VERDICTUM.IN

2024:BHC-NAG:12568

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL (APEAL) NO. 449 OF 2023

Kailas s/o Bajirao Pawar
Age about : 47 years, Occu. Labour,
R/o. Wari Hanuman, Tq. Telhara,
District: Akola .... APPELLANT

// V E R S U S //

The State of Maharashtra,
Through Police Station Officer,
Police Station Akot Rural, Akot,
District Akola ... RESPONDENT

WITH
CRIMINAL APPEAL NO. 457 OF 2024

Raju Motiram Solanke
Aged about : 27 yrs, Occ: Labourer,
R/o. Infront of Govt. Circuit House,
Popatkhed Road, Akot,
Tq. Akot Dist. Akola .... APPELLANT

// V E R S U S //

State of Maharashtra,
Through Police Station Officer,
Akot (Rural) Police Station,
Tq. Akot Dist. Akola ... RESPONDENT

Mr A. S. Mardikar, Sr. Adv. Assisted by Mr. Ved Deshpande a/w Mr. D.P. Singh, Advocates for appellant in Cr.Appeal No.449/2023.
Mr. K.H. Anandani, Advocate a/w Mr. Bhavin Suchak, Mr.V.D. Ruparelia and Mr. M.B. Sharma, Advocates for appellant in Cr.Appeal No.457/2024.
Mr. A.M. Joshi, APP for the respondent/State in both appeals

CORAM : G. A. SANAP, J.
DATE : 25.10.2024

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

O R A L J U D G M E N T :

1 These two appeals arise out of the judgment and order, dated 29.04.2023, passed by the learned Additional Sessions Judge, Akot, District Akola (for short 'the learned Judge'), whereby the learned Judge convicted the appellants for the offences punishable under Section 8(c) read with Section 20(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') and sentenced them to suffer rigorous imprisonment for twelve (12) years and to pay a fine of Rs.1,20,000/- each and in default of payment of the fine further directed to suffer additional imprisonment for three years each.

2 Background facts:

The appellant in Criminal Appeal No. 449/2023 is accused No.1-Kailas s/o Bajirao Pawar and appellant in Criminal Appeal No. 457/2024 is accused No.2-Raju Motiram Solanke. The FIR, in this case, was registered on the report of

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

Sagar Hatwar (PW-7), who at the relevant time was attached to the crime branch, Akola, as a Police Inspector. The case of the prosecution, which emerges from the FIR and other materials is that on 23.09.2020, PW-7 Sagar Hatwar, at about 10:50 a.m., received a secret information from his informer that two persons by name Raju Solanke and Kailas Pawar, within the jurisdiction of Akot Gramin Police Station, were possessing ganja for sale. The ganja was stored in a hut. PSI Hatwar recorded this information in a station diary. He apprised his superior about this information. He forwarded this information in writing to SP Akola. The SP Akola directed them to work out the information.

3 PSI Hatwar summoned two panch witnesses. He summoned photographer. He summoned one vendor with a weighing machine. He requested SDPO, Akot to accompany them, as an independent gazetted officer. After making this arrangement, at 4:30 p.m., they proceeded towards Adgaon by

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

two Government vehicles. They went to Marimata chowk, behind Marimata temple. At the spot, they saw that on the platform there was a hut made up of tarpaulin under the Neem tree. Accused Nos. 1 & 2/appellants were found sitting in the hut. The raiding party went towards the hut. PSI Hatwar gave his introduction and introduction of the other members of the raiding party. He apprised the appellants about the information received by him and told them that for the purpose of working out the said information, they have to take the search of the hut. PSI Hatwar also apprised the appellants of their rights under Section 50 of the NDPS Act. PSI Hatwar told them that Mr Sonawane is an independent Gazetted Officer and they could give their search in his presence. The appellants told that they have no objection to give their search in presence of the gazetted officer. Thereafter, PSI Hatwar, in presence of the panch witnesses, inspected the hut. In the hut, they found one sack. The said sack was opened. In the said sack, there were

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

eighteen (18) plastic packets. One packet was opened. The police and panchas were satisfied that the substance in the packet was ganja. The ganja was weighed on the weighing scale. It was 39 Kilogram. In presence of the panchas, three samples weighing 100 gram each were drawn. The samples had been packed and sealed. The labels with the signatures of the police and panchas had been affixed.

