

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 367 OF 2012**

Abdul Rehman @ Haji Ali
Mohammed Hakim,
Indian National, Age: 65 years,
R/o-Post Tal. Bijbihara,
Pamposh Mehta, Dist. Anant Nag,
Jammu Kashmir
(At present undergoing sentence at
Kolhapur Central Prison, Kolhapur)

...Appellant
(Org. Accused No.1)

Versus

The State of Maharashtra
(Anti Narcotic Cell CR No. 90/10
dated 03/03/10)

...Respondent

**WITH
CRIMINAL APPEAL NO. 324 OF 2012**

Bandu @ Buntty Dagdu Udanshive,
Hindu, Aged 46 years,
Permanently residing at
Shere Punjab Society,
Behind Tolani College, 1st Lane,
Plot No. 239, Room No. 4,
Ground Floor, Andheri (E),
Mumbai and preently in judicial custody
at Mumbai Central Prison, Mumbai

...Appellant
(Org. Accused No.2)

Versus

The State of Maharashtra
(At the instance of Anti Narcotics Cell
Worli Unit in CR No. 90/10)

...Respondent

**WITH
CRIMINAL APPEAL NO. 390 OF 2012**

Mohammed Afzal @ Afzal Chouda
Hayat Qureshi,
Age: 32 yrs., Occu:
R/at, Qureshi Manzil, R. No. 15,
2nd Floor, Hujria Street,
Nagpada, Mumbai-8
(At present Khalapur Central Prison)

...Appellant
(Orig. Accused No.3)

Versus

The State of Maharashtra
(At the instance of Antri Extortion Cell)

...Respondent

**WITH
CRIMINAL APPEAL NO. 409 OF 2012**

Zakir @ Zakir Chikna @ Zakir Chota
Shariful Hasan Sayyed,
Indian National, Age: 31 yrs.,
R/at: Parshi Colony Badarsabaithi Chawl,
Room No. 5, Behind Badarsa Masjid,
Behram Baug, Jogeshwari (W), Mumbai
(At present lodged in Kolhapur Central Prison)

...Appellant/
Org. Accused No.4

Versus

The State of Maharashtra
(Through ANC, C.R. No. 90/2010)

...Respondent

Mr. Anil Lalla a/w Ms. Aanchal Lalla I/b Lalla & Lalla for the Appellants in
Appeals/367/2012, 324/2012 & 409/2012

Mr. Ganesh Gole a/w Mr. Ritesh Ratnam and Mr. Bhavin Jain for the
Appellant in Appeal/390/2012

Mrs. P. P. Shinde, A.P.P for the Respondent-State

CORAM : REVATI MOHITE DERE, J.
TUESDAY, 9th APRIL 2019

ORAL JUDGMENT :

1 By these appeals, the appellants have impugned the judgment and order dated 5th March 2012 passed by the learned Special Judge under the Narcotics Drugs and Psychotropic Substances Act, Greater Bombay in NDPS Special Case No. 128/2010, convicting and sentencing them as under :

- for the offence punishable u/s 8(c) r/w 20(b)(ii)(C) and 29 r/w 8(c) of the NDPS Act, to suffer RI for 10 years on each count and to pay a fine in the sum of Rs. 1,00,000/-, each on each count, in default, to undergo SI for 6 months on each count.

- Substantive sentences were directed to run concurrently and the default sentences, if any, were thereafter directed to run concurrently.

