

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.708 OF 2010

PREMSINGH HIJARILAL JAISWAL)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Taraq Sayyed, Advocate for the Appellant.

Ms.PN.Dabholkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

**DATE : 28th SEPTEMBER 2017 &
29th SEPTEMBER 2017**

ORAL JUDGMENT :

1 By this appeal, the appellant / accused is challenging the judgment and order dated 31st August 2010 passed by the learned Special Judge under NDPS Act, Greater Bombay, Mumbai, in NDPS Special Case No.2 of 2009, thereby convicting the appellant / accused of the offence punishable under Sections 8(c)

read with 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). He is sentenced to suffer rigorous imprisonment for 10 years apart from directing him to pay fine of Rs.1,00,000/- and in default, to undergo further rigorous imprisonment for 1 year. He, however, is acquitted of the offence punishable under Section 8(c) read with Section 29 of the NDPS Act.

2 Facts in brief leading to the institution of the present appeal can be summarized thus :

(a) PW3 Assistant Police Inspector (A.P.I.) Kedare Pawar was attached to Anti Narcotic Cell (ANC), Azad Maidan Unit of Mumbai. On 11th August 2008, at about 7.00 a.m., he received information from his informant to the effect that at about 10.45 a.m. of that day, the appellant / accused is coming to Matoshri Ramabai Ambedkar Prasuti Gruha, Chembur, Mumbai, for selling charas, after purchasing it from Ajay alias Babli, resident of Uttar Pradesh. This information is recorded in the Station diary by PW3 A.P.I. Kedare Pawar. This information was then transmitted to

PW5 Police Inspector(P.I.) Vilas Chavan. Telephonic information about this information was given to Assistant Commissioner of Police as well as Deputy Commissioner of Police. PW3 A.P.I. Kedare Pawar, was directed by the Deputy Commissioner of Police to take necessary action under leadership of PW5 P.I. Vilas Chavan.

(b) PW5 P.I. Vilas Chavan then called his staff members and disclosed the information received from PW3 A.P.I. Kedare Pawar to them. Two panch witnesses namely PW6 Chandrakant Kengare and Manik were summoned through Police Constable Pisal. Necessary entry was taken in the Station diary. Material required for effecting raid was summoned.

(c) Panch witnesses were asked about their willingness to participate in the trap. After their consent, panchas took personal search of members of police team which was to effect raid. Similarly, they searched raiding material including the brass seal in order to ascertain that the same does not contain any narcotic substance or psychotropic drug. Panchas came to the conclusion

that no objectionable article or material was found either on person of members of the police team or in the articles / material collected for effecting raid. Then, pre-trap panchnama Exhibit 39 came to be scribed.

(d) By two police jeeps, PW5 P.I. Vilas Chavan, PW3 A.P.I. Kedare Pawar, PW7 A.P.I. Mohan Mane as well as other members of the raiding team and panch witnesses proceeded towards spot i.e. Matoshri Ramabai Ambedkar Prasuti Gruha of Chembur. There, raiding team was divided in two groups. Under leadership of PW5 P.I. Vilas Chavan – one team took its position towards the northern side of the spot, whereas the another team took position at the southern side of the spot.

(e) According to the prosecution case, at about 10.50 a.m. of 11th August 2008, one person matching description given by the informant to PW3 A.P.I. Kedare Pawar came in front of gate of Matoshri Ramabai Ambedkar Prasuti Gruha. He was holding a chocolate coloured cloth bag in his right hand. PW3 A.P.I. Kedare

Pawar confirmed the fact that the person who came there is the person who has imported charas as per information received by him. The raiding team was accordingly signaled. The appellant / accused Premsingh Jaiswal came to be surrounded by members of the raiding team. PW5 PI. Vilas Chavan disclosed his identity and showed his identity card to the appellant / accused. Inquiry regarding his name, address etc. was conducted.