4 Appellant Nos. 1 and 2 informed the police that the ganja was brought by them from one Shatrughna Chavhan, who was accused No.3. Shatrughna was resident of village Borva, Taluka Telhara. Appellant Nos. 1 and 2 took the police to the house of Shatrughna. The wife of Shatrughna was present in the house. The police apprised her about the information received by them. The police apprised her about her right to give a search in presence of the Gazetted Officer or Magistrate. She expressed her willingness for the search by the police. At the house of Shatrughna, the five big sacks were

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

recovered from beneath the cot. The sacks were opened. In sacks, small packets were found. The packets contained Ganja. The total weight of the ganja was 107.90 kilogram. The police drew three samples of 100 gram each. The panchanama was drawn.

5 It is stated that as per the instructions of PSI Hatwar, the photographer video recorded the entire process of recovery, search, seizure and drawing of panchanama. The raiding party came back to Akola. The samples and muddemal had been deposited in the malkhana. PSI Hatwar made a request to the Magistrate for the preparation of inventory for drawing the samples. Learned Magistrate directed the police to produce the articles before him. He carried out the inspection and inventory. The samples had been drawn at the time of inventory. After completion of the process of inventory, the ganja and sample packets had been kept in the malkhana. During the course of the investigation, the samples had been

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

sent to CA. The CA, on analysis, opined that the substance was ganja. On completion of the investigation, the charge-sheet was filed against the appellants as well as Shatrughna and the owner of the vehicle, which was used for transportation of the ganja from Andhra Pradesh to the house of Shatrughna.

6 Learned Judge framed the charge against the accused persons/appellants. The accused pleaded not guilty. Their defence is of a false implication to save the real perpetrators of the crime. In order to bring home the guilt of the appellants, the prosecution examined seven witnesses. Learned Judge, on consideration of the evidence, held the appellants guilty and convicted and sentenced them as above. The learned Judge, acquitted accused Nos. 3 and 4. The appellants, by way of these two separate appeals, are before this Court against the judgment and order.

7 I have heard learned Senior Advocate Mr A. S.

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

Mardikar for the appellant at length on merits in Criminal Appeal No.449 of 2023. I have also heard Mr K. H. Anandani learned Advocate for the appellant in Criminal Appeal No. 457 of 2024 and learned APP Mr A. M. Joshi for the State. Perused the record and proceeding.

8 Learned Senior Advocate Mr Mardikar advanced his arguments on merits of the case. Learned Senior Advocate took me through the evidence and pointed out that there are drawbacks and lacunas in the case of the prosecution. There was no compliance of Section 42(2) of the NDPS Act. Similarly, there was no compliance of Section 57 of the NDPS Act. Learned Senior Advocate in all fairness conceded that, in view of the law laid down by the Apex Court in the case of ***State of Rajasthan .v/s. Parmanand & another***[1] followed in subsequent decision of the Hon'ble Apex Court in the case of ***Ranjan Kumar Chadha v/s. State of Himachal Pradesh***[2]**,** the

1 (2014) 5 SCC 345
2 AIR 2023 SC 5164

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

compliance of Section 50 of the NDPS Act would not be necessary *inasmuch* as the recovery was made from the hut and not from the person of the appellants. The personal search of the appellants was not conducted. In short, the learned Senior Advocate submitted that evidence on record is not sufficient to prove the charge against the appellants beyond reasonable doubt. It is submitted that the panchanama and the evidence of the prosecution witnesses are silent about the description of the substance. It is pointed out that the description of the substance stated in the panchanama and deposed by the witnesses does not fall under the definition of ganja as provided in Section 2(iii)(b) of the NDPS Act.

9 The learned Advocate Mr K. H. Anandani, appearing for the appellant in Criminal Appeal No. 457 of 2024, adopted the submissions advanced by the learned Senior Advocate.