2 The prosecution case in brief is as under :

On 3rd March 2010 at 9:00 a.m, API Mohan Mane (PW 3-informant) received information from his informer that accused No.1- Abdul Rehman @ Haji, a resident of Jammu and Kashmir, a dealer in *charas*, was going to supply *charas* to his agents in Mumbai and its suburbs. The informer also informed that accused No. 2-Bandu @ Banty and accused No. 6 -Imtiazali @ Babusha and accused No. 5-Sandeep Devfule were his agents in Mumbai and also drivers. It was further informed that accused No.1-Abdul Rehman @ Haji would come in a sky-silver Honda City car bearing No. MH-01-DA-3825 to Mumbai and that he would be supplying *charas* to the customers/agents. The informer also gave the description of the said persons. The informer also revealed that two persons i.e. accused No. 3-Mohd. Afzal and accused No.4-Zakir Sayyed would be coming on a motorcycle to collect the said contraband from accused Nos. 1, 2, 5 and 6. The informer gave detailed description of all the six persons who would be present. According to PW 3-API Mohan Mane, he noted down the said information in the Information Register as well as

in the Station Diary and thereafter narrated the said information to PW 6- Bhanudas Jadhav (Police Inspector). PW 3-API Mohan Mane also telephonically informed the DCP, ACP, Sr.PI, Anti Narcotic Cell, Mumbai about the information so received. Pursuant thereto, the DCP directed PW 3 to verify the information and take further action under the leadership of PW 6-Bhanudas Jadhav. PW 3-Mohan Mane apprised PW 6-Bhanudas Jadhav about the information, pursuant to which, PW 6 called PW 7-API Kedari Pawar and other police staff to his chamber, briefed them about the information and also asked them to bring two panchas. Necessary steps were taken to procure material required for the raid. A copy of the Station Diary was sent to the superiors at Cuffe Parade. Police Naik-Khopkar brought two panchas i.e. PW 5-Afzal Ansari and Mohammed Yaya and introduced them to PW 6-Bhanudas Jadhav and the other raiding party members. The panchas disclosed their names and other details after which, PW 6 satisfied himself that the panchas were proper panchas. Thereafter, the panchas were informed about the provisions relating to search, seizure, arrest under the NDPS Act and were requested to act as panchas. PW 6-Bhanudas Jadhav also informed the panchas of the

information so received by PW 3-Mohan Mane. The personal search of the panchas were taken and likewise, the panchas also searched the police raiding party, however, nothing incriminating was found in the said search. Accordingly, a pre-trap panchanama was drawn, which was signed by the panchas. Thereafter, the raiding party, after making a note of the same in the Station Diary, left at about 12:15 p.m. Search of the two jeeps, in which the raiding party was travelling, was conducted and nothing objectionable was found in the said jeeps. Both the jeeps went to the spot via Worli Naka, Sea Link Road, Bandra (East), Western Express Highway, Andheri, Jogeshwari, Vikhroli Link Road and reached below the Jogeshwari flyover at about 1:15 p.m, where the alleged contraband was to come. The raiding party inspected the spot. PW 6-Bhanudas Jadhav gave instructions to the raiding party members and formed two groups and positioned one group at a distance of about 50 feet from the spot towards South; and the second group was positioned at a distance of 50 feet from the spot towards North. At about 2:00 p.m, the Honda City car came from Jogeshwari-Vikhroli Link Road and stopped. The said Car was driven by one person and there was another person who

was sitting near the driver and two persons were on the rear side. After about five minutes, one silver-grey Unicorn Honda motorcycle bearing No. MH-02-BW-5935 came near the car and stopped; two persons were on the motorcycle; they got down from the motorcycle; their appearance was similar to the description given by the informer. The said two persons who came on the motorcycle walked towards the car. According to the prosecution, two persons who were occupying the rear seat, got down from the car. It is alleged that their appearance was also similar to the description given by the informer. The said two persons shook hands with the two persons who came on a motorcycle and after talking, they went towards the rear side of the car and stood near the dicky. Two persons who had got down from the rear seat of the car, again went back to the car and each pulled out one blue coloured plastic bags and went near the dicky. The said persons handed over the plastic bags to the two persons who came on the motorcycle. Thereafter, two persons who got down from the front seat (one sitting on the driver's seat and the other next to the driver) of the car went near the four persons, who were standing near the dicky. PW 3-API Mohan Mane, being satisfied that the description of the said

