

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.96 OF 2011**

**GAURISHANKAR NATHULAL PATEL )...APPELLANT**

**V/s.**

**THE STATE OF MAHARASHTRA )...RESPONDENT**

Ms.Apeksha Vora, Appointed Advocate for the Appellant.

Smt.S.V.Gajare-Dhumal, APP for the Respondent - State.

**CORAM : ABHAY M. THIPSAY, J.**

**DATE : 12<sup>th</sup> OCTOBER 2015.**

**JUDGMENT :**

1           The appellant was prosecuted on the allegation of having committed offences punishable under Section 20 read with Section 8(c) and Section 29 read with Section 8(c) and Section 20 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act). The learned Special Judge, after holding a trial, found him guilty of the offences punishable under Sections 20(b)(ii)(B) and

20(b)(ii)(C) read with Section 8(c) of the NDPS Act and sentenced him to suffer Rigorous Imprisonment for 3 years and to pay a fine of Rs.5,000/- on first count and to suffer Rigorous Imprisonment for 10 years and to pay a fine of Rs.1,00,000/- on second count, with default sentences. The learned Special Judge acquitted the appellant of the offences punishable under Section 29 read with Section 8(c) and Section 20 of the NDPS Act. Being aggrieved by his conviction and the sentences imposed upon him, the appellant has approached this court by filing the present appeal.

2           On the application sent by the appellant from prison, praying that legal aid be provided to him, Ms.Apeksha Vora, advocate, was appointed to prosecute the appeal.

3           The prosecution case, as put forth before the trial court, in brief, be stated thus :

          That, P.S.I. Suhas Sawant (PW1), Sub-Inspector of Police, attached to Anti Narcotic Cell (ANC), Ghatkopar Unit,

Mumbai, was on duty on 19<sup>th</sup> April 2010. On that day, at about 8.00 a.m., he received secret information from his informer, to the effect that 'Vilas Khandare, Gaurishankar Patel and his wife Sunita and one person by name Ramesh residing at Borivali were the members of a gang dealing with narcotic drug, *charas* and *ganja* in partnership and sold drugs to their agents and customers in Mumbai city, Suburban area, Mira Road, Bhayandar, Vasai, and other places.' The information was also that 'the appellant and his wife Sunita were expected to visit, between 11 a.m. to 12 noon, in front of Ghatkopar Bus Depot in Tavera Motorcar bearing no.MH-04-DN-6545 carrying *charas* and *ganja* to supply the same to their agents and for selling it to the customers.' P.S.I. Suhas Sawant (PW1) recorded this information in the Station Diary and in person disclosed the same to the Unit in-charge Police Inspector Hiremath (PW5). That, after receiving instructions from the superior officers in the ANC Office at Cuffe Parade, steps were taken to effect raid and apprehend the offenders in presence of panchas. Accordingly, a trap was arranged. Two panchas Smt.Laxmi (PW4) and Uttam Kamaji Patil were called. The police

party and panchas went near Ghatkopar Bus Depot. At about 11.50 hours, a Tavera motorcar, bearing no.MH-04-DN-6545, which was being driven by the appellant, came there and stopped. The appellant got down from the said car and stood beside the car. His movements were felt suspicious. Since his description tallied with that of the suspect mentioned in the information given by the informer, he was apprehended by the raiding party. P.I. Hiremath (PW5) told him about the information and ascertained the personal details of the appellant from him. The appellant was informed of his right to have his personal search taken in the presence of a Gazetted Officer or a Magistrate, but the appellant declined the offer given to him. In the personal search of the appellant, a black coloured plastic bag containing 120 gms of *charas* was found in his pant pocket. Two samples were taken from the *charas* in the said plastic bag and the remaining quantity was separately packed and sealed. An amount of Rs.1,000/- was also found with the appellant, which amount was also taken charge of, packed and sealed separately. Then, the search of the Tavera motorcar was taken, when a ladies purse containing gold

and silver ornaments was found therein. The same was taken charge of. A white coloured nylon gunny bag and a blue coloured rexin bag were also found in the Tavera car. Both were found to be containing *ganja* – a narcotic drug. The gunny bag was having 19 kgs 785 grams of *ganja*, while the rexin bag was having *ganja* weighing 4 kgs 100 grams. Samples of the *ganja* were taken and the remaining quantity thereof was separately packed and sealed. A panchnama was drawn. Copy thereof was given to the appellant, and his acknowledgment of having received the same, was obtained.

