Bashir Shaikh Vs. State of Goa

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Court : Mumbai

Decided On : Sep-05-1990

Reported in : 1991(1)BomCR266; (1991)92BOMLR324

Judge : G.D. Kamat and ; M.S. Ratnaparkhi, JJ.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 21

Appeal No. : Criminal Appeal No. 5 of 1990

Appellant : Bashir Shaikh

Respondent : State of Goa

Advocate for Def. : G.U. Bhobe, Public Prosecutor

Advocate for Pet/Ap. : F. Rebello, Adv.

Disposition : Appeal allowed

Judgement :

M.S. Ratnaparkhi, J.

1. The order of conviction and sentence passed by the Additional Sessions Judge, Margao on 7th February, 1990 in Sessions Case No. 28 of 1988, convicting the accused-appellant for an offence punishable under section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'ND

and PS Act of 1985' for the sake of brevity), and sentencing him to suffer rigorous imprisonment for 10 years, fine of Rs. 1,00,000/- or in default to further rigorous imprisonment for one year, has been challenged in this appeal.

2. The accused-appellant came to be charge-sheeted before the Sessions Court for the offence of having in his possession about 35 grams of brown sugar. The prosecution sprang from the following facts. On 17th January, 1988, the PSI received an information that the accused was dealing in brown sugar. He, therefore, called two panchas and along with the party proceeded to the house of the accused at about 6.30 A.M. The party reached the house of the accused. The outer door was knocked. The accused opened the door. The PSI disclosed the purpose of the raid and asked the accused to take the search of the raiding party if he wanted. The raiding party including the panchas then went inside the room. They took the search. During the course of the search seven packets were found below the pillow. When the packets were opened, it was found that they contained brown sugar. The articles were seized under the panchanama drawn on the spot. The controband, so seized, came to be sealed under the paper seals bearing the signatures of the panchas. The panchanama was drawn there. The party then returned back to the police station. The accused came to be arrested in the evening at about 7 p.m. The packets seized and sealed at the spot were sent to the Chemical Analyser for his analysis. The Chemical Analyser on examination came to the conclusion that the contents of the packets contained 23.8 percent w/w of morphine. On receipt of the report, the charge-sheet came to be filed against the accused.

3. The learned Additional Sessions Judge, Margao framed a charge under section 21 of the N.D. and P.S. Act. The accused pleaded not guilty to the same and claimed to be tried. His defence is purely of denial. On his examination under section 313 of the Code of Criminal Procedure, he stated that nothing was recovered from him and he has been falsely implicated.

4. During the trial one panch and two Police Officers (who were present at the time of raid) came to be examined. The Chemical Analyser also was examined. On examining the accused under section 313 of the Code of Criminal Procedure, the

learned Additional Sessions Judge heard both the parties. He accepted the evidence of the prosecution and came to the conclusion that the prosecution had proved beyond any reasonable doubt that the accused was found in possession of 35 grams of the brown sugar. He, therefore, held the accused guilty of the offence and sentenced him to the term detailed in the opening paragraph of the judgment. This order of conviction and sentence has been challenged in this appeal.

5. Mr. Rebello, the learned advocate for the accused-appellant, took us extensively through the evidence led by the prosecution including the oral evidence, the first information report, the panchanama and the examination of the accused. It would be beneficial at this stage to refer to the evidence of the prosecution witnesses. Mohan Borkar (P.W. 1) was the panch. He deposed that while he was going by the road on 17-1-1988 the police called him at out 6.45 A.M. He was told that the police wanted to search the house of the accused, which was situated at Malbatt. Another panch was also called. The whole party then went to the house of the accused. The door was knocked and the accused opened the door. On opening the door, they entered into the bed room. There was a vacant cot. When it was searched, five plastic pudis (packets) were found below the pillow. The packets were weighed and the total weight was 35 grams. The packets were then put into one envelope. The signatures of the panchas were obtained on blank paper and then the blank paper came to be pasted thereon. The panchanama was drawn. The witness has been subjected to searching cross-examination and he was confronted with many omissions and contradictions. Suffice it to point out at this stage that these omissions were regarding the preparations for raid, namely, the police taking with them the sealing materials, scales etc. which, according to us, are not material from the point of view of charge with which the accused has been confronted. Another thing pointed out in the cross-examination of this witness was that the witness had acted as a panch about 10 to 12 times since 1967. It was also taken out from his mouth that he had taken a contract of painting and repairing police quarters sometimes before the incident. According to us, these circumstances would not negative the version of the witness. We do not think that the evidence of this witness is not worthless because of these contradictions and the conduct of the witness. On going through the evidence of this witness, we find that the witness deposes the following facts,

namely, that he accompanied the police at the time of the raid, that the accused opened the door, that there was one vacant cot, that on that vacant cot below the pillow the packets were kept. The evidence of the witness, though accepted in its entirely, leads to this only conclusion and nothing else.

