

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.182 OF 2015

Kashinath Raghunath Murambe,
Age 50 years, Occ. Nil/Convict,
r/o. C-14751, Confined in Yerwada
Central Prison, Pune, Dist. Pune ..Appellant
(Accused No.2)

Versus

The State of Maharashtra,
Through Tofkhana Police Station,
Ahmednagar, Taluka – Ahmednagar,
Dist. Ahmednagar ..Respondent
(Ori. Complainant)

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Mr.G.S.Rane, advocate for appellant (appointed)

Mrs.B.B.Gunjel, APP for respondent – State

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CORAM : M.T.JOSHI, J.
JUDGMENT RESERVED ON : JUNE 30, 2015
JUDGMENT PRONOUNCED ON : JULY 10, 2015

JUDGMENT :

Heard both sides.

2] Present appellant - Kashinath Raghunath
Murambe, original accused no.2, was convicted with
original accused no.1 – Manikrao, by learned

Special Judge / Additional Sessions Judge, Ahmednagar in Sessions Case No.191 of 2005 for the offences punishable under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "**N.D.P.S. Act**") and was sentenced to suffer R.I. for ten years and to pay a fine of Rs.1,00,000/-, in default, to suffer further S.I. for one year. Two other accused were acquitted from the said offences. Aggrieved by the said decision, present appeal is preferred by the appellant/original accused no.2.

3] The prosecution case, in short, is as under :-

. PW 1 – PSI Abdul Gaffar Shaikh of Tophkhana Police Station had received an information on 3rd August, 2005 at about 1:25 p.m. on telephone. The secret informant informed that Ganja bags were being transported from Ahmednagar to Manmad by a goods truck bearing registration No. ATT – 4629.

The P.S.I. reduced the said information in writing and conveyed it to his superior Officer i.e. PW 2 – Shaikh Nisar. Thereafter, for effecting raid, two panch witnesses were collected. A weighing scale was also arranged. A party was formed. A photographer i.e. PW 6 – Ghanshyam Tipole was also taken.

. The group went by a private vehicle near a Toll Naka on Ahmednagar – Kalyan road. One truck came from Kalyan road in high speed. Despite signal given by the party, the truck did not stop and, therefore, after chasing, the truck was made to stop. The registration number of the truck was same as per the information. Three persons i.e. original accused nos.1 to 3 were occupying the truck. Upon inquiry, they disclosed their names and other details or residence etc. PW 2 – Shaikh Nisar, P.I. asked the accused as to whether, they desire to have search in presence of superior

Officer or Executive Magistrate. They declined for the same. Thereafter, search of the truck was undertaken. It was found that on the top of the cabin under tarpaulin, six gunny bags containing Ganja were there. The entire contraband was weighed. It was 180 kgs. valued at Rs.1,80,000/-.

4] In presence of the panch witnesses, two sample bags of Ganja of 250 grams each were prepared from each of the gunny bags. All those gunny bags were sealed by putting labels and signature of the panch witnesses. The property was seized. Photograph of the activities were also taken. Thereupon, PW 2 – P.I. – Nisar Shaikh filed complaint in the police station. The property was handed over in the police station. A wireless message was sent to the superior about the said complaint. PW 2 – Nisar Shaikh, thereafter, carried investigation. He recorded statements of witnesses. The necessary inventory was taken in

the presence of learned Judicial Magistrate F.C. The samples were sent to the Chemical Analyzer, Aurangabad. The C.A. report revealed that the samples contained Ganja. In the circumstances, the chargesheet was filed with learned Chief Judicial Magistrate, Ahmednagar, which was lateron, committed to learned Special Judge. Learned Special Judge framed the charge.

5] Before learned Special Judge, in all, six witnesses were examined. PW 1 – Abdul Gaffar Shaikh, PW 2 – Shaikh Nisar, PW 4 – ASI – Rajan Barse were the members of the raiding party, as detailed supra. PW 3 – Vasant Borse is the Chemical Analyzer. PW 5 – Gaffar Shaikh is one of the panch witnesses. PW 6 – Ghanshyam Tipole is the photographer and PW 7 – Ambarnath Narwade is P.I. of local crime branch, who filed the charge sheet. Necessary documents like F.I.R., search and seizure panchnama, copy of wireless

message, station diary extract, photographs, C.A. report and copy of registration book of the truck were proved. Out of six witnesses, PW 5 – Gaffar Shaikh, panch witness did not support the prosecution case.

