

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

CRIMINAL APPEAL NO.205 OF 2018

Suresh Nivruti Shinde

Age : 32 years, Occu : Nil,

R/o. Mahatma Gandhi Kushtadhan

Colony Latur.

.. Appellant

Versus

The State of Maharashtra

.. Respondent

...

Advocate for Appellant : Shri Zia Ul Mustafa
APP for Respondent – State : Shri A.A. Jagatkar

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**CORAM : P.R. BORA, J.
Dated: August 08, 2019**

ORAL JUDGMENT :-

1. Accused no.3 in Special Case No.01 of 2007 decided by the Additional Sessions Judge-2, Ambajogai on 25.03.2014 has challenged the said judgment and order in the present appeal. The learned Sessions Judge has held the present appellant guilty for an offence punishable under Section 20 (b) r.w. Section 31 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter in short 'NDPS Act') and had sentenced him to suffer Rigorous Imprisonment for 15 years and to pay fine amount of Rs.1,50,000/-, in default to suffer 3 years Simple Imprisonment.

2. When the present appeal is taken up for hearing, the learned counsel appearing for the appellant submitted that, in Special

Case No.01 of 2007 four accused persons were prosecuted and all of them were held guilty by the learned Sessions Court. The learned counsel submitted that, accused nos.1, 2 and 4 were also held guilty by the Sessions Court for the offence punishable under Section 20 (b) of the NDPS Act and were sentenced to suffer Rigorous Imprisonment for 10 years and to pay fine of Rs.1,00,000/- each, in default to suffer two years and six months Simple Imprisonment. The learned counsel submitted that, accused nos.1 and 4 had preferred Criminal Appeal No.265 of 2014 against the Judgment and order passed in Special Case No.01 of 2007, whereas accused no.2 had preferred Criminal Appeal No.105 of 2016 against the said order of conviction. The learned counsel further submitted that, Criminal Appeal Nos.265 of 2014 and 105 of 2016 were heard together by this Court and vide judgment and order passed by this Court on 04.05.2017, this Court has set aside the conviction of all the said three accused and has acquitted them from the offence punishable under Section 20 (b) of NDPS Act charged against them. The learned counsel submitted that, the copy of the said judgment is placed on record by the present appellant.

3. The learned counsel further submitted that, since the present appellant was previously convicted for an offence under the NDPS Act, the Additional charge was framed against him under
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Section 31 of the said Act and that was the reason that, though the other accused were sentenced with the Rigorous Imprisonment for 10 years, the present appellant has been sentenced for the period of 15 years and is also subjected to pay a fine amount of Rs.1,50,000/-.

4. The learned counsel submitted that, in Special Case No.01 of 2007 allegation against all the four accused was that, on 11.09.2017 while they were travelling by Hyderabad – Aurangabad passenger train they were found in possession of 30 kg 900 gm ganja with an intent to transport it for sale. The learned counsel pointed out that, this Court in the Judgment delivered on 04.05.2017 in the aforementioned Criminal Appeal No.265 of 2014 with Criminal Appeal No.105 of 2016 has recorded a clear finding that, the prosecution has utterly failed in bringing on record any evidence to prove that, the present appellants were in conscious possession of the Ganja allegedly found below their seats in the train by which they were travelling at the relevant time.

5. The learned counsel submitted that, the present appellant for his own constraint could not file the appeal previously and hence the same could not be decided along with the appeals filed by the co-accused. The learned counsel submitted that, the findings recorded by this Court, however, would squarely apply to the case of

the present appellant also. The learned counsel, in the circumstances, prayed for allowing the appeal by setting aside the order of conviction and to acquit the appellant of the offences charged against him.

6. Learned APP Shri Jagatkar submitted that, since the present appellant was also charged with an offence under Section 31 of the NDPS Act, the Judgment delivered in the case of the other appellants may not be applicable and the case of the present appellant would have to be considered differently. The learned APP supported the order of conviction passed against the present appellant. The learned APP submitted that, the present appellant appears to be a habitual offender and the said aspect has been rightly considered by the learned Sessions Court. The learned APP, in the circumstances, prayed for dismissal of the appeal.

7. I have gone through the impugned judgment as well as the common judgment delivered by this Court in Criminal appeal No.265 of 2014 with Criminal Appeal No.105 of 2016. It is not in dispute that, the charge against all the four accused prosecuted in Special Case No.01 of 2007 was common that, all of them were found in possession of 30 kg 900 gm of Ganja for the purpose of transporting it for sale while they were traveling by Hyderabad–

Aurangabad passenger on 11.09.2007. It is quite evident that, the charge no.2 was framed against the present appellant under Section 31 of the NDPS Act since there was earlier conviction at his discredit under the NDPS Act.

8. This Court in the common judgment delivered in Criminal Appeal No.265 of 2014 in para no.14 has made elaborate discussion and has scanned the evidence insofar as the charge framed against the accused under Section 20 (b) of the Act is concerned. I deem it appropriate to reproduce the entire said discussion, which reads thus :

