

Banobi and Another

Vs

State of Maharashtra and Ohters

Criminal Appeal No. 405 of 1997

(G. T. Nanavati, S. N. Phukan JJ)

15.09.1999

JUDGMENT

NANAVATI, J.:-

1. The appellants are challenging in this appeal, their conviction under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. They have been convicted for keeping charas in their possession without any licence or permit. Appellant 1 has been convicted also under Section 21 for possessing heroin.

2. The prosecution case was that acting on information that Banobi, Appellant 1 and her husband, Appellant 2 were keeping in their possession brown sugar and opium in their house and selling the same, PI Sheikh along with Lady Police constable Pramila and two panch witnesses raided their house at about 2.45 p.m. on 28-11-1988. From the house one packet of charas containing 13 grams and 700 ml grams was found concealed in a hollow space near the hearth in that house. On search by Lady Police Constable Pramila 13 small packets containing heroin were also fund from the person of appellant 1. Though appellant 2 was not present at that time, it was alleged that he along with his wife was in possession of those substances. On these allegations both the appellants were tried for the offence sated above.

3. The trial court believed the evidence of PW 4 PI Sheikh, PW 1 Mohasin, the panch witness and PW 2 Lady Police Constable Pramila and held that the prosecution has successfully established that Appellant 1 was in possession of heroin as well as charas and that appellant 2 was in possession of charas and that they did not have any licence or permit to possess the same. The trial court convicted them. The High court has confirmed their conviction as it also agreed with the appreciation of evidence by trial court and the findings recorded by it.

4. It was contended by the learned counsel for the appellants that the evidence as regards possession of charas by the appellants is inconsistent and ought not to have been relied upon. He submitted that as noted by the trial court and also by the High Court, panch witness Mohasin has not referred to the recover of the packet containing charas and PW 2 Pramila has admitted that on search nothing was found from the house. This contention is really based upon a misreading of the evidence of the three witnesses. PI Sheikh has deposed about the recovery of one packet containing charas form a hollow place near the hearth and Lady Police Constable Pramila has also stated that though during the first search nothing was recovered, on further search they did find one packet containing charas form a hollow place near the hearth and Lady Police constable Pramila has also stated that though during the first search nothing was recovered, on further search they did find one packet containing charas from a hollow place near the hearth in that house. The panch witness Mohasin has also stated that

13 small packets which was already found. He has further stated that panchnama was prepared on the site and whatever is stated in the panchnama is correct. He has admitted his signatures thereon. He has also proved the signatures of the accused on that panchnama. In his cross-examination he denied that no search was made in his presence and nothing was found from that house. Thus, if the evidence of the three witnesses is read closely and carefully it becomes apparent that their evidence is read closely and carefully it becomes apparent that their evidence is consistent as regards the find of the packet containing charas.

5. It was next contended by the learned counsel for the appellants that while conducting the search of the person of Appellant 1 there was non-compliance with the requirement of section 50 of the NDPS Act and therefore we should not accept the evidence with respect to the recovery of 13 small packets of heroin. The learned counsel for the respondent submitted that PI Sheikh had not informed Appellant 1 about her right to be examined in the presence of a Magistrate or a gazetted officer. The learned counsel is right in this behalf and therefore, the conviction of Appellant 1 under Section 21 of the Act for possessing heroin will have to be set aside.

6. It was next contended that the conviction of Appellant 2 cannot be sustained as he was not present in the house when it was raided and the packet containing charas was found. Both the trial court and High Court have found that Appellant 2 was residing in the house along with his wife and the facts and the circumstances of the case justified such and inference. The only contention raised before the courts below in this behalf was that he had a dispute with his landlord and therefore he was falsely involved in this case at the instance of the landlord. Appellant 1 has admitted that he was staying in that house. If considering these circumstances the courts below thought it fit to believe the evidence and infer that he was also in possession of the packet containing charas, it cannot be said that the view taken by the courts below is unreasonable.

7. We, therefore, Partly allow this appeal. Conviction and sentence of Appellant 1 for the offence punishable under section 21 of the Act for possessing heroin is set aside. Conviction of both the appellants and their sentence for the offence punishable under Section 21 for possessing charas is confirmed.