

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 597 OF 2015

Ahemed Mohiuddin alias Mohamad
 Akram S/o Mohamad Iqbal,
 age : 58 years, Occu.: Business,
 R/o.: Room No.5, Bhadkal Gate Masjid,
 Aurangabad, Taluka and District :
 Aurangabad

(At present the appellant is in
 Aurangabad Central Prison, Harsool,
 Aurangabad, Taluka and
 District : Aurangabad)

..APPELLANT
 (Ori. Accused)

VERSUS

The State of Maharashtra,
 through the Assistant Police Inspector,
 Anti Terrorist Squad,
 Aurangabad Unit,
 Aurangabad, Taluka and
 District : Aurangabad

..RESPONDENT
 (Ori. Complainant)

Mr.G.A. Kulkarni, advocate h/f. Mr. R.S. Deshmukh,
 Advocate for the appellant
 Mr.R.V. Dasalkar, A.P.P. for the respondent-State

CORAM : M.T. JOSHI, J.

JUDGEMENT RESERVED ON : 05/02/2016

JUDGEMENT PRONOUNCED ON : 01/03/2016

JUDGEMENT :

1. Heard both sides.

2. The present appellant was convicted by learned Special Judge (N.D.P.S. Act), Aurangabad in Special Case No.1 of 2011, vide judgement and order dated 18th April, 2015, for the offences punishable under section 20 (b) (ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "N.D.P.S. Act") and was sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/- (Rs. One Lakh), in default to suffer simple imprisonment for one year. Hence, the present appeal by the original accused.

3. The prosecution case, in nutshell, is as under.

. On 17th January, 2011 at about 6.00 a.m. in the morning, PW7-Ankush Rathod, a police head constable of Anti Terrorist Squad (ATS), Aurangabad Unit received a secrete information that one person named as Ahemed Mohiuddin alias Mohamad Akram S/o Mohamad Iqbal, about 50 years old was to reach CIDCO Bus Stand, Aurangabad on the same day at 8.30 a.m. The description of the said person regarding his height, clothes on his person was

also received. He gave the information to PW9 Police Inspector of ATS Aurangabad Mr. Rajkumar Sonawane. He intimated about it to Deputy Superintendent of Police, Superintendent of Police as well as to the P.S.O. of ATS Police Station Kala Chowki, Mumbai on phone. Some other staff was also called by 7.15 a.m. in the morning. Thereafter, from the Superintendent of Police, Aurangabad, permission to take action was also sought. The permission was received in the same morning and thereafter, the trap was organized at the bus stand.

. PW1-Rajendra Aware and PW2-Bhagwat Vaidya were already collected as panch witnesses. The seal from police station, MIDC CIDCO, was collected. The weights and measurements were also collected and thereafter, the members of the raiding party proceeded to CIDCO Bus Stand, Aurangabad. The trap was organized by stationing various vehicles at various points in the vicinity of the bus stand.

. At about 8.40 a.m., the present appellant was seen climbing an auto rickshaw with a red colour school bag with him. The description as given by secret informant matched with the profile of the appellant. His movements were also found suspicious. In the

circumstances, PW7-Ankush Rathod police head constable gave a signal to the complainant. Thereafter, PW8- PSI Gorakh Jadhav relayed the information by gestures. The appellant was surrounded. Thereafter, the complainant, other police officials as well as panch witnesses disclosed their identity to the appellant. Upon inquiry, he gave his name, age etc.

. Thereafter, the complainant told the appellant that his personal search is to be obtained. In Hindi language, it was also communicated to the appellant that as per the provisions of the N.D.P.S. Act, the appellant can exercise right of taking his search in presence of either a Magistrate or a Gazetted Officer. He can make the demand of the same and in case such a demand is made, the necessary compliance would be made. The appellant, however, replied that he was ready to have his personal search by the police officer and the panch witnesses. Therefore, the search was carried. During search, in the school bag which was on the back of the appellant, 4.750 kilograms of charas valued at Rs. 4,75,000/- was found. By the use of N.D.P.S. kit, it was confirmed to be charas. Thereafter, samples A1 and

A2 were obtained from the said contraband in polythene bags which were later on put in the envelopes with the seal and the signatures of the panch witnesses. The rest of the contraband was also similarly sealed. The appellant was apprehended. The bag as well as the mobile and other personal things like cash were seized. The pre-trap panchanama was recorded. The appellant was unable to give full name of person at Nagpur from whom he had obtained the contraband. He was also unable to give full name of person at Aurangabad to whom he was directed to handover the same. In the circumstances, the complaint came to be filed by PW9 Police Inspector Rajkumar Sonwane on the same day at Exhibit-89.

