

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

CRIMINAL APPEAL NO.96 OF 2000

P.V. Rao, Intelligence Officer)
Narcotics Control Bureau,)
Mumbai.) .. Appellant
(Orig. Complainant)

VERSUS

1. Anil Baburao Pansare)
Survey No.18, Jhasavi Village,)
Ambarnath, District- Thane.)

2. The State of Maharashtra) .. Respondents
(Orig. Accused No.1)

Ms.Ameeta Kutikrishnan for the Appellant.
Mr.Kaustubh Dube i/by Mr.Ramesh Dube and Mr.Sunil Kadam for the
Respondent No.1.
Mrs. M.M. Deshmukh, APP for the Respondent no.2 -State.

**CORAM : R.D.DHANUKA &
SURENDRA P.TAVADE, JJ.**

RESERVED ON : 12th March 2020

PRONOUNCED ON : 11th August, 2020

JUDGMENT (per R.D. Dhanuka, J.) :-

. By this appeal, the appellant (original complainant) has
impugned the order of acquittal dated 23rd April, 1999 passed by the

Special Judge (NDPS) for Greater Bombay acquitting the respondent no.1 of the offence punishable under Section 21 read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “the said NDPS Act”). Some of the relevant facts for the purpose of deciding this Appeal are as under :-

2. It was the case of the prosecution that on 8th October 1997, PW-3-Superintendent Mr.Itty Mathew received an information in the evening that on the next day, there will be a narcotic transaction to be carried out by one person. The informant gave description of the said person to PW-3-Mr.Mathew and stated that the suspect would be having tattooing mark on his left hand. The said information was reduced into writing by Mr.Mathew and was kept in an envelope which was sealed and sent to the Assistant Director (PW-9). The extract of the said information was prepared and it was submitted to PW-9. On 9th October 1997, PW-3 along with other Intelligence Officers assembled in the office at 8.00 a.m. and chalked out their strategy to carry out the raid. They proceeded to the place at Kala Ghoda at 8.30 a.m. and maintained surveillance in the presence of Panchas.

3. At around 9.00 a.m., the members of the raiding party noticed one thin and tall personality. One of the officers closely passed nearby the suspect and confirmed the tattooing marks on his left hand. The said person waited on the spot for about 15 minutes and then started walking towards David Sassoon Library. He was holding a Addidas bag on his shoulder. The said person was stopped by the officers and disclosed their identity. He informed that he was working as a hamaal in the City Civil and Sessions Court, Mumbai. He was asked to reveal the contents of the Addidas bag which was carried by him. It was the case of the prosecution that Mr. Turiley who was working as an intelligence officer informed the respondent no. 1 that he had got right to be searched in the presence of the gazetted officer or Magistrate of his choice. It was informed to him that PW-3 Mr.Mathew was the Gazetted Officer present on the spot.

4. The respondent no.1 showed his willingness to be searched by PW-3. Thereafter his endorsement on the written offer about the appraisal of right under Section 50 of the said NDPS Act was taken. The Addidas bag carried by the respondent no.1 was thereafter opened and therein two plastic bags were found which were kept in brown coloured envelopes. There was powdery substance of brownish colour in

those bags. Small quantity of the said substance was taken from both the bags and was tested on Field Testing Kit which resulted positive for the presence of heroin. Since the said place was not suitable for completing the other formalities and drawing of the panchnama, members of raiding party decided to go to their office. They took the PW-1, Panchas and the recovered muddemal article which was weighed and found to be weighing 1 Kg. to the office. Three representatives samples of the said muddemal were drawn by PW-1 and kept in separate small plastic bags which were sealed and kept in separate envelopes. Signatures of panchas and the Intelligence officer – PW-1 Mr. Turiley were taken on it.

