

CRIMINAL APPELLATE JURISDICTION

Gulamsarwar Maksood Khan,]
age 40 yrs, r/o Room No.11,]
Chawl No.7, Vijay Patil Chawl,]
Near Shanti Prakash High School]]
Ulhasnagar, Thane]
(at present undergoing sentence]
at Nashik Central Prison, Nashik] **..Appellant.**
(Original Accused)

$$V_S$$

The State of Maharashtra ..Respondent.

Mr Ayaz Khan, Advocate for the Appellant.
Mrs P.P. Bhosale, APP for the State.
Mr V.M.Chougule, PI Amravati Gramin present.

CORAM : A.R.JOSHI,J
DATE : 21st November, 2015.

ORAL JUDGMENT :

1) Heard rival submissions on this criminal appeal preferred by the appellant-original accused challenging his conviction in the matter of offences punishable under section 8 (c) and 20 (b) (ii) (C) of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the NDPS Act”). Said impugned order is passed in N.D.P.S. Special Case No. 170 of 2013 by the Special Court under N.D.P.S. Act at Greater Bombay. Said order was passed on 23rd June, 2015.

2) Initially, the appeal was admitted and the application for bail was fixed for hearing. It was so happened on 22nd September, 2015. That time, noticing the evidence, which was adduced before the trial Court against the appellant, it was decided that the entire appeal can be decided expeditiously considering the status of the evidence and order to that effect was passed by this Court to the following effect:

“After hearing the application for bail during pendency of the appeal and after noticing the status of the evidence as against the appellant, it is decided to hear the appeal expeditiously by fixing it for final hearing on 20th October,2015 and as such the present appeal is adjourned to 20th October,2015 along with application. On that day the entire appeal shall be heard finally.”

Thereafter, on 20.10.2015 the matter was adjourned to 18.11.2015. As such on 18.11.2015 and 19.11.2015 and today also the present appeal is heard and it is being disposed of by this judgment and order.

3) The case of the prosecution in nut-shell is that PW 6 one A.P.I. Chougule, then attached to Anti Narcotic Cell (A.N.C.) Ghatkopar Unit, received an information on 19.6.2013 at about 12:00 noon regarding one person by name Gulam Sarwar Khan, resident of Ulhasnagar, District Thane, deals in narcotic drug Ganja and he supply the same to his customers. It

was also the information that on 19.6.2013 he was coming for sale of Ganja to his customers at mentioned bus route at Ghatkopar Andheri Link Road Ghatkopar (East), Mumbai between 4:00 to 4:30 p.m. The said information was reduced into writing by said PW no.6 API Chougule and forwarded a copy of Station Diary entry to his superior. Thereafter, the arrangement was made for collecting the material for raid, two panchas were called and pre-trap panchnama was drawn which is Exh.27. PW no. 5 was one of the panch witnesses.

4) According to the case of the prosecution, raiding party members, under the control and authority of PW 6 API Chougule, laid a trap near the bus stand as per the information received. The police party members were accompanied by the panch witnesses including PW no.5 one pancha. At about 4:10 hours they noticed one auto-rickshaw halting near the bus stand coming from the highway. After the rickshaw halted, the present appellant came out of the rickshaw. He was having three baggages which he took out of the rickshaw and waited

outside on road. Rickshaw then went away and the appellant was waiting for somebody. That time API Chougule ascertained that he is the same person regarding whom the information was given and as such on the instructions of PW 6 the appellant was apprehended on the spot. One PI. Bhole was also the raiding party member and he apprised the appellant as to the rights under section 50 of the N.D.P.S.Act. The three baggages were then opened and contains thereof were taken out. According to the raiding party members, the said material was Ganja. It was, in fact, a greenish coloured leafy substance with seeds. From each bulk, two samples were drawn of 25 grams each. Total there were three baggages, one green rexine bag, one brown colour bag and one black hand bag. They were having respectively 21, 16 and 17 kilograms Ganja. The bulk was marked as "A", "B" and "C" and the sample packets from each bulk were marked A-1, A-2, B-1, B-2 and C-1, C-2. During further search of the appellant cash of Rs.100/- was found. It was taken in an envelope and marked as Exh.D. A detailed trap panchnama was conducted on the spot. It was

concluded by evening. The appellant was put under arrest and the raiding party along with the accused went to Cuff Parade Office. C.R.No.273/2013 was lodged at about 22.00 hours by Police Naik, Dilip Bhoje (PW 2) who was the raiding party member. Said FIR was registered by PW 6, API Chougule.

