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

CRIMINAL APPEAL NO.588 OF 2008

Daulatram @Dolly Trilok Singh,
Age: 26 years,
R/o. Sagar Kutir Zopadpatti,
Room No. 21,
Near Seven Bungalows, Varsova Road,
Mumbai.

...Appellant
(Original Accused No.3)

State of Maharashtra
(Anti Narcotic Cell vide
C.R. No.319 of 2016 dated 08.11.06)

...Respondent

***WITH
CRIMINAL APPEAL NO.570 OF 2008***

Shahmohammed Salatmatmiya Shah,
Indian Inhabitant, Age: 32 years,
R/o. Khalid Chawl, Room No.3,
Near Iddgah Ground, Meghwadi,
Jogeshwari (E),
Mumbai.

...Appellant
(At present undergoing sentence at Mumbai. (Original Accused No.2)
Central Prison).

State of Maharashtra
(At instance of Anti Narcotic Cell vide
C.R. No.319 of 2016 dated 08.11.06)

...Respondent

**WITH
CRIMINAL APPEAL NO.580 OF 2008**

Bampada @Bamdeo @Ity Sanatan Adak,
Indian Inhabitant, Age: 34 years,
R/o. Sai Shradha Building, Room No.403,
Rahul Park, Bhayendar (E),
Thane.

...Appellant
(Original Accused No.1)

State of Maharashtra
(At instance of Anti Narcotic Cell vide
C.R. No.319 of 2016 dated 08.11.06)

...Respondent

Mr.Dilip Mishra, for the Appellants in Criminal Appeal Nos.580 and 570 of 2008.

Ms.Nasreen Ayubi, Appointed Advocate for the Appellant in Criminal Appeal No.588 of 2008.

Mr.S.V.Gavand, A.P.P. for the Respondent - State.

CORAM : REVATI MOHITE DERE, J.

DATE : 16th APRIL, 2019

ORAL JUDGMENT :

1. The Appellants vide Judgment and Order dated 11th June, 2008, passed by the learned Special Judge (under the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'the NDPS Act'),

City Sessions Court, Greater Bombay, in NDPS Special Case No.91 of 2007, have been convicted and sentenced as under:-

- for the offence punishable under Section 8(c) read with Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 to suffer rigorous imprisonment for 18 months and to pay fine of Rs.10,000/- each, in default, to suffer further rigorous imprisonment for 1 month.

The Appellants along with other co-accused, were however acquitted of the offence punishable under Section 8(c) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. The prosecution case in brief is as follows:-

According to PW6 – Manisha Anant Shirke, PSI attached to Anti Narcotic Cell (ANC), Kandivali Unit, she received information (Exhibit – 48) on 8th November, 2006 at about 06.10 hrs. at the Kandivali Unit, to the effect that three persons were coming near Hotel Holiday Inn, at Juhu at around 10.30 to 11.00 hrs. to sell *charas* to their customers. The said information was noted in the Station Diary and the information was forwarded to the superiors. A copy of the information is stated to have been sent to the superiors through WPC Pataskar. Accordingly, a team was

formed under the supervision of P.I – Angle. Head Constable Shewate is stated to have brought two panch witnesses. On arrival of the two panchas, a pre-trap panchanama was drawn and a team comprising of P.I – Angle, PW6 – P.S.I. Manisha Shirke, PW4 - P.S.I. Dilip Shinde (complainant), P.S.I. Chavan, and five other staff members and two panchas, left the Kandivali Unit for conducting the raid at 08.45 hrs. The police vehicle was parked in the parking area, opposite the main gate of Hotel, ‘Holiday Inn’ at around 09.35 hrs. Thereafter, the team proceeded to the spot situated near Sea Star Building, Balraj Sahani Marg, Near Holiday Inn, Juhu. Two teams were formed. At around 10.10 hrs. three persons were noticed coming from the direction of Balraj Sahani Marg. The said persons stood near the Western Side. All the three persons are alleged to have been carrying bags in their hand. After 10 minutes the said three persons were apprehended. After Section 50 of the NDPS Act was complied with, search of the said three persons was conducted, which resulted as under:-

- (i) The appellant - Bampada @Bamdeo @Ity Sanatan Adak, was found to be carrying 3 kgs 100 gms of *charas* in his bag;
- (ii) The appellant - Shahmohammed Salatmatmiya Shah, was found to be carrying 2 kgs of *charas*; and

(iii) The appellant – Daulatram @Dolly Trilok Singh, was found to be carrying 1 kg of *charas*.

Other articles found on their person were also seized.

Samples were drawn and thereafter post-trap panchanama was drawn by PW6 – P.S.I. Manisha Shirke. Thereafter, the raiding party along with panchas, the appellants and the seized articles returned to the Cuffe Parade Police Station, where PW4 – Dilip Shinde, lodged an FIR, which was registered vide C.R.No.319 of 2006. Thereafter, the muddemal was deposited in the warehouse. The statements of panchas were recorded and Special report (Exhibit – 52) was submitted to the superiors. On 9th November, 2006, PW2, Police Constable Hanumant Patil was called to the Cuffe Parade Office by PW6 – P.S.I. Manisha Shirke and was handed over two letters i.e. for collecting the muddemal from the warehouse (Exhibit – 28) and for forwarding the same to the FSL for analyzing the sample packets (Exhibit-29). On 9th November, 2006, the samples were forwarded to the FSL. After investigation, charge-sheet was filed as against the appellants. Charge was framed as against the appellants, to which they pleaded not guilty and claimed to be tried.

The prosecution in support of its case examined 6 witnesses.