6. The evidence of witness Narayan Krishna Yatele (P.W. 3) corroborates the evidence of Mohan Borkar (P.W. 1). He was working as ASI at the same police station at the relevant time and he was also the member of the raiding party. This witness deposes that the packets were found not below the pillow, but insite the pillow cover. This appears to be the departure from the evidence of Mohan Borkar (P.W. 1). His cross-examination shows that on that bed there was a mattress. Over the mattress there was a bedsheet. There was a pillow cover. There was another bed sheet above the pillow cover and the packets were found inside the cover of the pillow.

7. P.W. 4 PSI Rodrick's evidence generally corroborates the evidence of Mohan Borkar (P.W. 1) and Narayan Yatele (P.W. 3). But one circumstances which emerges from the cross-examination of this witness is that he along with P.W. 3 entered into the bed room, whereas the panchas and the remaining raiding party remained at the doors. According to him, P.W. 3 Narayan found the packets below the pillow. He took out these packets and showed the same to the panchas. Even the panch P.W. 1 Mohan admits in his cross-examination that he saw these packets for the first time when P.W. 3 Narayan showed these packets to him. He did not see P.W. 3 not actually taking out these packets from below the pillow or from the cover of the pillow.

8. This is in short the evidence of the witnesses examined by the prosecution. This evidence, taken at its face value, would show that the police went to the house of the accused where the accused was residing (along with others). When the accused opened the door and the PSI entered into the bed-room, there were two cots. On one cot, the father of the accused was sleeping. The other was vacant. The women-folk was in the inner room. These circumstances would show that the accused was not the lone person residing in that house, nor was the lone person occupying that bedroom exclusively. It can be fairly said, on the basis of the

evidence, that the accused was one of the occupants of the room. It is to be noted at this stage that these packets were not seized from the below the pillow (or from within the cover of the pillow), but there is no evidence as this bed was occupied by the accused.

9. Thus, inspite of absence of any evidence that the house was exclusively occupied by the accused and the vacant bed was exclusively occupied by the accused, the prosecution wanted to infer that it was the accused who was in conscious possession of these packets. The argument was advanced before the lower Court that the prosecution presumed that because the accused was present in that room, he must necessarily have the conscious knowledge of the existence of these packets under the pillow. The rational adopted by the trial Court was that there were only two beds in that room. One bed was occupied by the father and the one bed must have been necessarily occupied by the accused. This reasoning, according to us, contains an inherent infirmity inasmuch as there were other occupants also in the other side and there is no other evidence that either of them did not occupy the premises. On the other hand, looking to the defence of the accused, the inference that the accused was exclusively and consciously in possession of these packets would not be safely drawn.

10. Apart from the minor contradictions emerging out of the cross-examination of the witnesses, there is one more circumstance which is coming in the way of the prosecution. When Rodricks, the complainant as well as the Investigating Officer in this case, was under cross-examination, he admitted that one Shaikh Mustafa was also arrested at the instance of the accused in connection with an offence. This admission could be found in the first paragraph of the cross-examination of Rodricks. With this admission, the prosecution case becomes more complicated. If Mustafakhan was arrested in connection with this offence, we do not know what the Investigating Machinery has done in connection with that part of the investigation. It cannot be contemplated that Mustafakhan would be arrested only on the words of the accused unless the police investigating machinery has some believable material to arrest him. We do not know whether this part was investigated into and whether any material was collected. We have nothing before us to show whether Mustafakhan has been released under section 169 of the

Code of Criminal Procedure. This very Mustafakhan is attending the Court when the trial is going on. He is cited as one of the prosecution witnesses, but for reasons best known to the prosecution, this witness has not at all been examined. Can it by any stretch of imagination be said at this stage that having arrested Mustafakhan in connection with this very offence, the prosecution has created dark cloud over their own case inasmuch as it connects the accused with the offence? In our opinion, it does. The prosecution had at one stage a suspicion on Mustafakhan regarding the very offence. That suspicion has not been removed. At least there is no material placed before the Court for removing that suspicion. It will be very difficult-well-nigh impossible, in these circumstances, to hold that it is the accused and the accused alone, who was in possession of the contraband.

11. Thus according to us, the prosecution has not been successful in establishing its case that it was the accused and accused alone who was found in possession of the contraband. This being the case, there is definitely a doubt regarding the credibility of prosecution case inasmuch as it connects the accused; and the benefit of this doubt must necessarily go to the accused, with the result that it cannot definitely be said beyond any reasonable doubt, that it was the accused and accused alone, who was found in possession of the contraband. The accused has examined one witness in his defence. That witness happens to be his mother. But nothing comes out from the testimony of that witness. Particularly in view of the interence that we are drawing in this case regarding the culpability of the accused, we do not think it necessary to give the answer.

12. Thus disagreeing with the learned Additional Sessions Judge, we hold that the prosecution has failed to prove beyond any reasonable doubt that the accused was found in possession of the contraband. The order of conviction and sentence cannot, therefore, be sustained with the result that the appeal is allowed. The order of conviction and sentence is hereby set aside and the accused is acquitted of the charge framed against him. He shall be set a liberty forthwith.