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

10 The learned APP submitted that the entire process of raid, search and seizure had been video recorded. The CD of the video recording is at Exh. 27. The learned APP submitted that the description of the substance can be seen from the video recording. It is submitted that it is ganja as understood by the definition of the ganja provided under the NDPS Act. It is submitted that this substance therefore cannot be said to be only the leaves of the cannabis plant. The learned APP submitted that CA report categorically mentioned the description of the substance forwarded in the sample packets to CA. It also falls within the definition of the Ganja as understood by Section 2(iii)(b) of the NDPS Act. The learned APP submitted that the learned Judge had played the CD before delivering the judgment and took note of the relevant facts recorded in the CD. The learned APP, in short, submitted that evidence is concrete, cogent and reliable.

11 I have gone through the record and proceeding. I

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

have minutely perused the evidence. The CA has opined, on analysis of the samples, that the substance was ganja. The CA has recorded that Exhibit Nos. 1 and 2 contained Greenish Brownish coloured leaves, flowering tops, seeds and stalks wrapped in paper. It is seen that this substance falls within the definition of Ganja under Section 2(iii)(b) of the NDPS Act. The result of the analysis is crucial in this case.

12 It is to be noted that the entire process of raid at the hut as well as at the house of Shatrughna was video recorded with the help of the photographer. The photographer has been examined. Panch witness has supported the case of the prosecution. PW-1 Vinayak Shinde, the panch witness, has deposed in great detail about the raid, search, seizure and sampling. He has stated that, in his presence, the entire process was video-recorded by the photographer. PW-2 Santosh Solanke is the photographer. He has deposed about the video recording of the entire process of search, seizure, sampling and

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

apprehension of the appellants. PW-7 Sagar Hatwar, the investigating officer, has deposed in his evidence that the entire process of the raid was video-graphed. The CD of the video recording is at Exh. 27. In this context, it would be necessary to consider the evidence of the photographer (PW-2). At Para No.7, he has stated that on last date the CD was played on the computer of the Court by the clerk. The APP and the Advocates for the appellants had seen the recording. Perusal of the evidence of all the witnesses does not show that the learned Judge, while recording their evidence, had played the CD in the Court and personally saw it.

13 In this background, it is necessary to consider the observations made by the learned Judge in his judgment. Para Nos. 42 would be relevant. Learned Judge has noted that he had personally seen the video recording. Similarly, it was seen by the concerned clerk, APP and the advocates for the appellants. Learned Judge has noted that the advocates for the

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN
HIGH COURT OF JUDICATURE AT BOMBAY

appellants had no dispute about the contents of the CD. In my view, this observation is against the appellants. It is to be noted that the CD has been admitted in the evidence. It is marked as Exh. 27. The question is whether the evidence adduced before the Court is sufficient to prove the contents of the CD or not. If the Court comes to the conclusion that this evidence is not sufficient to prove the contents, then the question is as to how the same could be used against the appellant.

14 It is to be noted that we are in the era of technology. The technology is now being used for the purpose of investigation. This is a good sign for the criminal justice administration. The electronic evidence collected with the assistance of the technology, which may be audio recording, video recording, photography or the data from the memory card, cannot be admitted in the evidence as it is. Before such material is admitted as an evidence, proper care and procedure is required to be followed. Such material has to be converted

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

into a legally admissible evidence. The law prescribes the procedure. The prosecutor, the presiding officer and the advocates must be well versed with the procedure, while recording the evidence of the witness with regard to the contents of the video recording or CCTV footage. If there is a lack of procedural knowledge to convert such material into legally admissible evidence collected during the course of investigation then the very purpose of the video recording or collection of the CCTV footage capturing the incident will be frustrated. The video recording or CCTV footage without proper evidence to prove the contents of the video recording cannot be made use of against the accused. It needs to be stated that with the advent of technology and use of the technology during the investigation, all concerned are required to keep themselves abreast with the law and procedure. A great care is required to be taken while recording the evidence when such electronic evidence is produced before the Court. It is the duty

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

of the Court and other stake holders to see that it is converted into legally admissible evidence. If there is a failure on the part of the prosecutor and the presiding officer, on account of some misconception related to the subject, then it can cause miscarriage of justice. It needs to be stated that in this case on account of procedural error, apparent lacuna has crept in and which has resulted in miscarriage of justice. It has caused prejudice not only to the appellant but to the prosecution as well. It needs to be mentioned that in this case, on this count, there is an eminent flaw, which has caused prejudice not only to the appellants but to the prosecution as well.

