

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL APPEAL NO. 622 OF 1994

1. Jayantilal Modi
Residing at Ahmedabad
2. Kamlesh B. KapasiAppellants
Residing at Thakkar Bapanagar
Block 105/1 Ahmedabad
Then (Detained at Yervada Central
Jail, Pune.)

V/s.

The State of MaharashtraRespondent

WITH
CRIMINAL APPEAL NO. 643 OF 1994

Afzal MohammedAppellant
Then (Lodged at Yeravada
Central Prison, Pune)

V/s

The State of MaharashtraRespondent

WITH
CRIMINAL APPEAL NO. 82 OF 1995

1. Shabir Ali M. Shaikh
2. Mir Ali KhanAppellants
Then (In jail custody)

V/s

The State of Maharashtra

....Respondent

WITH
CRIMINAL APPEAL NO. 649 OF 1994

Muhammed Rafiq
Then (At present in custody)

....Appellant

V/s

The State of Maharashtra

....Respondent

Mr. Omkar Nagwekar Advocate appointed for Appellants
in Criminal Appeal No. 622 of 1994
Mr. Jayant Bhardeskar h/f Mr. A. P. Mundargi Senior
Counsel for Appellant in Cri. Appeal no. 649 of 1994
Mrs. A. A. Mane APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : JANUARY 6, 2016

JUDGMENT:

Heard. Appellants herein were convicted for offence punishable under section 8 (c) r/w section 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 vide Judgment and Order dated 05/10/1994 by Special Judge (N.D.P.S. Court) Greater Bombay in N.D.P.S. Special Case No. 473 of 1991 and were sentenced to suffer rigorous imprisonment for 10 years and fine of Rs. 1,00,000/- in default to suffer further rigorous imprisonment for a period of one year each. Being aggrieved by the said Judgment and Order appellants herein had filed criminal appeal

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nos. 622 of 1994, 643 of 1994 649 of 1994 and 82 of 1995.

2) Said appeals were taken up for hearing in the year 2001. This Court (Coram: S. S. Parkar, J.) by Judgment and Order dated 11/06/2001 was pleased to acquit all the appellants for the offences with which they were charged.

3) State of Maharashtra, being aggrieved by the said Judgment and Order had filed criminal appeal nos. 693 of 2002, 694 of 2002, 695 of 2002 and 696 of 2002 before Hon'ble Apex Court. The appeals had come up for hearing before Hon'ble Apex Court on 13/01/2010. Hon'ble Apex Court has passed an order as follows:

“The State is being aggrieved by the judgment of the High Court in Criminal Appeal Nos. 622/1994, 643/1994, 649/1994 and 82/1995 on the file of the High Court of Bombay wherein the accused were acquitted. The main reason for such acquittal was on the basis of the interpretation of Section 42 of the N.D.P.S. Act. When the matters came up before this Court, this Court by an order dated 13.07.2006, adjourned the matters awaiting the decision on this issue by the Constitution Bench and the issue was finally decided by the Constitution Bench in Criminal Appeal No. 36 of 2003 entitled Karnail Singh Vs. State of Haryana,

reported in 2009 (8) SCC p.539. In this view of the fact, we allow the appeals and set aside the judgment of the High Court and request the High Court to re-hear the appeal. The High Court may issue fresh notices to the accused initially. The criminal appeals are allowed accordingly.”

4) In view of the above, this Court had issued notices to the accused/appellants. Notices could not be issued, however, learned senior counsel Shri. Ashok Mundargi who had originally appeared in the appeals agreed to assist the Court. Similarly, this Court has appointed learned Advocate Shri. Omkar Nagvekar to espouse the cause of the appellants without waiting for the notices to be served. Learned counsel appointed for the appellants has drawn the attention of this court to paragraph no. 7 of the earlier Judgment of this Court dated 11/06/2001. The said portion reads thus:

“The aforesaid order of conviction and sentence is challenged by the six accused/appellants in the above four appeals. All the above appeals can be disposed of on a short point and allowed on the ground that there was non-compliance with the mandatory provisions of Section 42 of the Act in as much as though the officers of the Narcotic Cell had acted on the basis of prior

information received by them with regard to the possession of mandrax tablets allegedly recovered from the appellants and though according to the prosecution witnesses the information was reduced to writing, which has not been produced on record, the copy thereof was not sent to the superior officer as mandated by Sections 42 (2) of the NDPS Act. According to both the sides i.e. counsel for the appellants and the learned APP Ms. Kantharia, there is no dispute that though according to the prosecution witnesses information was reduced to writing the said writing is not produced on record nor there is anything on record to show that the copy of the said information allegedly reduced to writing was sent to the superior officer.”

5) The Hon'ble Judge had taken into consideration the judgment of the Full Bench to which a reference was made to determine as to whether compliance of section 42 (2) was mandatory or directory. Reference was decided in favour of the appellants holding that provisions of section 42 were required to be complied with. In view of this, Hon'ble Single Bench of this Court was pleased to allow the appeals. Since the appeals have been remanded by the Hon'ble Apex Court for re-hearing, this Court has perused the evidence brought on

record by the prosecution and has heard the appeals on merits for appreciating the evidence.