(f) According to the prosecution case, in tune with the provisions of Section 50 of the NDPS Act, PW5 PI. Vilas Chavan informed the object and purpose of search of the appellant / accused to him. He was conveyed that he had right to give his personal search before a nearest Magistrate or a Gazetted Officer. The appellant / accused declined this statutory right, which was also communicated to him vide a written communication Exhibit 37. The appellant / accused gave endorsement thereon to the effect that it is not necessary to undertake this formality and signed it.

(g) According to the prosecution case, then, PW7 Mohan Mane, took the bag from right hand of the appellant / accused. After opening, it was found to be containing a transparent plastic bag. That transparent plastic bag was containing 63 cakes of blackish, greenish colour, separately kept in separate transparent plastic pouches. PW5 P.I. Vilas Chavan then weighed those 63 cakes along with transparent plastic pouches in which those were kept separately. The material was found to be weighing 16 kgs. PW5 P.I. Vilas Chavan took out small samples therefrom and tested them by the field testing kit. It was found to be charas. Then PW5 P.I. Vilas Chavan took out sample from all those 63 cakes by cutting each plastic pouch containing those cakes from the middle portion of the pouch. In this manner, from all 63 cakes, two samples each weighing 25 gms. were drawn. Both samples were then kept in two different transparent plastic pouches. These plastic pouches were closed by applying stapler pins. Those were kept in two different brown envelopes. Both envelopes were then sealed and marked as "A1" and "A2". Remaining contraband weighing 15.950 gms. of charas came to be kept in original

transparent plastic bag in which it was found. The bag was then covered by white cloth and ends of that cloth came to be closed by sewing it. Wax seal came to be applied on sewed portion. It was labeled as Article A. Accordingly, a post trap panchnama Exhibit 39A came to be prepared in presence of panch witnesses.

(h) Routine investigation followed. One sample, which according to the Investigator, was containing charas weighing 25 gms., was sent through PW2 Jayawant Khopkar, Carrier Constable to the forensic laboratory, where it was examined by PW1 Sandeep Chetty, Assistant Chemical Analyser. Upon chemical analysis of the said sample, it was found to be containing charas falling under Section 2(iii)(a) of the NDPS Act, 1985.

(i) On completion of routine investigation, the appellant / accused came to be charge-sheeted. The learned Special Judge under NDPS Act, Greater Bombay, Mumbai, framed Charge for offences punishable under Sections 8(c) read with 20(b)(ii)(c) of NDPS Act as well as under Section 8(c) read with 29 of the said

Act. The Charge was explained to the appellant / accused. He abjured his guilt and claimed trial.

(j) In order to bring home the guilt to the appellant / accused, the prosecution has examined in all seven witnesses. PW1 Sandeep Chetty, Assistant Chemical Analyser, had conducted forensic examination of the sample sent to the forensic laboratory and the report of examination of the sample is at Exhibit 15. PW2 Jayawant Khopkar had reached the sample to the forensic laboratory. PW3 A.P.I. Kedare Pawar is an officer who received the secret information and who participated in the raid conducted by the ANC. PW4 Vijay Nimbalkar, A.S.I. attached to ANC was entrusted with the duty of the safe keeping of the seized muddemal, he being store keeper with the ANC. PW5 P.I. Vilas Chavan had headed the raiding team and seized the contraband. Independent panch Chandrakant Kengare is examined as PW6 who proved seizure panchnama Exhibit 39. PW7 Mohan Mane, A.P.I., is the Investigating Officer.

(k) Defence of the appellant / accused was that of total denial. He, however, did not enter in the defence. After hearing the parties, by the impugned judgment and order, the learned trial court came to the conclusion that the appellant / accused was found in possession of 16 kg charas on 11th August 2008. However, the charge of conspiracy was held to be not proved. Accordingly, the appellant / accused is convicted and sentenced as indicated in opening paragraph of this judgment.

