

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

CRIMINAL APPEAL NO. 541 OF 2000

The State of Maharashtra

...Appellant
(Orig. Complainant)

Vs

1. Shankar Khandu Thombare,
Age- 35.

2. Khandu Kondi Thombare,
Age 65

Both Agriculturist,
Residing of Makeswar Vasti,
Thombare Mala, Bavdhan,
Tal. Wai, Dist. Satara.

...Respondents
(Original Accused)

.....

Mr.V.B.Konde-Deshmukh, APP, for the Appellant-State.

Mr.Siddhsen S. Borulkar i/b. Mr.S.R.Borulkar for the Respondents-Accused.

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

**RESERVED ON : 20/02/2020
PRONOUNCED ON : 20/03/2020**

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

This Criminal Appeal has been preferred by the Appellant-State aggrieved by the judgment and order dated 9th May, 2000 passed by the learned Sessions Judge, Satara in Sessions Case No. 93 of 1998 whereunder respondents/accused were 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, Superintendent (PW-3) and Shri B.V. Dhavale, Excise Sub-Inspector, informant (PW-4) accompanied by panch witnesses went to the village Bawdhan on 25th February, 1997 and raided certain fields including the field of Shankar Khandu Thombare (A-1) and Khandu Kondi Thombare (A-2) bearing Gat No. 202. The prosecution alleged that informant and others found accused growing opium-poppy plants in their field where the sugarcane crop was standing. Those opium-poppy plants were 300 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-4 informant, later on lodged the report on the basis of which Crime No. 44 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 they were chargesheeted. The accused abjured their 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 respondents -accused.

5 Perusal of the record would show that in order to substantiate the charge, the prosecution examined eight witnesses. We would like to assess and marshal the testimonies of these witnesses hereinafter.

6 PW-4 informant stated in his evidence (Exh. 17) that in February, 1997 he was attached to Flying Squad at Satara State Excise Department. On 25th February, 1997 he was informed by the Superintendent about information having received that opium-poppy plants are being cultivated in the area of village Bavdhan and therefore, they should go and effect the raid. Accordingly, they called two panch witnesses and gave them idea of raid. He and other staff members accordingly went to Bavdhan. They sat near Wakeshwar locality and started keeping vigilance. It is his further evidence that one person was found working in the field at 9-00 am. They went in that field along with staff and asked his name. The said person disclosed his name as Khandu Kondi Thombare (A-2) and also told that the field belongs to him and that he has cultivated the opium-poppy plants in the land. A-2 came to be arrested. They also counted opium-poppy plants which were about 300 in numbers. They uprooted all the plants and out of it two plants were

separated for the purpose of sample along with the soil at the root. The sample was then seized. It is his further evidence that they brought seized contraband and the accused to their office at Satara and kept the muddemal and the samples in his safe custody. Later on, he lodged the complaint. The witness then proved his complaint at Exh. 18 and 19.

7 It is his further evidence that he recorded statements of the witnesses. A-1 is the son of A-2. It transpired in the course of investigation that both of them cultivate the land.

8 PW-3 Vishnu Hanmant Jadhav, Deputy Superintendent, Excise Department, Satara in his substantive evidence (Exh. 16) has broadly supported the version of PW-4, informant.

9 What is pertinent to note from the evidence of both these witnesses is that at 9-00 am on 25/02/1997 they noticed a person working in a field and then they approached him, enquired his details and the said person allegedly revealed his name as Khandu Kondi Thombare (A-2). A-2 also apprised them of his ownership over the land and that he had cultivated opium-poppy plants. Therefore, it can be safely inferred from the evidence of these witnesses that the whole incident took place at 9-00 a.m. on 25/02/1997. But, it does not appear to be so, if we go through the evidence of PW-1 Baban Bhausahab Nipane. Before that, we

would like to put on record a major inconsistency between the versions of PW 3 and PW 4 vis-a-vis the information pertaining to growing of opium-poppy plants by land holders of village Bavdhan. So also a noteworthy lacuna.

