

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 694 OF 2002

Narayan s/o. Vikram Pawale,
Age 43 years, Occu. Service
as Road Mukadam with Zilla Parishad
Nanded, R/o. House No. ND-42, K-13/1,
Saibaba Nagar, HUDCO, New Nanded.**Appellant.**

Versus

State of Maharashtra
through the Police Station (Rural)
Nanded.**Respondent.**

Mr. M.P. Kale, Advocate for appellant.
Mr. A.V. Deshmukh, APP for State.

CORAM : T.V. NALAWADE, J.
DATED : 5th February, 2015.

JUDGMENT :

1) The appeal is filed against judgment and order of Spl.N.D.P.S. Case No. 8/1998 which was pending in the Court of 3rd Assistant Sessions Judge, Nanded. The appellant is convicted and sentenced for the offence punishable under section 20 (b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act' for short). Both the sides are heard.

2) The incident in question took place on 16.2.1998. Shri. Gopinarayan, A.P.I. was attached to Nanded Rural Police Station. His constable Shri. Pole gave information that one person was coming with Ganja in a sack at Osmannagar Chowk. After receiving this information, entry of the information was taken in station diary and Gopinarayan proceeded to the spot along with staff and also with Police Inspector Shri. Chate. Two panch witnesses were also taken with them.

3) Gopinarayan, Chate and their staff waited for arrival of accused. When the accused arrived, Gopinarayan disclosed their identity and informed the accused/appellant that Shri. Chate was Gazetted Officer and search of the accused can be taken in presence of Gazetted Officer or Magistrate. When the accused gave consent for taking his search in presence of Chate, the search was taken. In the sack, Ganja weighing 8.7 k.g. was found. The sample of 100 grams was separated and sample was closed and sealed. Panchanama was prepared accordingly.

4) Gopinarayan gave report in respect of incident and the crime came to be registered for aforesaid offences. Further investigation was made by Gopinarayan. He forwarded sample to C.A. office with constable Pole. C.A. report was received that

packet contained Ganja. Chargesheet came to be filed for aforesaid offences.

5) Charge was framed and prosecution examined panch witness, Chate, Pole and Investigating Officer. The Trial Court has believed these witnesses. The trial Court has held that there was no need of compliance of section 50 of the Act and the trial Court has given conviction.

6) The learned counsel for the appellant mainly submitted that there was no proper compliance of provisions of sections 50, 52, 55 and 57 of the Act and non compliance of even the directory provision has caused prejudice to the appellant.

7) As the learned APP submitted that search of only gunny bag, sack was to be taken, there was no question of giving offer as required under section 50 of the Act. He placed reliance on some reported cases like **2014 (3) Bom.C.R. (Cri.) 445 [Krishan Kumar Vs. State of Haryana]** and **BCR (CRI)-2014-3-184 [Vijay Dhanbahadur Thapa Vs. State of Goa]**. On the other hand, the learned counsel for appellant placed reliance on the case reported as **AIR 2014 SC 1384 [State of**

Rajasthan Vs. Parmanand and Anr.] and AIR 2002 SUPREME COURT 289 [Bahadur Singh Vs. State of M.P. and Anr.].

8) The evidence is given by both Chate (PW 4) and Gopinarayan (PW 5) that offer as required under section 50 was given. The report at Exh. 29 was given by Gopinarayan. It shows that they wanted to take personal search of the accused and the personal search was taken after telling the accused, the purpose behind the action. In the substantive evidence, Gopinarayan has stated that inquiry was made about the contents of the gunny bag and they found that the accused was standing nearby in the dark. However, he has tried to say that he had seen the accused coming with gunny bag. He has given evidence that he introduced Chate to the accused and he told that Chate was Gazetted Officer and asked whether the accused had desire to get searched in presence of the Magistrate. He has give evidence that when accused gave consent for taking his search in presence of Chate, gunny bag was opened and Ganja was found in gunny bag. Chate has given evidence that he asked the accused as to whether the accused was ready to get searched in his presence and he had informed to the accused that he was Gazetted Officer. He has deposed that he had told the accused

that there was the right to the accused to get searched in presence of Tahsildar also. The evidence of these two police officers shows that they are not sure as to who was making the investigation.

