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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.213 OF 1994

Shri H.R. Barge	]	
Superintendent of Central Excise	]	
and Customs (Preventive),	]	
Headquarters, Pune, Through	]	
Public Prosecutor for	]	..Appellants
Union of India.	]	(Original Complainant)

Versus

- | | | | |
|----|---|---|--|
| 1. | Shri Ashok Manikchand Chankeshwara |] | |
| | Age : 35, Occupation – Motor Driver, |] | |
| | Residing at Natepute, Taluka-Malshiras, |] | |
| | District – Solapur. |] | |
| 2. | Shri Chandraprakash Bhaskar Dafal |] | |
| | Age : 39, Occupation : Service, |] | |
| | Residing at Natepute, Taluka-Malshiras, |] | |
| | District – Solapur. |] | |
| 3. | Shri Dilip Dattatraya Dafal |] | |
| | Age : 25, Occupation : Motor Driver, |] | |
| | Residing at Natepute, Taluka-Malshiras, |] | |
| | District – Solapur. |] | |
| 4. | Shri Suresh Lalsaheb Khawale |] | |

Age : 20, Occupation : Service,]
Residing at Natepute, Taluka-Malshiras,]
District – Solapur.]

5. The State of Maharashtra]..Respondents
(Nos.1 to 4 org. accused)

Mr.H.S. Venegavkar, for the Appellant/Union of India.
Mr.Ganesh Gole, for Respondent No.1.
Mr.Ashish Satpute, Amicus Curie appointed Advocate for Respondent No.4.

**CORAM : INDRAJIT MAHANTY &
V.K. JADHAV, JJ.**

JUDGMENT RESERVED ON : 14th DECEMBER, 2018.
JUDGMENT PRONOUNCED ON : 22nd DECEMBER, 2018.

JUDGMENT [Per : INDRAJIT MAHANTY, J.]

1. The present appeal has been filed by the Superintendent of Central Excise and Customs (Preventive) seeking to challenge the order of acquittal dated 31st January, 1994 passed by the Additional Sessions Judge, Pune, in Sessions Case No.502 of 1992 for the offences under Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“NDPS Act” for short) punishable under Section 20(b)(i) , 25 and 29 of the NDPS Act as well as under Section 66(1)(b) of the Bombay Prohibition Act.

2. It would be necessary, at the outset, to take note of the fact that

Division Bench of this Court (Coram : Shri Justice S.S. Parkar and Shri Justice S.R. Sathe), by judgment dated 28th and 29th September, 2004, had allowed Criminal Appeal No.213 of 1994 and convicted Respondent Nos.1 to 4 for the offences punishable under Section 20(b)(i) and Section 29 of the NDPS Act as well as under Section 66(1)(b) of the Bombay Prohibition Act, as well as for the offence punishable under Section 25 of the NDPS Act and ordered necessary directions imposing punishment of imprisonment and fine.

3. It appears from the record that the Appellants (present Respondents) had moved the Hon'ble Supreme Court of India in Criminal Appeal No.783 of 2005 and the said Appeal came to be allowed by the Hon'ble Supreme Court by order and judgment dated 23rd March, 2006 with the following directions :

“ The Appeal above-mentioned being called on for hearing before this Court on the 23rd Day of March, 2006, UPON perusing the record and hearing Counsel for the parties herein, THIS COURT DOTH in allowing the appeal ORDER THAT the impugned Judgment dated 28th/29th September, 2004 of the High Court of Judicature at Bombay in Criminal Appeal No.213 of 1994 be and is hereby set aside and the above mentioned matter be and is hereby remitted back to the Court to dispose of the appeal in accordance with law after giving opportunity of hearing to the parties. The appeal shall be disposed of as expeditiously as possible.”

In view of the aforesaid directions passed by the Hon'ble Supreme Court, the matter has come up for hearing afresh and it would be appropriate at the outset to also take note of the fact that during the pendency of the Appeal, Respondent Nos.2 and 3 have expired and consequently, the appeal stood abated against the said Respondents.