3 I have heard the learned advocate appearing for the appellant / accused. He vehemently argued that seized muddemal i.e. the bulk quantity was never produced before the learned trial court for being inspected and identified by the concerned witnesses. This has caused great prejudice to the appellant / accused. The learned advocate for the appellant / accused submitted that it was the duty of the prosecution to produce that bag in which seized muddemal was kept before the learned trial court. The witness ought to have identified the bulk, while in the dock. This would have granted an opportunity to the

appellant / accused to demonstrate that the contraband was not seized from him.

4 The learned advocate further argued that sealed packet allegedly containing the bulk was produced before the learned trial court only when PW6 Chandrakant Kengare – panch witness stepped in the witness box. Though it was elicited from his mouth that if shown he would be in a position to identify the seized contraband, the prosecution has not deliberately opened the sealed packet containing the contraband allegedly seized from the appellant / accused.

5 The learned advocate appearing for the appellant / accused further argued that even according to the prosecution case, from each cake, sample was drawn by cutting the transparent plastic pouch from the middle and in this way, two samples each weighing 25 gms were collected. If this actually happened, then, one sample sent to the forensic laboratory must have contained 63 tiny pieces weighing 25 gms. However,

evidence of PW1 Sandeep Chetty, Assistant Chemical Analyser, shows that sample received by the forensic laboratory was in round shape of 1 inch diameter. That sample was found to be weighing 26.6507 gms. The learned advocate appearing for the appellant / accused, as such, argued that the sample which was sent to the forensic laboratory, was not the sample which was drawn from the material allegedly seized from the appellant / accused.

6 The learned advocate for the appellant / accused then compared evidence of PW6 Chandrakant Kengare with evidence of official witnesses namely, PW3 A.P.I. Kedare Pawar, PW5 P.I. Vilas Chavan and PW7 Mohan Mane and submitted that evidence of panch witness is totally at variance with the evidence of official witnesses. The panch witness has spoken about using electronic scale whereas official witnesses are deposing about using manual scale for weighing the sample. He, further argued that, panch witness has not spoken about conveying statutory right to the appellant / accused as envisaged by Section 50 of the NDPS Act

and this fact shows that evidence of official witnesses on this aspect is not corroborated by the independent panch witness.

7 To buttress his submission, the learned advocate for the appellant / accused has placed reliance on judgment of the Hon'ble Apex Court in the matter of K. Mohanan vs. State of Kerala¹, Jitendra and Another vs. State of M.P.², judgment of this court in the matter of Hanamantu s/o. Gangaram Badawat vs. State of Maharashtra³ and Shri Shiv Kumar @ Ashok Mishra vs. Special Judge of N.D.P.S. Court⁴.

8 The learned APP supported the impugned judgment by contending that evidence of official witnesses as well as that of panch witness goes to show that the bulk was produced before the court. She further argued that discrepancy in weight of the sample as well as size and shape of the sample cannot amount to a discrepancy creating reasonable doubt in the prosecution case. A reasonable doubt is not an imaginary, trivial or a merely possible

1 (2000) 10 Supreme Court Cases 222

2 (2004) 10 Supreme Court Cases 562

3 2007 ALL MR (Cree) 3359

4 1997 Bombard. (Cree) 865

doubt, but it must be a fair doubt based on the reasons and common sense. Such doubt must grow from the evidence in the case. By relying on paragraphs 25 and 26 of the judgment in the matter of State of U.P. vs. Krishna Opal and Another⁵, the learned APP contended that the appellate court cannot upset the judgment of conviction unless there are “substantial” or “compelling” reasons or “very substantial reasons” or “strong reasons” for doing so. For upsetting the judgment of conviction, the appellate court is required to record the reasons as to why the lower court went wrong. She relied upon judgments of the Hon'ble Apex Court in P. P. Beeran vs. State of Kerala⁶ and Prabha Shankar Dubey vs. State of Madhya Pradesh⁷ to demonstrate that there was compliance of Section 50 of the NDPS Act.

