

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL 18 OF 2016

Shri. Munna Khan,
S/O Ataulah Khan,
Aged 55 years, R/O Basdila,
Khukhundo, Salempur, Deoria,
Uttar Pradesh.
Presently lodged in
Modern Central Jail, Colvale, Bardez Goa.

...Appellant.

Versus

- 1). State of Goa
as represented by Officer-In-Charge,
Anti-Narcotic Police Station,
Panaji, Goa.
- 2). The Public Prosecutor,
High Court Building,
Altinho, Panaji, Goa.

.... Respondents.

Ms. Dolorosa Tulkar, Advocate for the appellant.

Mr. Mahesh Amonkar, Additional Public Prosecutor for the respondents.

Coram : M. S. SONAK, J.

Reserved on: 17th September, 2020

Pronounced on: 19th September, 2020

JUDGMENT:

Heard Ms. Dolorosa Tulkar, learned Counsel for the

appellant and Mr. Mahesh Amonkar, learned Additional Public Prosecutor for the State.

2. This appeal is directed against the judgment and order dated 26.10.2015 made by the NDPS Court at Mapusa in Special Criminal Case No.06 of 2013 convicting the appellant (accused) for offences under Section 8(c), read with Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985, being found in illegal possession of commercial quantity of charas and sentencing the accused to rigorous imprisonment for ten years and payment of fine of ₹ One lakh and in default of payment of fine, to undergo further rigorous imprisonment for a period of one year.

3. The case of the prosecution is that on 17.10.2012 between 03:05hours to 07:00hours, at the bus stop shed, Tisk-Karapur, Sanquelim-Goa, the accused was found in illegal possession of 3.015kgs of charas being the commercial quantity and thereby the accused committed offence punishable under Section 8(c) read with Section 20(b)(ii)(C) of the NDPS Act, 1985.

4. The charge in the aforesaid terms was framed against the accused to which he pleaded “not guilty”. The prosecution examined 6 witnesses in support of its case and thereafter, the accused was questioned under Section 313 of CrPC. The accused denied the case

of the prosecution but neither examined himself nor did he lead any defence evidence. By the impugned judgment and order, the accused was convicted. Hence, the present appeal.

5. Ms. Tulkar, at the outset submitted that there is breach of the mandatory provisions of Section 50 of the NDPS Act since, in this case the accused was admittedly not searched before a Gazetted Officer or a Magistrate. She submits that such breach is fatal to the prosecution case. She relies upon *Arif Khan @ Agha Khan vs. The State Of Uttarakhand*¹ in support of this contention. She also relies on the decisions of this Court in *James Sunday Chinonso vs. State and anr.*² and *Krishna S/o. Kavi Raj Malla V/s. State*³ in support of her contentions.

6. Ms. Tulkar also submits that in this case there is no evidence that the accused was apprised of his right to be searched before a Gazetted Officer or a Magistrate in the language which was understood by the accused, i.e Hindi. She submits that this is yet another reason to conclude that there has been a breach of the mandatory provisions of Section 50 of the NDPS Act in the present matter.

1 (2018) 18 SC 380

2 Cri. Appeal No.44/2017 decided on 01/10/2019

3 Cri. Appeal No.15/2016 decided on 10/06/2019

7. Ms. Tulkar then submits that the presence of the pancha (PW-4) at the time of the alleged raid is extremely doubtful. She points out to the deposition of PW-4 who states that the sealing of the samples was done before the raiding team. She then refers to the deposition of the Investigating Officer (PW-6) who has stated that the sealing was done before the raiding team. She points out that there is no clear evidence as to which member of the raiding team brought the kit box for the raid. She points out that at one stage, there is reference to P.C. Mayur carrying the kit box. However, there is no such reference in the testimony of PW-6. She submits that P.C. Mayur was never examined by the prosecution. She therefore submits that all these factors cast a doubt on the very presence of PW-4 at the time of the alleged raid.

8. Ms. Tulkar points out that in any case PW-4 cannot be regarded as reliable witness. She submits that PW-4 in his cross-examination categorically deposed that this was the first case in which he has acted as a pancha and that he has not been pancha in any subsequent case at any police station. She points out that this was deposed by PW-4 on 14.09.2015. She then points out that the Investigating Officer (PW-6) in his deposition has clearly admitted that PW-4, besides acting as a pancha in the present case, also acted as pancha in a subsequent raid conducted by him in the year 2014. Ms. Tulkar submits that from this it is evident that PW-4 had no

qualms about lying on oath and the testimony of such witness ought not to have been considered by the learned NDPS Court for convicting the accused in this case.