4. It would also be necessary to note here that although Respondent No.1 appeared through his Counsel noted hereinabove, since no counsel appeared for Respondent No.4, this Court appointed Mr. Ashish Satpute as amicus curie to represent Respondent No.4 and consequently we proceeded to hear the matter.

5. Shri H.S.Venegavkar, learned counsel for the Union of India appeared on behalf of the Appellant and submitted that one Mr. Ramhari Tonpe while working as Inspector of Central Excise and Customs, Preventive, at Pune, noted information on 10th March, 1992 at about 3.30 p.m. from one informant that one Tata Tempo bearing No.MNQ 2858 would carry 300 kgs. Ganja and it will start from Natepute and will reach Jejuri in between 11.00 p.m. to 5.00 a.m. and that the destination of the Ganja was at Pune.

It is further the prosecution case that the Inspector wrote down the information and took signature of the informant, he also signed on it and kept the information in a sealed packet and wrote down DRI-1 Report. The said sealed report and DRI-1 Report was placed before the Assistant Collector Shri Tare. Shri Tare is stated to have called the concerned officers and asked them to help Inspector Tonpe in the raid. Accordingly, Mr. Barge, Superintendent was also directed to accompany Inspector Tonpe in the raid.

It is further prosecution case that Inspector Tonpe called two panchas to his Office and substance of the information was informed to them and they were given an idea that they will have to wait during whole night for the purpose of raid. Thereafter, Inspector, Superintendent Barge, police as well as panchas proceeded in two vehicles towards Jujuri. On reaching Jejuri they stopped the vehicles by the side of the State Transport Stand. No vehicle came till mid-night, therefore, Superintendent Barge decided to withdraw one party and the Nil Panchanama was prepared, and Superintendent Barge and some other staff members left the spot.

The Panchas, Inspector Tonpe, police and other staff remained at Jejuri. At about 4.30 to 4.35 a.m. one Bhujbal Sepoy noticed the vehicle as per information and gave whistle to stop it, but since the vehicle did not stop, the Inspector and police had to chase the Tempo., The said Tempo

was intercepted at the foot of Diva Ghat at Pune end. Accused No.1 was the driver of the Tempo. The Tempo was searched and 9 bags containing Ganja were found in the Tempo. Since it was already 5.30 a.m. and dark outside and no facility to weigh the huge quantity of Ganja was available, Inspector Tonpe told the accused No.1 that they will carry tempo and Ganja to the Office and the accused persons consented for it and they also told Inspector Tonpe that the bags contain Ganja. Accordingly, the vehicle alongwith Ganja and accused was taken to Tilak Road Office and gunny bags were taken in the Office and weighed on the platform weighing scale. The net weight of Ganja was 217.4 kg.

It is further the case of prosecution that 100 gram samples were taken from each bag and divided into two equal parts and each part was kept in envelopes and marked as A/1, A/2, A/3 and B/1, B/2 and B/3. The bags were then closed and lac seals were affixed on the mouth of the bags and paper labels bearing signature of the panchas, accused and Inspector Tonpe were affixed on the said bags. The signatures of the panchas, accused and Inspector Tonpe were put on the sample envelopes and lac seals were also affixed on the sample packets. The gunny bags were deposited in the Central Godown. One set of sample pack was sent to the Chemical Analyser alongwith letter through Bhujbal Sepoy on 12th March, 1992 and on receipt of Chemical Analysis Report, Superintendent Barge lodged the

complaint before the Trial Court. Accordingly, charges were framed, statements of accused were recorded and trial was commenced.

