

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

CRIMINAL APPEAL NO. 316 OF 1998

The State of Maharashtra

...Appellant
(Orig. Complainant)

Versus

1. Rameshwar Gulabrao Soni,
135/ 137, Sonawalla Bldg.,
3rd Floor, Zaveri Bazar,
Bombay -3.
2. Kirtikumar Bachulal Vora,
12, Maheshwari Co-op. Hsg Society,
PM. Road, Vile Parle (East),
Bombay

...Respondents
(Orig. Accused)

.....

Mr.V.B. Konde-Deshmukh, APP for the Appellant-State.

Mr. Anil G. Lalla a/w. Ms. Aanchal Lalla i/b. Lalla & Lalla for the
Respondents.

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**CORAM : PRASANNA.B.VARALE &
V.G. BISHT, JJ.**

DATE : 13TH OCTOBER, 2020

JUDGMENT (PER: V.G.BISHT, J.)

1. This appeal is filed by the State challenging the judgment and order of acquittal dated 7th May, 1997 passed in NDPS Special Case No. 111 of 1995 by learned Special Judge, Greater Bombay for the offence punishable under Sections 29, 21 read with Section 8 (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, “the NDPS Act 1985”).

2. Narrated in nutshell, the prosecution case is that, on 25th March, 1995 at about 09.00 p.m. Police Constable Harish Natu, i.e., informant, attached to Andheri Unit of Narcotic Cell received information from informer of Mr. Sharma to the effect that one Rameshwar Soni (respondent No.1 – A-1) along with his associate were coming from Rajasthan and on 26th March, 1995 at about 10.30 a.m. they were to deliver heroin to one Kirti (respondent No.2 – A-2) and his associate Majid (A-3). The said informer also gave brief description of those persons. Informant accordingly passed the said information to PI Dhavale (PW-4), who reduced it into writing in the information book and later on passed on to their Sr. PI Wadile, ACP Gaikwad and DCP Karkare of Narcotic Cell. PI Dhavale arranged raid as per the directions of DCP Karkare.

(a) On 26th March, 1995, informant arranged two panchas at about 08.15 a.m. Those panchas were apprised of the information received and after usual formality of search of police and panchas and drawing of pre-trap panchnama, raiding party left the office at 09.50 a.m. They reached near Nanavati Hospital at 10.10 a.m. and waited in separate groups.

According to prosecution at about 11.30 a.m. two pedestrians arrived from southern side of S.V.Road while one of them was carrying black polythene bag and the other had military green colour hand bag. Informer, who had joined the raiding party, identified the first one as Rameshwar Soni (A-1).

(b) At about 11.45 a.m. another pair of pedestrians arrived there and only one of them was carrying black polythene bag. Informer identified him as Kirti (A-2) and his companion as Majid (A-3). The raiding party then noticed that associate of A-1, who had come with military green coloured hand bag, handed over the bag to Majid. Thereafter, raiding party surrounded the four accused persons.

(c) The prosecution then contends that after apprising the accused persons of their statutory right under Section 50 of the NDPS Act, 1985 all the accused were subjected to search. A-1 was found possessing 1 kg. heroin and cash Rs. 500/-. A-2 also had 1 kg heroin and cash Rs. 200/-. The bag which was transferred by A-4 to A-3 contained three cloth bags. Each cloth bag contained 1 kg heroin. Thus, 3 kgs of heroin was recovered from it and there was also cash of Rs.400/-. Two samples were drawn from each of the stocks. Stocks, samples and cash recovered were separately packed, sealed

and labelled with labels signed by panchas and police officers under panchnama which was drawn on the spot. The accused persons and the contraband were then brought to Andheri Unit of Narcotic Cell.

(d) The prosecution lastly contends that after receipt of Chemical Analyzer reports, a chargesheet came to be filed against all the said accused persons. It appears from the record that the trial culminated into conviction of A-3 and A-4 whereas the present A-1 and A-2 came to be acquitted. Hence, this appeal against the said acquittal.

3. Mr. Konde-Deshmukh, learned APP for the appellant-State, assailing the judgment of acquittal vehemently submitted that the learned trial Judge ought to have held that the present respondents were possessing the contraband at the time of raid and therefore, they were guilty of the offence punishable under relevant provisions of the NDPS Act, 1985. According to learned APP the learned trial Judge has erred in holding that there is contradiction in the evidence of PW-1, PW-2 and PW-3. Despite there being consistent and cogent evidence, the learned trial Judge wrongly rejected the prosecution theory, leading to an erroneous judgment of acquittal, which is liable to be set aside.