5. It was the case of the prosecution that a team comprising of Intelligence Officer Mr.Malkani and Mrs.Tejwani was formed to raid the house of the respondent no.1. The said team left the office for going to Ambarnath at 1.05 p.m. on 9th October 1997 and reached near the place of the residence of the respondent no.1 at about 2.50 p.m. Two panchas from nearby area were called. On the search of the house of the respondent no.1, one transparent polythene bag containing brownish coloured powder was recovered from the loft in the kitchen of the house of the respondent no.1. In the said plastic bags, there was one more

transparent plastic bag containing brownish powder in it. The contents of the said bag tested positive for the presence of heroin. The powder thereafter was emptied in one plastic bag and on having been weighed and was found to be 700 gms. in weight. Further procedure regarding packing and sealing was completed in respect of the said contraband. The raiding party thereafter reached the office at 8.30 p.m. on the same day. After completion of the investigation, complaint was filed before the trial Court on 24th December 1997.

6. The prosecution examined in all 9 witnesses. The respondent no.1 examined two witnesses. Defence of the respondent no.1 was of total denial. Learned trial Judge by the impugned judgment and order dated 23rd April 1999 was pleased to acquit the respondent no.1 of the charges levelled against him under Section 21 read with Section 8(c) of the said NDPS Act.

7. Learned counsel for the appellant invited our attention to some portion of the evidence led by the witnesses examined by the appellant and also by the respondent no.1 before the Trial Court. She submits that since the recovery of the contraband items was at the public place, provisions of Section 42 of the NDPS Act were not applicable to

the raid carried out in respect of the seizure at Kala Ghoda. She submits that merely because the contraband was not sealed before being taken to the office, it could not be said that the prosecution had not established beyond reasonable doubt the recovery of the contraband from the respondent no.1. The finding of the learned Trial Judge that the prosecution has not complied with the requirements as contemplated under Section 50 of the NDPS Act is perverse and contrary to the evidence on record.

8. It is submitted that the finding of the learned Trial Judge that there was enough opportunity for the officers to use the official seal even after the completion of the seizure formalities is also contrary to the evidence on record. She submits that since the procedure of recording panchnama was cumbersome, the same could not be prepared on the road and was prepared in the office. She submits that the right of the respondent no.1 under Section 50 of the NDPS Act was clearly informed to him. It was not the case of the respondent no.1 in the cross-examination of the witnesses examined by the appellant that there was any tempering with the contraband item seized by the appellant. No such case was put to the witness examined by the appellant in their cross-examination.

9. It is submitted by the learned counsel that Mr. Itty Mathew (PW 3) had received information from an informant on 8th October, 1997, such information was received in writing. The witnesses examined by the appellant had confirmed the seizure of the contraband items from the respondent no.1. It is submitted by the learned counsel that both the panch witnesses examined by the appellant had turned hostile. Witness (PW 7) who was investigation officer in his cross-examination deposed that only writing (Exh.10) was executed on the road. Witness (PW 8) was the Assistant Chemical Examiner who had sealed the packets and had carried out the test. His deposition in the examination-in-chief was not shattered in cross-examination. The appellant had also examined Mr. Omprakash Diwakar (PW 9) who was the Zonal Director of NCB. His evidence was also not shattered. All the witnesses examined by the appellant had proved that the respondent no.1 was carrying bags containing contraband items. The respondent no1 fully knew about the contents in the said bags carried by him.

10. It is submitted by the learned counsel that the testing of contraband items was carried out on site and was found positive, showing

heroin, all the due care was taken by the appellant while selecting panchas. The learned Trial Judge has not considered various important aspects in the impugned judgment and order. The respondent no.1 could have examined his brother and his wife as the witnesses before the Trial Court which he filed. The factum of seizure of 700 gms. heroin from the respondent no.1 on the road was not in dispute. She finally submits that order of acquittal passed by the learned Trial Judge deserves to be set aside.

