

(1993) 09 BOM CK 0008

Bombay High Court (Nagpur Bench)

Case No: Criminal Appeal No. 221 of 1993

Bhruhaspatinath  
Chauranginath  
Ramkejogi

APPELLANT

Vs

The State of  
Maharashtra

RESPONDENT

---

Date of Decision: Sept. 30, 1993

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20, 8

Citation: (1994) 2 BomCR 36

Hon'ble Judges: M.S. Vaidya, J

Bench: Single Bench

Advocate: Shriniwas Deshpande, for the Appellant; R.C. Madkholkar, A.G.P., for the Respondent

Final Decision: Allowed

---

### Judgement

M.S. Vaidya, J.

This is successively the second appeal arising out of the decisions given by the Additional Sessions Judge, Washim, under the Narcotic Drugs and Psychotropic Substances Act cases wherein the question regarding identification of Muddemal property before the Court has been ignored at the trial.

2. The appellant in this case was a priest in Balanath Maharaj temple belonging to a public trust. On 9-3-1992 P.W. 4 Patil, P.S.O. of Risod Police Station in Akola District received an information that Ganja had been stocked in the aforesaid temple premises at Balkheda and the appellant was engaged in selling the same. Therefore, on taking an entry, vide Exh. 24, in the station diary, he proceeded to Balkheda and secured two panchas near the school premises. The Panchas were informed about the proposed performance of the raid and then, the temple premises were raided,

after performing necessary formalities. In course of the raid, the appellant was found present there. One plastic bag containing Ganja was found on the ground floor and one barrel containing Ganja was found on the first floor. The articles were then seized and the Ganja was weighed. It was found that Ganja was weighed 37 Kilograms. Samples weighing about 50 grams each were taken from Ganja found in two distinct containers. The same were packed in one packet only. The packet was sealed on the spot itself and a panchanama was drawn. The Muddemal property and the appellant were produced at Risod Police Station and F.I.R. Exh. 25 was drawn. An entry in the station diary was made vide Exh. 26 and information was sent to the superior officer. In course of time, the Muddemal sample was sent to the Chemical Analyser alongwith the forwarding letter Exh. 27 and C.A. report Exh. 28 was secured. Thereafter, the appellant was prosecuted for an offence u/s 8 read with section 20 of the Narcotic Drugs and Psychotropic Substances Act.

3. The prosecution adduced the evidence of P.W. 1 panch Subhash Gaikwad and P.W. 4 P.S.O. Patil as they were in the raiding party itself. P.W. 2 Giri, a trustee of the temple and P.W. 3 Baburao Dhore, Sarpanch of the village were examined to prove that the appellant lived in the temple premises and that they were under his management and control. P.W. 5 Survey was the carrier of the Muddemal property to the office of Chemical Analyser. He proved his duty certificate Exh. 30 and the invoice challan Exh. 31. C.A. report Exh. 28 was tendered by the P.S.O. Patil, which showed that the sample contained Ganja. Finding, therefore, favour with the prosecution evidence the learned Additional Sessions Judge convicted the appellant of the offence u/s 8 read with section 20 of the Narcotic Drugs and Psychotropic Substances Act and sentenced him to suffer R.I. for four years and to pay a fine of Rs. 10,000/- in default to suffer R.I. for one year. Appropriate orders regarding set off for earlier period of detention were passed.

4. Feeling aggrieved by this decision, the appellant preferred this appeal contending that the prosecution case was not at all proved satisfactorily by the evidence tendered on record. It was submitted that out of two panchas only one panch was examined and no reason was assigned as to why the second panch was not examined. The main contention was that the evidence of the panch and the P.S.O. was not worthy of safe reliance. Another contention was that the identification of the Muddemal property was not at all made at any stage of the trial. It was, therefore, submitted that the prosecution had failed to prove that the articles before the Court were really the articles which were allegedly seized from the temple premises and further that the aforesaid articles did contain the Ganja. It was, therefore, prayed that the appeal be allowed and the conviction and sentence awarded to the appellant be set aside, and finding the appellant not guilty of any offence, he be acquitted.

