

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.33 OF 2019

The State of Maharashtra
Through : Police Inspector,
Jawaharnagar Police Station,
Aurangabad.

..Applicant

Versus

1. Almode Kayode Khristophar
Age: 42 years, Occu.: Business,
R/o. Unit Street-5, Fako Keja,
Logos State, Naijeriya,
At present r/o. Flat No.703,
Building No.A-2 Kingston Sheren,
Handewadi, Undari Road, Pune.

..Respondent
(Ori. Accused)

...
APP for Applicant State : Mr.A.M.Phule
...

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

DATE : 11 OCTOBER, 2023

ORDER (PER ABHAY S. WAGHWASE, J.) :

1. Aggrieved by the judgment of acquittal passed by the learned Additional Sessions Judge-12, Aurangabad dated 23-11-2018 in Spl.(N.D.PS.) Case No.12 of 2016, by invoking Section 378(1)(b) of the Code of Criminal Procedure, State has preferred instant application thereby seeking leave to file appeal.

2. Apprising us about the charge to be under Section 21 of the Narcotic

Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act), learned APP submitted that respondent was apprehended for possessing contraband article. That crime was registered and investigation revealed his involvement and was therefore duly chargesheeted and tried. It is pointed out that as many as five witnesses have been examined by the prosecution. Prosecution had proved that, on 28-10-2016 accused was in possession of 04.71 grams of Cocaine and he was possessing the same for sale. Therefore, offence was made out. However, it is pointed out that learned trial Court acquitted the accused only on technical grounds. According to learned APP, they want to prefer appeal as they have a very strong case for re-appreciation and re-analysis of evidence and hence the prayers.

3. We have gone through the evidence adduced by the prosecution in the trial Court. It seems that in support of its case, prosecution has adduced evidence of following five witnesses. Their status are as under :

PW1 Balasaheb Raghunath Aher (PSI) is the Police Officer who lodged report. His evidence is at Exh.20.

PW2 Umeshkumar Vishnupant Kulkarni is Pancha to seizure panchanama. His evidence is at Exh.24. Seizure panchanama is at Exh.25.

PW3 Ramesh Manikrao Vedpathak is a labour working in Shivkrupa Jewellers and as per instructions from Shop owner and Police official he had taken weighing machine from the shop and went to Jawaharnagar Police Station. His

evidence is at Exh.27.

PW4 Vitthal Gajanan Ghodke (PSI) is Police Officer and he was a member of the team, which conducted raid. His evidence is at Exh.32.

PW5 Manish Madhukarrao Kalyankar is (PI) is Police Officer, who received secret information and conducted raid. His evidence is at Exh.33.

4. Evidence on record shows that on secrete information, trap was arranged and accused respondent was apprehended for being in possession of contraband Cocaine. Out of five witnesses, **PW1** Aher (PSI) is Police Officer, **PW2** Kulkarni is Pancha, **PW3** Vedpathak is also a Pancha, **PW4** Ghodke (PSI) is again Police Officer, **PW5** Kalyankar (PI) is Investigating Officer. Thus, out of five witnesses, three are Police officials.

5. According to **PW5** Kalyankar (PI), who carried out investigation, on receipt of secrete information regarding one Nigro, a foreigner coming to sale drugs near S.F.S. School, Jalna Road, he claims to have passed the information to superior vide (Exh.34) and on receipt of permission, raid was conducted. He apprised two PSI and five Police Constables about it and sent one constable for collecting drug identification kit. He also arranged two Panchas who consented to work as Pancha. They arranged a trap at 06:20 p.m. and at around 07:40 p.m., a Nigro came, he was intercepted, introduction was given, his name was asked and he was intimated that his body search would be taken

and offer was also given to the foreigner to take his body search, if so desires by themselves or in presence of a Magistrate. According to him, there is written communication to that extent, which is at Exh.38. Thereafter, on 'no objection' given by accused, small sachet was found in his right pocket of the pant and amount of Rs.6,500/- was also in his possession. After seizure of the same, crime came to be registered.

However, his **cross-examination** shows that though he claims that secrete information was noted, its document was not on record. He admitted that he did not inform other members of the raiding party about the name of the accused. He admitted that persons presence on the spot were not used as Panchas. He admitted that he himself did not give any notice as required under Section 50 of N.D.P.S. Act to the accused. He admitted that accused did not acknowledge the receipt of notice. He admitted that signature of the accused was not obtained on the sachet allegedly seized.

6. **PW2** Kulkarni, who is a Pancha, claims that on effecting search, mobiles and sachet were found and seized. According to him, 04.70 grams Cocaine was in possession of accused.

However, his **cross-examination** shows that he is readily available to the police to act as Pancha every time.

7. **PW3** Vedpathak, another Pancha, in cross-examination, is unable to

state from which direction and what mode accused came there. He is unable to state whether weighing machine was checked prior to its use. He gave contrary statement to that of PW5 Kalyankar by stating that weighing was done only once. As against it, PW5 Kalyankar had stated about weighing the contraband twice. This witness is unable to state whether anything was sealed at the spot. He is also unable to state whether he caused any signature on the paper on the spot.

8. Resultantly, here evidence of prosecution witnesses is not consistent. No prior permission has been sought for effecting the raid. There is non-compliance of mandatory requirement under Section 50 of N.D.P.S. Act. There are vital admissions not only by Police officers, who allegedly effected the raid, but even the Panchas. Exhibit 38, notice of the body search, has not been acknowledged by accused. Therefore, case of prosecution has not been established beyond reasonable doubt. Information allegedly received regarding a foreigner coming to sell Cocaine. There are major lapses on the part of investigating machinery while arranging and conducting raid. Therefore, in our opinion, learned trial court has committed no error in disbelieving the prosecution case. No case being made out, we are not inclined to grant leave as prayed for.

ORDER

Application for Leave to Appeal by State No.33 of 2019 is
hereby rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

SPT