

Radhakisan Parashar Vs. State

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Court : Mumbai

Decided On : Mar-17-1987

Reported in : 1988(1)BomCR332

Judge : G.F. Couto and ;Kamat, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 313

Appeal No. : Criminal Appeal No. 2 of 1987

Appellant : Radhakisan Parashar

Respondent : State

Judgement :

Couto, J.

1. The appellant, a native of Rajasthan, has been tried and ultimately convicted of an offence punishable under S. 20(b)(ii) read with S. 2(iii)(a) of the Narcotic Drugs and Psychotropic Substances Act, 1985 by judgment dt. 30th October, 1986. He was, thereafter sentenced to undergo 10 years of rigorous imprisonment and to pay a fine of Rs. 1 lakh and in default, to undergo a further period of imprisonment for 2 years.

2. The case of the prosecution is that on 13th March, 1986, the Excise Inspector Manual Jose Afonso conducted a raid for narcotic and psychotropic substance at

Azrem Beach of Vagotor and on such occasion, he found the appellant in unauthorised possession of 40 gms. of charas.

3. The accused pleaded not guilty to the charge. His case being that he is doing business of selling 'chillums' and, therefore, he had come Goa from Rajasthan for the purpose of selling the said 'chillums'. He denied the case of the prosecution that he was found in possession of any charas.

4. The prosecution examined three witnesses in order to prove its case, namely, the complainant Afonso, the Panch witness Nakul Murari and the Chemical Analyser M. M. Kaissari. On basis of this evidence, the learned Sessions Judge, Panaji, held that the prosecution had succeeded in proving that the appellant was in possession of 30 gms. of charas. He gave the benefit of doubt as regards the other quantity of charas which had been recovered by the Excise Inspector from near the mat where the appellant was lying. Accordingly, the learned Judge convicted the appellant for an offence punishable under S. 20(b)(ii) read with S. 2(iii)(a) of the said Act and thereafter, sentenced him to undergo 10 years of rigorous imprisonment and to pay a fine of Rs. 1 lakh.

5. Mr. Dessai, the learned counsel appearing for the appellant, began to invite our attention to the harsh punishment prescribed under the Act for the offence with which the appellant had been charged. He contended that harsher the punishment, stricter should be the analysis of the evidence so as to record a clear finding that the prosecution had been able to prove its case beyond any reasonable doubt. He, then, invited our attention to S. 20 of the Act, namely, that the said provision of law lays down that only those who are found in possession of the prohibited drugs and substances in contravention of the Act commit an offence under the said Section. Then, he urged that though under S. 54 of the same Act, a presumption of possession of illicit articles is drawn against a person who is found with such substances, the fact remains that it is for the prosecution to prove that the person found in possession of such substances is in illegal possession thereof. In the present case, this burden has not been discharged by the prosecution and, therefore, the conviction of the appellant was not justified.

6. We find no substance at all in the above submission of Mr. Dessai. As rightly pointed out by the learned Public Prosecutor, Mr. Bhohe, S. 54 of the Act specifically provides that in trials under the Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter IV in respect, inter alia, to any narcotic drug or psychotropic substances. Now, the expression 'unless and until the contrary is proved' clearly imposes the burden of proving that the possession of the prohibited substance is legal on the accused himself, and that dispenses entirely the prosecution from proving that possession of such substances is illegal. In its turn, S. 20 provides that whoever, in contravention of any provision of the Act or any Rule or order made or condition of licence granted thereunder, inter alia, produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable in cases where such contravention relates to cannabis other than ganja, with rigorous imprisonment for a term which shall not be less than 10 years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees, provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees. On reading the provisions of Sections 20 and 54 together, it necessarily follows that it is for the person who is found in possession of any such illicit drugs to prove that he holds a licence therefor or that he is in lawful possession of the same substance. If the presumption is not rebutted by such person, then the presumption will stand and there is no reason whatsoever for the prosecution to prove the unlawful and illegal possession by such person of the said substance.