6] Learned Special Judge came to the conclusion that the offence has been proved beyond reasonable doubt and the mandatory provisions have been followed. In the circumstances, conviction and sentence, as detailed supra, came to be recorded against the appellant.

7] Mr.G.S.Rane, learned counsel for the appellant/original accused no.2 made following submissions :-

. That while PW 1 – Abdul Gaffar, PSI, deposed that the information received by him was communicated to PW 2 – Shaikh Nisar, PW 2 – Shaikh

Nisar merely stated that the information was "shown" to him. Further, the prosecution case that the occupants of the truck were asked as to whether, they desire search in presence of a Gazetted Officer, is not a compliance of the provisions of Section 50 of the N.D.P.S. Act.

. He further took me through the facts of the case and submitted that even on facts, the prosecution case is not proved beyond reasonable doubt. The eye witnesses who would have been there i.e. staff members of the Toll Naka were not cited as eye witnesses.

. Further, despite one of the panch witnesses did not support the prosecution case, another panch witness was not examined and the Sessions Court relied over the statements of the raiding party only.

. In the circumstances, he submitted that the appeal may be allowed and conviction awarded by learned Special Judge may be set aside.

. In the alternative, he submitted that present appellant is behind the bars since the date of raid i.e. 3rd August, 2005. Learned Special Judge also imposed fine of Rs.1,00,000/- which could not have been deposited by the appellant and accordingly, he would be required to undergo further S.I. for one year in default of payment of fine, therefore, he submitted that the same may be reduced.

8] On the other hand, learned APP submitted that all the mandatory provisions are complied with by the prosecution. This is a case of recovery of six bags of Ganja. Such a large quantity of Ganja could not have been foisted by the police on the present appellant and his co-accused. In the

circumstances, merely because the panch witness has turned hostile, there is no reason to disbelieve the trustworthy evidence of the members of the raiding party. She, therefore, submitted that the appeal may be dismissed.

9] On the basis of this material, following point arises for my determination :-

Whether the prosecution has proved that on 3rd August, 2005 in the noon, present appellant along with the co-accused was found in possession of six gunny bags of Ganja on Ahmednagar – Kalyan road, at Ahmednagar, in contravention of the provisions of the N.D.P.S. Act.

. My finding to the above point is in the affirmative and the appeal is dismissed as regards

the order of conviction, however, as regards the order of sentence in default of payment of fine, the appeal is partly allowed, for the reasons to follow.

R E A S O N S

10] The prosecution witness, as detailed supra, except the panch witness, has deposed on the line of the prosecution case. The statement of PW 1 – Abdul Gaffar would show that he received the information and reduced it into writing and communicated the same to his superior Officer i.e. PW 2 – Shaikh Nisar. PW 2 – Shaikh Nisar, in turn, deposed that PW 1 – Abdul Gaffar had shown him the detailed information. Mr.Rane, learned counsel for the appellant, submitted that there was no communication of the written information. However, the next statement of PW 2 – Shaikh Nisar is material. He deposed that, upon seeing the

information, he sent PW 4 – Rajan Barse, ASI, for bringing panch witnesses and photographer. He further sent one constable – Supekar for bringing weighing scale. All these facts on record would show that PW 2 – Shaikh Nisar had not only seen the information but also on the strength of the same, took over the charge of the activities. Thus, it was, in a sense, communication of the information.