11. Learned counsel for the respondent no.1 on the other hand invited our attention to portion of the evidence led by the prosecution as well as by his client. He submits that the evidence of the witness (PW 3) and more particularly recorded in paragraphs 1 and 2 were *ex-facie* contradictory. In his cross-examination, he deposed that he did not remember whether Director of the NCB was present or not. There was contradiction noticed by the Trial Court even in the evidence led by the PW 9 and also PW 3. The appellant had selected one of the waiter from the canteen situated above in the NCB office who was not an independent witness. In so far as tattoo mark on the left hand of the respondent as was suggested by the appellant is concerned, learned counsel for the respondent no.1 has strongly placed reliance on the statement of the

respondent no.1 recorded under Section 313 of the Code of Criminal Procedure and more particularly to question no. 45. He submits that the Trial Court has rightly held that the appellant had failed to prove any such tattoo mark on the left hand of the respondent no.1. The Judge who had recorded the statement of the respondent no.1 under Section 313 of the Code of Criminal Procedure did not find any such tattoo mark on the left hand of the respondent no.1.

12. It is submitted by the learned counsel that there was no explanation rendered by the appellant as to why the contraband items were not sealed on the road. The panchnama was prepared in the office by the appellant contrary to law. The seal remained in possession of the witness (PW 3) who could have tampered with the seal. The respondent no1 had already addressed a letter to the Sessions Court on 23rd October, 1997 retracting from his statement recorded by the officers of the appellant.

13. In so far as second raid conducted by the appellant is concerned, it is submitted that only one of the panch was examined by the appellant who also turned hostile. The appellant could not point out any inconsistency in the evidence of defence witnesses. The appellant has

failed to demonstrate even before this Court about the strict compliance of the mandatory requirements under Section 50 of the NDPS Act. Even in the panchnama recorded by the appellant, it was not indicated that an opportunity required under Section 50 of the NDPS Act was given to the respondent no.1. The respondent no.1 was an innocent person and was not involved in any such offence as alleged by the appellant. The chain of situation does not prove the respondent no.1 is guilty. He also referred to various paragraphs of the judgment and order dealing with various judgments relied upon by his client before the Trial Court.

REASONS AND CONCLUSION

14. The Trial Court framed two points for determination. It is held by the Trial Court that as the recovery of the contraband items was at public road, compliance of Section 42 of the NDPS Act was not required to be followed. Since the raid was not after sunset, the reasons required under Section 43 of the NPDS Act were not required to be recorded.

15. On the issue whether requirement under Section 50 of the NDPS Act is complied with or not, we shall refer to the relevant portion of evidence. PW 1 in his cross-examination admitted that there was no

writing made on the road about the result of the personal search. He also admitted that the fact of writing declaration under Section 50 on the road was not written in the panchnama. He had not signed the said declaration. Even in the report (Exh.14), the witness did not mention that declaration was written on the road and that the endorsement in Marathi was made by accused. He also admitted that he has not mentioned in the panchnama that the conversation was in Marathi with the accused. He was unable to produce any contemporaneous record to show that the writing i.e. declaration (Exh.10) was written on the road.

16. A perusal of the evidence of PW 1, PW 3 and PW 5 clearly indicates that the witnesses examined by the prosecution have failed to prove that any understanding was given to the accused that he was being searched for the possession of the drug and any opportunity was given to the accused to be searched in presence of a Gazetted Officer or a Magistrate. The prosecution has also failed to prove and did not bring on record as to which of the witnesses had explained the right to the accused under Section 50 of the NDPS Act.

17. Supreme Court in case of *State of Punjab v/s. Balbir Singh*, **AIR 1994 SC 1872** has culled out the principles on the issue whether

compliance of Section 50 of NDPS Act is mandatory or not. It is held by the Supreme Court in the said judgment that failure to inform the person to be searched and if such person so requires, failure to take him to Gazetted Officer or Magistrate, would amount to non-compliance of Section 50 of the NDPS Act. It is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

18. A constitution bench of Supreme Court in case of ***Vijaysinh Chandubha Jadeja v/s. State of Gujarat, (2011) 1 SCC 609*** after adverting to various earlier judgments of Supreme Court has held that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent person and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a Gazetted Officer or a Magistrate. It is held that the obligation of the authorized officer under the said provisions is mandatory and requires strict compliance. Failure to comply with the provisions would render a recovery of the illicit article suspect and vitiate the conviction if the same

is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Similar view has been taken by the another constitution bench of the Supreme Court in case of ***State of Punjab v/s. Baldev Singh, (1999) 6 SCC 172.***