4. On registration of the crime, PW10 P.I. Kishor Kamble conducted the further investigation. The house of the appellant was searched. An enquiry was made with various witnesses, including PW5 Sabha Fatima w/o Mohd. Mustafa Hussain Sarwari in whose name the SIM card of the mobile was found. The call detail records (C.D.Rs.) of the SIM were collected. The statements of some more witnesses, including the members of the raiding party were recorded. The sealed samples were sent to the

chemical analyzer on 02.02.2011. The investigating officer received the chemical analyzer's report which showed that the said article was charas. The accused named by the present appellant with their first name only were unsuccessfully tried to be located and ultimately, the chargesheet came to be filed.

5. Before the learned Special Judge, eleven witnesses were examined. PW1 Rajendra Aware and PW2 Bhagwat Vaidya are the panch witnesses. PW3 Swapnil Pande is one shop owner from whom the weights and measures were collected, PW4 Anil Arak had taken the photograph of the activities. PW5 Sabha Fatima is the subscriber of the SIM card found with the appellant. PW6 Syed Layak Ali is the owner of the mobile shop from where the SIM card was purchased, PW7 Ankush Rathod – the police head constable had received the secret information. PW8 Gorakh Jadhav, the police constable was the member of the raiding party. PW9 P.I. Rajkumar Sonawane is the complainant while PW10 Kishor Kamble and PW11 Shivaji Thakre are the investigating officers.

6. The defence of the appellant was of total denial. According to him, he was not at all apprehended

at the CIDCO Bus stand and was falsely implicated in the offence. The learned Special Judge, however, found that the prosecution case is proved and therefore, the order of conviction, as detailed supra, came to be recorded.

7. Mr. G.A. Kulkarni, learned counsel holding for Mr. R.S. Deshmukh, Advocate for the appellant, made the following submissions before me.

. That, there is no compliance of the mandatory provisions under sections 42 and 50 of the N.D.P.S. Act. While one of the panch witnesses, PW1 Rajendra Aware has turned hostile, the statements of another panch witness PW2 Bhagwat Vaidya would show that it is not reliable. He further pointed out towards various variances in the statements of PW7 Ankush Rathod, PW8 Gorakh Jadhav and PW9 Rajkumar Sonawane and submitted that the prosecution has failed to prove its case beyond reasonable doubt. He, therefore, submitted that the appeal be allowed and the appellant be acquitted of the offences.

8. On the other hand, learned A.P.P> took me through the record and submitted that the prosecution has fully proved its case beyond reasonable doubt. He

submitted that the appeal be dismissed.

9. On the basis of above material on record and the submissions advanced on behalf of both sides, the following points arise for my determination :-

(I) Whether the trial has vitiated for non-compliance of provisions of either Section 42 and section 50 of the N.D.P.S. Act ?

(II) Whether the prosecution has proved that on 17th January, 2011 at or about 8.50 a.m. in the morning at CIDCO Bus Stand, Aurangabad, the present appellant was found in possession of 4.750 kilograms of charas, amounting to Rs. 4,75,000/- in contravention of the provisions of the N.D.P.S. Act and the Rules framed thereunder ?

My findings to both the above points are in the affirmative. The appeal is, therefore, dismissed for the reasons to follow.

R E A S O N S

10. The learned counsel for the appellant submitted that there is no compliance of the provisions of sections 42 and 50 of the N.D.P.S. Act.

11. The complainant who has carried the entire operation is the police inspector of Anti Terrorist Squad. There is notification empowering the police inspector to seize illegal narcotic drugs. Merely because the complainant is from Anti Terrorist Squad would not make any difference. The evidence further would show that not only the complainant had informed about the action taken by him within less than 72 hours to his immediate superior officials, even the receipt of the secret information was earlier relayed to them. Therefore, there is no breach of the provisions of section 42 of the N.D.P.S. Act.

12. As regards the necessary requirement as is provided by section 50 of the N.D.P.S. Act, the FIR at Exhibit-89 would show that the complainant had communicated to the appellant in Hindi as follows :

“According to the provisions of N.D.P.S. Act,
you have a right to have your search made in

presence of any Magistrate or a Gazetted Officer. You can make demand for the same and in case any such demand is made by you, we will make the necessary arrangement."

. Before the learned Special Judge, the complainant in this regard deposed as under :-

"I also informed him that he is at liberty to call Gazetted Officers at the time of seizure. He replied that it is not necessary."

