resident of Post Vadola Baheroba,
Taluka Nevasa, Dist. Ahmednagar

.... Appellant
(Ori. Accused 3)

Vs.

The State of Maharashtra
(At the instance of Anti Narcotics
Cell, Worli Unit Vide CR No.68/2012)

.... Respondent
(Original
Complainant)

WITH
CRIMINAL APPEAL NO.887 OF 2013

Ambadas Tukaram Pawar
Aged : 36 years, Occ. : Bricklayer/
Masonry,
At Post Gavrai, Taluka Nevasa,
Dist. Ahmednagar

.... Appellant
(Ori. Accused 2)

Vs.

The State of Maharashtra
(At the instance of Anti Narcotics
Cell, Worli Unit Vide CR No.68/2012)

.... Respondent
(Original
Complainant)

WITH

CRIMINAL APPEAL NO.989 OF 2013

Sunil Ranjit Mohite @ Dada

Aged : 23 years,

R/O : At Post Kedagaon Choufulla,

Tal. Daund, District Pune

.... Appellant
(Ori. Accused no. 1)

Vs.

The State of Maharashtra

(At the instance of Anti Narcotics

Cell, Worli Unit Vide CR No.68/2012)

.... Respondent
(Original
Complainant)

Ms. Beerta H. Bajwa I/by Lalla & Lalla for the Appellant in Criminal Appeal No. 887 of 2013.

Mr. Aman Singh, Court appointed Advocate for the Appellant in Criminal Appeal No. 810 of 2013.

Mr. Pooja Yadav, Court appointed Advocate for the Appellant in Criminal Appeal No. 989 of 2013.

Mrs. P.P. Shinde, APP for the State of Maharashtra.

Coram : **Smt. Sadhana S. Jadhav, J.**

Date : 26th October 2018

JUDGMENT :

1 The accused herein are convicted for the offences punishable under Sections 8(c) read with Section 20 (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“NDPS Act” for short) and sentenced to suffer rigorous imprisonment for 10 years. They are further sentenced to pay a fine of Rs.1,00,000/- each and in default of payment of fine, simple imprisonment for six months by the N.D.P.S. Special Court, Mumbai in NDPS Special Case No. 87 of 2012 vide judgment and order dated 4th and 5th July 2013.

2 Being aggrieved by the said judgment, the accused herein have filed the present appeals

3 Such of the facts necessary for the decision of these appeals are as follows :

 According to the prosecution on 26th March 2012 at about 9.30 am., Police Inspector and In-charge of Anti Narcotic Cell (“ANC”) Unit, Worli had received a secret information that the

persons namely Tanaji Mohite and Shivaji Chavan are dealing in the business of Ganja and that Ambadas Pawar and Sunil Mohite, who are their associates would be reaching Mumbai to sell the contraband. It was also informed that they are travelling in a grey colour Bolero Jeep bearing registration No. MH-17-V-2466 from Thane to Mumbai road near Priyadarshini Bus stop and they would reach Chunabhatti, Mumbai at about 2.00 pm. to 2.30 pm. for selling contraband. Accordingly, the information was reduced into writing in the Station Diary. The information was conveyed to Police Inspector, Mr. Sangle. The information was further conveyed to A.C.P., and Senior Police Inspector. P.I., Sangle had then called upon other members of the staff and had apprised them of the information which he received. PI Sangle directed PN Mohite to call panch witnesses and then the raiding party alongwith panchas had proceeded to the spot as informed by the secret informant. Pre-Trap panchanama was prepared.

4 At about 2.05 pm., the raiding party had seen Bolero jeep bearing registration No. MH-17-V-2466 and three persons were found sitting in the said vehicle. The raiding staff had found their movements suspicious and therefore they were apprehended. An enquiry was made with them individually. With the permission of inmates of the said jeep, PW-6- PI Sangle alongwith his staff had taken inspection of the said jeep. The rear seats were found folded and raiding staff found three gunny bags in the said jeep. There were two gunny bags weighing about 30 kgs. each and third bag was weighing about 10 kgs. The gunny bags were brought down and on opening, it was seen that the gunny bags were loaded with green coloured leaves, flowering and fruiting tops and seeds attached to the stalks with strong smell. The raiding staff was satisfied that it was “Ganja”, a contraband which falls under Section 2(b) of the NDPS Act, 1985.

