

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

CRIMINAL APPEAL NO. 535 OF 2000

The State of Maharashtra

...Appellant
(Orig. Complainant)

Vs.

Kondiba Bahiru Thambare,
age 33, Occupation Agriculturist,
Resident of Wakeshwar Vasti,
Thambare Mala, Bavdhan,
Taluka Wai, District. Satara

...Respondent
(Original Accused)

.....

Mr.V.B.Konde-Deshmukh, APP, for the Appellant-State.
Mr.Siddhsen S. Borulkar i/b. Mr.S.R.Borulkar for the Respondent-
Accused.

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**CORAM : S. S. SHINDE,
V.G. BISHT, JJ.**

RESERVED ON : 20TH FEBRUARY, 2020

PRONOUNCED ON: 20TH MARCH, 2020

JUDGMENT (PER: V.G.BISHT, J.)

1. This Criminal Appeal has been preferred by the Appellant-State aggrieved by the judgment and order dated 3rd May, 2000 passed by the learned Sessions Judge, Satara in Sessions Case No. 94 of 1998 whereunder respondent/accused was acquitted of the offence

punishable under Section 8 (b) r/w Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, “the NDPS Act”).

2. The brief facts of the case are:

Shri. V.H.Jadhav, Deputy Superintendent (PW-4) and Shri B.V.Dhavale, Excise Sub-Inspector (PW-5) informant accompanied by panch witnesses went to the village Bawdhan on 25th February, 1997 and raided certain fields including the field of Kondiba Bahiru Thombare (accused) bearing Gat No. 211. The prosecution alleged that they found accused growing opium-poppy plants in his field where the wheat crop was standing. Those opium-poppy plants were 400 in numbers. In the presence of the accused and panch witnesses the opium-poppy plants were uprooted and out of it, two samples alongwith earth sample were taken from the field under the panchnama.

3. PW-5 informant later on lodged a report on the basis of which Crime No. 46 of 1997 under Section 8 (b) r/w Section 18 of the NDPS Act came to be registered against the accused and after necessary investigation the accused was chargesheeted. The accused abjured his guilt and put forth the case of false implication.

4. Heard Mr.Konde-Deshmukh, learned APP for the appellant-State and Mr.Borulkar, learned Counsel for the respondent -accused.
5. Perusal of the record would show that in order to substantiate the charge, the prosecution examined five witnesses.
6. PW-5 informant stated in his evidence (Exh. 12) that on 25th February, 1997 he was attached to Flying Squad of State Excise Department at Satara. He was called by the Superintendent and told that a raid was to be effected in the area of Bavdhan for detection of opium-poppy plants. From Satara, Deputy Superintendent Jadhav (PW-4), two panch witnesses and the constables of the department went to Bavdhan by a jeep. It is his further evidence that when they reached Thombare Mala in Wakeshwar locality, they found a person working in wheat crop. They asked his name and he disclosed his name as Kondiba Bahiru Thombare i.e. accused. It is his further evidence that they then counted the plants which were around 400 and separated two plants as sample and as also soil from the root of those plants and treated it as sample. They sealed it and took the custody of the same.

7. According to this witness, they then brought the seized contrabands and accused to their office at Satara. They also collected 7/12 extract (Exh. 17) from the Talathi. The muddemal was kept in his safe custody in his office. On 1st March, 1997, he forwarded sample packets to the office of Chemical Analyzer, Pune. He then proved his report at Exh. 15.

8. From the bare reading of the evidence of this witness, it would appear that on 25th February, 1997 he alongwith PW-4 and other staff members went to the field of accused. The evidence does not clearly show as to gat number of field which this witness and other had raided. It also does not show in so many clear terms as to who was the owner of that field from where they collected 400 plants. Further, as is claimed in the FIR, there is no specific evidence as to from where these 400 plants were uprooted.

9. Suffice to say, there is no absolute clarity coming from the evidence of this witness. What is surprising from his cross-examination is that even he was not told the name of persons, by Superintendent, whose fields were required to be raided.