. The material on record would thus show that the appellant was made aware of his right to have his personal search carried in presence of a Gazetted Officer and the investigating officer only failed to make a statement in the court that he had also informed that the appellant has right to have his search in presence of a Magistrate also.

13. Mr. G.A. Kulkarni, learned counsel for the appellant, relied on the ratio laid down in the cases of **"Dilip and another Vs. State of M.P."**, reported in

(2007) 1 S.C.C. 450 and "State of Rajasthan Vs. Parmanand and another" reported in **(2014) 5 S.C.C. 345.**

14. In the case of **"Dilip and another Vs. State of M.P."** (cited supra), in the FIR, there was no statement that the accused therein was informed about his right and only two notices were introduced in the evidence regarding the same. On facts, therefore, the Supreme Court of India came to the conclusion that there was no compliance of section 50 of the N.D.P.S. Act.

15. In the case of **"State of Rajasthan Vs. Parmanand and another"** (cited supra), the issue was when during the personal search, no contraband was found and the contraband was found only in a bag carried by him whether the compliance of section 50 of the N.D.P.S. Act is required. The Supreme Court held that in such situation also, section 50 shall have application.

. In the present case, however, according to the prosecution, the compliance was made though the contraband was found in the bag and additional personal search of the appellant was taken. Therefore, the ratio in the case of **"State of Rajasthan Vs. Parmanand and**

another" (cited supra) has no application in the facts of the present case.

16. The issue is as to whether, on facts, it is proved that the compliance is made. Immediately filed FIR coupled with a somewhat defective testimony of the investigating officer, however, would show that the appellant was made aware of his right to have his personal search made before the Magistrate and/or a Gazette Officer and the appellant replied that his personal search can be carried by the complainant himself. Except the slight deviation in the oral testimony, there is nothing to disbelieve the prosecution version that the compliance of the provisions of the N.D.P.S. Act is made. I, therefore, hold that there is no breach of the provisions of section 42 or section 50 of the N.D.P.S. Act.

17. On facts, while PW1 Rajendra Aware, one of the panch witnesses refused to support the prosecution case, PW2 Bhagwat Vaidya, the another panch witness has deposed that in his presence, the appellant was apprehended and during his search, the charas, as detailed supra, was found.

18. There is inconsistency between the weight of the charas given by this witness – PW2 Bhagwat Vaidya. According to him, approximately, 4 kilograms of the charas was found. It should be noted that PW2 Bhagwat is an owner of a beetle-leaf shop. It is not expected from him that he should give the precise weight of the charas in the witness box as 4.750 kilograms.

19. There is also inconsistency as to which weights were used for weighing the charas. According to PW3 Swapnil Pande, the shop-keeper, he had supplied two weights of 1 kilogram each, one of half kilogram, 200 grams, 100 grams and 50 grams each.

. On the other hand, the complainant deposed that they were having one weight of two kilograms, 500 grams, 200 grams, 100 grams, 50 grams and 20 grams and two weights of one kilogram.

. An exact mathematical version of each and every details is not possible. On the other hand, if such an exact version is made then a suspicious parroting may be inferred.

20. PW2 Bhagwat Vaidya has deposed that the police did not make an enquiry with him regarding acting as a panch. He did not see the articles of sealing and labelling. His personal search was not taken. When they reached to CIDCO Bus stand, weighing scale was not with them. Generally, his deposition, however, would show that he was called as a panch witness right from the Anti Terrorist Squad office and continued till the seizure of the contraband was concluded. Whether the measurements and scales were carried or those were received at the spot after the raiding party proceeded would not make any difference.

21. PW2 Bhagwat has deposed that when he reached the office of Anti Terrorist Squad, the panchanama was already prepared. He put his signature on panchanama as per the say of the police. This statement is in reference to the pre-trap panchanama before proceeding from the office of the A.T.S. It does not mean that no activity was carried.

22. The learned counsel for the appellant pointed out certain inconsistencies between the statements of

PW7 Ankush Rathod, PW8 Gorakh Jadhav, PW9 Rajkumar Sonawane and PW10 Kishor Kamble, on the issue as to who had given signal and in what manner. It should, however, be noted that the large number of police staff was placed under the leadership of different officers at different places and therefore, variation in regard to the receipt of the signal by each member of the raiding party would be natural. It is not the prosecution case that only one person had given the signal to entire staff but the signals were relayed between them.

23. Taking into consideration all the overall facts, I do not find that there is any reason to interfere in the order of conviction and sentence, passed by the learned Special Judge. In the result, the following order.

24. The criminal appeal is hereby dismissed.

[M.T. JOSHI]
JUDGE