5. Though Shri Deshpande, learned Counsel for the appellant, contended that the evidence was not satisfactory on the point of conduct of raid itself, on perusal of the

evidence of P.W. 1 Gaikwad and P.W. 4 P.S.O. Patil, there appears no reason to doubt the fact that the raid in question was conducted on temple of Balanath Maharaj at village Balkheda. P.W. 4 P.S.O. Patil told in his deposition that on receipt of information that Ganja was being stocked in the Balanath temple at Balkhea, he had taken an entry in the station diary vide Exh. 24 and had proceeded to that village. He and P.W. 1 Gaikwad told the story that the panchas were called near the school and it was explained to them that a raid was to be conducted on the temple in respect of storage of Ganja in the temple premises. Both the aforesaid witnesses told that they had searched the premises and before the search, the appellant, who was present there, was offered personal search of the members of the raiding party. They told that one plastic bag containing Ganja was found on the ground floor and one barrel containing Ganja was found on the first floor. They told that the sample of Ganja was collected from both the containers and the same was packed in a packet. According to the P.S.O. and P.W. 1 Gaikwad the total weight of the Ganja was 37 Kgs. The panchanama Exh. 19 was proved by P.W. 1 Gaikwad and was corroborated by P.W. 4 P.S.O. Patil. The said panchanama specifically stated that the samples weighting 50 grams were collected from each of the two containers and they were packed together. The panchanama also stated that the packet was then sealed with label signed by both, the panchas and the P.S.O. F.I.R. Exh. 25 was proved by P.S.O. Patil and the station diary entry Exh. 26 was proved by him. Very little was elicited in cross-examination of these two witnesses, which could enable the Court to disbelieve their evidence on the point. P.W. 2 Giri, the trustee of the said temple, stated that the appellant used to manage the affairs of the temple and was performing daily rituals and further, that both the stories of the temple structure were in possession of the appellant himself. The Sarpanch P.W. 3 Dhore also told that the appellant was in possession of both the floors of the temple premises. Very little was elicited in cross examinations of those two witnesses, which could enable one to look on their evidence with suspicion. On the whole, therefore, the aforesaid evidence could prove that the raid was made, certain articles, which were allegedly contraband articles, were seized from both the floors and that the appellant, who was in possession of the temple premises was present at the relevant point of time.

6. The question, however, is whether or not, the prosecution succeeded in proving that what was found in the two containers that were seized from the temple, was Ganja. Indeed, in this respect, one has to note that neither P.W. 4 P.S.O. Patil nor P.W. 1 panch Gaikwad were shown the muddemal articles which were before the Court for the purpose of identification. The list of muddemal articles filed in the Court (at page 8-A of the paper book) showed that there were four articles before the Court, namely, (1) one white plastic bag of fertilizer containing 3 kgs and 500 grams of Ganja, (2) one old gunny bag containing 19 Kgs. and 500 grams of Ganja, (3) one old gunny bag containing 14 kgs. of Ganja. and (4) one old iron barrel. When none of the prosecution witnesses stated before the Court that the aforesaid articles were the articles that were seized from the temple, it was not possible to hold that

they were the articles which were really seized in the raid in question. In other words, the identity of the aforesaid articles as the property seized from the scene of offence during the course of raid was not at all established by the prosecution.

7. The matter does not rest there. In the panchanama Exh. 19, it is stated that apart from 4 articles described above, one more article was seized under the panchanama and that was a packet containing samples of the alleged contraband article, on which a seal was affixed under the signatures of the panchas and the P.S.O. himself. It does not refer to affixture of seal of police station on the packet. P.W. 1 Gaikwad spoke only in general terms of making seal on the packet, but he does not tell whether or not, the seal was one signed by the panchas and the P.S.O. or the seal was of the police station. P.S.O. Patil (P.W. 4) also told only that the packet in question was sealed, but he did not describe in detail the nature of the seal that was made on the scene of offence. There is no evidence on record to show that after the muddemal property was brought at the police station, the seal of police station was affixed on the said muddemal property in the presence of the panchas or any other witness. The fact that the article was sealed under the seal of the police station was thus not proved by the prosecution. According to the P.S.O., the entire muddemal property was produced at the police station. A copy of the entry in the Malkhana Register was not tendered in evidence, nor was it proved. Therefore, the word of the P.S.O. that muddemal packet containing sample was also tendered at the police station has no corroboration whatsoever. This circumstance assumes importance particularly because the muddemal list which was filed before the Court (vide page 8-A of the paper book) did not list the sample packet at all. There is, therefore, every reason to suppose that the sample packet was not even before the Court in any form at the trial. The learned A.G.P. invited our attention to the requisition to the Chemical Analyser (Exh. 27) and submitted that the packet was forwarded to the Chemical Analyser. The description of the articles forwarded to the Chemical Analyser was given at serial No. 6 as "one paper packet containing 100 grams of Ganja bearing a lac seal of police station." This description did not refer to the seal signed by the panchas which was allegedly affixed on the packet on the scene of offence as per the version in the panchanama. On the other hand, the packet which was forwarded did bear, as per this description, a wax seal of the police station. None of the witnesses examined by the prosecution has stated that the wax seal was made. Therefore, there is every reason to doubt whether or not, the sample packet of Ganja which was allegedly seized from the scene of offence under the seal of the panchas was the packet that was forwarded to the Chemical Analyser under the requisition Exh. 27. Reference may, then, be made to the description of the muddemal item sent to the Chemical Analyser as it is given in the report of C.A. at Exh. 28. It stated that the articles forwarded to the office of the Chemical Analyser was "one sealed packet intact as per copy sent labelled C.R. No. 73 of 1992". This description also did not refer to the paper seal allegedly made under the signatures of the panchas and the P.S.O. on the scene of offence. Copy of the seal was sent to

