

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.541 OF 2014

WITH

CRIMINAL APPLICATION NO. 1428 OF 2018

Pratap Bhimsingh Parera

R/o : Aska, District Ganjam,

Orissa (C-16693)

At present lodged in Circle No.3,

Barack No. 3, Yerawada Central Prison,

Pune – 6

.... Appellant

Vs.

The State of Maharashtra & Anr.

.... Respondents

WITH

CRIMINAL APPEAL NO.253 OF 2015

Gandadhar Babaji Lenaka

Age : 40 years,

R/o : Nandighor, Thana – Odoga

District Nayagad (Orissa)

.... Appellant

Vs.

The State of Maharashtra

(At the instance of Railway Police

Station, Solapur)

.... Respondent

WITH
CRIMINAL APPEAL NO.313 OF 2014

Mrs. Savita Pratap Parera
At present Yerawada Central Prison
Pune.

.... Appellant

Vs.

The State of Maharashtra
(Through Railway Police Station
Solapur (CR No.1/2011))

.... Respondent

WITH
CRIMINAL APPEAL NO.433 OF 2014
WITH
CRIMINAL APPLICATION NO.1106 OF 2017

Mrs. Santoshi Santosh Pradhan
Age : 27 years,,
R/o : Bramhapur, Near Gate Bazar,
District Ganjam (Orissa)
At present Yerawada Central Prison
Pune.

.... Appellant

Vs.

The State of Maharashtra
(Through Railway Police Station
Solapur (CR No.1/2011))

.... Respondent

Ms. Ameeta Kuttikrishnan, appointed Advocate for all Appellants.
Mr. S.H. Yadav, APP for the State.

Coram : **Smt. Sadhana S. Jadhav, J.**

Date : 7th December 2018

JUDGMENT :

1 The appellants herein are convicted for the offences punishable under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“NDPS Act” for short) and sentenced to suffer rigorous imprisonment for ten years. They are further sentenced to pay a fine of Rs.10,000/- each and in default of payment of fine, rigorous imprisonment for six months by the Special Court, Solapur in Special (NDPS) Case No. 23 of 2011 vide judgment and order dated 15th July 2013.

2 Being aggrieved by the said judgment, the appellants herein have filed the present appeals, through Jail.

3 It is the case of the prosecution that on 11th May 2011, PW-3- Pandurang Suryabhan Bandgar was working with Railway Protection Force (“RPF”), Solapur Division and was deputed on Bhubaneshwar-Mumbai Konark Express from Gulbarga to Dound on

patrolling duty. When he reached Bogie No. S-4, one woman sitting on Berth no.39, informed him that there was an unclaimed red coloured bag below her seat and it does not belong to any passenger in the coach. Therefore, he enquired with the passengers. That appellant- Savita Parera informed him that the bag belonged to her. She was accompanied by one female and two male persons, who are other appellants and they claimed the ownership of other bags. Upon enquiry, the said persons informed him that the bags contained domestic articles and clothes. He inspected the bags and he found pungent smell emanating from the bags. Therefore, he asked them to open the bags. He found polythene bags containing material like ganja. He immediately informed the Control Room, Solapur on phone. At about 7.45 pm, the train reached Solapur station. P.S.I., Khandare (PW-1) was present on the platform alongwith the Staff. The said four persons were made to alight from the train. The panchanama was prepared on the Railway Station. They all proceeded to G.R.P. Police Station, Solapur and thereafter he gave a written information, which is marked at Exhibit 64.

4 The investigation was set in motion and undertaken by PW-1, Vinayak Mahadeo Khandare, who was attached to Solapur Railway Police, as Police Inspector. He had summoned two persons to act as panchas and one person with weighing machine. They had seized the bags from below the Berth no. 39 in Bogie no. S-4. There were four persons. He informed them that whether they have any objection to seize the bags or whether they wanted to be searched before the Gazetted Officer or Executive Magistrate. They had no objection for the bags to be seized at the hands of PW-1 and accordingly they had signed the consent letters. The letters are collectively marked from Exhibits 53 to 56. They had weighed the material seized from the bags and weight of the same was found to be 43kg., 500 gms. Five samples of 500 gms. each were taken for chemical analysis in separate packets. They were sealed and labelled in presence of panch witnesses, seized property was deposited with Muddemal Clerk and thereafter PW-1 lodged a report at the police station on behalf of the State of Maharashtra. On the basis of the

said report, Crime No.1 of 2011 was registered against the accused at Solapur Railway Police Station for the offence under Section 20(b) of NDPS Act. The appellants/accused are in Jail since then.