7. Mr. Dessai next contended that in any event, the prosecution has completely failed to prove that the appellant was in possession of the charas allegedly found in his bags. In fact, prosecution examined only P.W. 1 Afonso and P.W. 2 Murari in order to prove such possession. However, the evidence of these two witnesses is not reliable as there are discrepancies in material parts of such evidence. He contended that P.W. 1 Has stated that after finding the appellant in the clearing of the bushes, he had taken the appellant along with him and other members of his staff to the restaurant Sea Palace where he had interrogated the owner of the said restaurant by name Madhav Govind Omshi. He had pointed to the appellant and

asked Omshi whether he knew him and Omshi had answered in the affirmative, saying that the appellant had his lunch in the said restaurant and had kept his luggage in the same stall. He further stated that the stall has a partition dividing it into two compartments and that the witness had directed the appellant to bring his luggage and that the appellant had gone inside and brought out the luggage, one being a bedding and the other two being bags. The bags were opened and in one of the bags a plastic packet containing charas was found. These charas were weighing 30 gms. However, according to the learned counsel, this version of the facts is not confirmed by P.W. 2 Murari, for he said that the room from where the bags were brought was pointed out by the owner of the restaurant, as well as that the same owner of the restaurant, had pointed to the three bags lying on the ground and to a fourth bag hanging from a steel rod. He further stated that all the four bags were brought out of the said room and opened. In one of the bags, besides clothes, a small tin was found and some charas inside the said tin. He further stated that, in addition to this, another plastic packet was found in the same bag containing charas. According to the learned counsel, while the complainant Afonso stated that the luggage of the appellant consisted of two bags and a bedding, the witness Murari spoke of four bags. The complainant Afonso does not make any reference to the tin of charas whereas the witness Murari stated that a tin with charas as well as a plastic packet with the same substance had been found in one of the bags. Finally, the complainant stated that the bags were brought out of the room where they were lying by the appellant whereas the witness Murari stated that the bags were shown by the owner of the restaurant. These discrepancies in the evidence of P.W. 1 and P.W. 2 are, according to the learned Counsel, of material significance and they go to show that ultimately, the prosecution has failed to establish that the charas had been recovered from the possession of the appellant. In addition, and to corroborate this conclusion, there is the circumstance that the prosecution has not produced the original panchanama. In fact, only a carbon copy of the panchanama, although signed by the panchas, had been produced. It is true that, at the time of the trial, the learned prosecutor gave an explanation as regards the carbon copy of the panchanama by saying that the original thereof had been handed over to the prosecutor who was conducting the case at that time and that the said original panchanama had been

misplaced. According to the learned counsel, it is obvious that the said panchanama is merely a copy and, therefore, could not have been at all admitted in the evidence, since the prosecution has failed to lay down the foundation to introduce secondary evidence. In this connection, reliance was placed by the learned counsel in the decision of the Supreme Court in *Roman Catholic Mission v. State of Madras*, : [1966]3SCR283 .

8. It was, however, contended by Mr. Bhobe that, first of all, the question of the panchanama being a secondary piece of evidence does not arise, and in fact, the panchanama produced is for all purposes to be said to be the original. In fact, though the body of the panchanama is a carbon copy of the original, the fact remains that the said panchanama was duly signed by the panchas. That apart, the learned Public Prosecutor contended that the panchanama is not the substantial evidence, constituting merely a corroborative piece of evidence which can be used only for the purposes of refreshing the memory of the panch or to contradict him. In the present case, the panch has been examined and the prosecution has established beyond any reasonable doubt through the evidence of the witness Murari and the complainant Afonso that the appellant was in possession of the prohibited charas. He specifically invited our attention to the cross-examination of the said two witnesses and to the fact that it is clear from the cross-examination that the case of the appellant was that the bags were belonging to him but the charas had been planted in his bags by the complainant. The learned Public Prosecutor has also brought to our attention the replies given by the appellant while being examined under S. 313 of the Cr.P.C. It is clear from his replies that he never denied the ownership of the bags where allegedly the charas were found. What the appellant did was to deny that charas were found in his bags.