19. Supreme Court in case of ***Sureshchand and Ors. v/s. State of Madhya Pradesh, 2013 CRI. L. J. 474 (SC)*** has held that the compliance of Section 50(1) of the NDPS Act is mandatory and require strict compliance. In the said judgment, Supreme Court had considered a situation where the panchnama had indicated that the appellants therein were merely asked to give their consent for search by the Police party and were not apprised of their legal right provided under Section 50 of the NDPS Act to refuse/allow the Police party to take their search and to opt for being searched before the Gazetted Officer or by the Magistrate.

20. A learned Single Judge of this Court in case of ***Bhanudas Dnyanoba Girigosawi and Ors. v/s. State of Maharashtra, 2015 SCC OnLine Bom 6062*** after adverting to various judgments of Supreme Court including the judgment in case of ***State of Punjab v/s. Baldev Singh*** (supra), ***Vijaysinh Chandubha Jadeja v/s. State of Gujarat*** (supra) and judgment in case of ***State of Rajasthan v/s. Parmanand and Anr.,***

AIR 2014 SC 1475 has held that the right under Section 50 of the NDPS Act is an indefeasible right and the said right has to be apprised to the accused person independently by the empowered officer. It is held that the investigating officer having failed to comply with the mandatory directions embodied in Section 50 of the NDPS Act, the conviction of the accused has rendered indefeasible in view of the constitution bench judgment of the Supreme Court in case of **State of Punjab v/s. Baldev Singh** (supra). The principles of law laid down by the Supreme Court and by this Court referred to aforesaid clearly apply to the facts of this case. We are respectfully bound by the said judgments of the Supreme Court. We are inclined to accept the principles of law laid down by a learned Single Judge of this Court in case of **Bhanudas D. Girigosavi** (supra) which view was taken by following the principles laid down by the Supreme Court in the above referred judgments.

21. In our view, it was a mandatory requirement under Section 50 of the NDPS Act for an investigating officer to apprise the accused of his indefeasible right to be searched before a Gazetted Officer or a Magistrate and in absence of compliance of such mandatory procedure, the trial would have been vitiated. The learned Trial Court has thus rightly rendered a finding that the provisions of Section 50(1) of the

NDPS Act was not complied with by the appellant thereby vitiating the trial. There is no substance in the submission of the learned counsel for the appellant that conditions under Section 50 of the NDPS Act were complied with by the prosecution.

22. The witness (PW 5) Mr.Datta M. Naik who was one of the panch witness as far as first raid is concerned, in his examination-in-chief deposed that he did not remember the talk which he along with others had at the spot. He did not know what was recovered from the bag. The officers took the respondent no.1 to the office along with the said witness. He did not remember as to what happened on the spot. In view of the fact that the said witness had turned hostile, after seeking permission of the Trial Court, the said witness was cross-examined by the appellant. In his cross-examination, he deposed that the officers did not disclose to him that a person would be coming at the place near Fort along with heroin and he was to be nabbed. The officers did not request him to act as panch. He denied the suggestion that the powder was recovered from the plastic bags which was initially found in an envelope. The packets were not weighed in his presence. His signatures were taken on some papers. The documents were receipts of lucky draw. He denied the suggestion that the contraband item was kept in a carton and was sealed in his presence. He

also denied that the panchnama was read over in English and was explained to him in Hindi. He denied that the three samples were drawn and it was separately kept in three envelopes and his signatures were taken on it.

23. In his cross-examination conducted by the respondent no.1, he admitted that he knew that 5 officers who had come to him took him with them. Their office was situated opposite the shop of the said witness. He denied that the accused was carrying an Addidas bag.