5 After completion of investigation, the charge-sheet was filed on 8th August 2011. The case was registered as Special Case No. 23 of 2011. The prosecution has examined eight witnesses to bring home the guilt of the accused.

6 PW-3 Pandurang Suryabhan Bandgar was the person who had set the law into motion. He has admitted in the cross-examination that Konark Express halts at Solapur station for 10 minutes. On that day, his duty was from Gulbarga to Dound and that he has completed his escort duty from Gulbarga to Dound. It is admitted that Bogie no. S-4 was reserved bogie. Berth No. 39 was not reserved in the name of any of the accused. All the berths in the said train were reserved on that day. That there is one T.T.E. (Travelling Ticket Examiner) for Bogie nos. 4, 5 and 6 from Wadi to

Solapur. His admissions in the cross-examination are as follows:

- That, he was Incharge of escort duty in the said train,
- That two Head Constables and two Constables were with him,
- That he has not enquired with T.T.E., in whose name berth No. 39 was reserved,
- That bogie no. 4 was reserved bogie,
- That without reservation ticket, the person cannot travel only on the card ticket in reserved bogie,
- that the persons, who are having card tickets have to take challan from T.T.E. in order to travel in the reserved compartment,
- that the accused were having challans,
- that the accused persons did not know Marathi language,
- that the woman sitting near berth no. 39 was Savita Parera,
- that he has stated in the report at Exhibit 64 that the accused were not carrying three bags with them, but they were sitting near three bags,
- that he has not mentioned in Exhibit 64 about the presence of PSI, Khandare with his staff on the platform and that he narrated the incident to them, neither he has stated that he had enquired with the accused.

7 PW-1, Vinayak Mahadeo Khandare has given following admissions before the Court:

- That the Sub Divisional Police Officer (SDPO) is the immediate superior officer to GRP at Solapur and that the office of SDPO is situated in the same premises.
- that he has not personally taken down the entry of information received in station diary, but the PSO has scribed it in the station diary. He had seen PSO taking the entry in the station diary, but the extract of the station diary is not filed alongwith the charge-sheet.
- that he has knowledge that the entry in the station diary is a vital piece of document in the case registered under NDPS Act and that the said provisions are mandatory.
- that there is no recital in Exhibit 58 (the FIR) that he had informed the accused persons of their rights to be searched and the bags to be seized in presence of the Gazetted Officer or the Executive Magistrate,
- that there is no recital in the report at Exhibit 58 that the material found in the bags was emanating foul smell or that it was contraband.

- that there is no recital in Exhibit 58 that seized property was weighed in presence of the man with the weighing scale and the panch witnesses on the platform.
- that there is no recital that samples were drawn in five packets, sealed, labelled and deposited with Muddemal Clerk.
- that S-4 is sleeper reserved bogie, there are eight berths in one compartment. Seat nos. 39 and 40 are single seater. They are chairs facing each other. The passenger on Seat no.39 can keep the luggage below his seat only. There were occupants on seat nos. 39 and 40.
- that there is no enquiry or investigation about the names or identity of the persons, who had occupied seat nos. 39 and 40. The reservation chart does not find place in the charge-sheet.
- that the consent letters at Exhibit 53 to 56 are in the writing of Writer, Mr. Pathak, Police Naik. The extract of muddemal register is not on record.
- that he (PW-1) had not handed over muddemal property to the Station House Officer and neither obtained signature and seal of

Station House Officer on the muddemal property given to Muddemal Clerk.

- that no inventory was made of the property seized before the Magistrate.
- that the accused are non-Marathi speaking persons. All the documents are written in Marathi. The consent letters are signed in Oriya language. Accused no. 3-Santoshi is illiterate.
- that according to him, he had submitted a written report to the superior officer as regards the seizure of the property but has not produced the said report on record. The complaint at Exhibit 58 does not indicate that four bags were found under Seat no. 39. He had called PW-7, Shabbir Imamsab Shaikh alongwith weighing machine.
- that muddemal property was sent to the office of the Chemical Analyser through Constable Malvadkar. It is further admitted that Shabbir Shaikh is running flower shop near Railway Police Station.