That, P.S.I. Suhas Sawant (PW1) lodged a report, which was treated as First Information Report (FIR), which was recorded by A.P.I. Yakub Mulla (PW6), who registered a crime on that basis. A.P.I. Yakub Mulla (PW6) deposited the seized muddemal property with A.S.I. Vijay Nimbalkar (PW3) attached to ANC as a storekeeper, in the store situate at Azad Maidan. On the next day, A.P.I. Yakub Mulla (PW6) sent the samples to the Forensic Science Laboratory (FSL) Kalina, Mumbai, through Gangadhar Sawant, a Police Constable attached to ANC (PW2).

After receipt of the report from the Chemical Analyser, confirming that the samples were of *charas* and *ganja*, a charge-sheet was filed against the appellant.

4           I have heard Ms.Apeksha Vora, the learned appointed advocate for the appellant. I have heard Smt.S.V.Gajare-Dhumal, the learned APP for the State. With the assistance of the learned counsel, I have gone through the entire evidence adduced during the trial. I have also carefully gone through the impugned judgment.

5           It must be observed at the outset that the panch Smt.Laxmi (PW4) did not support the prosecution case. Though she admitted having gone in front of Ghatkopar Bus Depot along with the police party, she did not say that any contraband articles were seized in her presence. She also speaks of the appellant coming there but says that after the appellant came there, the police were talking something with him, and that, she was at a distance. She also stated that on a paper, her name was written,

her address was obtained, and she was asked to leave the spot. She categorically stated that she did not know whether ornaments and drugs were found with the accused. She was declared as hostile and the learned APP in-charge of the trial was permitted to put questions in the nature of cross-examination to her. However, she categorically denied the suggestion that she had been giving false evidence to save the accused.

6            Thus, the case rests on the testimonies of P.S.I. Suhas Sawant (PW1), P.I. Hiremath (PW5) and A.P.I. Yakub Mulla (PW6). All these officers were members of the raiding party.

7            The first question that needs to be considered is about the compliance with the provisions of Section 42(2) of the NDPS Act. In this case, according to P.S.I. Suhas Sawant (PW1), he took down the information received by him in writing in the Station House Diary itself. He does not say that he forwarded a copy of the same to his immediate official superior, who is P.I.Hiremath (PW5). However, he also says that as soon as the information was

received by him, he informed about it orally to PI. Hiremath (PW5), who was also present in the Ghatkopar Unit of the ANC office. According to him, this was personally and orally conveyed by him to PI Hiremath (PW5) and also telephonically to the Assistant Commissioner of Police and Deputy Commissioner of Police, who directed him to work out the information under the supervision of PI. Hiremath (PW5). P.S.I. Suhas Sawant (PW1) then conveyed the directions of the superior officers to PI. Hiremath (PW5). P.S.I. Suhas Sawant (PW1) then said that the copies of the Station Diary were sent to superior officers through Woman Police Constable (WPC) Sawant. WPC Sawant was not examined as a witness, nor was the Assistance Commissioner of Police or the Deputy Commissioner of Police, to whom the copies were sent. However, that is, in reality, not important. As per the provisions of Section 42(2), P.S.I. Suhas Sawant (PW1) was required to forward a copy of the information taken down by him in writing to his immediate superior, who was PI. Hiremath (PW5). P.S.I. Suhas Sawant (PW1) does not say that he sent a copy of the information taken down by him in writing to PI.

