

State of Maharashtra Vs. Ashok

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Court : Mumbai

Decided On : Jun-09-1999

Reported in : (2000)102BOMLR257

Judge : G.D. Patil and ;A.B. Palkar, JJ.

Appeal No. : Criminal Appeal No. 141 of 1993

Appellant : State of Maharashtra

Respondent : Ashok

Disposition : Appeal dismissed

Judgement :

A.B. Palkar, J.

1. This is a State appeal against acquittal recorded by the Additional Sessions Judge, Wardha on 24.12.1992 in Sessions Trial No. 108 of 1992 against respondent for the offence punishable under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act (for short, the 'N.D.P.S. Act').

2. The respondent was prosecuted for the offence punishable under Section 20(b)(i) of the N.D.P.S. Act on the basis of the complaint filed by Constable Subhash Bhoyar who was on escort duty for taking prisoners to the Court premises. When on duty, he noticed the accused loitering in the premises nearby

the prisoners and while the accused was trying to hand over packet to one of the prisoners, he was caught red handed and packet in his possession was seized. It appears that the contents of the packet were Ganja. Seizure panchanama was drawn and accused was taken to Police Station and complaint was lodged on the basis of which offence came to be registered.

3. During further investigation, the packet was got examined through Chemical Analyser and it was confirmed that it contained Ganja.

4. The accused pleaded not guilty to the charge and in support of prosecution case, six witnesses were examined and after considering the evidence on record and the arguments advanced, the learned Additional Sessions Judge recorded a finding of acquittal which is impugned before us by the State.

5. On scrutiny of the entire material and arguments advanced before us, we are also of the considered view that there is no reason to disturb the finding of acquittal recorded in favour of the respondent.

6. At this stage, the facts which can be more or less, said to be established from evidence, clearly shows that the respondent was admittedly found moving or loitering in the Court premises where the prisoners were brought by the police and he was found while in the process of handing over one packet to one of the offenders in the custody. Naturally, the main witness is the Constable who found the accused in the process of handing over packet to one of the prisoners. His evidence is, therefore, material. P.W. 5 Subhash stated that the accused handed over one packet to one of the prisoners, viz. Tarasingh. The said prisoner is neither prosecuted nor examined in this case. The accused was taken from the spot to the Control Room and from Control Room, message was given on telephone to the City Police Station, Wardha. In the message recorded in the Station Diary, it is stated that person under the influence of liquor and having narcotic drug was held up. This entry is at number 47 and it is immediately recorded. If the accused was found under the influence of alcohol, and narcotic drug, there appears no reason as to why he was not sent for medical examination immediately. In the detailed report lodged later on and the Station Diary entry record consequent to that, it is not stated that accused was under the influence of

liquor. The pancha witnesses have not supported prosecution and were declared hostile. Although the respondent was found in possession of the narcotic drug in the Court premises, no attempt was made to take him before the Magistrate and no choice was given to him to be searched in the presence of Magistrate and the panchanama although it is mentioned that copy of it was delivered to the accused, but the Investigating Officer admitted that no. copy was given to the respondent. Another disturbing feature of the investigation is that at the stage of evidence it was stated that the respondent alongwith packet of Ganja was taken to the shop of Rupa Sindhi where the Ganja packet was weighed. Now, if it was so, then a panchanama of this incident could have been drawn separately or at least the person in whose shop the packet was weighed could have been examined. However, the prosecution has chosen neither to examine the said person nor there is panchanama to the effect that any such incident of weighing Ganja ever took place. There are the material circumstances coupled with the fact that the pancha witnesses have not supported the prosecution which have weighed on the learned Trial Court resulting in disbelieving the prosecution story and we are convinced that these circumstances do create suspicion regarding the entire story of the prosecution and have been rightly considered by the learned trial Judge while discarding the prosecution case. Even P.W. 5 Constable Subhash initially stated the said packet was with the prisoner Tarasingh which is contrary to the prosecution case that the accused was caught while handing over the packet to Tarasingh. In such a situation, Tarasingh should have been examined if, according to the prosecution, he was not in possession at that time and since he is not prosecuted, it may be safe to conclude that the prosecution does not want to contend that the packet at any time changed hands and was handed over to Tarasingh. There is no reason why this witness or the other witnesses either from and out of the prisoners or those present in the Court premises were not examined. The prosecution has totally given up its case that the person found in possession of Ganja was also under influence of liquor and there is no investigation made in that regard, as pointed out earlier, since the respondent was never produced before the Medical Officer for being examined. The station diary entry (Exhibit 19) received by the Wardha City Police Station does not even remotely indicate that the information contained any material that the person

named Ashok was found handing over packet of Ganja to the prisoner. This is material, because the respondent was known to P.W. 5 Subhash at whose instance, information on telephone was recorded immediately.

7. Another aspect of the matter is that when search of the respondent was to be taken, he was not afforded any opportunity of giving choice of being searched in presence of the Magistrate or the nearest Gazetted Officer. This is especially material, because the entire incident took place in the Court premises and the respondent could have been taken before the Magistrate. There is no explanation why the mandatory provisions of Section 50 read with Section 42 of the N.D.P.S. Act were not followed and in the circumstances we do not find any reason to take a view contrary to that of the learned trial Judge. However, in any appeal against acquittal, although the powers of the High Court are not different than those to be exercised while examining the judgment of conviction, the High Court would not normally disturb the finding of acquittal if the view of evidence taken by the Trial Court is the one which can be said to be possible view. In this case, the view taken by the learned trial Judge (sic.) rate set immensely. We, therefore, find no substance in the appeal and the same is hereby dismissed.