9 I have carefully considered the rival submissions and also perused the record and proceedings including deposition of witnesses and documentary evidence produced on record by the

5 (1988) 4 Supreme Court Cases 302

6 AIR 2001 Supreme Court 2420

7 AIR 2004 Supreme Court 486

prosecution. Now let us examine whether it is proved by the prosecution that the appellant / accused was found to be in possession of charas weighing 16 kgs. i.e. in commercial quantity in contravention of provisions of NDPS Act. According to the prosecution case, as has been deposed by PW3 A.P.I. Kedare Pawar, PW5 P.I. Vilas Chavan and PW7 Investigating Officer Mohan Mane, on 11th August 2008, at about 11.00 a.m., the appellant / accused was found to be in possession of 16 kgs charas – a narcotic substance which was comprising of 63 cakes and each cake was found to be put inside a separate pouch. Undisputedly, it is case of the prosecution, as reflected from the seizure panchnama Exhibit 39, that those 63 cakes separately kept in plastic pouches were kept in one transparent plastic bag which was found to be kept inside the cloth bag held by the appellant / accused in his hand. Recitals in seizure panchnama Exhibit 39 make the position of keeping the contraband in the bag held by the appellant / accused clear. First Informant PW3 A.P.I. Kedare Pawar has deposed that PW5 P.I. Vilas Chavan took out all 63 cakes from one transparent plastic bag and PW5 P.I. Vilas Chavan gave cuts at the

center by knife for drawing small quantities from each cake. His cross-examination reveals that while drawing these samples from each transparent plastic pouch, cakes were not removed from those transparent plastic pouch. PW5 P.I. Vilas Chavan in his chief examination deposed that from center of the cakes, he gave cut by knife and drew quantities for the purpose of collecting samples. His cross-examination is pointing out the fact that each cake was kept in a separate transparent plastic pouch. Evidence of PW7 Investigating Officer Mohan Mane also shows that from all 63 cakes, PW5 P.I. Vilas Chavan drew samples in small quantities. Exhibit 39 is the seizure panchnama prepared by police after testing the material on field testing kit and after drawing two samples each weighing 25 gms from 63 cakes allegedly found in possession of the appellant / accused. Page 5 of the seizure panchnama Exhibit 39 shows that PW5 P.I. Vilas Chavan gave cut to each transparent plastic pouch containing 63 cakes for drawing two samples from each cake. Evidence of PW3 A.P.I. Kedare Pawar, PW5 P.I. Vilas Chavan and PW7 Investigating Officer Mohan Mane who took part in the raid and the resultant seizure

shows that after drawing samples from each cake after cutting the plastic pouch in which those cakes were independently kept, two samples each weighing 25 gms were drawn and those were kept in two different transparent plastic pouches. Those pouches were then closed by applying stapler pins on them. Thereafter, they were kept in two different brown envelopes by marking them as “A1” and “A2”. Those were claimed to have been sealed by applying wax seal. This position reflected from the evidence adduced by the prosecution witnesses so also from contemporaneous documents in the form of seizure panchnama Exhibit 39 goes to show that each plastic pouch must be containing 63 tiny pieces of alleged contraband. Similarly, if what is stated by these three prosecution witnesses had really happened, then, bulk of the contraband must contain cut on each transparent plastic pouch containing each cake – 63 in number. According to the prosecution case, all those 63 cakes were kept in the cloth bag from which they were recovered. Then the bag came to be covered with a cloth and by sewing ends of that cloth, that bag was sealed. So far as weightment is concerned,

prosecution witnesses have categorically deposed that each sample was weighing 25 gms.