5) The muddemal property and the samples were deposited in the godown at Azad Maidan. They were so sent under the directions of PW 6 through one carrier. They were deposited at around 11:00 p.m. According to the prosecution, the material along with the brass seal required for the raid, was returned to Police Inspector Bhole by PW 6. According to the letter Exh.41, the said articles were sent for depositing on 20.6.2013. At this juncture, it must be mentioned that there is some anomaly in the date on which the said articles were sent back and were directed to be received under the instructions of PI.Bhole. The endorsement at the end of the letter Exh.41 which was signed by PW 6 Chougule on 20.6.2013, the signature of PI Bhole with his endorsement is appearing and it show the date "19.6.2013". Much is argued on behalf of the

appellant on this anomaly and this aspect shall be dealt in detail hereunder at the appropriate place.

6) It is the case of the prosecution that three samples A1, B1 and C1 were sent to the Chemical Analyser and the CA report was obtained.

7) During recording of evidence before the trial Court, total six prosecution witnesses were examined. PW 1 Shivaji Mane is the Godown-In-charge at Azad Maidan who received the bulk and the samples after the said articles were deposited. PW 2 is Dilip Bhoje, (Police Naik). He filed formal report being the complainant. PW 3 is one Ananda Kudale, the Chemical Analyser from Forensic Science Laboratory, Kalina. PW 4 is Tanaji Jadhav, Police Naik, who carried the samples to CA office for analysis. PW no. 5 is Moharam Shah, a panch witness during the search and seizure and last prosecution witness is PW 6 Vilas Chougule (API). In fact, this is the witness who has entirely conducted the entire raid and investigation and he is also the officer who received the secret information in the present matter.

8) During the arguments, learned counsel for the appellant emphasized various aspects as to the fabrication of the documents, inasmuch as the anomaly in the date of sending of the material back to the store after the raid and receipt of the same, some anomaly in the contents of the final report under section 57 of the NDPS Act which is Exh.44 and certain anomaly in the inward number from the office of PI Bhole. Apart from this argument as to fabrication of the documents, which shall be dealt in detail hereunder, it is further brought to the notice of this Court that the entire case is handled against the settled procedure required to be adopted in the cases under the NDPS Act. On this aspect, it is observed that admittedly PW no. 6 API Chougule had done almost all the work in the present matter. He is A.N.C Officer who apparently received the information and reduced the same into writing and sent it to his superior. He also organized and controlled the actual search and seizure. In fact, he gave directions for conducting raid after calling panch witnesses and after obtaining the material for the search and

seizure. He made seizure of contraband Ganja under the panchnama and then registered the FIR on the complaint given by PW 2. He directed the bulk and the samples to be deposited in the godown at Azad Maidan. So also he directed the Police Constable to carry the sample packets A-1, B-1 and C-1 to the office of the C.A. He is an officer who recorded the statements of the witnesses and after the search and seizure he prepared the final search and seizure report Exh.44 under section 57 of the NDPS Act. Finally, he is the officer who filed the charge-sheet after conclusion of the investigation and obtained the CA report.

9) Reliance is placed on the following authorities on this abnormal procedure adopted in the present matter. The said authority is **(2010) 15 Supreme Court Cases 369 (State by (Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamilnadu Vs. Rajangam.**

10) The question arose before the Hon'ble Apex Court in that matter and which call for consideration was whether then PW 6 who registered the crime could have investigated the

case or an independent officer would have investigated the case. While dealing with this issue, the reference to the issue of another case is also taken shelter of, i.e. **(1996) 11 Supreme Court Cases 709 (Megha Singh v. State of Haryana)**. Though the offences in Megha Singh v. State of Haryana were not under the NDPS Act, the principle laid down therein was taken shelter of. In Megha Singh v. State of Haryana, the Apex Court has taken a categorical view that the officer who arrested the accused should not have proceeded with the investigation of the case. By referring to this crystallized legal position, the Hon'ble Apex Court observed in paragraph 11 in State v. Rajangam and endorsed the view taken by the High Court in acquitting the accused.

11) The matter in State v. Rajangam was also for the offences under the NDPS Act and in that matter the officer who had registered the crime also investigated the crime.

12) After carefully going through the above cited decision and considering the factual position of the present matter at hand, in the considered view of this Court, it must be

said that the same officer PW 6, in our case, i.e. Vilas Chougule should not have conducted the investigation throughout as he was the officer who received the information and also registered the offence.