Hiremath (PW5). Infact, his evidence shows that he had conveyed the information to P.I. Hiremath (PW5) orally before it had been taken down in writing by him and entered in the Station House Diary. The evidence of P.S.I. Suhas Sawant (PW1) shows that P.I. Hiremath (PW5) was simply acting on the directions of the superior officers which were given telephonically by them to P.S.I. Suhas Sawant (PW1), which P.S.I. Suhas Sawant (PW1) had orally conveyed to P.I. Hiremath (PW5). P.I. Hiremath (PW5) also does not say that he received a copy of the Station House Diary. It is, therefore, not free from doubt as to whether there indeed had been a compliance with the provisions of Section 42(2) of the NDPS Act. The learned Special Judge also noticed this. He also noticed that P.I. Hiremath (PW5) was silent about the receipt of any such information from P.S.I. Suhas Sawant (PW1) in writing. He, however, was not impressed by the contentions raised by the defence about the non-compliance of the mandatory provisions of Section 42. He observed that though P.I. Hiremath (PW5) was silent about receipt of copy of the Station Diary entry containing information, he had identified his signature on such copy, during

the course of his evidence. The learned Special Judge was of the view that the signature of P.I. Hiremath (PW5) on the copy of the Station Diary entry (part of Exhibit 23 Collectively) indicated that it had been received by him, and that, therefore, there had been valid compliance with the provisions of Section 42(2) of the NDPS Act. I have examined the relevant evidence. I find that P.I. Hiremath (PW5) was shown the copy of the Station Diary entry during his examination-in-chief and he identified his signature thereon, but this signature appears to have been put for certifying the copy as true copy. It is, therefore, difficult to accept that there was a valid and proper compliance with the provisions of Section 42(2) and this aspect certainly is not free from doubt – to say the least. It is well settled that the provisions of Section 42 of the NDPS Act are mandatory and failure to comply therewith, would be fatal to the prosecution case. Infact, that the provisions are mandatory, was observed by the learned Special Judge himself, but as aforesaid, he was of the view that the provisions had been complied with.

8           The next question that arises is about the compliance of the provisions of Section 50 of the NDPS Act. The Supreme Court of India and various High Courts have time and again discussed the provisions of Section 50 of the NDPS Act. In the case of **State of Punjab vs. Balbir Singh**<sup>1</sup>, Their Lordships of the Supreme Court of India interpreted the expression “*if the person to be searched so requires*” occurring in Section 50(1), as making it an imperative requirement on the part of the officer intending to search, to inform the person to be searched of his right that, if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate.

9           The question whether is imperative for the Investigating Officer to inform the suspect, orally or in writing, about his right to be searched before a Gazetted Officer or a Magistrate again came up for consideration before a Constitution Bench of the Supreme Court of India in the case of **State of Punjab Vs. Baldev Singh**<sup>2</sup>. Their Lordships held, inter alia, that a

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1 JT 1994(2) S.C.108

2 (1999) 6 SCC 172

duty is cast on the Investigating Officer of intimating to the person concerned about the existence of his *right* that if he shall so require, he shall be searched before a Gazetted Officer or a Magistrate.

10 In K. Mohanan Vs. State of Kerala<sup>3</sup>, Their Lordships expanded the scope of the protection given to a person by Section 50 of the NDPS Act by stipulating what would be the proper form in which the person to be searched is to be informed of his right. It was observed in K. Mohanan's case that merely asking the suspect whether he required to be searched in the presence of a Gazetted Officer or a Magistrate cannot be treated as a proper communication and proper compliance with Section 50. It was laid down that the communication should be specific and what should be communicated to an accused/suspect is that he had a right under the law to be searched so.

11 Keeping in mind this legal position, the evidence in this case with regard to the compliance with the provisions of

<sup>3</sup> 2000 SCC(Cri) 1228

Section 50 may be examined. As aforesaid, the panch witness Smt.Laxmi (PW4) does not support the prosecution case in that regard. According to P.S.I. Suhas Sawant (PW1), PI. Hiremath (PW5) told the appellant that “he can give his personal search in the presence of a Gazetted Officer or Magistrate, and on his demand, such arrangement can be made.” PI. Hiremath (PW5) himself, in that regard, said as follows :

“I explained him in Hindi language that he can ask for his personal search in the presence of a Gazetted Officer or a Magistrate. He did not ask for such arrangement.”