10 Now let us examine whether one sample out of two samples collected from the contraband allegedly found in possession of the appellant / accused was sent for forensic examination in order to ascertain whether it was containing charas as defined by Section 2(iii)(a) of the NDPS Act. What was sent was the sample weighing 25 gms comprising of 63 tiny pieces drawn from 63 cakes. None of the prosecution witnesses deposed that all those 63 tiny pieces were amalgamated to form a round shaped article. On this backdrop, it is in evidence of PW1 Sandeep Chetty, Assistant Chemical Analyser, that what was received by him was a sample weighing 26.6507 gms. Cross-examination of this witness reveals that the sample was in round shape having 1 inch diameter. This witness has categorically admitted the fact that he has not noted down the condition in which the sample was received in the data sheet prepared by him. The reason given by him for this is he did not find it necessary. Thus, PW1 Sandeep

Chetty, Assistant Chemical Analyser, is not stating that he received sample in the form of 63 tiny pieces and is accepting the fact that the sample shown to him is a round shaped article having about 1 inch diameter. The sample drawn, weighed and sent was containing material weighing 25 gms whereas the sample shown to have been received by the forensic laboratory, as deposed by PW1 Sandeep Chetty, was weighing 26.6507 gms. The shape of the sample which was sent and which is deposed to have been received by the PW1 Sandeep Chetty is totally different. If really the sample in the form of 63 tiny pieces weighing 25 gms was sent to the forensic laboratory, then there is no reason for it to grow in weight, particularly when it was kept in the plastic pouch which was closed by stapling it and then put in the brown cover, which was sealed. The possibility of increase in weight due to moisture was also not there nor was this aspect clarified by the prosecution in its evidence. Thus, reasonable doubt lurks in the judicious mind as to whether the sample sent for forensic examination was the same which was drawn from the material seized from the appellant / accused. This doubt cannot be said to

be fanciful or over emotional doubt as it is grown out of the evidence adduced by the prosecution in the instant case.

11 Now let us examine whether in the wake of the doubt as to whether the sample sent for forensic examination was the same as was drawn from the material seized on 11th August 2008 from possession of the appellant / accused, let us ascertain whether non-production of the bulk had in any manner prejudiced the accused. Effect of non-production of the bulk and non-identification of the same during the course of the trial came to be examined by the Hon'ble Apex Court in the matter of **Jitendra and another (supra)**. Paragraph 5 and relevant portion of paragraph 6 thereof needs reproduction. It reads as under :

“5 There is no independent witness as to the recovery of the drugs from the possession of accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect it with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested

testimony of police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused. Although, the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, "non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced." The High Court relied on Section 465 of the Cr. C.P. to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6 In our view, the view taken by the High Court is unsustainable. In the trial it was necessary

for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the [NDPS Act](#).”

12 It is, thus, clear that, best evidence which is necessary to prove the guilt in such cases is production of the seized material during the trial and identification of the same by prosecution witnesses. In this case, this aspect is assuming overbearing importance because peculiar facts of the prosecution case reveals that each cake was kept in a transparent plastic pouch and each pouch was give a cut by PW3 A.PI. Kedare Pawar in its center for drawing to tiny pieces towards sample. Therefore, production of the bulk would have made sure that the bulk was comprising of

63 cakes and each cake is in different plastic pouch having a cut at its center.

13 Even Nagpur Bench of this court in the matter of Hanamantu (supra) had an occasion to examine importance of production of bulk in the case under NDPS Act. Relevant portion of paragraph 4 of this judgment reads thus :

“4 Thus what Section 52A mandates is preparation of inventory and certification thereof by the Magistrate. In the instant case admittedly no inventory was prepared and if prepared the same is not placed on record before the Court. Learned Sessions Judge in para 12 of his judgment observed that only samples of Ganja were produced before the Court and not the bags actually containing the Ganja that were allegedly seized. It is thus clear that the property in question is not produced before the Court at all. The production of such property before the Court could have been dispensed with had the inventory been drawn and copy thereof been produced. No witness therefore has identified the property that is allegedly seized. The penalty under the act is very severe. Law is well established.

