

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

CRIMINAL APPEAL NO. 129 OF 2002

Pradeep Sakharam Jadhav
Age : 47 years, occu.: labourer
R/o Badi, Taluka Mantha,
District Jalna.
At present r/o Rahul Nagar,
Old Jalna, District Jalna.

Appellant.

Versus

The State of Maharashtra
(Copy to be served on the Public
Prosecutor, High Court, Bench at
Aurangabad).

Respondent.

Mr. P.B. Bachate, Advocate holding for
Mr. R.B. Raghuwanshi, Advocate for the appellant.
Mr. R.V. Dasalkar, A.P.P. for the State/respondent.

CORAM : SUNIL K. KOTWAL,J.

**Reserved on : 12th March, 2018.
Pronounced on : 16th March, 2018.**

JUDGMENT :

1. The original accused No.1 in Special Case No.9/2000 has challenged his conviction under Section 20 (b) (i) of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as "N.D.P.S. Act" for short), recorded by Special Judge, Nanded dated 21.01.2002, sentencing accused No.1 to suffer rigorous imprisonment for five years and to pay a fine of Rs. 10,000/-, in default rigorous imprisonment for one year. Respondent is the State of Maharashtra.

2. Facts leading to institution of this appeal are that - on 04.05.2000 Police Station, Ardhapur received secret information that one person was sitting with two bags of Ganja, in front of Yogesh Hotel, in one Dhaba at 'Bhokar Phata'. Therefore, considering urgency of situation, A.P.I. Molvane (PW-9) without obtaining search warrant under Section 41 of N.D.P.S. Act, informed his superior officer S.D.P.O. Nanded about the said secret information and by writing a request letter to Tahsildar Ardhapur, he requested him to remain present on the above-said spot for raid. API Molvane (PW-9) rushed on the spot with other police staff and panchas, at about 10.45 a.m. The raiding party found accused No.1, who was sitting on Cot in front of Dhaba with two bags. Therefore, A.P.I. Molvane (PW-9) disclosed his identity and identity of Tahsildar, Ardhapur to accused No.1 and after giving personal search of all the members of the raiding party, he seized two bags containing Ganja from accused No.1. 7.25 kilo-grams Ganja was found in one bag and 3.50 kilo-grams Ganja was found in another bag. From each bag sample of 50 gms Ganja was obtained and it was separately sealed in separate bags, in presence of panchas. Seizure memo (Exh.18) and separate spot panchnama (Exh.38) were drawn on the spot. Accused No.1 was taken to Police Station, Ardhapur alongwith seized muddemal articles. A.P.I. Molvane (PW-9) lodged F.I.R. (Exh.34) against the accused at Police Station, Ardhapur. In the

result, offence was registered against accused Nos.1 and 2 at Police Station, Ardhapur under Section 20 (b) (i) of N.D.P.S. Act.

3. A.P.I. Molvane (PW-9) conducted investigation of this Crime. He referred the seized sample bags to Chemical Analyzer, Aurangabad. On examination of both the samples, Chemical Analyzer submitted report (Exh.39) that Ganja was detected in both the samples. After completion of the investigation, charge-sheet was submitted before Special Court, Nanded for the offence punishable under Section 20 (b) (i) of N.D.P.S. Act.

4. Charge (Exh.11) was framed against accused Nos.1 and 2 for the offence punishable under Section 20 (b) (i) of N.D.P.S. Act. Accused pleaded not guilty and claimed trial.

5. Defence of the accused is of total denial.

6. After considering the evidence placed on record by prosecution, trial Court pleased to convict accused No.1 for the offence punishable under Section 20 (b) (i) of N.D.P.S. Act and above-said sentence was imposed against him. Therefore, this appeal arises.

7. Heard strenuous argument submitted by Shri Bachate Advocate for appellant and learned A.P.P. for the State.

8. Learned Counsel for appellant pointed out my attention towards inconsistencies emerging in the evidence of prosecution witnesses as to when Tahsildar (PW-11) arrived at the spot of raid.

He pointed out that in the cross-examination of witnesses it emerges that the bags from which Ganja was seized were found below the cot on which the accused was sitting. According to learned Counsel for the appellant, such type of evidence is not sufficient to prove that Ganja was seized from conscious possession of accused No.1.

9. His next submission is that in compliance with Section 50 of N.D.P.S. Act, written notice was not served on accused No.1 before taking his personal search and therefore, for breach of Section 50 of N.D.P.S. Act the entire trial vitiates. He placed reliance on the judgment of Apex Court in the case of **“Megh Singh Versus State of Punjab”** in **Criminal Appeal No.452/2003** and **“State of Rajasthan Vs. Parmanand and another”** reported in **(A.I.R. 2014 SC 1384)**.