5 In compliance of Section 50 of the NDPS Act, the officer had asked the accused persons individually as to whether they would like to be examined by a Magistrate. PW-6, who is P.I. also informed

the accused that he happens to be a gazetted officer and whether they would like to be searched by him. They had given no objection and therefore their personal search was taken. Accused no.1 was found in possession of Rs.300/-, accused no. 2 was found in possession of Rs.250/- and accused no. 3 was found in possession of Rs.500/-. They had also seized registration book of the vehicle and a Toll receipt of the toll charges paid at Vashi Toll Naka and the key of Bolero jeep. The said contraband was seized in presence of the panchas. Thereafter the muddemal was produced before P.I. Koyande, Cuffe Parade, ANC. On 27th March 2012, PW-6 prepared special report of the crime and forwarded the same to the superior officer. Crime was registered being C.R. No.68 of 2012 against the accused and after completion of the investigation, the charge-sheet was filed against the accused.

6 The prosecution has examined seven witnesses to bring home the guilt of the accused. PW-8 was examined as a Court witness.

7 PW-1, Avinash Govind Shinde, Police Naik was attached to ANC Unit, Worli. He had carried the contraband articles and deposited the same with the Storekeeper In-charge. He had carried the said contraband to Kalina Forensic Science Laboratory, Mumbai. It is elicited in the cross examination that three sample packets were kept ready by PSI Sakpal in Worli Unit. They were not sealed in his presence. The stamp was put up in his presence. It is pertinent to note that on 26th March 2012, PW-1 had accompanied Mr. Sangle for one raid, but he could not recollect the location of the raid. He has further elaborated that they had seized 70 kg. Ganja in his presence. Rest of the answers are evasive in nature.

8 PW-2 Tanaji Bhagwan Gadhave was attached to ANC Unit, Azad Maidan Police Station as a Store Keeper. He has deposed before the Court that on 26th March 2012, at about 8.50 pm., PSI Sakpal had been to Unit with muddemal alongwith forwarding letter for depositing the muddemal in the Store. The articles were marked and kept in sealed condition. It is elicited in the cross-examination

that the vehicle which was seized in the offence was brought to Azad Maidan Police Unit.

9 PW-3, Sanjay Shamrao Prabhavale was working as Assistant Chemical Analyzer in F.S.L., Kalina, Santacruz (West), Mumbai. According to him, he received three sealed parcels alongwith forwarding letter from ANC Unit, Mumbai on 27th March 2012. The report is at exhibit 33 and the test conducted confirms the contents of three samples as contraband ganja.

10 PW-4, Mohan Dnyandeo Pawar was attached to ANC Unit, Worli and was officiating as Head Constable. According to him, at about 9.30 am., the secret informant had informed him that Tanaji Mohite and Shivaji Chavan resident of Ahmednagar district who are dealing in the business of ganja would be coming to sell ganja through their associates Ambadas Pawar and Sunil Pawar to their customers in Mumbai. He had given description of Ambadas and Sunil. He had conveyed the information to PSI, Sangle orally and then telephonically to A.C.P. and Senior P.I. Thereafter he had

complied with the order of P.I., Sangle and Mr. Sakpal in conducting the Pre-Trap panchanama. P.N., Mohite had introduced two panchas Arjun Ramesh Manthena and Kalidas Manthena to act as panchas. According to him, the panchas had informed him that they had not acted as panchas in any other cases. The entry was made in Station Diary by PSI, Sakpal. They had reached the spot. Except drivers of the vehicles, the raiding party had walked towards the spot. The raiding party was divided into two groups. One was led by Mr. Sangle and other by Mr. Sakpal. At about 2.05 pm., they had seen the vehicle bearing No. MH-17-V-2466 proceeding towards the spot. They had apprehended three persons in the vehicle. Mangalsingh Onavale, original accused no.3 was the driver of the vehicle. He had further substantiated that after opening the packets, they had found green coloured flowering, fruiting tops with stalks having strong smell. It is elicited in the cross-examination that there is nothing on record to show that the said register was maintained at ANC Unit, Worli. That the information received on a particular day is recorded in the information register.

