Usman Haidarkhan Shaikh Vs The State of Maharashtra

Court: Bombay High Court

Date of Decision: July 6, 1990

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 100
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€" Section 20, 41, 42, 43, 50

Citation: (1990) 3 BomCR 181 : (1991) CriLJ 232 : (1990) 1 MhLj 984 : (1990) MhLj 984

Hon'ble Judges: V.P. Tipnis, J; I.G. Shah, J

Bench: Division Bench

Advocate: A.P. Mundargi, for the Appellant; Smt. Vijaya Kapse Tahilramani, Additional Public Prosecutor, for the Respondent

Judgement

Shah, J.
The accused who has been convicted of the offence punishable u/s 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances

Act, 1985 and is sentenced to R.I. for 10 years and a fine of Rs. 1,00,000/-, in default further R.I. for 2 years in Sessions Case No. 576/87 on the

file of the Sessions Judge, Thane, has preferred this Appeal.

2. Briefly stated the facts giving rise to this Appeal are as under :-

Accused Usman is a resident of Bhiwandi. P.S.I. Jadhav, Head Constable Kasurde, Head Constable Pathan and Constable Gaikwad of

Bhoiwada Police Station, Bhiwandi were attached to the Divisional Detection Branch, Bhiwandi in September 1987. On 23-9-1987 they were on

patrolling duty after about 5.00 p.m. and while they were patrolling and when they reached near a hotel by name Tohfa on Kalyan Road at about

6.45 p.m. an informant approached them and gave them information that the accused was selling charas tablets in front of Apsara Talkies and that

he was sitting on a parapet wall of a well. The police, therefore, called two panchas and proceeded along with the panchas and the informant

towards the reported scene of offence and the informant pointed out from a distance the accused who was sitting on a parapet wall of a well. The

informant then went away. The police thereafter went near the accused and caught him and effected search of his person. In the search a plastic

bag containing 69 tablets of charas is alleged to have been found in the pocket of the trouser of the accused. Police seized the said contraband

articles and after completing the formalities of effecting panchanama of seizure of the said articles, took the Accused and the contraband Articles

seized from the Accused to Bhiwandi Town Police Station and the same were then produced before the Head Constable Kadam who was the

Police Station Officer. An offence under C.R. No. III-232-87 was registered and P.S.I. Dhonnar was entrusted with the investigation. On

completion of investigation and receipt of the C.A. report in respect of the contraband articles alleged to have been seized from the accused, a

charge sheet was filed against the accused.

3. The learned Sessions Judge before whom the accused was tried, framed charge in respect of the offence u/s 20(b)(ii) of the N.D. & P.S. Act.

The accused pleaded not guilty and claimed to be tried. His defence was of total denial.

4. On the strength of evidence led before the learned Sessions Judge, he found that the prosecution had established that the accused was found in

possession of charas as claimed by the prosecution and, therefore, convicted and sentenced the accused as stated earlier. Being aggrieved by the

said order of conviction and sentence, the appellant-accused has come in appeal to this Court.

5. On behalf of the appellant-accused, it is contended that the evidence produced by the prosecution is not trustworthy and suffers from number of

infirmities and, therefore, the learned Sessions Judge was in error in holding that the prosecution has proved that the Accused was found in

possession of the contraband articles as claimed by the prosecution. It is also contended that the various provisions of the N.D. & P.S. Act which

are mandatory were not complied by the police while raiding the Accused and, therefore, also the alleged seizure of contraband articles from the

Accused cannot be relied upon.

6. The prosecution in order to prove the case against the Accused, examined P.W. 1 Head Constable Kasurde, P.W. 2 Pujari, the panch witness,

P.W. 3 Head Constable Pathan and P.W. 4 P.S.I. Dhonnar. The learned Sessions Judge has accepted the evidence of the said prosecution

witnesses as reliable and relying on their evidence he found that the prosecution had established that the Accused was in possession of the

contraband articles.