10. In reply, learned A.P.P. for the State submitted that from the evidence of prosecution witnesses it becomes clear that before taking search, the accused No.1 was informed that he has right to be searched in presence of Gazetted Officer or nearest Magistrate. Next limb of the argument of learned A.P.P. is that as the Ganja was seized from two separate bags and not on personal search of the accused, compliance of Section 50 of N.D.P.S. Act is not mandatory.

11. It is to be noted that in the case of **“State of Rajasthan Vs Parmanand”** (cited supra) the Apex Court has referred to the judgment of Constitution Bench in **“State of Punjab Vs Baldev**

Singh” [(1999) 6 SCC 172] wherein the Constitution Bench has drawn the following conclusions :-

“(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.”

12. In view of above-said settled position of law, a written notice need not be served on accused No.1 to inform him about his right to be searched before Gazetted Officer or Magistrate. Therefore, non service of notice to accused No.1 by A.P.I. Morvane (PW-9) at the time of raid does not vitiate the trial. The preliminary objection raised by learned Counsel for the appellant is rejected.

13. Regarding non-compliance of Section 50 of N.D.P.S. Act, as per prosecution case itself the Ganja was seized from two bags and not on personal search of the accused. In “**Kalema Tumba Vs. State of Maharashtra**” [(1999) 8 SCC 247], the Apex Court held that if a person is carrying a bag or some other article

with him and Narcotic Drug is recovered from it, it cannot be said that it was found from his person, and therefore, it is not necessary to make an offer for search in presence of Gazetted Officer or Magistrate in compliance of Section 50 of N.D.P.S. Act. In State of **“Himachal Pradesh Vs Pawan Kumar” [(2005) 4 SCC 350]**, three Judges Bench of Supreme Court held that a 'person' would mean a human being with appropriate coverings and clothing and footwear. A bag, briefcase or any such article or container, etc. can under no circumstances be treated as body of human being. Therefore, it is not possible to include these articles within ambit of word “person” occurring in Section 50 of the N.D.P.S. Act. In view of this legal position, merely Ganja was seized from the two bags with accused No.1, Section 50 of N.D.P.S. Act will have no application.

14. In the case at hand, neither P.I. Morvane (PW-9) nor any other member of the raiding party deposes that personal search of the accused was taken and Ganja was seized from the person of the accused. Therefore, Section 50 of N.D.P.S. Act will not be applicable and on the ground of non-compliance of Section 50 of N.D.P.S. Act trial will not be vitiated. Both the authorities relied by learned Counsel for the appellant are of no help to him to claim acquittal for non-compliance of Section 50 of N.D.P.S. Act.

15. Now question arises whether prosecution can establish that more than 10 kilo-grams Ganja was seized from the conscious

possession of the accused person.

16. Police Constable Jadhav (PW-1) is the person who was one of the member of raiding party. Though in examination-in-chief he deposes that 10 kg and 75 gms Ganja was found in two bags when accused was sitting on Cot at one Dhaba at Bhokar Phata, the truth has come on record when this witness was subjected to cross-examination. Police Constable Balaji Jadhav (PW-1) admits in his cross-examination that when he saw the accused sitting at Dhaba, the bags were lying on the ground below the Cot, one at right side and other on left side of the accused person. Even Police Constable Vasant Jadhav (PW-2), who was member of the raiding party, though deposes that Ganja was found in two bags at the time of raid, he nowhere says that two bags containing Ganja were in the hands or in actual possession of accused No.1. Even Police Head Constable Datta Jamdade (PW-4) has admitted in his cross-examination that at the time of raid the bags were lying below the Cot and accused No.1 was sitting on the Cot.

17. To the contrary, Police Constable Sadashiv Avad (PW-5) deposes that one person was sitting on the Cot in Dhaba and he was having two bags in his hand. Panch Govind Shingare (PW-3) has brought different story that the said person was sitting under Cot and the bags were lying in his hands. On the other hand, Investigating Officer (PW-9) who was head of the raiding party,

deposes that at the time of raid accused was sitting on Cot and both bags were on the ground and those bags were held by the accused.