11 It is pertinent to note that in the cross-examination, it is admitted by PW-4 that the first entry in the register is dated 3rd January 2012 and the last entry is dated 18th December 2012. One page from the register is blank on which number 484/12 is written by pencil. Page numbers are given to the register. On the last page, there is certificate of the superior officer. On page number 23, the information of C.R. No.450 of 2012 has been noted down, whereas on page number 17, the information is of C.R. No.234 of 2012 has been noted down. He has also admitted that he had noted information in the register after the informant left the Unit. According to him, the message was conveyed to the senior officers telephonically. PW-4 has candidly admitted before the Court that he is unaware of the provisions of N.D.P.S. Act of search, seizure and arrest.

12 The witness has categorically admitted that only the officers and staff, whose names are mentioned in the F.I.R.

participated in the raid. In fact in the examination-in-chief, he had mentioned that the panchas were called to the police station and were apprised of the facts of the case as well as pre-trap panchanama.

13 Learned counsel for the appellants rightly submits that it is doubtful as to whether the panchas had accompanied the raiding party.

14 It is pertinent to note that it is specifically stated by PW-4 in the cross-examination that he had not made enquiry about the customers of Ambadas Pawar and Sunil Mohite. He also did not know whether the informant knew the customers of Ambadas and Sunil. According to PW-4, one of the officers had enquired with the inmates of the Bolero car the reason for waiting, but he feigned ignorance about the name of the officer, who had enquired with the accused. It is also admitted that it is not mentioned in the F.I.R. as to who was driving the vehicle and the location of the other two

persons. According to the witness, he had forgotten to mention the same. He has denied suggestion that the entries in the station diary are manipulated. He deposed that the panchas had not accompanied the raiding party to Cuffe Parade and after reaching there, PW-4 was informed that he would file F.I.R. on behalf of the State.

15 PW-5 Kalidas Shriniwas Manthena is the panch witness. He is a student. According to him, he was at the bus stop near Jamboli Maidan, Worli. They were summoned by P.I., Mohite to act as a panch and he alongwith his cousin had agreed to oblige Mr. Mohite. They were apprised of the facts of the case, the secret information received by them. He has deposed that two groups were formed. He was in the group led by PSI, Sakpal, whereas his cousin was the member of the group of PI Sangle. He has deposed that the contraband was seized from the vehicle. According to the witness, they had signed on the sealed articles. He has further deposed that on that day, he had not attended the college as there was family function at the place of his relative at BDD Chawl, Worli, Mumbai. It

is specifically stated that the police did not find driving licence with any of the accused persons. The gunny bags were kept below the backside seats. In the cross-examination, he has admitted that he had gone to ANC Unit. Before leaving the spot, the panchas were informed that they would have to go to Cuffe parade office and to deposit the articles there. He further deposed that he alongwith other panch were asked to return to Worli Unit as officers wanted to record their statements. The witness has stated that the officers had explained to the accused in Marathi the provisions of Section 50 of N.D.P.S. Act and had also asked them as to whether they wish to be searched before nearest Magistrate or a gazetted officer and arrangements would be made for the same.

16 At this juncture, the learned counsel for the appellants vehemently submits that the witness does not state that PW-6 had informed the accused persons that he also happens to be a gazetted officer and if they were willing, he could cause their search. According to the learned counsel for the appellants, there is no

compliance of Section 50 (1) of the NDPS Act in letter and spirit and on that ground alone, accused deserve to be acquitted.