7. On behalf of the Accused, it is contended that the prosecution no doubt has examined panch witness Pujari P.W. 2, but it is clear from his

evidence that he is a panch witness who has been used as such in a number of narcotic cases. It is also pointed out that not only that he has been

used as a panch witness in the cases, but he has acted as a panch witness in 5-6 cases lodged by Head Constable Kasurde P.W. 1. Now it is true

that P.W. 2 Pujari, the panch witness, in his deposition admitted that he was summoned as a witness in one another narcotic case about a fortnight

before, his evidence was recorded in the present case. He further admitted that he was a panch witness in 5-6 cases lodged by Head Constable

Kasurde. Relying on this evidence, it is very strenuously contended on behalf of the Accused that this evidence is sufficient to show that the said

panch witness is actually a ""stooge"", in the hands of the police. It is therefore further contended that when the prosecution relies on the evidence of

such panch witness who cannot be considered as an independent witness, no reliance could be placed on his evidence it appears that the learned

Sessions Judge did not consider the said infirmity as fatal to the prosecution. The learned Sessions Judge, it appears, has relied upon the ruling

reported in Abdul Sattar v. The State 1989 Cri LJ 430. In the said decision, it has been observed (at page 430 Cri LJ 1989) -

It is true that whenever a search is conducted, it is always advisable, as required by Section 100(4) of the Cr.P.C., to have two independent and

respectable witnesses who are residents of the locality. It is also true that if a case, particularly a case under the Narcotic Drugs Act, is sought to

be proved only through police officers and no independent witness is examined, such evidence is to be scrutinized carefully and is, ordinarily,

doubtful. However the mere fact that witnesses who are not residents of the locality are taken by a raiding party to witness a raid, is not sufficient

to vitiate the proceedings. Similarly, even if no independent witnesses but only police officers are examined to prove the case, that will not by itself

constitute fatal infirmity, for that would warrant and require a very cautious and careful examination of their evidence, but not discarding it

summarily on that count.

In the said ruling it has been further observed -

That on the facts the evidence of the pancha who was a Home Guard was reliable and it was corroborated on all essential points by other

witnesses and there was nothing on record to make doubtful his integrity and independence.

Now, therefore, Shri Mundargi, the learned counsel appearing for the Appellant-Accused, very strenuously contended that the said decision of this

Court relied upon by the learned Sessions Judge in fact does not lay down the proposition which would help the prosecution. It was contended

that in the said decision also it is laid down that the evidence of the panch witness must be of an independent witness and the panch witness must

be a man of integrity. He, therefore, contended that in the face of the admissions given by the panch witness when it is clear that the same Head

Constable Kasurde who was with the raiding party, had taken him as a panch witness in 5-6 cases, is sufficient to show that he cannot be

considered as an independent witness. There is a force in this contention. At any rate, the said admissions clearly show that panch witness Pujari at

least could be considered as an amenable witness to the said Head Constable Kasurde who was a member of the raiding party. There is also

evidence on record of P.W. 3 Head Constable Pathan who has very clearly stated that it was Head Constable Kasurde who called the two panch

witnesses. It is also further clear that even the second panch witness who is not examined in this case, was also a person who had acted as a panch

witness in other cases filed by Head Constable Kasurde and that at the time when the evidence in this case was recorded he was residing in the

same compound where Head Constable Kasurde was residing. The learned Additional Public Prosecutor appearing for the State contended that

merely because the said panch witnesses who were taken at the time of the raid were taken as panch witnesses in some cases earlier by itself

would not be sufficient to discard their evidence totally. Now as far as evidence of panch witness Pujari is concerned, no doubt it must be held that

it is not the evidence of an independent witness. He definitely must he stamped as a witness who could be amenable to Head Constable Kasurde,

the member of the raiding party and, therefore, no reliance could be placed on his evidence.

8. The learned Additional Public Prosecutor also tried to contend that even if the evidence of the panch witness is discarded, there is sufficient

evidence of the police officers who were in the raid and their evidence sufficiently establishes that the Appellant-Accused was found in possession

of 69 tablets of charas and they were seized by the police and then were sent to C.A. for analysis and admittedly the C.A. report shows that they

were of charas. In this respect, it must be stated that once the police who raided the Accused had taken the panch witnesses and when one out of

the said panch witnesses is examined in Court as a prosecution witness and it is clear from his evidence that he at least could he held to be a

person amenable to a member of the raiding party, it does not lie in the mouth of the prosecution now to contend that discard the evidence of

panch witness and rely on the evidence of the police officers only.

9. Apart from this, there are several other indications in the present case on the basis of which it could be said that the police party which raided

the Accused, dealt with the case in a very casual manner and even did not try to comply with the provisions of various Sections of N.D. & P.S.

Act. Section 42 of the said Act provides that if information is received from any person in respect of the offence punishable under Chapter IV of

the said Act, the officer who received the said information must take down in writing the said information. Admittedly no such writing was effected.

