

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL REVISION APPLICATION NO. 116 OF 2021

Nasir Shaikh Yusuf Sheikh Vs. State of Maharashtra

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. Amol Hunge, Advocate for the applicant
Mr. A.R.Chutke, APP for respondent/State

CORAM : AVINASH G. GHAROTE, J.
DATE : 14/07/2022

1] Heard Mr. Hunge, learned counsel for the applicant and Mr. Chutke, APP for the respondent/State.

2] The learned Magistrate has convicted the applicant for the offence u/s 65(e) of the Maharashtra Prohibition Act and sentenced him to suffer S.I. for three years and to pay fine of Rs. 25,000/-, in default S.I. for 30 days by the judgment dated 23.5.2018.

3] The appellate court by the judgment dated 19.06.2021 has partly allowed the appeal by maintaining the conviction, however setting aside the sentence for imprisonment. The sentence of fine has been maintained.

4] It is against these two judgments, that the present revision has been filed.

5] Mr. Hunge, learned counsel for the applicant submits that the prosecution story that the applicant was found carrying 5 bottles of Royal Stag (foreign liquor) of 180 ml each, worth Rs. 1,500/- and two bottles of Imperial Blue (foreign liquor) of 180 ml each, worth Rs.600/-, on 21.5.2016 has not been proved, inasmuch as the punch witnesses before whom the seizure has been made have turned hostile. He therefore submits that in absence of an independent witness, to prove the seizure, the conviction cannot be based upon the mere statements and evidence of police constables who are all interested in ensuring that the prosecution succeeded and therefore have narrated the incident in a parrot like manner. He therefore submits that the learned Courts below ought not to have relied upon the evidence of PW-3 to 8, as they were all interested witnesses. He further submits that even during the course of evidence, PWs-3 to 8 have not identified the accused, as no question to that effect was put to them. He therefore submits that the conviction based upon the testimony of PWs-3 to 8 who are interested witnesses, cannot be sustained.

6] Learned APP opposes the application and supports the impugned judgment. He does not dispute that the witnesses to the spot panchnama and the seizure viz. PW-1 and 2 have turned hostile and so also the fact that no question was put to PW-3 to 8 in the nature of identifying the accused, he however submits that the evidence of PWs-3, 4 and 5 who were present on the spot

is worthy of credence and the conviction based upon their evidence is clearly sustainable in law.

7] It is a trite position of law, that wherever possible, the conviction ought to be based upon the testimony of independent witnesses and upon the chain of events being established to the satisfaction of the court based upon the evidence on record, and unless it is shown from the record that the testimony of the other witnesses was clear and reliable, it would not be safe to base a conviction upon the testimony of interested witnesses. In the instant case, there is no doubt that PW-1 and PW-2 who are the panch witnesses to the spot and seizure have turned hostile. It is also a matter of record that the conviction is based upon the testimonies of PWs-3, 4 and 5 & 8 who are the police constables and who are claimed to have carried out the raid on the basis of secret information.

8] PW-3 is the person who has lodged the FIR on the basis of the raid which is claimed to have been conducted by him along with PWs-4 and 5. It is however material to note that neither PW-3, nor PW-4 have identified the appellant, as the accused person who is claimed to be carrying the bottles of foreign liquor on the fateful day from whom it is claimed to have been seized. Though PW-5 in his chief states about the incident, however, in his cross examination he categorically states that the incident narrated by him in his examination in

chief had never occurred. It is therefore apparent that the entire conviction has been based upon the testimony of PWs-3 and 4, who have failed to identify the accused. In absence of the PWs-1 and 2, supporting the prosecution story regarding the seizure of the material and the evidence of PW-5 which indicates that no such incident had taken place, the conviction of the appellant merely on the testimony of PWs-3 and 4 is clearly unsustainable. The courts below as is apparent from perusal of the impugned judgment have not taken into consideration the admission of PW-5 as has been brought out in his cross examination. The evidence of PW-6, is of the Station Diary Constable, who has lodged the crime against the accused. PW-7 was the police constable who has taken the seized liquor bottles to Chemical Analyzer Laboratory, Nagpur, who in his cross examination has also admitted that he did not know the date of recording of his statement and the duty pass at Exh. 33 did not bear his signature regarding receipt of the same. PW-8 has in his cross examination stated that he was unable to tell the number of the motor-cycle of the accused. There is also contradiction between the deposition of PW-3 who says in his cross examination that on the fateful day no secret information was received, as against which the PW-8 says that the raid was conducted on the basis of secret information received from the informant.

9] That apart, PW-8 further in his cross examination indicates the absence of PW-4 at the time of

the incident. It would therefore be apparent that the testimonies of PWs-3, 4, 5 and 8 are contradicting each other, considering which the same were clearly unsafe for a conviction to be based upon. The impugned judgments do not indicate these contradictions and omissions to have been taken into consideration. It would not be out of context to mention here that the name of the appellant has been included in the list of persons who are held to be eligible for compassionate appointment by the Ordnance Factory, Chanda, on account of demise of his father, who was working there. Considering that the impugned judgments do not consider the inherent contradictions and omissions in the evidence of PWs-3, 5 and 8 and that there is no independent witness to support seizure of the material from the accused, in my considered opinion, the conviction as rendered by the Court below cannot be sustained, in view of which the impugned judgments are hereby quashed and set aside and the appellant is acquitted from the offence under Section 65(e) of the Maharashtra Prohibition Act. His bail bond stands cancelled. The fine amount be refunded to the appellant.

10] Criminal Revision is allowed and disposed of accordingly.

JUDGE

Rvjalit

Digitally sign by RAJESH
VASANTRAO JALIT
Location:
Signing Date: 15.07.2022 10:37