17 PW-6, Rajendra Ganpat Sangle is the investigating officer. He was attached to ANC Unit, Worli. He has deposed before the Court the procedure adopted by him after receipt of the information and while conducting raid. According to the witness, he had complied with all the mandatory provisions of N.D.P.S. Act. He has deposed in the cross-examination that the panchanama was typed in the sequence of the events occurred on the spot. Six separate printouts of the formats of Section 50 were taken out. According to him, they had carried one printer and one laptop alongwith them to the spot. It is also admitted that there is no entry in the station diary in Cuffe Parade office when they reached with muddemal. He had accompanied with investigating officer from Cuffe Parade to Azad Maidan Unit. It is also admitted that the information was not signed by PSI, Sakpal neither by ASI Sondkar, who happens to be immediate superior of PW-4.

18 At this juncture, learned counsel for the appellants submits that there is no compliance of Section 42 of NDPS Act, as there is no cogent material on record to indicate that the seniors were not informed about the secret information received by PW-2. It is also admitted that Mr. Pawar had not carried any chit to convey the information to PW-6. It was after conveying the information to PW-6. The said information was recorded in the register within 20 minutes. The same entry was then taken in the station diary. PW-6 has not signed either on the information register or on the station diary. The witness has stated that he has documentary evidence to show that the extract of the information noted down in the information register was forwarded to the superior, but was not aware as to when the same information was conveyed to the superiors. It appears that the raiding staff has used the personal laptop of PC, Chaudhari. PW-6 has categorically admitted before the Court that he had not informed the accused that he happens to be a gazetted officer and that he was empowered to take their search. It

is also admitted that he did not have the list of nearest gazetted officer. It is also admitted that till date, he had never availed of the services of any Magistrate or gazetted officer in any NDPS raid. According to him, he had given individual offer to the accused as contemplated under Section 50 of the Act. It is also admitted that although it is necessary to record the reply of the accused, he has not done so. Once again learned counsel for the appellants has vehemently urged that there is non-compliance of the mandatory provisions under Section 50 of NDPS Act.

19 PW-6 has also admitted that upon being apprehended, none of the accused had made any attempt to flee from the spot. According to PW-6, the property was produced before Mr. Koyande in Cuffe Parade office and he had affixed labels with his signatures on all articles, however, upon being confronted, it is admitted that the signatures of Mr. Koyande are not found on the labels of the said contraband. There is no record to that effect. PW-6 has once again reiterated the contention of PW-2 that the staff and officers, whose

names are mentioned in the panchanama were the members of raiding party. At this juncture, according to the learned counsel for the appellants, this would be sufficient to infer that the panchas had not accompanied the raiding party to the spot. According to PW-6, Mr. Sakpal had signed the panchanama on 26th March 2012. It is admitted by PW-6 that on 26th February 2013, Ambadas Pawar had sought for information under Right to Information Act and had applied for certified copies of the station diary entries dated 26th and 27th March 2012. The said application was forwarded to A.C.P., A.N.C., Mumbai. It is admitted that there was only one bound station diary in Worli Unit and that the copies were prepared in the station diary format and were handed over to the accused under R.T.I. According to the witness, papers cannot be removed from bound book of a station diary and that blank format of station diary is not officially allotted. It is prepared by the police.

20 PW-7, Anant Yeshwant Sakpal deposed that there was investigation about the ownership of the vehicle, which was seized in Crime No. 68 of 2012. It is admitted by the officer that in the

charge-sheet, the make and number of the vehicle was not correctly mentioned because of copy, cut and paste and he had signed the charge-sheet without reading the contents of the same. In the introductory part of the charge-sheet, he had mentioned a vehicle of Indica make bearing registration No.AP-13 H-1667 and it does not tally with the vehicle involved in the present case and it was only during the hearing of the bail application that he realised the mistake committed by him. He has later submitted that the said mistake was pointed out to him only after framing of the charge. According to the officer, the vehicle in the offence is registered with R.T.O. at Ahmednagar and one Mr. Bansi Pagare who happens to be the brother-in-law of accused no.3 is the registered owner of the vehicle. The officer recorded the statement of Bansi Pagare, but had not included in the charge-sheet, since it did not support the case of the prosecution. There was no material on record to show that the vehicle belonged to accused no.3. **It is admitted by PW-7 that there is no documentary evidence to connect the accused no.3 with the vehicle in the case.**