18. Thus, two sets of evidence are before the Court. From the testimony of some witnesses it has been brought on record that at the time of raid accused No.1 was sitting on the Cot at one Dhaba and two bags containing Ganja were found below that Cot. Second set of evidence shows that both bags were in the hand of the accused when accused was sitting on the Cot. Panch witness (PW-3) says that accused was sitting below the Cot. When such type of inconsistent theories come on the record, definitely benefit of doubt goes in favour of the accused, in view of "**Sharad Birdhi Sarda Vs State of Maharashtra**" reported in **(AIR 1984 SC 1622)**. Therefore, when two probabilities arise, the probability which is in favour of the accused is to be accepted. In the circumstances, it is to be held that at the time of raid accused No.1 was sitting on Cot at Dhaba and that time two bags containing Ganja were found below that Cot. Undisputedly, such Dhaba is public place having access to public at large. Therefore, merely on the basis of seizure of two bags from below the Cot where accused No.1 was sitting, prosecution cannot establish that two bags containing Ganja were seized from the 'conscious possession' of the accused. Benefit of doubt deserves to be given to the accused.

19. The damaging blow to the prosecution case is the evidence of A.S.I. Pundlik Thorat (PW-7) who was in-charge of Muddemal Property at Police Station, Ardhapur and the evidence of Carrier of the muddemal i.e. Police Constable Hiralal (PW-10). According to A.S.I. Pundlik Thorat (PW-7), on 04.05.2000 P.S.I. Morvane (PW-9) handed over him two bags of Ganja and two samples of Ganja which were deposited in Muddemal Room. According to this witness, on 04.05.2000 he handed over both samples of Ganja to Police Constable Hiralal Kathare (PW-10) for giving it to C.A., Aurangabad. However Police Constable Hiralal Kathare (PW-10) deposes that though on 04.05.2000 two samples were handed over to him by A.P.I. Morvane alongwith covering letter for depositing it at the office of Chemical Analyzer, Aurangabad, from his cross-examination it emerges that on 04.05.2000 he had returned those sample packets and on 05.05.2000 sample packets were re-handed over to him and he deposited it to the office of Chemical Analyzer, Aurangabad on 06.05.2000. Police Constable Hiralal (PW-10) nowhere deposes that sample packets were handed over to him by A.S.I. Pundlik (PW-7) on 04.05.2000. It means that from 04.05.2000 till 05.05.2000 those sample packets were in custody of A.P.I. Morvane who was the head of raiding party as well as Investigating Officer of this crime.

20. A.P.I. Morvane (PW-9) nowhere deposes that after returning to Police Station from raid, the seals of Police Station used by him at the time of sealing of Ganja samples, were handed over in the safe custody of in-charge of muddemal properties Pundlik Thorat (PW-7), to rule out tampering of muddemal samples in between 04.05.2000 to 05.05.2000, before referring it to Chemical Analyzer. Thus, the possibility of tampering of the sample packets by A.P.I. Morvane (PW-9) cannot be ruled out by prosecution and in such circumstances benefit of doubt goes in favour of the accused.

21. Another important aspect is that Investigating Officer A.P.I. Morvane (PW-9) nowhere deposed that specimen seal used at the time of sealing of article, was separately sent to Analyst. Division Bench of this Court in the case of **“Murata Chiharu Vs. State of Goa”** reported in [**1999 (1) Mh.L.R. 235**] ruled that there is sanctity in sending specimen seal to Analyst and specimen seal is separately sent to him so as to ensure that there is no tampering of sealed envelopes. On this count also prosecution cannot rule out the possibility of tampering of sealed samples of Ganja before it reached to Chemical Analyst. Therefore, in view of possibility of tampering of muddemal at Police Station, benefit of doubt goes in favour of accused No.1.

22. In the circumstances, I have no hesitation to hold that prosecution miserably fails to prove that on 04.05.2000 accused

No.1 was found in conscious possession of Ganja which is narcotics drug within the meaning of N.D.P.S. Act. Unfortunately while convicting the accused under Section 20 (1) (b) of N.D.P.S. Act learned trial Court did not consider the above lacunas emerged in the prosecution evidence. Therefore, the conviction of the accused for the offence punishable under Section 20 (1) (b) of the N.D.P.S. Act being bad in law, deserves to be set aside, by allowing this appeal.

23. Hence, the following order

ORDER

1. Criminal Appeal No.129 of 2002 is allowed.
2. Conviction of appellant / accused No.1 Pradeep Sakharam Jadhav in Special Case No. 9/2000 is set aside.
3. Appellant Pradeep Sakharam Jadhav is acquitted of the offence punishable under Section 20 (b) (i) of N.D.P.S. Act.
4. Bail bonds and surety bonds of the appellant shall stand cancelled. He be set at liberty if not required in any other case.

**(SUNIL K. KOTWAL)
JUDGE**