The prosecution case is that an offer was conveyed to the appellant also in writing and the endorsement of the appellant was obtained thereon. This writing (Exhibit 40) does mention that the appellant had a right to have himself searched in the presence of a Gazetted Officer or a Magistrate, and that, if the appellant would so demand, arrangements therefor would be made. On this writing, there is an endorsement made by the appellant to the

effect that 'police can take my search' (पुलीस मेरी तलाशी ले सकती है). Now, when the witnesses i.e. P.S.I. Suhas Sawant (PW1) and P.I. Hiremath (PW5) have not stated in their oral evidence, about the appellant having been communicated in a proper form, as required by law, the compliance of the provisions of Section 50 cannot be inferred or accepted on the basis of such a writing. Moreover, the endorsement made by the appellant, who admittedly is educated only till 3<sup>rd</sup> Standard, does not indicate that he had been communicated about any *right* in him, to have himself searched in the presence of a Gazetted Officer or a Magistrate. A.P.I. Yakub Mulla (PW6) has, however, stated about P.I. Hiremath (PW5) verbally explaining the appellant 'his right under Section 50 of the NDPS Act, that he has right to ask for personal search in the presence of a Gazetted Officer or a Magistrate, and that, if he so demanded, necessary arrangement would be made.' The learned Special Judge also noticed that the evidence of P.S.I. Suhas Sawant (PW1) and P.I. Hiremath (PW5) did not show a proper compliance with the provisions of Section 50 of the NDPS Act, but, he held that A.P.I. Yakub Mulla (PW6)

had clearly stated about that. Now, the communication that was made with the appellant was by P.I. Hiremath (PW5) and when he himself does not say about his having communicated with the appellant in a particular manner as required by law, whether a statement by A.P.I. Yakub Mulla (PW6), who was examined later, as to what P.I. Hiremath (PW5) actually stated to the appellant, can be relied upon, is not free from doubt.

12            Apart from this, there were certain other infirmities in the prosecution case which were noticed by the learned Special Judge also.

13            The prosecution witnesses in their evidence have spoken about the *charas* being tested with the aid of Field Testing Kit. However, neither the panchnama (Exhibit 53) nor the FIR lodged by Suhas Sawant (PW1) mentions about the substance being tested with the aid of Field Testing Kit. The learned Special Judge observed that in view of this, there was a serious doubt as to whether the spot test to establish the identity of the seized

substance was carried out. He, however, was of the view that it was not very important, as, 'ultimately, the sample was tested in the laboratory and it answered positive for *charas*.' He observed that the panchnama and the FIR indicated that, that the seized substance was *charas*, was ascertained only on the basis of its smell, as taken by PI. Hiremath (PW5). The learned Special Judge was of the view that being an experienced Officer, PI. Hiremath (PW5) could very well identify the substance to be '*charas*' from its smell, and without the help of Field Testing Kit. Though this is indeed possible, what the learned Judge overlooked is that the witnesses were trying to improve over their original version.

14           There was also a discrepancy in the evidence of PI. Hiremath (PW5) and A.PI. Yakub Mulla (PW6) in respect of labeling of the seized muddemal articles. PI. Hiremath (PW5) stated that the seized muddemal property was produced before Senior Police Inspector Koyande who was present at the Cuffe Parade office of the ANC, and that, Koyande put his signatures on the labels which were on the seized muddemal articles. A.PI.

Yakub Mulla (PW6), however, stated that the property was produced before P.I. Chavan who affixed his signature labels on the muddemal property. Even this discrepancy was noticed by the learned Special Judge who found that the labels on the muddemal articles actually contained signatures of P.I. Chavan, and not of Sr.P.I. Koyande. However, the learned Special Judge did not give much importance to this, as according to him, 'Yakub Mulla (PW6) had clarified that Sr.P.I. Koyande was acting as Assistant Commissioner of Police at the relevant time, and that his signature is also appearing below the true copy of the station diary entry of the information.' According to the learned Special Judge, 'it did not matter whether the labels had been signed by Sr.P.I. Koyande or P.I. Chavan, as according to him, none of them was a party to the search and seizure operation.' What the learned Special Judge ignored, however, is that the evidence of the witnesses was discrepant. He did not consider what was the effect of such basic discrepancies in the evidence of two police witnesses, and whether such discrepancies created a doubt about the truth of the matter as to the real happenings.