21 It is admitted by PW-7 that the original time of entry was 8.30 am. and was scored and written as 12.30 am. It is admitted that the unused loose sheets of station diary are used. The witness had admitted in following words:

“I have affixed the stamp on all the pages of Ex. 63 colly with my signatures yesterday after the Court hearing. I have affixed the stamps and made my signatures on the documents because I was called upon to produce these documents in the Court.”

The witness PW-7 has also admitted the correction in respect of the original time of the entry wherein 8.30 am, was scored of to be read as 12.30 am. It is pertinent to note that according to PW-7, he had made an enquiry with Pagare as well the bank i.e. H.D.F.C. in respect of the loan documents. According to him, he had unofficially obtained the documents from the bank, but did not include the same in the charge-sheet. He had also obtained photocopy of the loan transaction from Mr. Pagare. It is also pertinent to note that the witness could not offer any plausible explanation for not including the documents in respect of the ownership of car in the charge-sheet

and neither he has deposed before the Court as to whether the loan repayment was made by original accused no. 3. The arrest panchanama has also not been included in the charge-sheet for the reasons best known to the investigating officer.

22 It is elicited in the cross-examination that there is no register of the entries at Exhibit 63 collectively as Exhibit 63 was prepared as per the say of PW-7. He has further admitted that he does not know as to who is the scribe of Exhibit 63. It is admitted that the entries were made “on the printed proformas of the station diary, but loose unused printed proformas of the station diary are available in the office and that whenever required, the loose unused station diary entry forms are used”. PW-7 has further admitted that he has not obtained permission of the Incharge for making use of the loose sheets. It is submitted that as the copies were solicited under the Right to Information Act, 2007, loose sheets were made available although, there was no problem in photocopying the original station diary entries and forwarding it under the RTI Act. PW-7 has further admitted that he had affixed a stamp on all pages at Exhibit 63

collectively with his signatures, after the Court hearing on the preceding date. It is also elicited in the cross-examination that the original time of entry no.1 was 8.30 am., but it has been altered to 12.30 am. It is admitted that entry no.1 has no relation with the present case. By 9.30 pm., all the events recorded in this entry had occurred.

23 PW-7 has further stated that Mr. Pagare was informed that contraband- Ganja was found in his vehicle, however, there is no record to show as to when Mr. Pagare had attended the office. As discussed earlier, the loan transaction documents obtained from Mr. Pagare do not form a part of the record and therefore there is no material to show that the loan was repayed by the accused-appellant. PW-7 has admitted that the copy of the arrest panchanama do not form part of the record.

24 It is pertinent to note that in the cross-examination, PW-7 has admitted as follows :

“I tried to trace out the absconding accused i.e. Shivaji Chavan and Tanaji Mohite when I had gone to Ahmednagar. Today I do not have any documents to show that I had tried to search. I had visited their houses, but they were not available at their respective houses. I did not record the statements of the family members. I did not obtain arrest warrants against them from the Court.”

This admission would be relevant to ascertain as to whether the accused were in conscious possession of the contraband. Moreover Shivaji Chavan and Tanaji Mohite are not residents of Ahmednagar, but they are residents of Newasa, as they happen to be neighbours of Ambadas, the accused person.