9) The report given by Gopinarayan shows that he wanted to take the personal search of the accused, but in the report at Exh. 29, he has not mentioned that he had given offer to the accused as required under section 50 of the Act. The seizure panchanama is proved in the evidence of Chate. In the seizure panchanama also, there is no mention that offer as required under section 50 of the Act was given to the accused. Police Constable Pole (PW 1) is examined and his evidence does not show that such offer was given. Thus, there is no record to show that the offer as required under section 50 of the Act was given to the accused, but there is substantive evidence given by Chate (PW 4) and Gopinarayan (PW 5). When there is specific mention in the report at Exh. 29 that personal search was to be taken, it was necessary for the prosecution to prove that there was compliance of provision of section 50 of the Act. Provision of section 50 of the Act is mandatory in nature and the incident took place in the year 1998, before the amendment effected to section 50. This Court has no hesitation to hold that there was

non compliance of mandatory provision of section 50 in the present case.

10) The evidence of aforesaid two police officers creates confusion over the procedure followed for the investigation i.e. whether it was under section 41 or 42 of the Act. Both the officers have stated that they had received information and the information was reduced to writing. Chate has given evidence that after taking action, he had handed over investigation to Gopinarayan. The provision of section 41 (2) of the Act shows that when information is received, it needs to be reduced in to writing, the grounds of belief need to be mentioned and a copy of it needs to be sent to immediate superior officer. This provision is also mandatory in nature. A copy of station diary entry produced on the record is to the effect that Pole had given information that one person was likely to come with Ganja at Osmannagar Chowk. If Chate had received information, it was necessary for him to show that there was compliance of section 42 (2) of the Act, but no such evidence is given by him. He did not communicate his action to his immediate superior. Even if it is presumed that it was Gopinarayan, who made investigation, his evidence does not show that he had sent the copy of information reduced to writing to his superior officer.

11) When the incident in question took place on 16.2.1998, the sample of the property came to be forwarded to C.A. Office on 25.2.1998 and it was received by C.A. Office on 27.2.1998. The evidence of PW 1, Pole shows that the property was with Gopinarayan. Though Gopinarayan has stated in the evidence that he had deposited the sample in the police station, no record of the police station like muddemal register of police station was produced. The property was reached to C.A. Office after about 11 days of the incident and due to this delay, it was necessary for the prosecution to show that there was proper compliance of provisions of sections 52 and 55 of the Act. This Court has no hesitation to observe that there is no satisfactory evidence on this compliance. Though these provisions are directory in nature, in view of the facts of the present case, the absence of independent evidence to corroborate the case, this Court holds that prejudice has been caused to the accused.

12) Gopinarayan has given evidence that he had given report to S.D.P.O., his immediate superior officer after the action taken by him. Copy of report is produced at Exh. 30 and it is shown to be sent on 16.2.1998. There is nothing on the record to show that it was reached to the immediate superior officer

within prescribed period, 48 hours, after the arrest or seizure. This report is also not complete as required by section 57 of the Act. As there is absence of independent evidence, non compliance of this directory provision cannot be ignored in this case.

13) In the present case, there is evidence of aforesaid three police officers. Though the panch witnesses have turned hostile, even the sample packets were not confronted to the panch witnesses to point out that the sample packets were bearing their signatures. As there is nothing on the record to show that property was deposited in muddemal room of the police station immediately after the incident and as there was non compliance of sections 52 and 55 of the Act, these circumstances also can be used in favour of accused in the present case. This Court holds that the evidence is not sufficient to convict the accused for the offence for which the charge was framed. Due to the non compliance of the aforesaid provisions of the Act, this Court holds that the accused is entitled to acquittal. In the result, the following order.

ORDER

The appeal is allowed. The judgment and order of Spl. N.D.P.S. Case No. 8/1998 delivered by 3rd Assistant Sessions

Judge, Nanded is hereby set aside. The accused is acquitted of the offence punishable under section 20 (b) of the Narcotic Drugs and Psychotropic Substances Act, 1985. Fine amount, if any, is to be returned to the appellant. Bail bonds of the appellant stand cancelled.

[T.V. NALAWADE, J.]

ssc/