“14. In the case of **Girija Prasad (Dead) through L.Rs. vs. State of M.P.**, the Apex Court has observed that the credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is further observed that it is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. It is further observed that there is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. What is required is the rule of prudence to be more careful while scrutiny of evidence of such witness. Once the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence. Thus, the legal position is quite settled as to acceptance of testimony of police official. In this view, the testimony of Moinkhan Pathan (PW.1) cannot be rejected or discarded for the reason that the prosecution has not examined any independent witness. However, the rule of prudence requires that before acting upon the testimony of such

witness, testimony of such witness needs to be scrutinized very carefully and to guarantee truthfulness of fact deposed of such witness, insist for corroboration. On careful and close scrutiny of testimony of Moinkhan Pathan (P.W.1), I am of the view that his testimony is not of such a nature on which court can place implicit reliance without corroboration. In order to prove guilt for the offence punishable under Section 20 (b) of N.D.P.S. Act, it is incumbent upon the prosecution to prove that the accused was found in conscious possession of the contraband article. It has come on record that all the seats in the railway bogie in which accused are alleged to have been travelling, were occupied. The accused were found travelling in general bogie. There is no iota of evidence to show that the accused were travelling in the said bogie. No railway tickets or any evidence gathered to establish that they were travelling in the said bogie and the alleged bags were kept by them below the seats where they were found to be sitting. There is no other evidence to show that the accused were found boarding the train with those bags. So also, there is no evidence to show that the accused had kept the bags below the seats where they were sitting. If we consider the testimony of Moinkhan Pathan (P.W.1), then according to him, the accused were sitting on seat nos.12,13,14 and 15. On suspicion, enquiry was made and they found to be frightened. On checking the bags lying below their seats, the alleged contraband article was found in the bags. Thus, the testimony of Moinkhan Pathan (P.W.1) no way establishes the link that the accused boarded the train with the alleged bags and they kept the bags below their respective seats. Only for the reason that the bags were lying below the seats where they were found to be sitting in itself is not sufficient to establish that the accused were found in conscious possession of the alleged contraband article. In this context, learned Counsel appearing for the appellants has placed reliance on the decision of this Court in the case of **Pralhad s/o Lalna Koylawar vs. The State of Maharashtra**, wherein, in a case similar to the facts of the prosecution case, the conviction was set aside and accused were acquitted. In para 8, the Court has observed, as under:

"8. The version of PW Devidas reveals that the bag was found lying unattended on the rack. He suspected that the appellants were the owners of the bag. No witness was examined to show that either of the appellants was found entering the bogie No.4 alongwith the said bag. The

solitary version of PW Devidas falls too short to establish into "conscious possession" of the said bag with the appellants. The offence is of serious nature. Obviously, the prosecution is required to prove the offence beyond reasonable realm of doubt. The presence of the cloth bag on a berth / rack of the Railway compartment coupled with the presence of the appellants in the same compartment by itself is insufficient to positively infer their complicity."

9. With the observations as above, this Court has set aside the order of conviction passed against accused nos.1, 2 and 4 and has acquitted them. This Court has observed that, the star witness in the sessions case was Moinkhan Pathan (PW-1). According to his testimony, the accused were sitting on seat nos.12, 13, 14 and 15 in one bogie of Hyderabad - Aurangabad passenger train. This Court has further observed that, on inquiry made with the accused since they could not give proper answers, only on suspicion they were taken in custody and were prosecuted for the offence under Section 20 (b) of the NDPS Act. As has been observed by this Court, the testimony of Moinkhan nowhere establishes the link that the accused boarded the train with the alleged bags and they kept the bags below their respective seats. The Court has further observed that, only for the reason that the bags were lying below the seats which were occupied by the accused persons is not sufficient to establish that, the accused were found in conscious possession of the alleged contraband article. This Court has relied upon the Judgment in the

case of **Pralhad s/o Lalna Koylawar Vs. The State of Maharashtra,**
2008 (2) B Cr.C 39. This Court in para-17 of the Judgment has recorded the following finding :

“17. On due consideration of the submissions advanced, the question which poses for my consideration is whether the prosecution has proved that accused were found in possession of contraband article. As discussed above, except the testimony of Moinkhan Pathan (PW.1), there is no other evidence to show that the accused were found in possession of alleged contraband article. The testimony of Moinkhan Pathan (PW.1) is not such to place implicit reliance on it. Although, independent witnesses were available, the prosecution has not recorded the statement of the witnesses who were travelling in the same bogie and particularly, the compartment in which the accused were alleged to be travelling with the alleged contraband article. As per the testimony of Moinkhan Pathan (PW.1), the fact regarding finding of the accused in possession of contraband article, revolves around 4.45 a.m. in the midnight on 11.09.2007. There was no information passed on by Moinkhan Pathan (PW.1) to his superior officer immediately after the contraband article found in possession of the accused. It has come on record that the train was stopped at each and every stoppage. There is no station entry to show that immediately the information was passed on to concerned police station. Moinkhan Pathan (PW.1) has deposed that the bogie was heavily crowded by passengers travelling to Shirdi. He deposed that he reached police station (Railway), Parli Vaijnath at 7.30 a.m. He nowhere deposed that he contacted the superior officer i.e. Officer-in-Charge of the police station and informed him about the accused being caught with huge quantity of Ganja.”

It appears to me that, the observations as are made by this Court in the aforesaid common judgment would squarely apply to the case of the present appellant. In the circumstances, for the same reasons as are recorded by this Court in the common Judgment and order passed in Criminal Appeal No.265 of 2014 with Criminal Appeal

No.105 of 2016, the present appellant also deserves to be acquitted of the offence charged against him under Section 20 (b) of the NDPS Act. It need not be stated that, in view of the finding as above, the charge framed under Section 31 of the NDPS Act against the present appellant also has to be held to be not proved. For the reasons stated above, the following order is passed.

ORDER

(i) The Judgment and order dated 25.03.2014 passed by the Additional Sessions Judge-2, Ambajogai in Special Case No.01 of 2007 is quashed and set aside.

(ii) The appellant – accused is acquitted of all the offences charged against him. He be released forthwith, if not required in any other case or crime.

(iii) Criminal Appeal stands allowed in the aforesaid terms.

(iv) The copy of the present judgment and order be supplied to the appellant free of costs and be delivered to him through the Jail Authorities. Registry to ensure the compliance.

(P.R. BORA, J.)

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