6 In the course of trial, learned Sessions Judge framed three points for consideration as follows :

- 1] *Does the prosecution prove that on 10.3.1992 at about 3.30 a.m. the accused found in possession with ganja in conspiracy with each other?*
- 2] *What offence the accused have committed ?*
- 3] *What order ?*

The finding of the learned trial court was 'No' to the first two points and accordingly the order of acquittal was passed and reasons were recorded in the impugned judgment.

7. Learned Trial Court considered the submissions advanced by the learned counsel for the respective parties and came to hold that the statement of the accused recorded by the Competent authority was verified and it was seen that Inspector Tonpe (PW 1) had recorded statements of accused. Superintendent Barge had also recorded statements of accused Nos.1 to 4 which were marked as Exhibit 38 to 41. Accordingly, he took into consideration the statement of accused No. 4 at Exhibit 52, statement of accused No.1 at Exhibit 51 and statements of other accused persons as well and came to hold that it is settled principle that the statements recorded by

the Central Excise and Customs Officers are admissible and they are not inadmissible in evidence, yet since the accused persons had retracted their statements, the same could not be accepted as evidence. It is further recorded that while the statements recorded by Superintendent Barge at Exhibit 38 to 41 disclose that Ganja was loaded by one Gajanan Mahadeo Padase and that Accused No.1 had agreed to transport it by accepting Rs.3000/- by way of his hire charges, but the statements recorded by Inspector Tonpe disclose that Ganja was not of the said Padase, but instead Chandraprakash Dafal, accused No.2 had approached accused No.1 and requested him to transport the gunny bags for Rs.300/- and accordingly it was loaded in the mini tempo. The trial court found that two different stories were put in the statements dated 11th March 1992 and 6th April 1992 and when the first statement was recorded by Superintendent Barge, there was no necessity for the second statement to be recorded on 6th April 1992 and such recording of distinct statements would clearly negate that such statements were not voluntary. The Trial Court placing reliance on the Judgment in the case of Hasmukh Lal vs. State of Gujarat, 1993(2) Cri.L.C. 530, in particular, Section 24 and 3 of the Indian Evidence Act, came to hold that confessional statement of an accused is a weak piece of evidence and if retracted by the accused, cannot be relied upon unless corroborated by some independent witnesses and retraction can be made at a later stage of

confession by an accused and can be taken as an aid but cannot be taken as a foundation.

8. Accordingly, learned Sessions Judge found that in the instant case, not only two different statements recorded by two different officers at two different times, but raised doubt whether any such statement was really recorded and did not find the said statements to be true version of the accused. Accordingly, the accused persons were acquitted for all charges.

9. Shri Venegavkar, learned counsel for Union of India placed reliance on the judgment in the case of **SK. Raju alias Abdul Haque Alias Jagga vs. State of West Bengal**¹ and submitted that finding of the Trial Court that Section 42 of the NDPS Act had not been complied with was erroneous finding, since the vehicle in which the Ganja was being transported (Tempo) was seized on a public road, and accordingly, he submitted that requirement of compliance of Section 42 was not required since the vehicle was found in public place.

10. On the other hand, Shri Ganesh Gole, learned counsel for Respondent No.1 and Shri Ashish Satpute appearing for Respondent No.4 (only two survived accused), submitted that the facts in the judgment

¹ (2018)9 SCC 708

referred to and relied upon by the learned counsel for Union of India categorically requires compliance of Section 50 of the NDPS Act. They submitted that in the fact situation of the case at hand, the conditions stipulated under Section 50 have not been complied with and in particular placed reliance on the finding of the Hon'ble Apex Court in the aforesaid judgment in para Nos.18, 19 and 20, which are quoted hereinbelow.

“18. In Parmanand, on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two-Judge Bench of this Court considered whether compliance with Section 50 (1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50 (1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two-Judge Bench of this Court in Dilip v. State of M.P.] It was held thus: (Parmanand SCC p. 351, para 15]

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

19. Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate or before the nearest gazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being searched before the Superintendent, who was not an independent officer. It was held thus : (Parmanand case, SCC pp. 352-53, para 19).