24. The second panch witness (PW 6) Mr.Kashinath Bhanushali also turned hostile. He pleaded ignorance and deposed that he did not know whether anything was recovered and samples were drawn at the house of the respondent no.1. Nothing was recovered in his presence. Nothing was weighted in his presence. He did not accompany the officers to the house of respondent no.1. He also admitted that he was involved in a criminal case of gambling. It is thus clear that both the panch witnesses turned hostile and gave evidence contrary to the case of the prosecution. None of those two witnesses were independent witnesses.

25. The witness (PW 6) in his cross-examination admitted that he was involved in a criminal case pertaining to gambling and was externed from Thane and other two districts jurisdiction. Investigating officer who asked PW 5 and Pw 6 to be panch witnesses did not examine the credential of those panch witnesses and did not take due care while selecting them. None of the panch witness could be considered as independent witness. Be that as it may, both the witnesses turned hostile and gave evidence contrary to the case of the prosecution and did not support the prosecution's case. This Court in case of ***Shri Shiv Kumar Ashok Mishra v/s. Special Judge of N.D.P.S. Court, reported in 1996 CRI. L. J. 1454*** has held that in a Narcotic case where the search and seizure are the pivotal portions of the investigation, the statement of the official witness should have been corroborated at least by one independent witness. It is held that search and seizure are important parts of the investigation that have to be proved in such a manner as prescribed by the statute. The non-corroboration by the witness, at least by one of the panchas examined by the prosecution is fatal to the prosecution, particularly that portion of the evidence satisfying the requirement of mandatory provision of an enactment. In this case, one of the panch who had allegedly put the thumb impression was admittedly not examined by the prosecution though the witness PW 5 had turned hostile. The

prosecution could have examined the said panch witness who had allegedly put his thumb impression and could be made available. The Trial Court was thus justified in granting benefit of doubt to the accused in absence of corroboration on this point. Court in such circumstances is obliged to draw adverse inference against the prosecution.

26. A perusal of the evidence further indicates that the witness PW 9 Mr. Omprakash Diwakar who was working as a Regional Director, NCB at Mumbai had deposed that one of the informant had met him personally in the office on 8th October, 1997, at about 6:30 p.m. and had briefed him that some transaction of narcotic dealing was likely to take place near Kalaghoda on the next day morning. As he was busy in some other ongoing operation, he had asked the informant to wait. He then called the Superintendent Mr. Mathew (PW 3) and directed him to record the information for the purpose of reward. He had left the office at about 6:45. In his cross-examination, he admitted that the information given by the informant was not recored in his presence. He did not mention on any paper about giving information to PW 3. He had also not mentioned that the information was produced in writing by PW 3 or that the information was recorded by PW 3 as per his instruction and communicated to him on the same day telephonically.

27. On the other hand, the said witness PW 3 in his examination-in-chief deposed that at about 17:00 hours one of the informant came to his office and gave an information. The said information was reduced in writing by him and obtained the signatures of the informer. The PW 3 also signed the said writing. In his cross-examination, he deposed that the informant came directly to him and gave him information. There is a contradiction in the evidence of PW 3 and PW 9 on the issue whether the informant had given any such information directly to PW 3 or PW 9 or directed such informant to the PW 3 to accept such information from the informant. In our view, the learned Trial Court thus rightly did not accept the case of the prosecution on this ground also.

28. It was the case of the prosecution that since the testing of the contraband item was carried out on the road, such contraband items were carried by the officers of the appellant to the office without sealing on the road. The appellant could not have taken the contraband items in open conditions. Sealing was required to be done on the site itself. It was the case of the prosecution itself that the testing and weight of the contraband item was carried out on the road and that the declaration (Exh. 10) was also prepared on road. The prosecution has failed to prove that the

contraband item seized by the appellant was subsequently tested by the Assistant Chemical Examiner. He had not put the staple pin close to the Dy. C.C. seal. He was unable to tell as to how the staple pin was attached. In our view, the prosecution has failed to prove beyond reasonable doubt that the contraband items were recovered from the accused, continued to remain in proper sealed condition and without interference reached the PW 8 for examination. The respondent no.1 is thus entitled to get the benefit of doubt.

