

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.13 OF 2019

The State of Maharashtra
Through Police Station Murum,
Tq. Omerga, Dist. O,bad.

... Appellant
(Orig. Informant)

Versus

1. Ahmed Isak Shaikh,
Age : 27 Years, Occu. Labour,
R/o. Salimchal, Near Reshma Kirana,
Andheri Plot, Jogeshwari East,
Mumbai - 60.
2. Mohammad Yunus Mohmmad Ayub Shaikh,
Age : 42 Years, Occu. : Labour,
R/o. K. M.105/3/3 B, Block,
Near Sadabhar Hotel,
Jogeshwari East, Mumbai - 60.
3. Taufiq Bashir Ahmed Shaikh,
Age : 24 Years, Occu. : Labour,
R/o. Ajgarali Chal, Andheri Plot,
Jogeshwari East, Mumbai - 60.

... Respondents.
(Orig. Accused)

...
APP for Appellant : Mrs. V. S. Choudhari
...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATED : 22nd JUNE, 2023

PER COURT :

1. Heard learned APP at the admission stage.
2. The present application has been filed under section

378(1)(b) of the Code of Criminal Procedure (Cr.P.C.), seeking leave to challenge the acquittal of respondents by learned Special Judge (under NDPS Act) Omerga, by judgment and order dated 30.11.2018 in Special NDPS Case No. 01 of 2016 from the offences punishable under sections 20(b)ii(C) of the Narcotic Drugs and Psychotropic Substance Act, 1985 (NDPS Act).

3. Before we proceed, it is to be noted that section 36-B of NDPS Act deals with Appeal and Revision. It provides that the High Court may exercise so far as may be applicable, all the powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure, on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court, that means, a special provision for filing the appeal is made available by the said section 36-B of NDPC Act. For that purpose, leave need not be asked under section 378(1)(b) of Cr.P.C. The petition is therefore considered under section 36-B of NDPS Act.

4. Learned APP has taken us through the copies of depositions made available and material which was before the learned trial Judge. The prosecution story in short is that, PW-4 API Vilas Gobade lodged the FIR, stating that, he was on night

round with other police officers around 11.00 p.m. on 04.06.2016. They met SDPO, Omerga on their journey and then at about 3.15 hours of 05.06.2016, they found one Honda City car bearing No.AP-10-AM-0727 coming from Solapur side and proceeding towards Omerga. They asked the vehicle to be stopped and demanded the documents from the driver. He was asked to open the dickey and they found a blue colour plastic bag. After it was opened on his direction, they found packets were smelling Ganja. One packet was opened and they found ganja in that packet. They carried the impression that the persons traveling in the car were transporting the said article, i.e. ganja and therefore, the car was brought to Yenegur out post. Names of the persons traveling in the car were revealed. Intimation was given to the police station and thereafter, panchanama was carried out. The SDPO was the Gazetted Officer and he offered search to be taken and those persons accompanying with car took objection. The articles were seized and after registration of the FIR accused persons came to be arrested. After completion of the investigation charge-sheet was filed. Prosecution examined in all six witnesses to bring home the guilt of the accused and after hearing both sides and considering evidence, the learned Special Judge has acquitted all the accused persons. Hence present leave application.

5. Perusal of the evidence would show that both the panchas have turned hostile by taking permission to put questions in the nature of cross. The prosecution has tried to extract the answers favourable to it. However, except signature they have not admitted anything. No doubt, when it is alleged that the offence is stated to have committed around 3.15 a.m., there may not be availability of an independent witness, but when the prosecution has come with the case that the panchas were summoned and the entire seizure has taken place in their presence, then corroborative evidence is expected. The learned Special Judge has categorically held that there was non compliance of sections 55 and 57 of the NDPS Act and we do not find that the said observation and finding is perverse. Further, it has come from the cross examination of the Investigating Officer that he had not even tried to establish the ownership of the car. The accused persons are stated to be from Mumbai, whereas registration of the car appears to be from Andhra Pradesh. Under such circumstance, establishing the ownership was one of the major factors. The alleged muddemal is stated to be recovered from the dicky and therefore its knowledge to the persons who were accompanying the driver seat as well as rear seat and conscious possession ought to have been established. As the prosecution has failed to prove the

perversity and illegality, we do not find that the appeal deserves to be admitted. It stands dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)