



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.112 OF 2016

Shaikh Ayuniddin s/o Shaikh Karimoddin
Age: 48 years, Occu.: Agri.,
R/o. Adas, Tq. Kaij, Dist. Beed.

.. Appellant

Versus

The State of Maharashtra

.. Respondent

...
Mr. Sudarshan J. Salunke, Advocate for the appellant.
Mr. N. D. Raje, APP for the respondent/State.

...

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 07.10.2026

Pronounced on : 08.10.2026

JUDGMENT :-

1. In this appeal, there is challenge to the judgment and order of conviction dated 12.02.2016 passed by learned Special Judge, Majalgaon in Special (NDPS) Case No.03 of 2012, thereby convicting the appellant for offence under Section 8(b) read with Section 18(a) of the Narcotic Drugs and Psychotropic Substances Act [NDPS Act].

BRIEF FACTS OF THE PROSECUTION CASE

2. In brief, the case of the prosecution before the Trial Court was that PW5, a Police Inspector, received secret information that the accused was cultivating opium poppy in land bearing Gut No. 252,

situated at village Adas. He claims to have thereafter informed the higher authorities, planned a raid and engaged panchas. He took note of the information in Station Diary, paid visit on the spot and noticed that accused had planted opium poppy trees on his land of onion crops. Said plants weighing 1 Kg. were seized and both accused and seizure was brought to police station after drawing panchanama and he himself registered crime as well as investigated the same and charge-sheeted accused, who was tried by the learned Special Judge vide above Special Case and he came to be accordingly convicted as stated above.

. Feeling aggrieved by the same, the appellant has challenged the impugned judgment and order by filing instant appeal.

SUBMISSIONS

On behalf of appellant/accused :

3. Learned Counsel for the appellant questioned the prosecution case by submitting that, at the outset, there is non-compliance with the mandatory provision under Section 42 of the NDPS Act. He emphasized that PW1 has not produced the secret information allegedly received by him, on the strength of which the investigation was carried out. According to him, this amounts to a blatant violation and, therefore, the entire investigation and trial stand vitiated. To buttress the above submission, he seeks reliance on the judgment of

the Hon'ble Apex Court in ***Kishan Chand Vs. State of Haryana, 2013 Cri .L.J. 723.***

4. He would further point out that equally there is non compliance of Section 52-A(c) of the NDPS Act, as according to him, sample was not drawn in presence of Magistrate, which is also a mandatory procedure. He pointed out that on what basis sample was drawn is also not clarified by prosecution. He pointed out that there is nothing on record to show that there was deliberate cultivation. He would submit that admittedly crop in the field was onion crop and there is no other evidence except statements of police officials about existence and cultivation of poppy opium. He pointed out that single sapling/plant has been picked up. He would submit that cultivation contemplates conscious act of planting and nurturing plants, but, here, there was nothing to show that any special activity of cultivation was undertaken. In support of above, he seeks reliance on the judgment of this Court in the case of ***Subhash Mahadu Mahajan v. State of Maharashtra, 2026 (2) Bom.C.R. (Cri.) 695.***

5. According to learned Counsel for the appellant, there is no iota of evidence to show that the land was in possession of appellant. Rather, the land stood in the name of his father and according to him, there is no distinct evidence in the form of testimony of neighbours to

show that accused himself cultivated the crop.

6. He pointed out that alleged seizure is of 07.03.2012, but seized muddemal is sent to Analyzer on 22.03.2012 i.e. almost after a fortnight and according to him, there is no proof that said seizure was kept in sealed condition to rule out possibility of tampering. He took this Court through the evidence of carrier PW3. He pointed out that evidence of this witness show that though he had received sample on 21.03.2012, he has retained the muddemal till next day, after which it was deposited with analyzer. Consequently, he questions the integrity of the muddemal and report.

7. In the alternative, he submitted that taking the quantum of sentence awarded by learned Trial Court, there being no criminal antecedents and particularly, taking into account the age of the appellant, leniency be shown and he be let off on already undergone sentence.

On behalf of respondent/State :-

8. In answer to above, learned APP would justify and support the judgment and order of conviction and prayed to dismiss the appeal for want of merits.