29. The onus was on the prosecution to prove beyond reasonable doubt by leading cogent and reliable evidence that the accused was in exclusive conscious possession of the contraband items, which the prosecution in this case has miserably failed to prove. In our view, the provisions of NDPS Act being penal in nature, all the requirements laid down under the provisions of the said Act are required to be complied with strictly.

30. In so far as the case of the prosecution that the brother of the accused had accompanied some of the officers of the appellant along with one of the panch to the office of the appellant is concerned, the accused had examined the witness Mr. Tukaram Balwant Tardalkar (DW-1) who was working with Ulhasnagar Mahanagar Palika as vehicle in-charge.

The said witness deposed in his examination-in-chief that Mr. Manohar Pansare brother of the accused was working as a driver with the Ulhasnagar Municipal Corporation since last four years and had reported to the duty on 9th October, 1997. He produced a log book of vehicle no. MZM 7807. He deposed that the said Mr. Manohar Pansare (brother of the accused) was allotted duty on 9th October, 1997 and was attached to Chief Account Officer.

31. The said witness deposed that the vehicle was given in possession of Mr. Manohar Pansare at 10:00 a.m. who took the said vehicle to the Chief Account's Office at 5:30. The vehicle was returned to the office after taking the Chief Account Officer to his residence at 8.45 p.m. The Chief Account Officer used to sign the log book after the duty was over. After bringing the vehicle to the garage, the said Mr. Manohar Pansare handed over the log book in the vehicle section.

32. In so far as the second raid is concerned, a perusal of the evidence summarized aforesaid, makes it clear that there is inconsistency in the case of the prosecution on the issue whether the accused had informed the appellant that certain contraband items were also stored at his residence or it was a guess work of the appellant that such contraband

item must have been stored by the accused at his residence also. Even in case of the recovery of the contraband item while conducting second raid, the appellant did not follow requisite procedure under the provisions of the NDPS Act. The appellant also did not examine any independent witness even in respect of such transaction. The witness of the panch witness has not supported the case of the prosecution at all.

33. After considering the evidence led by both the parties, the Trial Court rightly rendered various findings that the prosecution had failed to prove that the accused was found in possession of 1 kg heroin a Narcotic Drug in contravention of the provisions of NDPS Act at the place opposite Army Restaurant and stores at the junction of A.S. D'Mello Road and David Sasoon Library Road, Kala Ghoda, Fort, Mumbai on 9th October 1997 and 700 gms. of heroin were illegally found in the house of the accused and thereby committing any offence punishable under Section 21 read with Section 8(c) of the NDPS Act, 1985.

34. There is no merit in the submission of the learned counsel for the appellant that finding rendered by the Trial Court in respect of official seal is perverse or warrants interference. The Trial Court has after

considering the entire evidence on record has rightly rendered such finding in favour of the respondent no.1. There is also no substance in the submission of the learned counsel for the appellant that the examination-in-chief of the witness examined by the appellant was not shattered in the cross-examination by the respondent no.1. In our view, merely because the respondent no.1 did not examine his brother and his wife as the witness before the Trial Court, that would not support the case of the prosecution. The prosecution has failed to discharge the onus cast on it.

35. For the reasons recorded aforesaid, we do not find any substance in any of the submissions made by the learned counsel for the prosecution and the same are devoid of merit.

36. We do not find any infirmity in the judgment and order rendered by the Trial Court. The findings rendered by the Trial Court are based on appreciation of the evidence led by both the parties. No case is thus made by the prosecution for intervention with the judgment and order passed by the Trial Court.

37. We therefore pass the following order :-

- (a) The impugned judgment and order dated 23rd April, 1999 passed by the Trial Court is upheld. Criminal Appeal No.96 of 2000 is dismissed.
- (b) Bail bond, if any stands cancelled.
- (c) There shall be no order as to costs.

(SURENDRA P. TAVADE)

(R.D. DHANUKA, J.)