8 PW-2, Sarfaraj Ahmad Shaikh has acted as a panch. He was called at Railway Police Station. He has acted as panch for the arrest of the accused persons. It is pertinent to note that he has candidly deposed before the Court that he has only signed the panchanama and left the place. The police have not shown any person to him.

9 PW-4, Mahadeo Jayram Sonawane has also acted as a panch for seizure of the bags. He was present at Solapur Police Station. He had entered bogie no. S-4 alongwith police personnel, more particularly to Berth no. 39. There were two male, 2 female and one child. They all were made to alight at Solapur Railway Station alongwith four bags. PW-7 Shaikh was present with the weighing scale. He has noted the contents of each bag. He allegedly enquired with the four persons about the said bags and they admitted that the bags belonged to them and that all four persons alongwith the child were travelling together. The panchanama was prepared on the platform from 7.35 pm. to 9.15 pm. The panchanama is at Exhibit 61.

He has admitted in the cross-examination that there is no recital that Ganja was found in black packets. **The capacity of the scale was 300 gms.** The ganja found in one bag was weighed only once. The number of black bags were not counted. It is admitted that Head Constable, Bandgar is also working with R.P.F. and that R.P.F. and G.R.P.F. are in front of each other. That another panch, Nandalal Ram is also an employee of R.P.F. That there is no entry about the said incident in the station diary of R.P.F. He had neither informed his superior that he had been called to act as a panch and he was not directed by his superior to go for panchanama. **The bags were under Berth number 39 and there was no enquiry as to who was occupying Birth number 39.**

10 PW-5, Suhas Shrikrushna Malvadkar was working as Police Naik. According to him, he had carried the seized samples to the office of Chemical Analyser at Pune. When he visited the office the office was closed. PW-1 had directed him to take the samples again on the next day. PW-5 was also working as Court Orderly. He

had also noticed two male, two female and one child and there were four bags.

11 PW-6, Pandhari Appa Kadam, was on duty at Solapur Railway Police Station as a P.S.O. He had received one phone call from R.P.F. constable, Bandgar and that in Bogie no. S-4 of Konark Express, he has found two male and two female transporting contraband. He had taken the entry at serial no. 16.

12 PW-7, Shabbir Imamsab Shaikh is declared hostile by the prosecution and therefore it would not be necessary to discuss his examination-in-chief. Hence, the fact that the contraband was weighed has not been proved.

13 PW-8, Rajendra Malkappa Nandure was deputed at Solapur Railway Police Station. He was summoned by PSI, Khandare to the Railway Station platform. He had taken two panch witnesses from RPF office. He has also stated that the accused were two male, two female and one child.

In the cross examination, he has admitted that PSI, Khandare had not informed him the reason for going to platform. His statement was recorded in the course of investigation, but he had not stated that the said bags belonged to two male and two female pointed out by Mr. Bandgar. He has admitted that it would not be possible for him to tell that he could not recollect as to whether the weighing machine was electronic or it was a scale and further that how much ganja was weighed everytime.

14 Upon perusal of the records and proceedings and substantive evidence adduced by the prosecution at the time of the trial, it is clear that the prosecution has failed to establish that the bags containing contraband belonged to the accused persons for the following reasons:

First and foremost PW-3, Pandurang Bandgar has specifically stated that he has not enquired, recorded or ascertained the identity of the person in whose name Seat number 39 was reserved or the person who was travelling on Berth number 39. He

has not mentioned in his report at Exhibit 64 about the child, which was with the four accused. There is no enquiry with the T.T.E. about the challan, which was found in possession of accused no.4- Savita Parera stating therein that they had paid Rs.1,800/- and that they had not occupied any particular seat in the reserved bogie. That the bags were not identified as belonging to the accused persons. There is no recital in the panchanama about any other articles in the bags besides the contraband, although the accused were shown to be travelling from Bhuvaneshwar to Mumbai.