15 It is to be noted that the video recording of the entire process was the best evidence in the possession of the prosecution. The question that was required to be addressed by the learned Judge while recording such evidence was as to how it has to be converted into legally admissible evidence. The learned Judge and the learned prosecutor have committed a

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

procedural error. The proper procedure had not been followed. In this case, the main witnesses are the panch witnesses, the photographer, other members of the raiding party and the investigating officer. If the evidence consists of a video recording of the particular incident or part of the incident, the recorded incident must be proved through the concerned witness. As far as the video recording or recorded CCTV footage is concerned, the witness who is an eyewitness to the incident or acted as a panch witness or in other capacity, must describe the incident on oath before the Court. In such a case, at the time of recording the evidence of the concerned witness, the video recording, either recorded in the CD or pen drive or any other electronic gadget, must be played on the screen. The witness, after playing the CD, must describe or translate the video recording or the contents of the recording in his own words on oath before the Court. If it is an audio recording, then the part of the audible conversation must be transcribed

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

and placed on record under the signature of the investigating officer. Unless and until the recorded video or CCTV footage is played at the stage of evidence of the witness, the witness would not be able to describe or narrate the incident in his or her own words on oath before the Court. In this way, at the stage of recording of evidence, each and every witness concerned with the video recording of the incident or any part of the incident must describe or narrate the incident in his or her own words on oath before the Court. If it is not so done, then it would be very difficult to understand or read that video recording by the presiding officer, prosecutor or Advocate. This procedure has to be scrupulously followed. This has not happened in this case. The CD was not played while recording the evidence of the panch witnesses, the photographer, the other members of the raiding party and the investigating officer. It is therefore apparent that the legally admissible evidence as to the contents of the recording/CD has not at all

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

been recorded.

16 The CD is a part of the record. At the stage of the arguments in these appeals, the CD was played in the Court. It is evident that the video recording commenced with the apprehension of the appellant. The CD contains the recording of the inspection of hut, recovery of the substance, the description of the substance and further part of the proceedings. The CD further contains the recording of the raid and recovery at the house of Shatrughna. The learned Judge was required to play the CD at the time of recording evidence of each witness and record the contents appearing on the screen with the help of the concerned witness. If this procedure had been followed, then the contents of the CD would have become legally admissible evidence. This procedure had not been followed. This has caused prejudice to the appellants as well as to the prosecution. The important evidence collected in the form of the video recording has not been converted into legally

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN
HIGH COURT OF JUDICATURE AT BOMBAY

admissible evidence. In order to verify the correct factual position, at the stage of the argument of the appeals, the video recording was played. It was very difficult to understand the contents of the CD. If the evidence of the witnesses had been recorded on playing the video recording at the time of the evidence, then the oral testimony of the witnesses on oath, as to the contents of the CD would have been part of the record.

17 It is evident that in this case the detailed description of the ganja has not been recorded in the panchanama. Similarly, the detailed description of the ganja has not been stated by the witnesses. The substance seized from the possession of the appellant can be seen from the video recording. It was necessary to show this part of the recording to the witnesses and record the description of the substance in detail through each and every witness. In my view, this is a fundamental flaw in this case. The appellants could not be held responsible for this mistake or rather a mess. It was the

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

responsibility of the learned prosecutor to insist before the learned Judge to play the CD when the witnesses were in the witness box. It was not done by the learned Prosecutor/ incharge of the case. Similarly, the learned Judge did not follow this procedure scrupulously. It seems that the learned Judge did not act diligently while recording the evidence of the witnesses with regard to the incident or a part of the incident video-graphed by the investigating officer. Learned Judge has observed in his judgment that there was no objection as such on the part of the appellants to this CD. In my view, this observation is totally perverse. This observation is not only against the appellants, but it is also against the prosecution. In this case, the required evidence as to the contents of the video recording or CD has not been properly recorded. There is a procedural error. It was the duty of the Court to give justice to the hard work put in by the police officer, while conducting the raid and ensuring the video recording of the entire proceedings.

