

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.863 OF 2019
IN
CRIMINAL APPEAL NO. 479 OF 2017

Kantilal N. Joshi
Aged 62 Years,
R/at 308, Gautam Nagar,
Near Ambamata Temple
Bhayender (W) Thane.

... Applicant

Versus

The State of Maharashtra

... Respondent

.....
Mr. Anil G. Lalla i/b. Lalla and Lalla Advocates, Advocate for the
Applicant.

Ms. A. A. Takalkar, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 9th DECEMBER, 2020.

PER COURT:

1. The applicant is convicted for the offence punishable under Section 8(c) r/w Section 20(b)(ii) C of Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'NDPS Act') and sentenced to suffer rigorous imprisonment for a period of Ten years and to pay fine of Rs.1,00,000/- by Judgment and order dated 6th May, 2017 passed by learned Special Judge (NDPS), Gr. Bombay in NDPS Case No.05 of 2011.

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2. the prosecution case is that on 28th September, 2010 the accused was apprehended and on being searched he was found in possession of 1 Kg 400 grams of Charas. Procedure of sampling, sealing was completed. On completing investigation, charge-sheet was filed.

3. During the trial prosecution examined 7 witnesses. The trial Court convicted the appellant for the offences as stated above. He was acquitted for offence punishable under Section 8(c) r/w Section 29 of NDPS Act.

4. Learned advocate for the applicant submitted that the applicant was on bail during the trial. He is not misused the facility of bail granted to him. He has not involved in any other case. There was no breach of conditions of bail. There are serious discrepancies in the evidence of witnesses. The appeal preferred by the applicant has been admitted and pending for final disposal. It may not come up for hearing immediately. There is discrepancy in respect to the weight of samples obtained by the investigating machinery during investigation and those received by the chemical analyzer. The forwarding letter to the chemical analyzer mentions that the samples of 25 grams Charas were sealed and forwarded to

the C.A.(Chemical Analyzer). It is submitted that PW-3 was working as assistant C.A. at Forensic Science Laboratory, Kalina has deposed that on 29th September, 2010 their laboratory has received one parcel along with forwarding letter to H.O.D. and the H.O.D. had handed over the parcel to her for verification. In the cross examination she deposed that as per forwarding letter weight of substance is 25 grams and actual weight found 29.2895 gram. There is 16% difference in weight. She did not communicate this fact to the police. It is further submitted that there is variation in respect to the description of the contraband seized from the accused. PW-3 has stated that when she opened parcel, she found greenish brown lumps in stapled polythene bag which was packed in packet. Whereas PW-4 was a member of raiding party has stated that he saw greenish sticks. The results found positive brownish colour. It is submitted that PW-5 Police Inspector Bhanudas Jadhav stated that the substance was greenish brown in colour emitting strong odour and was wet. It is submitted that apart from variation in the weight there is variation in respect to description of the contraband. The discrepancies goes to the root of the matter. It is also submitted that witnesses were cross examined with regard to sealing and packaging.

Suggestions were given to PW-6 that the sampling, sealing was not done at the scene of offence and that he signed by sitting in Warli Unit. Suggestion was also given to PW-7 that the documents and articles are fabricated and tampered and the panchnama was drawn with the help of amenable panchas and accused is falsely implicated in this case. It is further submitted that the applicant was granted temporary bail by this Court by order dated 30th November, 2018 on the ground that his wife was suffering from Chronic Myeloid Leukemia and is requiring Bone Marrow transplantation. The temporary bail was then extended till 30th April, 2019 and 16th June, 2019. The copies of the order passed by this Court are annexed to this application. Learned counsel relied upon the decision of Supreme Court in the case of *Rajesh Jagdamba Avasthi Vs. State of Goa* 2005(2) Bom. C.R. (Cri.) 929, *Abdul Rashid Vs. State of Maharashtra*, 1999 (2) crimes 362, *Abdul Rehman @ Haji Ali Mohammed Hakim Vs. State of Maharashtra*, 2019 ALL MR (Cri.) 2107. *James Eazy Franky Vs. D.R.I.* decided by Delhi High Court in Criminal Application No. 372 of 2009 and *Noor Aga Vs. State of Punjab and Another*, 2008 AIR SCW 5964.