15 It is pertinent to note that PW-3 has specifically admitted that the said train halts at Solapur for just 10 minutes and that he was present at the time of panchanama and after the panchanama he had lodged the report at G.R.P. Police Station and that he has completed his escort duty from Gulbarga to Dound. It would be practically impossible to complete the entire exercise within 10 minutes. It is not known as to why there is no mention about the child accompanying the accused persons and to whom the child

belonged, as the accused no. 4 Savita happens to be the wife of the accused no. 2 Pratap and accused no. 1 Gandadhar and 3 Santoshi are independent persons.

16 The accused were not even acquainted with Marathi language and that the consent letters obtained from them are in Marathi. Accused no. 3- Santoshi Pradhan is illiterate and accused no.1 to 4 have signed in Oriya language.

17 The admissions as stated above given by PW-1 are more than sufficient to hold that the enquiry and investigation in a case under NDPS Act was only an idle formality.

18 Learned counsel appointed for the appellants/accused has therefore rightly submitted that the appellants herein have been falsely implicated. It is submitted that in fact the bags were unclaimed. The owners of the bags were not known and that a false case has been foisted upon the appellants. It would be pertinent to note that there is no material on record to indicate that the

appellants were in conscious possession of the contraband nay as to whether they were in possession of the contraband at all. In the case of Avtar Singh and Others¹, the Apex Court had held as follows:

“Possession is the core ingredient to be established before the accused in the instant case are subjected to the punishment under Section 15. If the accused are found to be in possession of poppy straw which is a narcotic drug within the meaning of Clause (xiv) of Section 2, it is for them to account for such possession satisfactorily; if not, the presumption under Section 54 comes into play. We need not go into the aspect whether the possession must be conscious possession.”

The manner in which the police officers have been summoned to act as a panchas would further reflect upon the manner in which the investigation was carried out. Both the panchas are police personnel.

19 The statements made to the police by the accused would be hit by Section 25 of Indian Evidence Act and would not be admissible in evidence. All this has to be viewed from the angle that the panchanama contemplated under the NDPS Act are stringent in nature and therefore in the present case, the charge is confined to possession of contraband at the relevant time.

¹ (2002) 7 Supreme Court Cases 419

20 In the present case, it is the claim of the prosecution that the accused persons had volunteered that they are the owners of the bags. Prelude needs to be taken into consideration the passenger occupying seat no. 39 had informed the R.P.F., PW-3 that the said bag below her seat was unclaimed. In all probabilities, she had seen the bag for a long time. The identity of the person occupying seat no. 39 has not been ascertained and therefore the very presence of the accused persons in a reserved bogie and claiming unclaimed bags is shrouded with mystery. Moreover, there is no explanation by PW-3 about the existence of child alongwith the accused persons. It was incumbent upon the prosecution to ascertain the parentage of the child, the name, age etc. This Court cannot be oblivious of the fact that the child has undergone imprisonment for more than 7½ years and that his childhood is lost. The original native place of the accused is also not enquired into. No explanation was called from them and therefore the accused not only deserve to be acquitted but also strict action would be contemplated against the prosecuting agency. The silence and failure of the accused to explain the

circumstances and therefore undergoing imprisonment for more than 7½ years would reflect upon the poor administration of the society. No case for drawing presumption under Section 114 of the Act could perhaps be made out to prove that the accused were in possession of the contraband. A farce is made out of following mandate of Section 50 of the NDPS Act. In fact, in the present case, the contraband was found in the unclaimed bags. It was not even necessary to search the person of the accused and therefore, it is not known as to why the consent of the accused was recorded under Section 50 especially on the consent letters written in the language not known to the accused. The question that falls for consideration would be as to whether the accused persons had followed the question put to them in their statements under Section 313 of Code of Criminal Procedure. This Court has gone through the original records and proceedings. The evidence is recorded in vernacular i.e. in Marathi language. The language is unknown to the accused persons. There is no material to show that the questions were put to them in Hindi. It is pertinent to note that in question no. 101 of the Statement of accused, Santoshi

Pradhan has answered as follows:

“I again say that police seized our mobile and cash amount with us”

The statement is signed in Oriya language and the answer is in the English language. At the time of framing of charge under Section 228, Sub-clause 2 of Cr.P.C., the questions were put in English and it bears the thumb impression of the accused-Santoshi. Same is the case with the accused Pratap Bhimsingh Parera and Gandadhar Babaji Lenaka.