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

The video recording is the most important and vital evidence in this case. It can reflect upon the credibility and authenticity of the raid. Similarly, the description of the substance, which can be seen from the video recording, would be of immense importance. It cannot be excluded from consideration, if it is proved properly. This is one flaw in this case. It has caused prejudice to the appellants as well as to the prosecution.

18 The next important flaw which can be seen is the failure of the prosecution to examine the CA. It is noticed that in the Vidarbha region, in the trials under the NDPS Act, the CA is not examined. In my view, this is a serious mistake on the part of the prosecution. It needs to be placed on record that in Greater Mumbai, in every case under the NDPS Act, the CA is examined. In Vidarbha region, while deciding the appeals against the conviction and sentence in NDPS cases, it is noticed that this aspect is taken for granted by the prosecution. It needs to be stated that in Vidarbha region, the majority of the

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

cases under the NDPS Act are with regard to the seizure of the ganja. The examination of the CA, in the case of the analysis of ganja, is very important because, in the report of the CA the description of the substance in detail is recorded invariably. The description of the substance, seized as a ganja, is required to be proved to bring it within the amsbit of the definition of ganja under Section 2(iii)(b) of the NDPS Act. In this case, the prosecution has failed to examine the CA. In this case, the learned prosecutor did not produce remnant samples received from the office of CA. Similarly, the prosecutor did not produce the representative samples drawn at the time of the seizure on the spot as well as drawn in presence of the learned Magistrate at the time of the inventory. The remnant samples are required to be shown to the CA to bring on record the nature of the narcotic drug and the description of the drugs. Similarly, the representative samples are required to be opened before the Court at the time of the evidence of the concerned

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

witness. The presiding officer is required to note down the description of the narcotic drug/substance found in the sample packets. It is further pertinent to mention that if the seized drug is not destroyed, then the same shall also be produced before the Court while recording the evidence of the witness. The description of the substance found in the packets/sacks shall also be recorded. The learned presiding officer is required to record this part of the evidence very meticulously and note down the description of substance.

19 I am conscious of the fact that under Section 293 of the Code of Criminal Procedure, the reports of certain Government scientific experts may be used as evidence in an inquiry, trial or other proceedings. The record shows that no specific order was passed by the learned Judge, while admitting the CA report. It is to be noted that, in cases under the NDPS Act, as and when a CA report is tendered, the Court shall insist the prosecutor to examine the CA. If the CA is available, then

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

the learned Judge shall not exhibit the report without examining the CA. The trial of the offences under the NDPS Act cannot be taken lightly. The trial for the offences under the NDPS Act has to be conducted very carefully. It needs to be mentioned that in such a trial, the Court has to deal with so many technical aspects and issues. The NDPS Act provides for checks and balances while conducting the investigation in the crime so as to avoid false implication of innocent persons. The act provides for stringent punishment for a proved offence. Therefore, the Court has to be very careful while recording the evidence. In this case, the required care was not taken.

20 The NDPS Act is special legislation for the control and regulation of the operations relating to Narcotic drugs and Psychotropic substances. Before enactment of the NDPS Act, the Opium Act 1857, the Opium Act 1878 and the Dangerous Drugs Act, 1930 were enacted long ago. With the passage of time and developments in the field of illicit drug traffic and the

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

drug abuse at the national and international level, many deficiencies in the existing laws had come to notice. The drug trafficking and drug abuse had posed serious problems to the National Governments. It is not out of place to mention that narcotic drugs is a menace to the society. It is the duty of all the stake holders to sincerely & scrupulously implement the provisions of the NDPS Act. If the provisions of the NDPS Act are not sincerely and scrupulously implemented and the use of the drugs becomes rampant, it is bound to destroy the edifice of our society. It can destroy the younger generation, which is the future of this country. The national survey shows that the average age of the Indian population is 30 to 35. If the use of drugs is unchecked and rampant, then it is bound to spoil the younger generation and ultimately the society. All concerned, as and when required to deal with such illicit drugs or drug trafficking, has to put a right foot forward.