9. There is great substance in the submissions of the learned Public Prosecutor. Undoubtedly, there are some discrepancies between the evidence of the complainant Afonso and the witness Murari but such discrepancies are only minor in nature. In fact, the discrepancies are in respect of the number of bags which were belonging to the appellant and whether the bags had or not been brought out by the same appellant. What, however, matters is whether the bags were

belonging to the appellant, and in this respect, there was no challenge whatsoever on the part of the appellant. Therefore, the ownership of the bags where the charas were allegedly found has been admitted by the appellant and consequently, established by the prosecution. Then, the whole case of the appellant in the trial Court had been that the complainant Afonso had planted the charas in his bags. This suggestion has been denied by the complainant, and the apart, the evidence adduced by the prosecution clearly shows that such planting was improbable. We say so because it has not been denied that the complainant on seeing the appellant moving suspiciously, followed him up to a clearing existing in the bushes and then, found the appellant lying on a mat with two 'chillums' lying nearby. Further, it is not disputed that a search was conducted in the place and charas weighing 10 gms. were recovered from the said clearing and from under some stones. It is not further denied, and is on the contrary specifically admitted by the appellant, that the complainant asked him where he was staying and where he had kept his luggage; also, that the appellant took the complainant and his party to the restaurant and there, the bags had been produced. The complainant and his party were all the time near the appellant and, therefore, he had no opportunity whatsoever to plant the charas in the bags of the appellant. In addition, the appellant has not brought on record any kind of evidence justifying the planting of the said illicit substance in the bags of the appellant. He has not even suggested to the appellant that on account of some enmity or for some other reason, the complainant had planted the charas in the bags of the appellant. We have, therefore, no doubt in concurring with the finding of the learned trial Judge that the charas were, in fact, found in possession of the appellant.

10. Mr. Dessai last contended that there is another aspect of the case which is most relevant. The prosecution has indeed not examined Omshi, the owner of the restaurant, although the said Omshi, was a material witness necessary for the unfolding of the prosecution story. The failure of the prosecution in examining the said Omshi, taken together with the discrepancies of the evidence of P.W. 1 and P.W. 2, is fatal to the prosecution case, he urged. Reliance was placed in this connection in *Narain v. State of Punjab*, : 1959 CriLJ537 .

11. In Narain's case, the Supreme Court observed that if a material witness has been deliberately or unfairly kept back, a serious reflection is cast on the propriety of the trial itself and the validity of conviction resulting from it is open to challenge. Then, the Court noted that it is an accepted rule as stated in *Stephen Seneviratne v. The King* AIR 1936 PC 289 : (Cri LJ 963) that witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution. Now, applying the above dictum of the Supreme Court, it is necessary to see whether the examination of Omshi, the owner of the restaurant, was at all necessary to unfold the prosecution story. Obviously, the answer to this question is in the negative. The prosecution story has indeed been fully unfolded by the witnesses Afonso and Murari and the examination of Omshi would have amounted only to duplication of the evidence. As also observed by the Supreme Court in the same case, the prosecution is not bound to call all witnesses who may have seen the occurrence and so duplicate the evidence. That being the case, in our view, the omission on the part of the prosecution to examine Omshi is not at all relevant and it has not vitiated the case.

12. The appellant was found in possession of 30 gms. of charas, a substance which falls under the definition of cannabis under S. 2(iii)(a) of the Act. The appellant failed to produce any evidence to establish that he was in lawful possession of the said substance and, therefore, in view of the presumption under S. 54, it is to be held that he has committed the offence under S. 20(b)(ii) of the Act. Therefore, the learned trial Judge has correctly convicted the appellant and imposed on him the proper sentence under the Act.

13. The learned Judge, however, after imposing the mandatory sentence of fine, further directed that in default of the payment of fine, appellant has to undergo a further period of rigorous imprisonment for two years. In our view, this further imprisonment in default is not, in the circumstances of the case, justified to the extent it was imposed. In our view, in default of the payment of fine of Rs. 1 lakh, the appellant should undergo a further period of rigorous imprisonment for a period of one year only.

14. With the above modification as regards the sentence, this appeal is dismissed.

15. Appeal dismissed.

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