BRIEF ACCOUNT OF EVIDENCE BEFORE THE TRIAL COURT

9. **PW1** Mahadev at Exhibit-19 deposed that on 07.03.2012, while he was on duty, he received phone call from Police Constable Machve to arrange two panchas and also to collect weights and measurements for proposed raid at village Adas. According to him, he himself, Police Inspector, Police Head Constable Machve and two panchas went to the village Adas and when they reached to the field of accused, they noticed that in the crops of onion and garlic, accused had planted trees of opium poppy. He himself, panchas and Police Inspector uprooted the opium poppies, which were 2-3 feets of height, having flowers. According to him, weight of the opium poppies were found to be 1 Kg. and thereafter, seizure panchanama was drawn and accused being taken to Police Station. He identified the accused before the Court.

. While under **cross-examination**, he admitted that Police Inspector had not issued him a written order. He is unable to give boundaries of the land, which was visited. He is unable to state total plants of opium poppy and he also admitted that Police Inspector did not carry out separate weight of each tree. He is unable to give full name of the person from whom weights and measurements were arranged. Rest is all denial.

10. **PW2** Ganesh at Exhibit-20 deposed that on 07.03.2012 when he was present at Dharur, one constable called him and directed him to sign on blank paper. He identified Exhibit-21. When he denied that he accompanied Police Inspector to the field at Adas and Police Inspector seized opium poppy tree, he was declared hostile and to every suggestion in defence, he has answered in affirmative.

11. **PW3** is the carrier, who, in his evidence at Exhibit-25, deposed that on **21.03.2012** Police Inspector directed him to take seizure to C.A. Aurangabad and accordingly, on the same day, in-charge of Malkhana handed him the articles at around **9.00 p.m.** and on next day early in the morning, he went to C.A. at Aurangabad and handed over the muddemal.

. While under cross-examination, he admitted that on **22.03.2012, he reached C.A. office at 11.00 a.m.**

12. **PW4** at Exhibit-28 deposed that his field is adjacent to that of accused, whom he knew, but he denied knowing whether accused planted opium poppy in his field and, therefore, finding him not supporting, he was declared hostile and cross-examined by learned APP.

13. **PW5** is the Investigating Officer, who narrated all the steps taken by him till charge-sheeting accused.

14. Here, the appeal is sought to be allowed on following fundamental grounds :

Firstly, there is no convincing independent eye witness account about cultivation and seizure;

Secondly, there is non compliance of Section 42 of NDPS Act; and

Thirdly, integrity and custody of seizure to be doubtful.

15. In the light of above grounds raised, available evidence is reanalyzed. Admittedly, case of prosecution is based on evidence of as many as five witnesses. **PW1** is the police constable, **PW2** is the panch to spot panchanama, but he has not supported prosecution as he denied that it did not happen that on 07.03.2012, in his presence, there was any visit to the field of accused and seizure of any opium poppy plant; **PW3** Pandurang is the carrier; **PW4** is the immediate neighbour of accused, who has also not supported prosecution. Resultantly, there is only evidence of **PW1**, **PW3** and **PW5**.

16. In the light of above objection about no independent witness, it is noticed that though efforts were done by prosecution to examine

PW4, who is immediate neighbour, as stated above, this witness, has not supported prosecution and he denied that the accused planted opium poppy in his land. Therefore, there is substance in the submission that apart from police witnesses, there is no independent witness.

17. As regards to non compliance of Section 42 of NDPS Act is concerned, it is tried to be submitted that Investigating Officer was duty bound to note the secret information allegedly received by him and also to further produce it in the Court, but he has failed to do so. In view of such submissions, evidence of PW5 is examined, which is at Exhibit-29. He seems to have deposed that on 07.03.2012, while he was present in the police station, a secret information was received about accused have planted opium poppy in his field in land Survey No.252 of village Adas and after receiving such information, he claims that immediately on the same day, he passed the information to Superintendent of Police, Beed, Additional S.P, Beed, Dy. S.P., Kaij as well as Tahsildar, Kaij and then he narrated about directions given to Constable Machve to arrange panchas by issuing letter Exhibit-30 and then issuing letter to Constable Satpute to arrange weights and measurements for carrying weight of opium plants. This letter he identified to be at Exhibit-31 and accordingly, seal was also arranged