the C.A. The letter of requisition Exh. 27 shows that it was only a seal of the P.S.O. Risod Police Station. It is not stated in the requisition that a copy of the paper seal that was allegedly made on the scene of offence was also enclosed with the requisition. Therefore, this is an additional circumstance which raises a doubt about the identity of the muddemal sample which was sent to the Chemical Analyser allegedly as the packet seized in connection with C.R. No. 73 of 1992. The evidence of police constable Survey, the carrier of the sample to the office of C.A., was not of much consequence to identify the packet as the packet that was seized on the scene of offence. Under such circumstances, the prosecution has failed to establish that the packet which was allegedly seized on the scene of offence as the packet containing sample was the sample which was ultimately forwarded to the C.A. for analysis.

8. As already stated above, the list of muddemal articles filed in the case in the trial Court did not even make a bare mention of the aforesaid packet. Obviously enough, the aforesaid packet or remainders thereof (after chemical analysis) alongwith proper seal was not available before the Court at the trial. The evidence of P.W. 4 P.S. Patil and P.S.I. Gaikwad does not show that the aforesaid witnesses were shown the cover of the packet that had remained after chemical analysis of the sample in question. Obviously, if the article was not before the Court, it could not have been shown to the witnesses for identification before the Court. Under such circumstances it could hardly be held that identity of the packet in question was properly established at the trial.

9. The result is that the prosecution has thus failed to prove the identity of the muddemal articles that were seized on the scene of offence as well as the identity of the packet which was ultimately sent to the Chemical Analyser. Therefore, it could well be said that the report of Chemical Analyser that sample contained Ganja could be connected with the commission of offence alleged against the present appellant. Benefit of this must go to the appellant and it must be held that the prosecution has failed to prove that he had possessed the Ganja as alleged by the prosecution.

10. The result is that the appeal must succeed. The appellant must be found not guilty and after setting aside the conviction and sentence, he must be acquitted and ordered to be set at liberty. Fine if any paid by him will have to be refunded to him. We order accordingly.

11. Before concluding, a reference must be made to the submission advanced by the learned Counsel for the appellant as well as the learned A.G.P. to the effect that the decision of the case in the aforesaid manner, without giving to the witnesses even an opportunity to identify the muddemal property before the Court as the muddemal property, which was seized on the scene of offence was an instance of non-application of mind of everybody at the trial. Indeed, the learned A.G.P. submitted that probably in all the districts of Vidarbha Region the practice of bringing from the office of Chemical Analyser remainder of samples or packets

thereof sent to the Chemical Analyser is consciously not followed. It was, therefore submitted that omission to do so results in a grave menace to the social security inasmuch as in the absence of necessary proof of identity of packages, cases were likely to be acquitted either in the trial Court or in the appellate Court, despite the fact that it was judicially well recognised that the offences under the Narcotic Drugs and Psychotropic Substances Act deserve to be tried and decided with extraordinary care and caution. Importance of establishing before the trial Court the identity of muddemal property seized on the scene of offence and of the packet or packets in which the samples were collected on the scene of offence, or at some other place thereafter, cannot be over-emphasised. But for the proof of identity of such property, it is virtually impossible for any Court to arrive at proper legal conclusions in respect of the commission of the alleged offence. Neglect of duty either of the prosecution or of the Judges or Magistrates before whom trials are conducted for such offences, in this respect, can prove fatal to the prosecution itself. It is, therefore, only to be highlighted that the Prosecutors in the trial courts as well as the Judges and Magistrates before whom such trials are conducted should be diligent in ensuring that the property was got properly identified at the trial stage itself. We only hope that at least hereafter, necessary diligence would be shown in the matters in the larger interest of social security.

12. The appeal is allowed accordingly and disposed of.