10. Equally important witness is PW-4 Vishnu Hanmant Jadhav. It appears from his evidence (Exh. 11) that on 25th February, 1997 he was working as Deputy Superintendent in Krishna Sahakari Sakhar Karkhana, Karad. According to him, his Superintendent told him that he wanted to do some cases at Wai and therefore, he accompanied him. Excise Sub-Inspector Dhavale (PW-5) and other staff members including two panch witnesses went to Wakeshwar Vasti, Thombare Mala, Bavdhan Shiwar. They were standing by the side of field in which the crop of wheat was grown. They noticed that there were some plants having white flowers in that field. One person was working nearby that field. PW-5 asked him as to whom that field belongs to which that person told that it is his field and gave his name as Kondiba Bahiru Thombare. The rest of the evidence of this witness is on the line of PW-5 as far as collection of 400 plants and sampling etc., are concerned.

11. The examination-in-chief of this witness clearly shows that when Mr.Dhavale (PW-5) asked the person who was working in the field as to whom the field belonged, that person not only replied that field belonged to him but also revealed his name. However, in the cross-examination, this witness stated that in his presence there was

no conversation between the accused and Sub-Inspector Dhavale (PW-5) except that PW-5 had asked his name. This clearly goes to show that except asking identity of the accused by PW-5, nothing more was asked, namely, as to ownership of field and rightly so because PW-5 in his whole evidence has nowhere stated that he had inquired with accused about the ownership of field from where the alleged opium-poppy plants were seized.

12. There is one more reason to doubt the testimony of informant and this witness and the reason for that is cross-examination of PW-4.

13. In the cross-examination, PW-4 stated that the Talathi and Police Patil were called at that place and that they were not called prior to making of raid. In sharp contrast, firstly, the presence of Police Patil is nowhere revealed either by panch witnesses or for that matter, by informant in their substantive evidence respectively. As regards summoning the Police Patil is concerned, who is none other than PW-2, his evidence clearly points to the fact that right from the beginning he accompanied PW-4 and PW-5 and other staff members.

14. Thus, the testimony of this witness falls short of in the material particular i.e. summoning of Police Patil. Not only there is perceptible inconsistency between the versions of PW-4 and PW-5 but at the same time, panch witnesses are also not lagging behind and we say so for the reasons to be recorded hereinafter.

15. PW-1 Mahesh Gajanan Shedage stated in his evidence (PW-6) that on 25th February, 1997 he was called by Excise Sub-Inspector Dhavale (PW-5) in the Excise office. He told him that he wanted to go for raid and therefore, he should accompany him. Accordingly, he went with him. They went to village Bavdhan. Shende, Javalikar, Rasal and the Excise staff had also accompanied them. Second panch, namely, Nipane was also present there. They saw that there was wheat crop in the field and in that field, opium-poppy plants of the height of 3-4 ft. were grown. Sub-Inspector asked as to whom those plants belong. Excise Sub-Inspector had also asked his name and was asked to uproot those plants. The panchnama was drawn. Bundles were prepared. Two to three bundles were packed and therefore, their signatures were obtained. He then proved the panchnama at Exh. 7.

16. This witness lastly stated that the bundles were wrapped in a gunny-bag and was marked. The plants were counted and weight was also taken. He then stated that he cannot tell how many plants were there and what was its weight.

17. At the very outset, it must be noted that this witness has nowhere attributed the presence of PW-2 Police Patil through out in his evidence. We point out this fact because PW-4 in his substantive evidence has deposed about the presence of Police Patil at the time of making raid.

18. The evidence of PW-1 clearly suggests that there were opium-poppy plants in the field where the wheat crop was standing and the owner Thombare was present. Interestingly, this witness has nowhere stated in his evidence as to how many plants were there. In the cross-examination also he clearly admitted that he was not in a position to tell as to how many opium-poppy plants were there. If the whole raid was carried out in his very presence and the fact that prosecution has a specific case of collection of 400 opium-poppy plants from the field, then in all seriousness this witness ought to have stated the number of opium-poppy plants seized from the

field. This definitely is very important aspect which cannot be overlooked.

19. Then the evidence of this witness points out and again suggests that he was knowing that the accused was the owner of that field. If that was so, then a question also arises as to how he came to know that the accused was the owner of that field because it is not his evidence that he was knowing the accused since prior to incident. For the above said reasons, it would not be safe to accept and approve the testimony of this witness.

20. PW-2 Ashok Gulabrao Bhosale stated in his evidence (Exh. 8) that he knows accused. It is his evidence that when he was sitting in the Grampanchayat Office, Excise Sub-Inspector came and took him with them for seeing the field. The opium-poppy plants were there. He does not know the gat number or survey number of that land. The field is owned by accused. In the cross-examination, he stated that he is a Police Patil.