10 The evidence of PW 3 clearly shows that on 25/02/1997 he was present in the Superintendent's office at 5.50 am. Superintendent, Sub-Inspectors Rasal, Davalbhakt and Dhavale (PW-4) were present. Sub-Inspector Rasal told them that he had received information regarding cultivation of opium-poppy plants in the area of Bavdhan and raid was to be effected. Then Superintendent had appointed Mr.Dhavale (PW 4) for that work. Thus, it is quite apparent from the evidence of this witness that the information in respect of cultivation of the opium-poppy plants was received by Sub-Inspector Rasal whereas the evidence of PW-4 informant shows that the said information was received by Superintendent and therefore, he (Superintendent) asked him to carry out the raid.

11 Apart from the above major inconsistency what is disturbing our mind is that the alleged information admittedly was not reduced into writing by the concerned. Therefore, there is no occasion for us to verify the correctness or otherwise of the said information and as also about its source. Needless to say, the prosecution has canvassed on record that

pursuant to the information the raid was carried out. Then, it was all the more obligatory and incumbent on the part of concerned officer to have reduced the said information into writing and his subjective satisfaction about the necessary raid. This is a major lacuna which definitely gives severe set back to the theory of prosecution.

12 Reverting back to the testimony of PW-1, his evidence (Exh. 10) shows that on 25/02/1997 he along with PW-3, PW-4 and others reached the fields and waited till 7-30 am. At that point of time they saw one person working in the field. Then they asked him as to ownership of field to which that person replied it of his ownership and also revealed his name as Kandu Thombare (A-2). The evidence of this witness is in direct conflict with PW-3 and PW-4 inasmuch as according to this witness, A-2 was confronted at about 7-30 am whereas according to PW-3 and PW-4 it was at 9-00 am.

13 Similarly, his cross-examination shows that Talathi and Police Patil were also summoned in the field before uprooting of the opium-poppy plants. This means uprooting of the opium-poppy plants was done in the presence of Talathi and Police Patil of village Bavdhan. As against this, the cross-examination of PW-3 and PW-4 show that the Talathi and Police Patil were not called for the purpose of raid in the field of present accused.

14 Further, cross-examination of PW-1 shows that arrest panchanama of A-1 was prepared in the office of State Excise. Neither it is the evidence of PW 3 nor that of PW-4 informant that A-1 was also found in the field when the alleged raid was carried out. Even the very examination-in-chief of PW-1 does not show about the presence of A-1 at the time of raid. This being so, there was no question at all of preparation of arrest panchanama of A-1 in the office of State Excise. There is something amiss which creates doubts.

15 Thus, the over all analysis of the evidence of the material witnesses viz. PW-1, PW-3 and PW-4 is not encouraging. We are constrained to observe that all these material witnesses differ with each other on material particulars as pointed out herein-above. Therefore, our dissatisfaction and denial to the acceptance of their testimonies.

16 The last material witness from the point of view of prosecution is PW-2 Shirish Baburao Jangam (Exh.12), who carried the seized contraband to the Forensic Science Laboratory.

17 PW-2 stated in his evidence that on 01/03/1997 he carried the sealed samples to Chemical Analyzer, Pune and deposited the same there. His cross-examination shows that before he carried the sealed samples, they were lying in possession of Mr. Dhavale (PW 4). Even PW-4

informant has stated in his evidence that the muddemal was in his safe custody.

18 We notice the absence of positive evidence showing that seized opium-poppy plants were safely deposited with the concerned in sealed condition after taking proper entry in the register made for the purpose. It is also not the evidence of PW-4 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.

19 As is evident from the evidence of PW-2 that the muddemal was carried to the office of Chemical Analyzer, Pune on 01/03/1997, it is quite clear that the said muddemal was lying with PW-4 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 parcels 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.

20 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 further being neither perverse nor illegal, the Appeal is liable to be dismissed. Hence, the Appeal is dismissed accordingly.

21 Bail bonds, if any, shall stand cancelled.

(V. G. BISHT,J.)

(S. S. SHINDE, J.)