15           According to Yakub Mulla (PW6), he deposited the seized muddemal property along with a forwarding letter with Vijay Nimbalkar (PW3) at the Azad Maidan godown. Vijay Nimbalkar (PW3) also stated about it. In the forwarding letter (Exhibit-29), totally 13 articles have been mentioned, including one sealed envelope containing gold and silver ornaments marked “B”, a Tavera motor car, its key and a driving licence. The evidence, however, reveals that actually the motor car was not brought to the Azad Maidan Godown, and it was reported to have been parked at the Cuffe Parade office of the ANC. Vijay Nimbalkar (PW3) has admitted that he neither saw the car nor the keys, nor the driving licence. In other words, he simply made the entries on the say of Yakub Mulla (PW6) without actually receiving the property in the godown. Even this aspect of the matter was noticed by the learned Special Judge, who did not give much importance to the same.

16           It also appears that though the metal seal, Field Testing Kit, weighing scale, material for labeling etc. was said to

have been deposited by P.S.I. Mulla in the Ghatkopar unit of ANC on 19<sup>th</sup> August 2008 itself, the evidence of PW3 indicated that the seal was with Yakub Mulla (PW6) even on 20<sup>th</sup> August 2008. Even this discrepancy was noticed by the learned Special Judge who, however, held that there was no possibility of the samples being tampered with, at the hands of Yakub Mulla (PW6).

17            In his examination under Section 313 of the Code, the appellant categorically stated that the key, said to be of the vehicle – and said to have been recovered from the appellant – did not belong to him. According to him, he was picked up from his residence on 18<sup>th</sup> August 2008 in the evening. According to him, the police, at that time, searched his residence and took away the ornaments of his wife. The police also asked him for the keys of the vehicle which were not with him, but the police recovered the keys from his residence and towed the vehicle from his residence. Though not much importance to such assertions can be given, there is a curious aspect of the matter on which no light is thrown by the prosecution. It is not clear as to how the *Tavera* vehicle was

taken to the office of the ANC at Cuffe Parade. When all the minor details of the happenings are given, that how the vehicle was taken to Cuffe Parade, should not be mentioned, does create some doubt as to whether the keys, said to have been recovered, were indeed of the *Tavera* car by which the appellant is said to have come to the Ghatkopar Depot.

18           After carefully considering the entire evidence on record, it appears, firstly, that there was no compliance with the provisions of Section 42(2) of the NDPS Act. Secondly, the evidence about having complied with the provisions of Section 50 of the NDPS Act, could not be safely accepted. In this background, when the case rested solely on the testimony of the Police Officers who formed a part of the raiding team, and when there was no independent witness to support the fact of the apprehension of the appellant at a given place and time and recovery of the contraband articles from his possession, it was not safe to hold the appellant guilty of the alleged offences. It may be observed that the offences under the NDPS Act are serious,

inviting drastic punishments. Ordinarily, it would be unsafe to rely only on the testimony of the police officers or Officers of the Investigating Agency to hold the fact of seizure of contraband from an accused, as proved. In this case, the panch Laxmi (PW4) did not support the prosecution case. The learned Special Judge meticulously discussed this aspect of the matter, and was of the view that after the matter had been adjourned, Laxmi was won over by the appellant. No such conclusion can be safely arrived at, particularly because the matter had been adjourned on the prayer of the Special Public Prosecutor conducting the trial, and not on the prayer of the appellant. It is significant that the prosecution did not examine the other panch witness. When one of the panchas had turned hostile, and had not supported the prosecution case, it was necessary for the prosecution to have made an attempt to support the evidence of the Police Officers by an independent witness i.e. by calling the second panch.

19           Upon considering the entire facts of the case and the evidence adduced during the trial, I am of the opinion that there

certainly existed a reasonable doubt about the guilt of the appellant. The learned Special Judge should have given the benefit of such doubt to the appellant and should have acquitted him.

20           The Appeal is allowed.

The impugned judgment and order of conviction is set aside.

The appellant is acquitted. He be set at liberty forthwith, unless required to be detained in some other case.

Fine if paid, be refunded to him.

21           The Appeal is disposed of in the aforesaid terms.

**(ABHAY M. THIPSAY, J.)**

**CERTIFICATE**

**Certified to be true and correct copy of the original  
signed Judgment /Order.**