persons was similar to that received by him from the informer, signalled at PW 6-PI Bhanudas Jadhav, pursuant to which, the raiding party surrounded all the accused on the spot. The accused persons disclosed their names and addresses. PW 6-PI Bhanudas Jadhav disclosed his identity as well as the identity of the raiding party members. After completing the necessary formalities including apprising the accused of their right under Section 50, which was declined by the accused, PW 6-Bhanudas Jadhav took personal search of each of the accused. Each of the accused i.e. accused Nos. 1 to 4 was found in possession of a blue plastic bag. One plastic bag was also found on the rear seat of the car. The contraband was tested with a field testing kit and was found to contain *charas*. Accordingly, two samples of 50 grams each were taken in plastic pouches. Thereafter, the said pouches were kept in brown envelopes and the mouth of the envelopes were closed by gum, labels bearing signatures of the I.O and panchas were affixed on the envelopes and thereafter, the envelopes were tethered with thread and three wax seals were put on the envelopes. The said procedure was carried out in respect of each of such seizure from each of the accused Nos. 1 to 4 as well as plastic

bag found on the rear seat of the car. All the documents found in possession of the accused were seized under a panchanama.

After concluding the post-trap panchanama, the raiding party took the seized articles and produced the accused before ACP Kharpade (ACP Kharpade has not been examined by the prosecution). ACP Kharpade is stated to have inquired with the accused, verified the articles produced before him and affixed labels bearing his own signatures on the articles. Thereafter, PW 3-API Mohan Mane lodged an FIR, after completing all the formalities. The muddemal was sent for storage to the Azad Maidan Narcotic Cell Unit. The said articles were sent to the Chemical Analyser ('CA') on 4th March 2010. The seized articles i.e. the contraband were sent to the CA for analysis through PW 1-ASI Ramdas Sawant. Thereafter, after receipt of the CA report, which showed that the sample was *charas*, charge-sheet was filed. Accordingly, learned Judge framed charge against all the six accused including the aforesaid appellants for the offences punishable under Sections 8(c) r/w 20(b)(ii)(C) and 29 r/w 8(c) of the NDPS Act. The appellants pleaded not guilty and claimed to be tried.

The prosecution, in support of its case, examined 7 witnesses i.e. PW 1-ACP Ramdas Sawant (Carrier), PW 2- Vijay Nimbalkar (Store Keeper), PW 3-API Mohan Mane (informant); PW 4-Sanjay Prabhavale (CA); PW 5-Afzal Ansari (panch); PW 6-PI Bhanudas Jadhav (Part of the Raiding Party and a Gazetted Officer) and PW 7-API Kedari Pawar (Investigating Officer).

The defence of the appellants was of total denial and false implication. According to the appellant No.1, he had come to Mumbai for medical treatment and was picked up from the airport; according to appellant Nos. 2 and 6, they were apprehended from their houses; and according to appellant No. 5, he was arrested from Andheri. The learned Special Judge, after considering the evidence on record, acquitted accused No. 5-Sandeep Devidas Devfule and accused No. 6-Imtiazali @ Babusha Muktarali Khan of the offences punishable under Section 8(c) r/w 20(b)(ii)(C) and 29 r/w 8(c) of the NDPS Act and convicted the aforesaid appellants, as stated in para 1 hereinabove. The said accused Nos. 5 and 6 were the drivers, who were sitting in the front seat of Honda City car.

3 Learned counsel for the appellants assailed the impugned judgment and order on several grounds, however, it is not necessary to reproduce all the arguments. The main ground raised by the learned counsel was that there was a discrepancy in the quantity (weight) of the sample sent to the CA for analysis and the quantity (weight) received by the CA and as such, the same was fatal to the prosecution. Learned counsel relied on a Division Bench judgment of this Court in the case of *Abdul Rashid vs. The State of Maharashtra*¹ and *Rajesh Jagdamba Avasthi vs. State of Goa*². He submitted that all the samples that were taken in the present case were admittedly 50 grams, whereas, what was received by the CA was less by 6 to 7 grams in each of the samples. He submitted that in the light of the discrepancy, the possibility of tampering with the articles cannot be ruled out. He further submits that the labels allegedly put by ACP Kharpade has not been deposed to by PW 4-Sanjay Prabhavale (Asst. CA). He further submits that the panch to the panchanama of seizure of the contraband is a habitual panch and almost 10 cases are registered against him, thus, affecting his credibility and as such the credibility of the seizure.