5. Learned APP submitted that there is no discrepancy in the evidence of witnesses. The variation in the weight of samples is minor which would not affect the prosecution case. There was no effective cross examination of witnesses in respect to the discrepancy in the weight. The difference in weight can be due to air pressure. There was no tampering. The chain of seizure forwarding samples to CA and the report about the samples is not broken. Learned APP relied on the decision of the Supreme Court in the Case of *Dehal Sing Vs. State of Himachal Pradesh* (2010) AIR (SCW) 5533. *Noor aga Vs. State of Punjab & Ors.* (Supra), *State Vs. Dilbagh* 2004 13 SCC 99, *Kulwant Sing Vs. Narcotics Control Bureau* delivered by Delhi High Court and *State of Rajasthan Vs. Kalki and Another*, (1981) AIR (SC) 1390.

6. It is undisputed that two samples of 25 grams each were obtained and the same were forwarded to FSL Kalina. The weight of the contraband in the sample was 25 grams. The C.A. in her evidence have deposed that the actual weight found on the substance was 29.2895 grams although the forwarding letter indicated its weight as 25 grams. The forwarding letter also refers to C.A. as weight of the samples as 25 grams. Learned counsel for

the applicant has also submitted that the data sheet Exh.28 with C.A. report also records the weight as 29.2895 grams. It is also contended that no witnesses have explained as to how discrepancy is come on record. The Judgments relied by both the sides deal with issue relating to variation in weight. It is observed that, small difference in weight losses significance when one finds no infirmity in other parts of the prosecution story. Minor differences in weight could not vitiate the trial. There may be normal discrepancies in the evidence of witnesses. The decisions also observe that discrepancy in weight given to analysis cannot rule out the possibility of contents having been tampered. In the absence of explanation from prosecution for discrepancy in the quantity received by the analysis would be serious infirmity in prosecution case which could be fatal. In the case of *Noor Aga Vs. State of Punjab and Another* (Supra) it was observed that, a slight different in weight may not be help to be crucial as to this regard the prosecution case. The original weight of the sample was 5 grams and the letter accompanying the weight of the sample in the laboratory of 8.7 grams. Initially the colour was brown and as per C.A. report it was white. It was further observed in that case, the scenario was different. The place of seizure was airport. The

officer must be carrying goods case. Marginal increases or decreases may make a huge difference. In the present case the applicant is harping upon the discrepancies in respect to weight as well as the description of the weight of the contraband. This issue will have to be examined minutely, while appreciating the evidence. However, from the evidence the discrepancies are highlighted by the learned counsel for the applicant. It is relevant to note that, for a period of about Six years the applicant was on bail during the trial. Albeit on a different ground with regards to purity of the contraband. It is also noted that the applicant was granted temporary bail by this Court on the ground of health condition of his wife vide order dated 30th November, 2018 which was in force till 16th June, 2019. There is no report of misuse of bail granted to applicant. Hence, sentence can be suspended in pending appeal.

ORDER

- i) Criminal Application No.863 of 2019 is allowed.
- ii) The sentence of imprisonment imposed vide Judgment and order dated dated 6th May, 2017 passed by learned Special Judge (NDPS), Gr. Bombay in NDPS Case No.05 of 2011 is suspended pending appeal preferred by

the applicant. The applicant is directed to be released on bail on his furnishing PR. bond in the sum of Rs.50,000/- with one or two sureties in the like amount.

iii) The applicant shall attend the trial Court once in Six month, till pending of appeal.

iv) The applicant is permitted to furnish cash bail security in the sum of Rs.50,000/- for a period of Twelve weeks in lieu of surety.

v) Application stands disposed of accordingly.

7. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(PRAKASH D. NAIK, J.)