The explanation which is sought to be given by the prosecution and which has been readily accepted by the learned Sessions Judge, is that they

had no time to reduce to writing the said information as they had to immediately raid the Accused. The said explanation definitely cannot be

accepted in view of the fact that it is clear from the evidence of the witnesses on record that after the informant gave the information, Head

Constable Kasurde called for the panchas. Necessarily some time must have elapsed between the receipt of the information from the informant and

the arrival of the panch witnesses. There were several persons including P.S.I. in the raiding party and, therefore, in this period the information

which was only that the Accused was selling charas tablets sitting on the parapet wall of the well, definitely could have been reduced to writing. It

would have hardly taken a couple of minutes to write the said information. Further it is also clear that there was also non-compliance of Section 50

of the N.D. & P.S. Act. The said section provides that if a search of any person under the provisions of Sections 41, 42 or 43 or the said Act is to

be taken, the person whose search is to be taken if requires that the search should be taken in the presence of the Gazetted Officer or the

Magistrate, he should be taken to such officer or the Magistrate and then only the search should be taken. This provision implicitly makes it

obligatory on the police officer who is in charge of the raid to inform the Accused of the said writing and thereafter only if the Accused declines to

resort to such search in the presence of the Gazetted Officer or the Magistrate, then only he should be searched. In the present case, through the

mouth of the police officers who are examined as prosecution witnesses, evidence is tried to be led before the Court that the Accused was

informed and asked as to whether he wanted the search to be taken in the presence of a Gazetted Officer or a Magistrate. This evidence led

through the mouth of the police officers is clearly an afterthought. It is an attempt made by the prosecution to improve upon its case with a view to

fill in the lacunae which were present in the present case. This is obvious because panch witness P.W. 2 Pujari in his deposition also does not make

any reference to this fact. Neither in the panchanama nor in the FIR there is a whisper about it. It therefore is clearly a lame attempt made by the

prosecution through the evidence of the police officer. We have absolutely no doubt that in the present case the Accused definitely was not

informed about his right provided u/s 50 of the Act. There is also no compliance of section 57 of the said Act. Section 57 provides that whenever

any person makes any arrest or seizure under the said Act, he shall, within 48 hours next after such arrest or seizure, make a full report of all the

particulars of such arrest or seizure to his immediate official superior. Admittedly, the P.S.I. who was the main member of the raiding party, did not

report about the said arrest or seizure to his immediate official superior. The prosecution, it appears, tried to contend before the learned Sessions

Judge that in the remand memo submitted to the Magistrate seeking the remand of the Accused when he was produced before the Magistrate on

the next day, the particulars of arrest and the seizure are mentioned and the Magistrate could be considered as an immediate official superior. The

learned Sessions Judge also accepted the said contention and held that there was sufficient compliance of the provisions of Section 57. It is difficult

to agree with the view taken by the learned Sessions Judge. The Magistrate definitely could not be considered as the immediate official superior to

the P.S.I. In the present case, there is definitely evidence on record that the D.C.P., was the immediate official superior to the P.S.I. It is clear that

this provision is definitely made with a view to have a check on the investigating officer. It is his superior in the department who alone can keep

check on the investigating officer and, therefore, there is absolutely no doubt that by immediate official superior the legislature intended to mean the

official superior to the department only. In the present case, therefore, there is no compliance of the said provision also. It appears that the learned

Sessions Judge felt that the said provisions in respect of which, as stated earlier, there has been a breach, are not mandatory and, therefore, even if

there is some breach in respect of them, it would not affect the prosecution case. Now without entering into the question as to whether the said

provisions are mandatory or not, it must be said that the said provisions definitely have been made with a purpose. The purpose obviously would

be to have certain cheeks on the investigating agency as the offences under Chapter IV of the N.D. & P.S. Act are very serious offences and are

punishable to the minimum sentence of 10 years and fine of Rs. 1,00,000/-. When there is non-compliance of these provisions, it must be held that

at any rate the evidence of the police office who failed to comply with the said provisions, cannot be relied upon implicitly to base the conviction.

Once the evidence of the panch witness P.W. 2 Pujari is rejected, the prosecution necessarily has to fall back only on the evidence of the police

witnesses. In the circumstances, as stated above, it would be hazardous to accept the evidence of the police witnesses as trustworthy and hold that

the Accused was found in possession of the contraband articles. The learned Sessions Judge, therefore, was in error in holding the Accused guilty

of the offence punishable u/s 20(b)(ii) of the N.D. & P.S. Act. In the result, the conviction of the Accused of the offence and the sentence awarded

thereunder will have to be set aside. Hence the order.

10. The appeal is allowed. The order of conviction and sentence of the offence punishable u/s 20(b)(ii) of the Narcotic Drugs and Psychotropic

Substances Act, 1985 is set aside. The Appellant-Accused shall be released forthwith if not required in any other case. Fine if recovered be

refunded to the Appellant.

11. Appeal allowed.