21 In the backdrop of the above-stated eminent

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

drawbacks in this case, this court has two options either to order the retrial or direct the recording of the additional evidence. Before opting for any of the options, it would be necessary to quote certain observations of the Hon'ble Apex Court relevant for the issue from the decision in the case of ***Brigadier Sukhjeet Singh (Retired) MVC .v/s. State of Uttar Pradesh and others***[3]. Para Nos. 22, 23, 24 and 25 are relevant. The same are extracted below.

> ***"22. Chapter XXIX of the Code of Criminal Procedure, 1973 deals with "Appeals". Section 391 Cr.P.C. empowers the appellate court to take further evidence or direct it to be taken. Section 391 is as follows:***
>
> ***"391. Appellate court may take further evidence or direct it to be taken.-(1) In dealing with any appeal under this Chapter, the appellate court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the appellate court is a High Court, by a Court of Session or a Magistrate.***
> ***(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the appellate court, and such court shall thereupon proceed to dispose of the appeal.***
> ***(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.***

3 (2019) 16 SCC 712

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

23. The key words in Section 391(1) are "if it thinks additional evidence to be necessary". The word "necessary" used in Section 391(1) is to mean necessary for deciding the appeal. The appeal has been filed by the accused, who have been convicted. The powers of the appellate court are contained in Section 386. In an appeal from a conviction, an appellate court can exercise power under Section 386(b), which is to the following effect:

"386. (b) in an appeal from a conviction—
(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial, or
(ii) alter the finding, maintaining the sentence, or
(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;"

24. Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the appellate court to secure ends of justice. The scope and ambit of Section 391 CrPC has come up for consideration before this Court in Rajeswar Prasad Misra v. State of W.B. Hidayatullah, J., speaking for the Bench held that a wide discretion is conferred on the appellate courts and the additional evidence may be necessary for a variety of reasons. He held that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

HIGH COURT OF JUDICATURE AT BOMBAY

would be failure of justice without it. Following was laid down in paras 8 and 9: (AIR p. 1892)

"8. ... Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.

9. Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if was possible) to list here. We do not propose to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise.

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

25. This Court again in Rambhau v. State of Maharashtra had noted the power under Section 391 CrPC of the appellate court. Following was stated in paras 1 and 2: (SCC p. 761)

"1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of Section 391 of the Code of Criminal Procedure. A plain look at the statutory provisions (Section 391) would reveal the same…
2. A word of caution however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in Rajeswar Prasad Misra v. State of W.B. in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in that event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard."

22 The legal position enunciated by the Hon'ble Apex Court, as above, is required to be borne in mind while addressing the issue of retrial or the issue of recording additional evidence. The Apex Court has held that whether there is a need for a retrial or additional evidence depends upon

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

the facts and circumstances of each case. The Apex Court has held that while exercising the option, the Court has to keep in mind the concept of justice, which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard. The Court must be satisfied that the case in question indicates the failure of justice. It is held that once the court comes to the conclusion that there has been a failure of justice, the Court has to exercise the powers.

23 Reverting back to the appeals on hand, in my view, if the CD is read in evidence as it is, it would heavily prejudice the accused/appellants. Perusal of the cross-examination would show that the CD has been seriously challenged. The learned Judge, who was the master of ceremony, while conducting the trial, has failed to address this issue at the stage of trial. It was the duty of the learned Judge to take proper care while admitting the CD in evidence, on the basis of the relevant

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

evidence. In this case, the evidence was not properly recorded. Similarly, the prosecution has failed to examine the CA. There is no plausible reason on record for non-examination of the CA.

24 In the above backdrop it would be appropriate to make a useful reference to the decision of the Hon'ble Apex Court in the case of ***Rahul Vs. State of Delhi, Ministry of Home Affairs and Another with connected appeals***[4]**,** wherein the Hon'ble Supreme Court has highlighted the powers and the duty of the learned Judge qua examination, cross-examination of the witnesses and minute supervision of the over all proceeding. In this context it would be profitable to extract paragraph 44 of this judgment. It reads thus:

> ***44. This Court while not accepting the submission that it was improper for the Court to have interjected during the course of cross-examination of the witness, had observed in State of Rajasthan v. Ani [(1997) 6 SCC 162] thus:***
>
> > ***"11. We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial court to put "any question he pleases, in any form, at any time, of***

4 (2023) 1 SCC 83

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

any witness, or of the parties, about any fact relevant or irrelevant" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the psower whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question.

12. Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the Judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses in the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a Judge felt that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN
HIGH COURT OF JUDICATURE AT BOMBAY

> *during evidence-collecting process. It is a useful exercise for trial Judge to remain active and alert so that errors can be minimised.*
>
> *13. In this context it is apposite to quote the observations of Chinnappa Reddy, J. in Ram Chander v. State of Haryana (1981) 3 SCC 191:*
>
>> *"2. The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. (emphasis in original)"*

25 The Hon'ble Apex Court and this Court on numerous occasion have been constrained to make similar observation. It seems that the concern expressed by the Apex Court and this Court has not been percolated down to the concerned. The case on hand is an example of a failure of the

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

exercise of the powers under Section 165 of the Indian Evidence Act, 1872 by the presiding officer. The conduct of the trial proceedings in this manner can cause injustice. The exercise of the powers by the presiding officer can enhance the quality of the trial and the ultimate adjudication, more particularly when the Court is conducting a trial under the special legislation like NDPS Act.

26 It is to be noted that in this case, for the purpose of proving the contents of the CD, the recall of all the witnesses would be necessary. The witnesses were the members of the raiding party. Each and every witness would be required to describe/translate the contents of the CD/video recording. Similarly, the prosecution would be required to examine the CA. Therefore, in this case, the option of recording additional evidence may not be appropriate. Even after recording the additional evidence, the further procedure with regard to the recording of 313 statement of the accused would be required to

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

be gone into. In this case, in my view, the retrial would be the best option in the interest of the appellants as well as the prosecution. In the facts and circumstances, in this case I am opting to order a re-trial.

27 It is to be noted that two accused have been acquitted. Accused No. 4 was the owner of the vehicle, which according to prosecution was used for the transportation of ganja from Andhra Pradesh to Borva. It is to be noted that the recovery of ganja, weighing 107.90 kilogram, was made from the house of Shatrughna. The wife of Shatrughna was found in the house at the time of recovery. The police have done video recording of the seizure, sampling and recovery of this 107.90 kilogram ganja. The CA report of the analysis of the samples was also part of the record. I am informed by the learned APP that the incharge prosecutor of the case has not recommended the appeal against the judgment of acquittal of accused No. 3 to the Law and Judiciary department of the Government of

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

Maharashtra. As far as this accused is concerned, it may not be appropriate to make any observation. However, the failure of the prosecutor to recommend even the appeal against his acquittal is unfathomable.

28 Accordingly, the criminal appeals are partly allowed.

29 The judgment and order of conviction and sentence of the appellants/accused Nos.1 and 2 dated 29.04.2023 passed by the learned Additional Sessions Judge, Akot, District Akola in Special Sessions Trial No. 34 of 2020 is quashed and set aside.

30 The matter is remanded back to the learned Additional Sessions Judge, Akot, Akola, for retrial.

31 The learned Judge is directed to conduct a retrial. The learned Judge shall ensure the meticulous recording of the

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

evidence. The learned Judge shall dispose of the matter within three months from the date of receipt of the record of this case.

32 The appellants are remanded to judicial custody.

33 Learned Judge on receipt of the case papers for a fresh trial, shall regulate the custody of the appellants.

34 Liberty is granted to the accused/appellants to move an application before the learned Judge for bail, if so advised. As and when it is made, the learned Judge shall decide it in accordance with law.

35 The criminal appeals stand disposed of, accordingly. Pending applications, if any, also stand disposed of.

36 The copy of this judgment be forwarded to the Registrar General, High Court of Judicature at Bombay and the Registrar (Inspection-I), High Court of Judicature at Bombay. The Registrar General and the Registrar (Inspection-I) shall

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::

VERDICTUM.IN

ensure that while conducting the inspection of the Court, the above-noted as well as similar drawbacks in the proceedings must be looked into and brought to the notice of the concerned officer so as to avoid such mistakes in the future. The Registrar General shall circulate this judgment to all the Principal District Judges in the State of Maharashtra for taking all necessary steps.

(G. A. SANAP, J.)

Namrata

::: Uploaded on - 19/11/2024 ::: Downloaded on - 20/11/2024 12:47:13 :::