6) In the present case, P. W. 1 Ms. Gopika Jahagirdar who happens to be first informant in the said case has deposed before the court that on 02/04/1991 at about 11.30 a.m., she had received the information that a person named Shabbir with other unknown 2 to 3 persons are dealing in the business of mandrax tablets. The information received by her was reduced into writing in the information book. It is further stated that when she received the information, P.I. Ghuge was also present in the office. P.I. Ghuge had passed on the said information to the superior officer. P. W. 1 was instructed to record that information into writing in the information book by Shri. Ghuge. Same was reduced into writing by P.S.I. Singh in her presence. That information was conveyed by Ghuge to A.C.P. Sawant on phone. Thereafter, upon instructions of senior most officers, raid was arranged. Panchas were summoned. Pre-trap panchanama was recorded and the raiding party proceeded to the spot which was given by the secret informer. It is pertinent to note that P.I. Ghuge has not been examined by the

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prosecution. According to P.W. 1 information was given by P.I. Ghuge to A.C.P. Sawant. That A.C.P. Sawant has not been examined by the prosecution. The information which was allegedly reduced into writing by P. W. 1 in the information book is not produced on record neither it forms a part of papers of investigation and therefore it was not brought on record even at the time of trial and therefore there was no evidence even to remotely assume that the said information was reduced into writing. Since the prosecution has not examined P.I. Ghuge or A.C.P. Sawant, there is nothing on record to indicate that the said information was given to the senior most officers as contemplated under section 42 (2) of N.D.P.S. Act.

7) In the cross-examination P.W. 1 has stated that there is an information book maintained in the police station. That information book is regularly checked by superior officers including D.C.P. Sood. A copy of the information book is regularly sent for the perusal of these officers. However, in the present case at hand, P.W. 1 was unable to give the date when the copy of the information was sent to the superior. Learned APP vehemently submits that evidence of P.W. 1 to the extent

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that she had reduced the information into writing in the information book is sufficient compliance of section 42 (2) of N.D.P.S. Act and that she will have to be believed on the ground that PI. Ghuge had given the information to the superior officer.

8) As against this, learned counsel appointed for the appellants submits that all that is stated in the cross-examination is that there is a procedure of reducing into writing the information received by the officer, however, it has to be read in context with the present case. There has to be a reference to context and unless sufficient evidence is produced on record or at least the information book is produced on record to show that information was rather reduced into writing, it cannot be said that there was compliance of section 42 (2) of the Act.

9) In the cross-examination P. W. 1 has further admitted as follows:

“In this case, the information received by me was not written by me. I will not be able to produce that information book but that can be produced by the I.O. if the court so demands. The information was communicated to the D.C.P. Within 2 to 4 minutes. There was talk in between P.I. & D.C.P. over the telephone for about 2 to 3 minutes.”

10) P. W. 1 does not say that in her presence P.I. Ghuge had given the information of the present case to the superior officers.

11) Section 42 (2) of Narcotic Drugs and Psychotropic Substances Act, 1985 reads as follows:

“Where an officer takes down any information in writing under subsection (1) or records grounds for his belief under the proviso thereto, he **shall** within seventy-two hours send a copy thereof to his immediate official superior.”

12) The mandate of the statute is that an information which is reduced into writing under subsection (1) shall necessarily be sent to the superior officer. It therefore contemplates that communication to the superior officer should also be in writing and it should be accompanied by the extract of the information which is reduced into writing by the officer in-charge of a police station. The Legislature has used the word “shall” which makes it mandatory that any information reduced into writing has to be necessarily conveyed to superior officer. In the present case, P.W. 1 has stated that she had reduced into writing. Unless the extract of the said information is produced on record, no

implicit reliance can be placed upon a stray statement of the prosecution witness.

13) P. W. 4 Nohar Singh was also attached to the Narcotic Cell, M.I.D.C. Unit as P.S.I. He has deposed before the court that on 02/04/2001 P.W. 1 Jahagirdar had informed him that one of her informant had given information that a person by named Shabbir Ali and three others were in front of hotel Nalanda with contraband article. She has already passed on that information to P.I. Ghuge. P. I. Ghuge had communicated that information to D.C.P and A.C.P Narcotic Cell and the raid was arranged as per the directions by the superior officers. It is pertinent to note that P.W. 1 had reduced the said information into writing and had given a copy of the same to P.I. Ghuge instead P.W. 4 has deposed that he had noted down the information in the information book. The extract of the said information is not placed on record by the prosecution. In the cross-examination P.W. 4 has admitted that he had not informed the senior P.I. about the information but P.W. 1 had informed. He has further proceeded to state that an entry was taken in the station diary before leaving the police station for

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conducting the raid, however, he was not aware as to who had taken the station diary entry. In any case, the extract of station diary is not on record. The evidence of P.W. 4 is inconsistent with the substantive evidence of P.W. 1 to the extent that according to P.W. 1 information was reduced into writing by P.W. 4, however, he does not say that he had reduced into writing and therefore, it is clear that the information received by P.W. 1 was never reduced into writing either by P.W. 1 herself or P.W. 4 and therefore there was no question of communicating the written information to the superior officer as has been claimed by the prosecution.