PW1—Sandeep Chetti, Assistant Chemical Analyser, FSL, Kalina; PW2 – Police Constable, Hanumant Patil, carrier of the sample packets to FSL, Kalina from the warehouse i.e. Azad Maidan Unit; PW3 – Vijay Nimbalkar, A.S.I. Store In-Charge at the Azad Maidan Unit, where PW6 – P.S.I. Manisha Shirke deposited the muddemal in the warehouse ; PW4 – P.S.I. Dilip Shinde, attached to Kandivali Unit, who was present at the time of the raid; PW5 - Vinod Tambe, panch, who was present at the time of the raid and PW6 – P.S.I. Manisha Shirke, the Investigating Officer.

The defence of the appellants was that of total denial and false implication.

The learned Special Judge after considering the evidence on record, passed the Judgment and Order dated 11th June, 2008, convicting and sentencing the Appellants, as mentioned in paragraph 1 of this Judgment.

3. Mr.Mishra, learned counsel for the appellants submitted that in the facts, there is non-compliance of the mandatory provision of Section 42(2) of the NDPS Act. He submitted that a copy of the Station Diary entry (Exhibit – 48) was produced by PW6 – P.S.I. Manisha Shirke, for

the first time in her evidence and that the said document was neither a part of the charge-sheet nor was it produced under Section 294 of Code of Criminal Procedure, during trial. He submitted that although it is alleged by PW6 – P.S.I. Manisha Shirke that a copy of the Station Diary entry was sent to the Cuffe Parade office from Kandivali office, there is no inward number on the said document i.e. (Exhibit – 49), to show that the same was received at the Cuffe Parade Office. He submitted that the officers who had made endorsements/signed the said document (Exhibit – 49) have also not been examined. This according to the learned counsel is fatal to the prosecution case. According to the learned counsel, the prosecution had also failed to examine the carrier of the said document i.e. copy of the Station Diary (computerized typed copy, Exhibit – 49) from Kandivali office to the Cuffe Parade office. Mr.Mishra further submitted that PW6 – P.S.I. Manisha Shirke had admitted in her evidence, that the seal which was used in the said case i.e. which was put on the samples/contraband that were collected at the time of the raid was the same that was affixed on the forwarding letter which was sent to the FSL. However, it appears from the record, that the forwarding letter shows that the inscription on the forwarding letter i.e. Exhibit – 22 is not the same as the inscription that is

there on the samples.

4. Learned APP supported the impugned Judgment and Order of conviction and sentence. Learned APP is however unable to show that Section 42(2) of the NDPS Act has been complied with.

5. Heard learned counsel for the parties at length and with their assistance perused the evidence of the witnesses and the documents on record.

6. At the outset, it may be noted that it is not necessary to note the various submissions advanced by the learned counsel for the appellants, inasmuch as, the Appeals need to succeed, as Section 42(2) of the NDPS Act has not been complied with.

7. The evidence of PW6 – P.S.I. Manisha Shirke, attached to the Anti Narcotic Cell (ANC), Kandivali Unit, shows that she had reduced the information received by her, in the Station Diary. Admittedly, a copy of the said Station Diary was not a part of the charge-sheet nor was it produced

under Section 294 of Code of Criminal Procedure. The said document i.e. copy of the Station Diary was produced for the first time, when PW6 – P.S.I. Manisha Shirke was examined. Infact, when the original Station Diary was produced by PW6 – P.S.I. Manisha Shirke, at the time of recording of her evidence, an objection was raised by the defence for not providing a copy, pursuant to which, a copy was given to the Counsel for the appellants and a copy of the original Station Diary was taken on record and marked as ‘Exhibit – 48’. It is also not in dispute that what was sent by the Kandivali Police to the Cuffe Parade Police was not a copy of the handwritten entry made in Station Diary entry (Exhibit – 48) but a computerized typed copy (Exhibit – 49) along with a forwarding letter dated 8th November, 2006, having outward number 256 of 2006. Admittedly, the document at Exhibit – 49 colly., i.e. a copy of the computerized typed copy of the Station Diary along with the forwarding letter, does not bear an inward number to show that the document was received by the Cuffe Parade office. Admittedly, none of the officers who had made endorsements on Exhibit – 49 i.e. Deputy Commissioner of Police, Anti Narcotics Cell, A.T.S., Mumbai or Assistant Commissioner of Police, Anti Narcotics Cell, A.T.S., Mumbai or Senior Inspector of Police -

Angal, Anti Narcotics Cell, A.T.S., Mumbai, have been examined by the prosecution to prove receipt of the said document. Neither the carrier of the said document was examined to show that the document was delivered from the Kandivali office to the Cuffe Parde office.

8. Learned APP is unable to show compliance of Section 42(2) of the NDPS Act. *In Karnail Singh v/s State of Haryana¹*, the Constitution Bench of the Apex Court in para 35(d) held as under:-

“35.

(a)

(b)

(c)

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police

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officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001”.

9. In the facts, the prosecution has miserably failed to prove that a copy of the Station Diary (information) was sent to the superiors, as contemplated under Section 42(2) of the NDPS Act. Considering the same, the Appeals ought to succeed on this very ground. Hence, the following order is passed:

ORDER

- i) The Appeals are allowed;
- ii) The Judgment and Order dated 11th June, 2008, passed by the learned Special Judge under the NDPS Act, City Sessions Court, Greater Bombay, in NDPS Special Case No.91 of 2007, convicting and sentencing the appellants is quashed and set aside;

iii) The appellants are acquitted of the offences, with which they are charged. They be released forthwith, if not required in any other case. Fine amounts, if paid, be refunded to the appellants.

10. I would like to record a word of appreciation for the efforts taken by Mr.Dilip Mishra, in conducting the appeals.

11. High Court Legal Services Committee to award fees of the learned Appointed Advocate, Ms.Nasreen Ayubi, as per Rules.

REVATI MOHITE DERE, J.