9. Ms. Tulkar points out that in this case there has been a breach of provisions of Section 52 and 55 of the NDPS Act. She submits that there is evidence that the Investigating Officer kept in his own custody the muddemal property, i.e. the seized alleged contraband. She submits that in such a situation, the possibility of tampering with the sample can never be ruled out and no conviction can therefore be based in such circumstances.

10. Finally, Ms. Tulkar points out that PW-1 claims to have analysed only 55 sticks from out of the 110 sticks allegedly seized from the accused. She points out that PW-1 had deposed that each of these sticks weighed between 16.9gms to 36.5gms. Ms. Tulkar, on the basis of this points out that it is inconceivable that the 55 sticks which were allegedly analysed by PW-1 could be found to be weighing 1.495kgs when the total weight of the 110 sticks was found to be 2.995kgs. She submits that this is a very serious discrepancy which has not at all been explained by PW-1 and such discrepancy renders the conviction of the accused, quite unsustainable.

11. Ms. Tulkar also points out that in this case, the analytical report states that about 1gm of the substance was taken from 55 pieces weighing 1.495kgs as representative substance. This position was initially confirmed by PW-1 in her deposition. However, later on, by way of an afterthought, the PW-1 sought to explain that she had taken a total of around 1gm each from each of the 55 pieces. Ms. Tulkar submits that this later improvement is not even reflected by the analytical report. Ms. Tulkar submits that from all this, it is evident that the prosecution has failed to establish that any commercial quantity of the contraband was found with the accused.

12. Ms. Tulkar submits that since, the punishment under the NDPS Act is quite severe, the procedures and safeguards under the NDPS Act ought to be scrupulously observed by the Investigating Agency. Since, in this case there have been breaches of safeguards, the conviction of the accused, warrants interference. For all these reasons, she submits that this appeal may be allowed and the conviction and sentence imposed upon the accused be set aside.

13. Mr. Mahesh Amonkar, the learned Additional Public Prosecutor contests all the contentions raised by Ms. Tulkar. He relies on the reasoning in the impugned judgment and order in support of his defence. He submits that in this case the provisions of

section 50 of the NDPS Act were not at all attracted and in any case, they have been duly complied taking into consideration the law laid down by the Hon'ble Constitution Bench in the case of *State of Punjab vs. Baldev Singh*⁴ and *Vijaysinh Chandubha Jadeja vs. State of Gujarat*⁵. Mr. Amonkar submits that the evidence on record clearly indicates that the contraband was found in the bag which the accused was carrying. He submits that to the search of the bag which the accused was carrying, the provisions of section 50 of the said Act do not apply. He relies on *State of H.P. vs. Pawan Kumar*⁶ in support of this proposition. Mr. Amonkar submits that there is no good reason to suspect the presence of PW-4 at the time of the raid. He submits that there are no discrepancies and in any case based on some trivial discrepancy, the testimony of such witness cannot be discarded. Mr. Amonkar submits that in this case there has been compliance with the provisions of Section 52 and 55 of the NDPS Act. He submits that the samples were not retained by the Investigating Officer with himself and, further, even seals were immediately handed over to the Dy.SP so as to rule out any occasion for tampering.

14. Mr. Amonkar submits that there is no infirmity whatsoever in the testimony of the Chemical Analyzer-PW1. He

4 (1999) 6 SCC 172

5 (2011) 1 SCC 609

6 (2005) 4 SCC 350

submits that all procedures and safeguards were duly followed and on the basis of a case which was never put to PW1, the accused, cannot seek any mileage, much less, an acquittal in this matter..

15. For all the aforesaid reasons, Mr. Amonkar submits that this appeal may be dismissed.

16. The rival contentions fall for my determination.

17. In this case, the evidence of PW6 (Investigating Officer) very clearly bears out that to begin with, the black and grey handbag having mark 'D dunhill' was searched by him and his raiding party. PW6 has deposed that after the accused handed over this bag, it was found to have one main compartment with zip, two side compartments with zip and one compartment on the front portion of the bag. PW6 then deposed that he opened the main compartment of the handbag by removing the zip and found therein one auto press transparent polythene bag containing sticks of black colour substance. He then deposed that he opened the said transparent auto press polythene bag and found sticks of cylindrical shape of black colour substance. He minutely observed the black substance and after smelling it informed the panchas that this is suspected to be charas, a narcotic drug. PW6 has then deposed that he counted the cylindrical charas sticks which were found to be 110 in number. He

then weighed the same and found them to be 3.015kgs alongwith the wrappings. He then put the 110 sticks in the auto press polythene bag, closed the mouth of the polythene bag, packed and sealed the same.