1 1999 (2) Crimes 362

2 2005 (2) Bom. C.R. (Cri.) 929

4 Learned A.P.P supported the impugned judgment and order and submitted that no interference was warranted. Learned A.P.P has, however, not been able to justify or explain the discrepancy in the weight that has come on record i.e. 50 grams seized at the time of seizure and what was received by PW 4-Sanjay Prabhavale (Asst. CA).

5 Perused the papers with the assistance of the learned counsel for the parties. It is not necessary to refer and consider all the submissions advanced by the learned counsel for the appellants, inasmuch as, the appeals ought to succeed for the reasons stated hereinunder.

6 The evidence of PW 3-API Mohan Mane and PW 6-Bhanudas Jadhav is consistent with each other, inasmuch as, both have categorically admitted that the samples that were taken at the time of seizure/raid were 50 grams from each of the packet. The witnesses have also admitted that the said 50 grams was weighed on an

electronic weighing scale and were found to be weighing 50 grams each. The requisition sent to the CA also shows that the samples that were sent were of 50 grams each, whereas, the report of the CA shows that the quantity of *charas* that was received by them for analysis was less than 50 grams, in each of the samples. Exhibit 35-data-sheet of the CA shows the weight of Exhibits as 44.5153 gms; 44.1038 gms; 43.3604 gms; 44.3860 gms; and 44.5786 gms. It is also evident that the weight was taken by the CA on an electronic weighing scale. There is a difference of about 5 to 6 grams between what was allegedly sent by PW 3-API Mohan Mane and what was received by the CA. The discrepancy is not disputed by the learned A.P.P. No explanation has come on record or put forth by the prosecution affording any explanation for the said discrepancy. It is also pertinent to note, that PW 4-CA has not mentioned about any labels found affixed of the Cuffe Parade Office on which ACP Kharpade had put his signature. It is also pertinent to note that no C.R. number is mentioned on the packets received by the CA. This Court in a similar case ***Abdul Rashid (supra)*** observed that the evidence in respect of the identity of the contraband is very crucial and that it needs to be

emphasized that the weight of the contraband is one of the most important features on which the identity of the contraband is established and as such must be attended to with a degree of precision and with a degree of correctness. It was further observed that any amount of laxity, looseness or error could have fatal consequences to the prosecution. The Division Bench, having regard to the discrepancy that was found in that case, inasmuch as, the sample was of 20 gms but what was received by the CA was 16 gms and in view of the discrepancy in the quantity, granted benefit of doubt to the appellant therein.

7 In the instant case, admittedly, there is a discrepancy in the quantity of sample sent to the CA and what was received by him for that purpose. The packets do not mention the C.R number, nor does PW 4 depose about finding of labels having signature of ACP Kharpade on it. Admittedly, ACP Kharpade has not been examined. As the discrepancy, which is a serious infirmity, is fatal to the prosecution, the appellants are entitled to benefit of doubt. In the present case, the panch is also a habitual panch with 10 cases

registered against him. The said panch was taken after his credentials were verified.

8 Considering all the aforesaid aspects and in the facts, the appeals deserve to be allowed. Hence, the following order :

ORDER

- (i) The appeals are allowed;
- (ii) The judgment and order dated 5th March 2012 passed by the learned Special Judge under the NDPS Act, Greater Mumbai in NDPS Case No. 128/2010, convicting and sentencing the appellants, is quashed and set-aside;
- (iii) The appellants are acquitted of the offences with which they are charged. They be released forthwith, if not required in any other case.
- (iv) Fine amounts, if paid, shall be refunded to the appellants.

9 Appeals are disposed of on the aforesaid terms.

REVATI MOHITE DERE, J.