Higher the penalty stricter the proof. This Court in an unreported decision in Criminal Appeal No. 414 of 2006 ([Shiva Narayan Mohite and Ors. v. State of Maharashtra](#)) at Nagpur decided on 06.06.2007 has held as follows:

In Jitendra's case (supra) the Apex Court dealing with the case under the N. D. P. S. Act held that in the trial under the N. D. P. S. Act it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband were seized from the possession of the accused and the best evidence would have been the seized materials which ought to have been produced during the trial and marked material objects. The Apex Court also found unsustainable the finding of the High Court that the non production of the contrabands before the Court was not fatal to the prosecution. In my opinion, the ratio laid down by the Apex Court in Jitendra's case (supra) is squarely applicable in the present case. Non production of the contraband before the trial court has caused serious prejudice to the accused and moreover the prosecution has not given any reason for non production of best evidence before the trial

Court. In my opinion, non production of the contrabands before the trial court is fatal to the prosecution case. On this ground only the accused are entitled to be acquitted.

This Court therefore relied on a decision of the Supreme Court in [Jitendra and Anr. v. State of M. P.](#) 2004 Supreme Court Cases (Cri) 2028 and held as above.”

14 Analogous to the facts of the case in **Hanamantu** (**supra**), in the instant case also evidence on record does not indicate that in pursuance of provisions of Section 52A of the NDPS Act, the prosecution has got the inventory prepared and certified by the Magistrate. In the light of this aspect, non-production of contraband before the trial court can be considered as a factor causing prejudice to the accused. The question is not whether there was tampering with the bulk and the sample but the question is whether there was possibility of such tampering to the bulk and the sample in the light of the fact that the bulk was not produced before the trial court during course of trial and when it was produced while examining PW6 Chandrakant

Kengare – panch witness, despite his willingness to identify the bulk, the prosecution has not shown it by opening the bag containing the bulk.

15 Evidence of PW3 A.P.I. Kedare Pawar, PW5 P.I. Vilas Chavan and PW7 Investigating Officer Mohan Mane does not show that during the course of their examination, the bulk was produced before the learned trial court and they had identified the bulk by inspecting the same and by stating that it is the same material which was seized from the appellant / accused . So far as PW6 Chandrakant Kengare – panch witness is concerned, evidence shows that the bulk was available with the learned trial court during the course of his examination. Paragraph 13 of his chief examination is interesting. This witness has candidly stated that he can identify the bulk if shown to him. What was shown to this witness was the bundle containing the bulk and marked as Exhibit A. For the reasons best known to the prosecution, instead of showing the bulk contained in the sealed bundle, this witness was shown four seals on one side and five seals on other side of that bundle. It is elicited from this witness that all the seals are

intact. This obviously makes it clear that the prosecution was not sure as to whether the sealed bundle Exhibit A was containing 63 cakes independently kept in transparent plastic pouch and each pouch was having cut in its middle, made for the purpose of drawing of samples from each cake. It is apparent that as the prosecution was not sure that the bundle was containing the bulk as is stated to be seized from the possession of the appellant / accused, it did not dare to open the sealed bundle despite willingness shown by PW6 Chandrakant Kengare – a panch witness, to identify the bulk. The learned trial court could have assured itself that the bulk produced before it corresponds with the bulk alleged to have been seized at the time of effecting seizure panchnama Exhibit 37, by ascertaining the fact that the bulk is kept in different transparent plastic pouch having cuts thereon.

16 In this fact situation, law laid down by the Hon'ble Apex Court in the matter of Jitendra and another (supra) as well as by this court in the matter of Hanamantu (supra) applies with

full force to the case in hand. I, therefore, do not deem it necessary to discuss other aspects and other evidence.

17 In the result, I proceed to pass the following order :

ORDER

- i) The appeal is allowed.
- ii) The appellant / accused is acquitted of the offence with which he stood charged. Fine amount, if any, paid by him be refunded to him. He be released forthwith, if not required in any other case.

(A. M. BADAR, J.)