21 It is apparent that there is a failure in affording an opportunity to the accused persons to explain the circumstances appearing in the evidence against them. Moreover the Court has also failed to see the minor child alongwith the accused. It is apparent that the accused have not understood the questions put to them under Section 313 Cr.PC and the same has been mechanically recorded. Question number 71 is as follows:

“It appears from the evidence of PW-5 that they noticed two male, two female and one child there, what have you to say about it?

Ans.: It is false

22 In a case of State of Rajasthan Vs. Parmanand², the Apex Court had held as follows:

“Does if merely a bag carried by a person is searched without therebeing any search of his person, Section 50 of NDPS Act will have no application. But a bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application”.

In the case of Sk. Raju alias Abdul Haque alias Jagga Vs. State of West Bengal³, the Apex Court has held as follows:

“According to Section 50(1), an empowered officer should necessarily inform suspect about his legal right, if he so requires, to be searched in presence of a gazetted officer or a Magistrate- Strict compliance with S. 50(1) by empowered officer is mandatory- S. 50, however, applies only in case of a search of a person”.

23 In the present case, there was no necessity of searching a person. Secondly, the accused were asked in Marathi language unknown to them. This has to be read in view of the fact that under Section 313 Cr.P.C., the accused have specifically stated that the

² (2014) 5 SCC, page 345

³ (2018) 9 Supreme Court Cases, 708

police officers had taken away their mobile and cash. Upon plain reading of the substantive evidence, it is more than clear that injustice has been done to the persons, who are innocent. The days they have spent in Jail cannot be returned to them. They have been deprived of their liberty for as long as eight years. The police department would be responsible for the same. These are the cases, which may be treated as an eye opener as to how innocent persons have suffered at the hands of police machinery, who have foisted a serious false case upon the innocent persons. It is doubtful as to whether the present appellants/accused would be rehabilitated in their own state also or would be acceptable by their society, since they have undergone imprisonment for eight years in a different state. Although, they are acquitted, the trauma which they have gone through, nay their life, for ever would leave a negative impression upon them.

24 In case of Sidhartha Vashisht alias Manu Sharma Vs. State (NCT of Delhi)⁴, the Apex Court has held as follows:

⁴ (2010) 6 SCC, 1

“197. In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in Indian places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.

198. A person is entitled to be tried according to the law in force at the time of commission of offence.”

25 The Indian Constitution is rooted in Democracy and Rules of Law and it is committed in providing a free and fair trial. This forms a part of the cardinal principle of Criminal Law revolving around the Natural Justice wherein, even the accused or guilty person is treated with a human treatment. The concept of fair trials emanates from the basic understanding that State and its agencies

are entrusted with the duty to bring offenders to justice. The investigation should be a fair investigation and persecution should not take the place of prosecution. A right to fair trial includes a right to fair investigation. At this stage, it is necessary to record that a bias investigation, in violation of the procedures laid down, false implication and ill-treatments to the accused is in violation of the principles of human rights. The State would be responsible for violation of such rights and therefore the negligent, insensitive and irresponsible officers need to be cautioned and their activities need to be enquired into.

26 It is, in view of above discussions, the appeals deserve to allowed. Hence, the following order :

ORDER

- (i) The appeals are allowed.
- (ii) The conviction and sentence awarded by Special Court, Solapur in Special (NDPS) Case No. 23 of 2011 vide judgment and order dated 15th July 2013 is hereby quashed and set aside.

- (iii) The appellants are acquitted of all the charges and be released forthwith.
- (iv) The fine amount if paid, be refunded.
- (v) The Superintendent of Yerawada Prison to send the compliance report of this order and the particulars of the child such as name, age, etc. immediately to this Court.
- (vi) The professional fees of Ms. Ameeta Kuttikrishnan shall be quantified as per rules in each appeals.
- (vii) The writ be issued expeditiously
- (viii) The appeals and applications stand disposed of accordingly.
- (ix) Registry to inform this order to the appellants/accused forthwith, who are lodged in Yerawada Prison.

(*Smt. Sadhana S. Jadhav, J*)