11] It is no doubt true that it would have been better if the staff at Toll Naka was cited as witnesses as, according to prosecution case, near the Toll Naka, the truck was given a signal to stop. Further, the prosecution ought to have examined next of the panch witness finding that PW 5 – Gaffar Shaikh, one of the panch witnesses, has turned hostile. It should be, however, borne in mind that the members of the raiding party were strangers to the accused. The members of the

raiding party had no axe to grind against them. According to the defence, the gunny bags of Ganja were lying unclaimed by the side of the road. Therefore, the raiding party stopped their truck and framed them in the case. It should be noted that it is improbable to foist the substantive property upon the accused. There is no need to disbelieve the evidence of the members of the raiding party in this regard. Therefore, in my view, learned Special Judge has rightly come to the conclusion that the prosecution case has been proved beyond reasonable doubt.

12] As regards the compliance of the mandatory provisions of the N.D.P.S. Act, Mr.Rane relied upon the provisions of Section 50 of the N.D.P.S. Act and therefore, on the ratio of ***Myla Venkateswarlu Vs. State of A.P., AIR 2012 SC 1619.***

13] It should be borne in mind, however, that no personal search of the appellant or any other accused was carried. According to the prosecution, only the truck was searched. In that view of the matter, mandatory provisions of Section 50 of the N.D.P.S. Act would not be applicable.

14] Similar is the case regarding the ratio in the case of ***State of Rajasthan Vs. Parmanand and anr., AIR 2014 SC 1384***. It was also a case of personal search and giving a written notice to the accused person. In that case, a common notice to all the accused was signed by only one accused for himself and on behalf of others. All this material, however, is not relevant in the present case for the reasons already forwarded.

15] In the case of ***Kishan Chand Vs. State of Haryana, AIR 2013 SC 357*** relied on by Mr.Rane, it was held that the information should be recorded

and be sent to the superior officer. The record, however, would show that the information was reduced into writing and it was communicated to the superior i.e. by PW 1 – Gaffar to PW 2 – Shaikh Nisar and even a wireless message (Exhibit 43) was communicated to the superiors. Therefore, I do not find that there is violation of any mandatory provision.

16] On the other hand, Mrs.Gunjal, learned APP for respondent – State relied on the ratio in the case of ***Jaitun Alikhan Irani and anr. Vs. State of Maharashtra, 1999(Supp.) Bom.C.R. 167.*** In that case, in the similar set of facts, it was held that compliance of the mandatory provision was made.

17] Thus, in view of the above observations, there is no merit in the case of the appellant as

regards the conviction recorded by learned Special Judge.

18] As regards the sentence, the substantive sentence being statutory sentence cannot be reduced and Mr.Rane, learned counsel for the appellant, also does not press for the same. The record itself would show that present appellant is not able to pay the fine amount of Rs.1,00,000/- imposed on him. Mr.Rane, therefore, relied on the ratio laid down in the case of (i) **Shanti Lal Vs. State of M.P., 2008 Cri.L.J. 386(1)**; (ii) **Vishnu Prasad Vs. State of Uttarakhand, AIR 2012 SC 572**; and (iii) **Shahejadhkan Mahebubkhan Pathan Vs. State of Gujarat, 2012 AIR SCW 5875(1)** and submitted that the simple imprisonment of one year in default of payment of fine imposed by the learned Special Judge may be reduced.

. Reading of said ratio laid down in the above cases would show that the convict cannot be made to suffer for his poverty and in the circumstances, there can be reduction in the sentence awarded by the learned Judge.

19] In the present case, learned Special Judge has directed present appellant to suffer simple imprisonment of one year in default of payment of fine of Rs.1,00,000/-. Taking into consideration all the facts on record, in my view, said sentence can be reduced to three months.

20] In the result, the following order :-

a] The appeal is hereby partly allowed.

b] The appeal is hereby dismissed as regards the conviction and substantive sentence awarded by

learned Special Judge in Sessions Case No.191 of 2005.

c] As regards the sentence in default of payment of fine, it is hereby directed that the appellant shall deposit fine of Rs.1,00,000/-, in default, he shall suffer simple imprisonment for three months instead of one year imposed by learned Special Judge.

21] Since Mr.G.S.Rane, learned counsel, has been appointed by this Court vide order dated 17th February, 2015, to defend the case of the appellant, his fees is quantified at Rs.10,000/- (Rs.Ten Thousand) which shall be paid by High Court Legal Services Sub-Committee, Aurangabad.

[M.T. JOSHI, J.]