by issuing letter to ASI. Accordingly, Constable Machve produced panch Ganesh Nakhate and Vishnu Singare, whom he claims to have explained about the proposed raid and they agreed to act as panch. He again deposed that thereafter, he took entry in the Station diary and along with Dy. S. P., Kaij, police staff and panchas, by carrying the articles of measurement, went to land Survey No.252 at village Adas and accused to be present in his field. He further deposed that they noticed that **accused has planted opium poppy plant in the field of garlic and onion.** The trees were uprooted, weighed and found to be of 1 Kg. According to him, accused told that land was Dargah Inami land and that since his forefather, he is cultivating the said land. That, amongst the trees removed by them from the field, one opium poppy tree was removed by way of sample and remaining opium poppy trees were seized and sealed in presence of panchas and spot panchanama Exhibit-21 to be drawn and thereafter, seizure and accused to be taken to Police Station, where he has lodged the report.

. He thereafter deposed that in-charge of Malkhana AIS Dhas had kept the sealed articles in his custody. After arresting the accused, crime was registered and he identified complaint Exhibit-35. He then identified the documents shown to him before the Court i.e. Certificate of Conversion of Land at Exhibit-36 and the copy of the land Survey No.207/2 at Exhibit-38. He further deposed about

sending the seized articles to the C.A. through ASI Naiknaware and receiving the C.A. report. He also deposed that an inventory of the seized articles was prepared by the learned JMFC.

. While under extensive cross-examination, he admitted that he personally lodged report and personally investigated the matter. He admitted that he did not make inquiry with Police Patil, Agricultural Assistant of village Adas. **He admitted that he did not make any inquiry with the Talathi as to whether the accused had paid land revenue in respect of the land from which opium poppy plants were seized. He also admitted that he did not record the statement of any officer of the Waqf Board.** He answered that after receiving secret information he had taken the entry in station diary and he also communicated it to higher officers and he claims to have received the secret information orally. He admitted that he did not write the said oral information, but took entry in the station diary and he also admitted that he did not produce the copy of station diary along with chargesheet and he is unable to assign any reason for not doing so. He admitted that seizure panchanama does not bear signature of gazetted officer. He also admitted that when they went to the field of accused at the time of raid, except accused nobody was present. He is unable state exactly how many opium trees were having flowers and what was the total weight of the opium trees. He admitted that he did

not record statement of the Jeep driver, ASI Dhas, who was in-charge of Malkhana. Rest is all denial.

18. Learned Counsel for the appellant has sought reliance on the judgment of the Hon'ble Apex Court in the case of **Kishan Chand** (supra), which mandates compliance of Section 42 of NDPS Act. Relevant observations to that extent are found in the paragraph No.17 of the said judgment :-

“17. In our considered view, this controversy is no more res integra and stands answered by a Constitution Bench judgment of this Court in the case of Karnail Singh (2009 AIR SCW 5265) (supra). In that judgment, the Court in the very opening paragraph noticed that in the case of Abdul Rashid Ibrahim Mansuri v. State of Gujarat [(2000) 2 SCC 513: (AIR 2000 SC 821: 2000 AIR SCW 375)], a three Judge Bench of the Court had held that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused. However, in the case of Sajan Abraham (AIR 2001 SC 3190: 2001 AIR SCW 2970) (supra), again a Bench of three Judges, held that this provision is not mandatory, and substantial compliance was sufficient. The Court noticed, if there is total non-compliance of the provisions of Section 42 of the Act, it would adversely affect the prosecution case and to that extent, it is mandatory. But, if there is delay, whether it was undue or whether the same was explained or not, will

be a question of fact in each case. The Court in paragraph 35 of the judgment held as under:-

35. In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the

superior officer should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the Information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

[Emphasis supplied]

18. *Following the above judgment, a Bench of this Court in the case of Rajinder Singh (supra) took the view that total non-compliance of the provisions of sub-sections (1) and (2) of Section 42 of the Act is impermissible but delayed compliance with a satisfactory explanation for delay can, however, be countenanced.*