13) Now coming back to the allegations as to fabrication of the documents, certain factual position is required to be mentioned in detail as under :-

14) Firstly, it is the factual position that the copy of the information prior to going for raid was sent to the superior vide Exh.37 and which bears the inward number from the office of the Senior PI and that number is 537/2013 dated 19.6.2013. As against this, the search and seizure report Exh.44 which is dated 20.6.2013. However, inward number of the same office of Senior PI and said inward number is 439/2013 of 20.6.2013. However the said Senior PI has not been examined before the Court, in order to clarify the anomaly in the inward numbers. This position as to Exh.37 having the inward number 537/2013 and Exh.44 having inward No.439/2013 is admitted by PW 6 API Chougule. By

pointing out this, it is argued on behalf of the appellant that inward number of 19.6.2013 should not have been greater than the inward number of 20.6.2013 and vice versa. On this anomaly, learned APP on instructions from the officer present in the Court submitted that the inward No. 439/2013 as is appearing at the end of Exh.44 and which is of the date 20.6.2013 is in fact the inward No. 539/2013. According to learned APP, this is, in fact, an error committed by Senior PI while writing inward number 439/2013 instead of 539/2013. It must be mentioned that this explanation is coming now at the appellate stage and there was nothing brought before the trial Court as to this was an error committed due to inadvertence by said Senior PI. In fact, said Senior PI was not examined before the trial Court to come out of this anomaly.

15) Secondly, it is brought to the notice of this Court on behalf of the appellant that a letter was prepared which is Exh.41 for returning the seal and other material, after the raid, back to the store and it was so prepared by PW 6 on 20.6.2013. However, curiously enough there is a footnote on

the said letter in the handwriting of one officer PI Bhole with his signature and the date and significantly date is mentioned as 19.6.2013. The said endorsement of PI Bhole, being a footnote at the end of Exh.41, is to the effect of giving directions to HL2264, one Shri Parab, to receive back the material given for the raid from API Chougule. The substantive evidence of PW 6 Chougule do mention that he prepared the said letter on 20.6.2013 and when this anomaly of earlier dated signature of PI Bhole was brought to the notice of PW 6 during his cross-examination he had answered that this anomaly could only be answered by PI Bhole. On this second anomaly, the learned APP stated that said PI Bhole could not have been examined before the trial Court to clarify this anomaly for the reason that by that time he was already dead. This statement is coming from the learned APP now during the appeal and there was nothing brought before the trial Court as to non-availability of PI Bhole during recording of the evidence. Even today it is enquired with learned APP as to what is the exact date of death of PI Bhole and where is the

proof to that effect by way of death certificate. The learned APP could only tell as per the instructions from the officer that said PI Bhole died somewhere in the year 2014. Factually, all this information was not brought before the trial Court in order to submit that it was not possible for the prosecution to bring PI Bhole for this clarification of the anomaly in the date. Definitely, in the opinion of this Court, these anomalies create a reasonable doubt as to the authenticity of the documents prepared. More so, when the entire action in the present case is by API Chougule PW 6.

16) Thirdly, attention of this Court is drawn towards the contents of Exh.44 i.e. the report under section 57 of the NDPS Act. Said report is in vernacular Marathi which is prepared by and bearing the signature of PW 6 API Chougule. It is addressed to the ACP of Anti Narcotic Cell. It is dated 20.6.2013. Earlier regarding this report the anomaly in the inward number from the office of Senior PI is discussed. Now, it is seen that in the report it is specifically mentioned by PW 6 that on 20.6.2013 the seized muddemal was deposited with

Azad Maidan Stores and entry in the muddemal register was taken at serial no. 532/13 on 19.6.2013. This anomaly is required to be viewed in juxtaposition of the earlier anomalies pointed out to the Court and as such in the considered view of this Court, again it must be said that it is also the mitigating circumstance to the case of the prosecution and doubting the authenticity of the documents prepared in the present case.

17) Fourthly, it is brought to the notice of this Court that in has come in the evidence of PW 6 that on 20.6.2013 he sent PW 4, a Police Naik, at about 2:00 p.m. to the Stores along with letter addressed to PI In-charge of store for giving the custody of the articles. As against this, the station diary entry is made at Ghatkopar A.N.C. Unit by PW 6 on 20.6.2013 which shows that PW 4 left Ghatkopar Unit for depositing the samples A1, B1 and C1 to CA office at 10:15 a.m. However, there is no acceptable explanation given by PW 6 when this anomaly was confronted to him during his cross-examination. At the actual timing at which PW 4 was told to go to the office of CA, there is no substantive evidence of PW 4 and he is silent

on this aspect. In the considered view of this Court, this anomaly also is a mitigating circumstance to the case of the prosecution doubting the authenticity of the documents.

18) Apart from the above, it is also brought to the notice of this Court that the sample packets A-1, B-1 and C-1 which were received back from the CA office were opened in presence of the CA i.e. PW 3 and that time the actual sample Ganja with its polythene pouch was marked as article no.9 insofar sample A1 is concerned. For samples B-1 and C-1 the similar contraband Ganja, with the polythene pouch, were marked respectively as article no.10 and 11. It is strongly argued on behalf of the appellant that the said article 9,10 and 11 were not shown to any of the prosecution witnesses except the Chemical Analyser PW 3. In fact, PW 2 complainant was examined prior to the Chemical Analyser but at the time of recording of the evidence of the complainant the muddemal packets i.e. remnant samples were not opened and they were not identified by the complainant though they were opened and marked as article no. 9,10 and 11 being the remnant

samples with polythene bags during the evidence of the CA PW 3, subsequently, they were not shown to the panch PW 5 and also PW 6 is silent as to the said articles. As such, no identity of the said samples is established which were returned back from the office of CA.