18. PW6 has then deposed as to how he proceeded to open the other pockets/compartments of the hand bag but found that they were empty. PW6 has deposed that the black and grey colour empty handbag having the mark 'D dunhill' was then folded by him, wrapped, sealed and labeled. PW6 has deposed that only after the aforesaid was completed that PW6 proceeded to conduct the personal search of the accused. In the course of such personal search, PW6, did not find any contraband narcotics on the person of the accused. PW6 has also deposed that he very clearly informed the accused on his right to be searched before a Gazetted Officer or a Magistrate, if he so requires, and that the accused declined such offer. The testimony of PW6 is corroborated by the pancha witness PW4 almost entirely.

19. In the aforesaid circumstances, there is substance in the contention of Mr. Amonkar that the provisions of Section 50 of the said Act may not even be accepted since, the prosecution, was not relying upon any contraband recovered on the person of the accused

but rather, the prosecution, was relying upon the contraband narcotics recovered from the handbag which was carried by the accused.

20. In *Pawan Kumar* (supra), the Hon'ble Apex Court in the context of the provisions of Section 50 of the NDPS Act, has held that a bag, brief case, or any such article or container, etc. can, under no circumstances, be treated as a body of human being. Therefore, it is not possible to include these articles within the ambit of the word 'person', occurring in Section 50 of the NDPS Act. This is yet another reason on the basis of which it is possible to say that the provisions of Section 50 of the NDPS Act were not attracted to the facts of the present case.

21. However, Mr. Tulkar submits that this was a case of composite raid and therefore, the provisions of Section 50 of the NDPS Act were attracted. This contention, deserves no acceptance in the facts and circumstances of the present case. However, even if such contention were to be accepted, in this case, it cannot be said that there has been no compliance with the mandatory content of Section 50 of the NDPS Act.

22. The contention of Ms. Tulkar is based upon

misconstruing the decision in *Arif Khan* (supra). The contention of Ms. Tulkar almost suggests that the view taken in *Arif Khan* (supra) is to be read and construed as the view which is in variance with the law laid down by at least two Constitution Bench decisions in *Baldev Singh* (supra) and *Jadeja* (supra).

23. The contention almost identical to what is now raised by Ms. Tulkar was considered and rejected in *Kushal Puri V/s. State*⁷. For the reasoning set out therein, the contention of Ms. Tulkar regards violation of the provisions of Section 50 of the NDPS Act is required to be rejected. The decisions in *James Sunday Chinonso* (supra) were based upon concessions made by the learned Public Prosecutor in the said matters. In *Ravinder Kaur Grewal and ors. vs. Manjit Kaur and ors*⁸ the Hon'ble Supreme Court has held that a decision based on concession cannot be treated as a precedent. To the same effect, are the observations in *State of Rajasthan vs. Mahaveer Oil Industries and ors*⁹.

24. In *Director of Settlements, A.P. and ors. vs. M.R. Apparao and anr.*¹⁰ the Hon'ble Supreme Court has explained that the statements of the Court on matters other than law, like facts, may have not binding force, as the facts of two cases may not be similar.

⁷ Cri. Appeal No.9/2017 decided on 17.09.2020

⁸ 2019 (8) SCC 729

⁹ 1999 (4) SCC 357

¹⁰ (2002) 4 SCC 638

But what is binding is the ratio of the decision and not any finding of fact. It is the principle found out upon a reading of a judgment as a whole in the light of the question before the Court that forms the ratio and not any particular word or sentence to determine whether a decision has 'declared law'. It cannot be said to be a law when a point is disposed of on a concession and what is binding is a principle underlying the decision.

25. For all the aforesaid reasons, it is not possible to accept Ms. Tulkar's first contention concerning breach of the provisions of Section 50 of the NDPS Act in the present matter.