14) P. W. 6 P.S.I. Avinash Sawant was also attached to Narcotic Cell. He has deposed before the court that P.W. 1 Jahagirdar had received the secret information from their informant about the involvement of the accused in a case of possession and transportation of narcotic drugs and psychotropic substance. He has deposed before the court that the information received by P.W. 1 Jahagirdar was passed on to P.I. Ghuge who had conveyed that information to A.C.P. Sawant and D.C.P. Sood on telephone. D.C.P. Sood gave necessary instructions to P.I. Ghuge to

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carry out the raid. PI. Ghuge gave the instructions to the then P.S.I. Singh to record the information in the information book. Accordingly information received by P.W. 1 was reduced into writing in his presence and thereafter, the raid was conducted. He has further deposed before the court that the information was received by P.W. 1 in his presence. He has categorically admitted as follows:

“It is true the information that was passed on to A.C.P. and D.C.P. was not in writing but it was telephonic information. So also after the conclusion of the raid, oral intimation was sent to A.C.P. and D.C.P. on telephonic message.”

15) This would be a clear indication that the information received by P.W. 1 was never reduced into writing. There is no station diary extract on record to show that a telephonic message was given to the senior officer.

16) In the case of Karnail Singh Vs. State of Haryana, reported in 2009 (8) SCC p.539 Hon'ble Apex Court has held as follows:

“Under [Section 42\(2\)](#) as it stood prior to amendment such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42 (1) should

forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same would adversely affect the prosecution case and to that extent it is mandatory.”

The Hon'ble Apex Court has further observed:

“Compliance with the requirements of [Sections 42 \(1\) and 42\(2\)](#) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency”.

17) In the present case, there is absolutely nothing on record to indicate that the police officers had no time to reduce the information into writing and convey the same to the superior officer in writing or send a copy thereof to the superior officer. Instead it is the case of the prosecution that the officers had reduced the information into writing in the information book, however, all the witnesses have passed the

buck on the other and there is no cogent and convincing evidence even to remotely indicate that the information was rather reduced into writing.

18) The Hon'ble Apex Court in the case *cited supra* has further observed:

“While total non-compliance of requirements of sub-sections (1) and (2) of [section 42](#) is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of [section 42](#). If the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of [section 42](#) of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of [section 42](#) of the Act. Whether there is adequate or substantial compliance with [section 42](#) or not is a question of fact to be decided in each case”.

19) The evidence on record, in the present case clearly indicates that prosecution has failed to bring on record any cogent and convincing

evidence to even remotely indicate that the information received by P.W. 1 was at one point of time reduced into writing and the copy thereof was sent to official superior, although the police had sufficient time to conduct the raid or to act upon the secret information.

20) Learned counsel for the appellants has drawn the attention of this court to the Judgment of the Hon'ble Apex Court in the case of **Sukhdev Singh Vs. State of Haryana** reported in 2013 (2) SCC p.212 wherein Hon'ble Apex Court has held as follows:

“The provisions of [Section 42](#) are intended to provide protection as well as lay down a procedure which is mandatory and should be followed positively by the Investigating Officer. He is obliged to furnish the information to his superior officer forthwith. This question is no more res integra and stands fully answered by the Constitution Bench judgment of this Court in [Karnail Singh v. State of Haryana](#) [(2009) 8 SCC 539].

21) Hence, in view of the above discussion, this court is of the opinion that there is substantive non-compliance of the provisions of section 42 (2) of N.D.P.S. Act and hence, appellants deserve to be acquitted of all the charges levelled against them.

22) It would not be possible for this court to depart with the Judgment without recording appreciation for efforts put in by Advocate Omkar Nagwekar who was appointed by this court to espouse the cause of the appellants.

ORDER

- (i) Appeal nos. 622 of 1994, 643 of 1994, 649 of 1994 and 82 of 1995 are allowed.
- (ii) The acquittal recorded in favour of appellants vide Judgment and Order dated 11/06/2001 is hereby confirmed.
- (iii) The Judgment and Order dated 05/10/1994 passed by Special Judge (N.D.P.S. Court) Greater Bombay in N.D.P.S. Special Case No. 473 of 1991 is hereby quashed and set aside.
- (iv) Appellants are acquitted of all the charges levelled against them.
- (v) Bail bonds of the appellants stand cancelled.
- (vi) The professional fees of appointed Advocate are quantified to the tune of Rs. 5000/- to be paid to him within 3 months from today.

(vii) All appeals stand disposed of.

(SMT. SADHANA S. JADHAV, J.)