

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 176 OF 2016**

Jogindersingh @ Zokia Raghubirsingh Chauhan,

Age : 67 yrs., Occ. Labour.

R/o. A/p. Sangavi, Tal. Deola,

Dist. Nashik.

..Appellant.

v/s.

State of Maharashtra

through P.I. Deola Plice Station,

Taluka Deola, District Nashik.

..Respondent.

Mr. Tejas Hilage, advocate appointed for the appellant.

Mr. S.R. Agarkar, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : APRIL 23, 2019.

JUDGMENT :

1 The appellant herein is convicted for the offence punishable under section 8 read with section 22(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to suffer R.I. for 5 years and to pay fine of Rs. 50,000/- I.d. to suffer further R.I. for one year by the Additional Sessions Judge-3, Nashik vide Judgment and Order dated 4/12/2014 in Special (NDPS) Case No. 13 of 2013.

Talwalkar

2 Such of the facts necessary for the decision of this appeal are as follows :

(i) That on 20/1/2013 the police of Deola Police Station had proceeded to Umarale Shivar in connection with the investigation of Crime No. 13 of 2013 registered at Deola Police Station for offence punishable under section 302 of the Indian Penal Code.

(ii) On the way near Gram Panchayat office, one unknown person had stopped the vehicle. The said person had informed P.I. Sonawane, who in turn informed the others, that a person namely, Jogindersingh @ Jogiya Chavan from Andhra Pradesh is the owner of Sai Prasad Hotel and is in possession of opium as well as foreign and country-made liquor and he serves the same to the customers. P.I. Sonawane had then decided to lay a trap.

(iii) Accordingly, he had informed the SDPO Shri Gunjal about the said information, reduced the information into writing in the station diary and then proceeded to the hotel.

(iv) At about 4.25 p.m. they met one person at the hotel, who had disclosed his name as Jogindersing @ Zokiya Raghubirsingh Chavan, resident of district Nijamabad, Andhra Pradesh.

Talwalkar

(v) The investigating agency had informed him about the personal search and had apprised him of his right to be searched by a Gazetted Officer or an Executive Magistrate. However, he denied the same.

(vi) In the personal search, three transparent plastic packets were found in the right side pocket of his pant containing brown colour opium, each packet weighed about 50 gms. of opium. The police officers had taken steps thereafter, in accordance with the provisions of the N.D.P.S. Act.

(vii) The accused had further informed that he is residing in village Sangvi in the house of one Namdeo Ahire. He led the police to the said house. In search and seizure, they had found 15 plastic packets containing opium to the tune of 780 grams. They had also found the powder of opium fruits weighing about 21 kilograms. Samples were drawn and sent for chemical analyser.

(viii) On the basis of this, Crime No. 2 of 2013 was registered at Deola Police Station. After completion of investigation, charge-sheet is filed and case is registered as Special (NDPS) Case No. 13 of 2013.

3 The prosecution examined 4 witnesses to bring home

the guilt of the accused.

4 P.W. 1 Vilas Shivaji Wagh was attached to Deola Police Station as Police Hawaldar and was a member of the raiding party. In fact, he was accompanying PI Sonawane for investigation of the crime No. 13/2013. P.W. 1 is the first informant. According to him, an oral intimation was given about his right to be searched by an Executive Magistrate or Gazetted Officer, which he had denied. It is admitted by P.W. 1 that there was no enquiry about the owner of the hotel Sai Prasad nor licence was seized. It is also admitted that prior to personal search by P.I. Sonawane, PI had not offered his personal search. There was no enquiry of Namdeo Ahire or the owner of the house Savitabai Ahire. It is also admitted that the seized article Nos. 3, 7 and 11 do not bear the signature of the panchas.

5 P.W. 2 Nimba Khairnar, who acted as panch for search and seizure has been declared hostile by the prosecution, as according to him, his signatures were obtained by the police and he had not witnessed any search or seizure.

6 P.W. 3 Arjun Bhimaji Khelukar was attached to Deola Police Station as police Hawaldar. He had carried the seized samples to the Forensic Science Laboratory.

7 P.W. 4 PI Sonawane is the investigating officer. According to him, he was proceeding to village Sangvi for investigation of Crime No. 13 of 2013 and near village Umarale one person had given him tip about the accused being in possession of contraband and remains in Hotel Sai Prasad. He has deposed before the Court about the steps taken by him in the course of investigation. It is admitted by him that the owner of the hotel Sai Prasad is Mothabhau Sukdeo Deore and the licence is issued in his name. And the house where they had conducted search was owned by Namdeo Ahire. It is further admitted that out of 3 packets seized from the possession of the accused, samples were drawn from 2 packets and marked as S1 and S2 and there was a reserve sample which was marked as Article-3. According to him, during the search of the said hotel, 58 liquor bottles were found and seized.

8 The learned Special Judge has rightly held that there is no material collected in the course of investigation to indicate

that the hotel and the house were in exclusive possession of the appellant and therefore, he is convicted for being in possession of 150 grms. Opium, which is above small quantity and less than commercial quantity.

9 The learned Counsel for the appellant submits that since P.W. 2 who acted as panch has turned hostile, the seizure from his personal search has not been proved and therefore, the accused deserves to be acquitted. It is also submitted that PI Sonawane had failed to offer his personal search before the accused was searched and the same would be fatal to the prosecution. That no written intimation was given about right to be searched by an Executive Magistrate or Gazetted Officer. Hence, there is violation of mandate of section 50 of the NDPS Act and the same is fatal to the prosecution. According to the learned Counsel, the information received by P.W. 4 was not further communicated to the Senior Officer within 72 hours and therefore, there is non-compliance of section 42 of the NDPS Act.

10 The submission may partly be correct. It is not denied by the accused in statement under section 313 of the Code of

Criminal Procedure that he was in possession of 3 packets containing 50 gms. of opium in each packet.

11 The learned APP was directed to call for a report from the jail authorities about the sentence undergone by the appellant and a report is received from Nashik Road Central Prison indicating therein that on 24/1/2018 the appellant has been released from Nashik Road Central Prison, as he had undergone substantive sentence and hence has been enlarged on 24/1/2018.

12 The learned Judge had rightly acquitted the accused of being in possession of 21 kgs. of opium as there was material to indicate that he was the exclusive owner or the house was in his exclusive possession. That the statement of the accused is not recorded under section 53A of the Indian Evidence Act. However, the prosecution has proved beyond reasonable doubt that the accused was found in exclusive possession of 150 grms. of narcotic substance. Hence, conviction for the offence punishable under section 8(c) of the NDPS Act deserves to be upheld and sentenced to the period already undergone.

13 The professional fees are quantified as per rules, to be paid by the High Court Legal Services Committee to the learned Counsel appointed to espouse the cause of the appellant.

14 Hence, following order is passed :

ORDER

- (i) The appeal is dismissed.
- (ii) The order of conviction and sentence passed by the Additional Sessions Judge-3, Nashik vide Judgment and Order dated 4/12/2014 in Special (NDPS) Case No. 13 of 2013 is hereby upheld.
- (iii) Writ be issued accordingly.

15 The appeal is disposed of accordingly.

[SMT. SADHANA S. JADHAV, J.]