“19.We also notice that PW 10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest gazetted officer or before PW 5 J.S.Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers

that they would like to be searched before PW 5 J.S. Negi by PW 10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or the nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW 10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW 5 J.S. Negi, the Superintendent, who was part of the raiding party. PW 5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW 5 J.S. Negi, the search would have been vitiated or not. But PW 10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW 10 SI Qureshi is vitiated.”

20. The question which arises before us is whether Section 50(1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW 2 and PW 4.

11. Insofar as compliance of Section 50 of the NDPS Act is concerned, it reads thus :

50. Conditions under which search of persons shall be conducted -

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by any one excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy two hours send a copy thereof to his immediate official superior.

12. On going through the evidence of PW 1 Ramhari Tonpe who was the head of the raiding party, it is clear therefrom that he was the Officer, who stopped the Tempo, enquired with the driver who gave his name as Ashok Manikchand Chankeshwar (Respondent No.1). Thereafter, one Inspector J.M. Deshpande and Sepoy Bhujbal entered the Tempo from the backside where they found three persons inside the Tempo. Inspector Tonpe also entered the Tempo, enquired names of the said three persons who gave their names as Chandraparakash Bhaskar Dafal (accused No.2), Dilip Dattatraya Dafal (accused No.3) and Suresh Lalasaheb Khawale (Accused No.4). In his evidence in examination-in-chief, he stated that he

enquired about the bags from accused No.2 (since deceased) who told him that Ganja is in the bags. Thereafter, he called panchas, opened all the gunny bags in presence of panchas and verified and found that Ganja was there in the bags. Thereafter, he took the vehicle carrying Ganja to his office, where weight was carried out and samples were drawn. It is extremely important to take a note of the statement made by PW 1-Tonpe to the following effect,

“ I took personal search of the accused and nothing was found in it.”

The aforesaid evidence of PW 1-Tonpe clearly indicates that the accused were never informed of their rights to be taken before a Gazetted Officer or the nearest Magistrate. It is clear from the evidence of the raiding inspector that he never made any such offer for search being conducted in presence of a Gazetted Officer or a Magistrate. Admittedly, he himself carried out the search of the vehicle in which the contraband was being carried and also carried out physical search of the accused persons.

13. In the case at hand, we find that there is no shred of evidence of compliance of requirement of Section 50 of the NDPS Act. Clearly in the case at hand the contraband was carried in a vehicle (Tempo). The Hon'ble Supreme Court in the aforesaid judgment in para 12 has stipulated that an empowered officer under Section 42(1) is obliged to reduce to writing the

information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place. In the case at hand, admittedly, the raiding party found the contraband in the conveyance (Tempo). Consequently, it was obligatory on the part of the Officer to comply with the requirement of Section 42(1) of the NDPS Act and in the case at hand evidence is available on record to indicate that the information received by the Inspector was reduced into writing and placed before the Superior Officer, who gave directions to carry out the raid. Therefore, we are of the considered view that finding of the learned trial Court to the effect that requirement of Section 42 had not been complied, appears to be clearly perverse in the fact situation of the present case.

14. We find that the requirement of Section 50 of the NDPS Act and in particular sub-section (2) and (3) have not been complied with and accordingly as held by the Hon'ble Supreme Court in the case of State of Rajasthan v. Parmanand² the empowered officer was required to comply with the requirement of Section 50(1) as the person of the Respondent was also searched. Accordingly, in the case at hand, there has been total non-

² (2014) 5 SCC 345

compliance of the requirement of Section 50 of the NDPS Act, rendering the seizure unlawful and consequently supporting the order of acquittal passed by the learned trial Court. Hence, we do not find any merit in the present appeal.

15. Accordingly, Appeal No.213 of 1994 stands dismissed.

Sd/-
(V.K. JADHAV, J)

Sd/-
(INDRAJIT MAHANTY, J)