25 It is admitted that the registered owner had not received any letter with regard to repayment of the loan amount. There is a variance in the engine number written in R.C. book, which is 74B 14835 and the other records. The chassis and engine numbers are not recorded in the panchanama, although it was necessary. The engine number does not tally with the R.C. book number. It is admitted that till date the PW-7 had never undertaken exercise of

recording the chassis and engine numbers with the help of a trace paper. The witness has failed to give proper description of the vehicle, which was seized. There is lengthy cross-examination as far as the collection of documents from HDFC Bank is concerned. In any case, it can be safely inferred that the prosecution has miserably failed to establish that the accused Mangalsingh is the registered owner of the said vehicle. In any case, the said vehicle was registered with the R.T.O., Shrirampur and therefore the registration number of the vehicle was MH-17-V-2466. There is no material on record to show that the investigating agency had visited the R.T.O. office at Shrirampur. It is admitted by the prosecution that they had visited the R.T.O. office at Ahmednagar and not Shrirampur.

26 The question for determination is as to whether the accused were in conscious possession of the said contraband. In the case of Avtar Singh and Others Vs. State of Punjab, reported in 2002 Cri. L.J. page 4330 (Supreme Court), the Apex Court had held that:

“the driver of the truck vehicle and the persons who were found sitting on gunny bags, which contained poppy husk could not be attributed “conscious

possession” of such bags unless there was proof of those persons were concerned with the goods”.

27 In the case of Naim s/o Jamiroddin Sheikh Vs. State of Maharashtra, reported in 2009 ALL MR (Cri.), page 477, a Single Bench of this Court upon placing reliance on the judgment of the Hon'ble Apex Court in the case of Avtar Singh and others Vs. State of Punjab, reported in 2002 Cri. L.J. page 4330 (Supreme Court) has observed in same case:

“Unless it is proved that he was the owner or transporter of the contraband Ganja, the conviction could not be rendered against him”.

28 In the present case, according to the prosecution, the original accused no.2 Ambadas Tukaram Pawar was the driver and the owner of the vehicle. However, it has transpired that the vehicle was registered in the name of Bansi Pagare, who happens to be the relative of the accused and it is admitted by PW-7 that there is no documentary evidence to connect accused no.3 with the vehicle in the case. Moreover, the accused persons had immediately disclosed to the police that the contraband probably belongs to Shivaji Chavan

and Tanaji Mohite. No efforts were made to trace out Shivaji Chavan and Tanaji Mohite. Moreover, the Court cannot be oblivious of the fact that Shivaji Chavan happens to be the neighbour of Ambadas Tukaram Pawar. For the reasons best known to the prosecution, there were no efforts made to trace out the accused, who were dealing with the contraband.

29 In the case of Premnarayan Prabhulal Mina & Anr. Vs. State of Maharashtra, reported in 2008 ALL MR (Cri.) 599, a Single Bench of this Court has held that”

“unless, it is clear from the evidence that the appellants or either of them participated in the act of the loading of bundles in the truck vehicle, it is difficult to say that they were in “conscious possession” of those bundles.

In order to prove the “conscious possession” of bundles of Ganja, it is necessary for the prosecution to establish direct control of the appellants over the contraband. There is no evidence to show that the persons, who loaded the said bundles have been apprehended or the passengers had the knowledge about loading thereof. Mere fact that the bundles of ganja were found in the truck vehicle will not by itself proved that the appellants were the actual possessors of these bundles”.

The statement of the owner of the truck vehicle was not recorded. In the case of Avtar Singh (Supra), the Hon'ble Apex Court had held that:

“the possession and ownership need not necessarily go together but the minimum requisite element, which has to be satisfied is custody or control over the goods. Can it be said, on the basis of evidence available on record that the three appellants, one of whom was driving the vehicle and other two sitting over the bags were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt”.

30 In the case of Premnarayan & Anr. Vs. State (supra), it has held that:

“mere presence of both the appellants in the truck vehicle would not clinch the issue of “conscious possession”.

The investigation should have been carried out regarding the actual loading of the bundles, ownership of the bundles and the participation of either the appellant in wilful transportation of the bundles as possessors.

31 In view of above discussion, it would not be necessary to discuss the other evidence. The appellants deserve to be acquitted with the aid of benefit of doubt.

32 The appeals are allowed and disposed of.

(*Smt. Sadhana S. Jadhav, J*)