19. *The provisions like Sections 42 or 50 of the Act are the provisions which require exact and definite compliance as opposed to the principle of substantial compliance. The Constitution Bench in the case of Karnail Singh (2009 AIR SCW 5265) (supra) carved out an exception which is not founded on substantial compliance but is based upon delayed compliance duly explained by definite and reliable grounds.”*

19. Bearing in mind above settled position and reverting the case in hand, here, it is indeed noticed that though PW5, who claims to have received oral secret information and though claims to have noted it, the same was not annexed by him to the charge-sheet, regarding which there is clear admission by him. Resultantly, appellant has succeeded in raising doubt about compliance of necessary provision under Section 42 of the NDPS Act. The Hon’ble Apex Court has reiterated that compliance of Section 42 of NDPS Act is mandatory and its non compliance renders case of prosecution doubtful.

20. The next limb of argument is that there is delay in dispatching seizure, rendering its custody and integrity doubtful. Reliance to this extent is placed on the judgment of this Court in the case of **State of Maharashtra vs. Kondiba Bahiru Thambare, 2020 (2) ABR (Cri.) 770.**

21. In view of above ground, evidence in that regard is minutely scrutinized and it is noticed that admittedly, according to PW5 Investigating Officer, raid was conducted on 07.03.2012, spot panchanama and seizure were shown to be drawn and thereafter, crime was registered. In his evidence, PW5 has stated that he handed over the seizure with in-charge of Malkhana, ASI Dhas. Through PW3, seizure is shown to be dispatched to C.A., but as pointed out, PW3 seems to have collected seizure at 9.00 p.m. of 21.03.2012. Therefore, since 07.03.2012 to 21.03.2012 muddemal was lying in the Malkhana and was not immediately dispatched to C.A., as C.A. seems to have received it on 22.03.2012.

22. Under such circumstances, if muddemal was in the custody of ASI Dhas, in the considered opinion of this Court, to prove the chain of custody and its integrity, it was bounden duty of prosecution to examine ASI Dhas on the point that muddemal was indeed kept in sealed and intact condition till it was picked up by PW3. But, surprisingly, ASI Dhas is not examined and even PW5 has admitted in

cross-examination that he did not record statement of in-charge of Malkhana ASI Dhas.

23. Further, in view of evidence of PW3, in spite of taking muddemal on the night of 21.03.2012, he has delivered it at around 11.00 a.m. next day i.e. on 22.03.2012.

24. Consequently, as pointed out, indeed, muddemal was not dispatched immediately to the analyzer and there being doubt about it to have remained intact from 07.03.2012 to night of 21.03.2012, question of integrity of the muddemal having remained intact does arise. In cases of such nature, it is duty of prosecution to demonstrate and rule out any possibility of tampering, but here it is not done so and therefore, benefit of the same indeed goes to the accused.

25. The cumulative effect of the above discussion is that, firstly, there is no independent evidence on the point of raid and seizure; the secret information is not demonstrated to have been noted in the Station Diary; there is non-compliance with Section 42 of the NDPS Act; and lastly, the chain of custody of the muddemal and its integrity have not remained unquestionable. Resultantly, appellant succeeds. Hence, the following order is passed :-

ORDER

- I. The Criminal Appeal is allowed.
- II. The conviction awarded to the appellant Shaikh Ayuniddin s/o Shaikh Karimoddin by learned Special Judge, Majalgaon in Special (NDPS) Case No.03 of 2012 vide judgment and order dated 12.02.2016 for offence under Sections 8(b) and 18(a) of the NDPS Act, stands quashed and set aside.
- III. The appellant Shaikh Ayuniddin s/o Shaikh Karimoddin stands acquitted of the offence punishable under Sections 8(b) and 18(a) of the NDPS Act
- IV. The bail bonds of the appellant stand cancelled.
- V. Fine amount deposited, if any, be refunded to the appellant after the statutory period.
- VI. It is clarified that there is no change as regards the order regarding disposal of *muddemal*.

[ABHAY S. WAGHWASE, J.]