21. At the very beginning of the appreciation of evidence of PW-1, we have pointed out that PW-1 panch witness throughout in his evidence has nowhere revealed or attributed the presence of this

witness at the time of alleged raid. Even according to PW-4 this witness was called at the time of raid alongwith the Talathi. It may not be out of place to mention here that this witness being Police Patil of village and the fact that he knows accused very well was unable to tell the gat number of the land where the opium-poppy plants were found. As already noted, the presence of this witness being doubtful and it gets further so in the light of his cross-examination where he stated that he does not remember whether the wheat crop was there in that field or not. It must be remembered here that according to prosecution those opium-poppy plants were seen in the field where wheat crop was standing. Therefore, inability of this witness to state whether there was wheat crop or not is quite questionable.

22. His cross-examination then shows that he cannot tell as to who actually was cultivating the land in question from where opium-poppy plants came to be seized and was also not knowing that the land pertains to accused prior to raid. This certainly implies that he was told by somebody on the date of raid that the land in question was of ownership of accused. Then comes material omission.

23. His examination-in-chief showing that the opium-poppy plants were in the field being not part of his statement recorded under Section 161 of the Code of Criminal Procedure he was therefore confronted in the cross-examination and he insisted that he had in fact stated before the police that there were opium-poppy plants in the field of accused and he is unable to tell the reason as to why that fact is not mentioned in his statement.

24. This omission could not be proved by the prosecution inasmuch as the investigating officer was not brought before the Court for the reasons best known to it. Thus, the defence was deprived of the opportunity of proving this material omission for want of presence of investigating officer. In such a situation an adverse inference must be drawn against the prosecution.

25. The oral evidence discussed so far by us definitely presents a gloomy picture and does not in any manner raise confidence in our mind. There are other shortcomings and pitfalls as well.

26. The last witness examined by the prosecution is PW-3 Shirish Baburao Jangam who appears to be carrier of the seized muddemal to the Forensic Science Laboratory, Pune. It is his evidence (Exh.9)

that on 1st March, 1997, Excise Sub-Inspector Dhavale (PW-5) gave him two sample packets in sealed condition and he accordingly carried those sample packets to the office of Chemical Analyzer, Pune. Though findings of the Chemical Analyzer favours prosecution but we cannot resist ourselves from putting a comment or two on record about the procedure in respect of seized muddemal as adopted by PW-5 informant.

27. We have already pointed out from the evidence of PW-5 informant that the muddemal was in his safe custody in his office. He being informant what he meant thereby that the muddemal was kept in his safe custody is nowhere explained. Absolutely no evidence is adduced by the prosecution to prove that the seized opium-poppy plants were safely deposited with the concerned in sealed condition after taking proper entry in the register meant for the purpose. It is also not the evidence of PW-5 informant that he himself was In-charge of the said register and therefore, he was entitled to keep the custody of the seized articles after he returned to the office.

28. As is evident from the evidence of PW-3 that the muddemal was carried to the office of Chemical Analyzer, Pune on 1st March,

1997, it is quite clear that the said muddemal was lying with PW-5 for about five days. Needless to say, there is no evidence of safe custody of the seized muddemal. In other words, it cannot be said that the prosecution has ruled out the possibility of the sample parcel having not been tampered with by anybody till it reached the hands of Chemical Analyzer. This circumstance further makes the case of the prosecution a suspect. Thus, seen from any angle, there is nothing but total failure on the part of prosecution.

29. A careful perusal of 7/12 extract (Exh. 17) would show that accused is one of the owner of the agricultural land bearing Gat No. 201. It also shows the joint owners of land in question. The column pertaining to the crops at the relevant time shows that there were groundnuts, rice, ghevada, dubashalu etc. It nowhere discloses standing of wheat crop whereas the case of prosecution is that opium-poppy plants were found in the standing wheat crop. The prosecution has not been able to prove and as already noted that it was accused and accused alone who was responsible for alleged opium-poppy plants.

30. In the aforesaid premise, we conclude that the learned trial Court has taken into consideration all the material aspects of the case. The prosecution has not been able to make out good grounds for interference at the hands of this Court. The impugned order being in accordance with law and being neither perverse nor illegal, the Appeal is liable to be dismissed. Hence, the Appeal is dismissed accordingly.

31. Bail bonds, if any, shall stand cancelled.

(V. G. BISHT,J.)

(S. S. SHINDE, J.)