26. Ms. Tulkar's second contention relates to independence of the pancha (PW4) and the discrepancies in his testimony. On perusal of the testimony of PW4 and PW6 on the aspect of labeling and sealing of the sample, it is not possible to hold that there is any discrepancy or in any case any serious discrepancy between the versions of the two witnesses. There are bound to be some differences in matters of expression. However, in substance, both, PW4 and PW6 have deposed quite consistently to the manner of packing, sealing, labeling of samples in the present case. Therefore, based upon any inconsistency or in any case extremely trivial inconsistency, there is no case made out to doubt the independence

of PW4 or to otherwise discard his testimony. Similarly, absolutely nothing turns upon which member of the raiding party actually carried the kit box at the time of the raid. The examination of P. C. Mayur is also inconsequential in the facts of the present case. There is overrunning evidence about the carrying of the kit box and the user of its contents at the time of the raid. Based upon such circumstances therefore, there is absolutely no good reason to doubt the independence of the PW4 or to otherwise discard his testimony.

27. There is evidence however, that PW4 had acted as a pancha to a subsequent raid in the year 2014 which was incidentally conducted by PW6, i.e. the Investigating Officer in the present case, in the year 2014. Therefore, the PW4, may not have been right to deposing that he has never acted as a pancha in any subsequent raid. However, the learned NDPS Judge has explained that it is possible that PW4 may have not recollected this raid. Even if such explanation is not taken into account, this reply of PW4 is certainly not such as to discard his entire evidence or to strategize him as some unreliable witness. In the first place, this is not a matter of great moment and, secondly, the principle of *falsus in uno falsus in omnibus* is really not applicable in such matters. [(i) *Shakila Abdul Gafar Khan vs. Vasant Raghunath Dhoble & Anr*¹¹; (ii) *Ugar Ahir & Ors vs. State of Bihar*¹²; (iii) *Balraje alias Trimbak vs. State of*

¹¹ 2003 7SCC 749

¹² AIR 1965 SC 277

*Maharashtra*¹³, and (iv) *Kameshwar Singh vs. State of Bihar & Ors*¹⁴.]

28. For all the aforesaid reasons, even the second contention of Ms. Tulkar deserves no acceptance in the facts and circumstances of the present case.

29. The third contention relates to the alleged non-compliance with the provisions of Section 52 and 55 of the NDPS Act and the possibility of tampering with the sample which was seized, packed and sealed in the present case. The contention almost identical to this contention was raised but rejected in *Kushal Puri* (supra). Therefore, for the same reasoning this contention is liable to be rejected in this case as well.

30. Besides, the evidence on record very clearly establishes that the Investigating Officer did not retain the samples (M.O.) with himself but such samples were immediately handed over to other police officer in the police station. This aspect has not only been deposed to orally by the witness but further, there is documentary evidence on record in the form of entries in registers which establishes this aspect beyond any reasonable doubt. The prosecution, in order to ward off allegations of tampering, even

13 2010 6SCC 673

14 2018 6SCC 673

deposited the seal which was used in this case with the concerned police officer i.e. the Dy.SP, who has also been examined as PW3 in the present case. In these circumstances, it is not possible to accept Ms. Tulkar's third contention about any breach of the provisions of Section 52 and 55 of the NDPS Act and the possibility of any tampering of the sample in this matter.

31. Finally, even the contention based upon the testimony of the Chemical Analyzer(PW1) is required to be rejected in the facts and circumstances of the present case. This is because PW1 has clearly deposed that the 55 sticks which were weighed by her were found to be 1.495kgs. PW1 has also deposed that from each of the 55 sticks which were weighed by her, she took 1gm of representative sample each and thereafter analysed the same. It is only upon finding that each gram from out of each 55 sticks taken out for analysis by her, contained narcotic charas, she opined that the substance seized was indeed narcotic charas. Therefore, based upon the contention advanced there is absolutely no good reason to discard the testimony of PW1. At the highest, in this matter, it can be said that PW1 has failed to analyse or test the balance 55 sticks from the 2.995kg of substance. This means that the evidence on record only establishes that from out of a substance weighing 2.995kgs seized from the accused, there is evidence that 55 sticks weighing 1.495kgs were found to contain the narcotic charas and not the entire substance

seized. Such a finding, however, will make no difference whatsoever to the conclusion and the conviction of the accused for possessing the commercial quantity of charas which is 1kg and above. The substance of 1.495kg which was found to be charas beyond any reasonable doubt thus constitutes commercial quantity for which the accused stands convicted.

32. For all the aforesaid reasons, this appeal is liable to be dismissed and is hereby dismissed. There shall, however, be no order as to costs.

M. S. SONAK, J.

msr.