19) It is also brought to the notice of this Court that pancha PW 5 had not identified the accused before the Court during the trial though the appellant-accused was sitting in the dock when the evidence of PW 5 was recorded. This is the factual position. However, only by itself, it cannot be said that the case of the prosecution must fail but this aspect is required to be viewed in the light of the earlier discussion and the cumulative effect of the prosecution case is required to be construed.

20) Now, the attention of this Court is drawn towards the main objection as to non-compliance of Section 50 of the NDPS Act in the strict sense, it being a mandatory provision. The learned counsel for the appellant pointed out the specific substantive evidence of the complainant PW 2 and pancha PW

no. 5 and also of the Investigating Officer PW 6. Nowhere in their evidence, it is categorically established that the right under section 50 of the NDPS Act was made aware to the appellant prior to his search during the raid. Even during the trial PW 4 who is in fact examined as a carrier of the samples to the office of CA was also examined by the prosecution to give evidence on this aspect of compliance of Section 50 of the NDPS Act. Apparently, this was done on the factual position that said carrier was also one of the raiding party members and he also deposed as to the talk between PI Bhole and the appellant. Said PI Bhole was the officer who apprised the appellant and it was so told by all other witnesses. In fact, the substantive evidence of PI Bhole was necessary but apparently for the reason now mentioned during the hearing of the appeal that said PI Bhole was no more in the year 2015, he could not be examined. Even it is seen that in the substantive evidence of PW 6 API Chougule, he did not mention anything that after apprising the appellant regarding Section 50 of the NDPS Act, he declined to be searched in presence of a Gazetted Officer or

Magistrate. Needless to mention that compliance of Section 50 of the NDPS Act is mandatory and strict compliance is necessary and which is in fact not being done in the present case as apparent from the substantive evidence of mainly of PW 2, 5 and 6 and also PW 4 though he was the witness who carried the samples to the office of CA and also a raiding party member. In fact, this is the main aspect of non-compliance of Section 50 of the NDPS Act goes to the root of the matter and vitiates the entire case. Apart from this, lastly it is argued that there is still doubt whether what was allegedly seized from the appellant-accused was in fact Ganja. This was the last argument canvassed on behalf of the appellant.

21) On the last argument as to whether what was seized was Ganja or not, attention of this Court is drawn towards the definition of Ganja in section 2 (iii) (b) of the NDPS Act.

“2. In this Act, unless the context otherwise requires,--

(iii) “cannabis (hemp)” means –

(a) ...

(b) ganja, that is, the flowering or

fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated”.

22) As against the above definition, the FIR Exh.16 and panchnama Exh.29 show the description of Ganja as leaves, flowers, twigs and tops of the plant with seeds. In fact, this description is in vernacular Marathi but there is no specific mention as to 'flowering and fruiting tops'. It is significant to note that said definition of Ganja excludes the seeds and leaves when they are not accompanied by the tops. Apart from this description in the FIR and panchnama, the substantive evidence of PW 2 shows that the substance found during the search and seizure was having green small tree branches flowering and leaves. So far as PW 5 is concerned, he described the substance as to flowering, seeds, leaves and sticks. API Chougule PW 6 described the substance as green small tree branches, flowering and leaves. According to PW 6 on the spot prima facie it was ascertained by testing the green leaves on the hand and taking

their smell and it was done by PI Bhole.

23) Considering the above state of affairs depicted from the substantive evidence of the prosecution witnesses and mainly considering the anomalies in the documents suggestive of fabrication coupled with the active role of API Chougule in conducting the entire investigation since beginning to end and considering the non-compliance of Section 50 of the NDPS Act, in the considered view of this Court, the material brought before the trial Court was not sufficient to establish the guilt of the appellant-accused for possession and dealing in narcotic Ganja, thus, attracting the punishment for the offences under section 8 (c) read with section 20 (b) (i) (iii) of the NDPS Act, 1985. In the result, the present appeal must succeed and same is accordingly disposed of by passing the following order:

:ORDER:

- (a) The appeal is allowed;
- (b) The impugned judgment and order dated 23.6.2015 in N.D.P.S. Special Case No. 170 of 2013 is quashed and set aside;

(c) The appellant-accused is acquitted of the offences under section 8 (c) read with section 20 (b)

(ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985. He be released from custody, if not required in any other case;

(d) If the fine amount is already paid, the same shall be returned back to the appellant;

(e) In view of disposal of the main appeal itself, Criminal Application No. 1067 of 2015 becomes redundant and same is accordingly disposed of.

(A.R. JOSHI, J.)