4. Mr. Lalla, learned Counsel for the respondents, on the other hand, supported the impugned judgment of acquittal. The learned Counsel during the course of argument also invited our attention to the judgment and order dated 21st February, 2001 passed in Criminal Appeal Nos. 359 of 1997 with 409 of 1997 whereby the convicted A-3 and A-4 came to be acquitted by allowing their respective appeals. Thus, according to learned Counsel, there being no merit in the appeal, the same is liable to be dismissed.

5. PW- 1 Shri Harish Krushna Natu, informant, states in his evidence (Exh. 10) that after having received information from the informer that A-1 and his associate from Rajasthan were to come in front of Nanavati Hospital and to give delivery of the narcotics drugs to A-2 and his associate, namely, A-3 on 26th March, 1995 after 10.30 a.m., he took the informer to Mr. Dhavale i.e., PW-4. PW-4, on his part, recorded the information and apprised the same telephonically to his superiors.

6. According to this witness, he brought two panchas in the office, namely, Kishore Gawde (PW-3) and one Shetty. They collected sealing material and articles and accordingly prepared pre-trap panchnama. Thereafter, they proceeded and reached near

Nanavati Hospital at about 10.15 a.m. The informer also joined them. At about 11.30 a.m. they saw two persons approaching by S.V. Road from southern side. The person having black polythene bag was Rameshwar (A-1) and other was his associate who was also having greenish coloured handbag. Thereafter, two persons came of which one was having black coloured polythene bag in his hand and his name was Kirti (A-2) and the other man in his association was Majid (A-3). All these names were revealed by the informer who was accompanying them.

7. It is his further evidence that the person who was in company of A-1 had handed over that bag to Majid (A-3) who had arrived there subsequently. At that point of time, they all surrounded those persons and apprehended them. Mr.Dhavale then disclosed his identity to all those four persons. They were asked their names and accordingly they revealed their name as Rameshwar Soni, Kirtikumar Vora, Majid Lakhani and Laxminarayan Soni. Those persons were then informed that they were to be searched for narcotics drugs. They were also informed that such a search could be taken in presence of a Gazetted officer or a Magistrate. All of them denied the same.

8. Testifying further, the informant states that A-1 was having black coloured polythene bag and in that bag one cloth bag was there. They opened that bag, that was also found containing one polythene bag having one yellowish coloured paper bag and it was found containing brown coloured powder. On being tested a small quantity, it tested positive for heroin. A-1 was also found in possession of an amount of Rs. 500/-.

9. Similarly, they took search of A-2 who was having one black coloured plastic bag. The said plastic bag was containing one cloth bag which was also containing yellowish coloured paper bag containing brown coloured powder. It also tested for heroin. A-2 was also found in possession of an amount of Rs. 200/- . All these articles were seized under seizure panchnama.

10. Since, according to prosecution and as also PW-1 informant, the accused were found in possession of heroin and as also some amount and the fact that all these articles came to be seized under seizure panchnama. It is the evidence of PW-3 Kishore Gawde, panch witness, whose evidence assumes significance in order to find the corroboration and as also substantiation of prosecution theory. We

intend to appreciate the evidence of PW-3 panch witness led by prosecution for the purpose.

11. PW-3 Kishor Waman Gawde states in his evidence (Exh. 20) that on 26th March, 1995 he was called in the office of Narcotic Cell Unit in the morning time at 8.15 a.m. There were about 20 to 25 persons. One lady constable was there. One pancha was also there by name Shetty. They were given to understand about likely deal of narcotics and that their services would be required as a panch witness. After completing certain formalities, they all started from the office at about 9.00 a.m. The vehicles were stopped just before Nanavati Hospital. Mr. Dhavale (PW-4), Mr. Bhosale and Mr. Sharma stood along with their groups at the different spots. In the meantime, one person met Mr. Dhavale and left. Later on, he came to know that he was informer.

12. It is his further evidence that at about 10.15 a.m. two persons had arrived there from the southern side and stood at the corner of the hospital. One accused was having black coloured bag in his hand and the other was having green coloured bag. After about half an hour two more persons had come from northern side and joined the earlier two persons. Out of the persons who had come from

northern side, one had a black polythene bag in his hand. The persons who had come earlier, one of them handed over the bag to the next person who had come subsequently and had nothing with him.

13. His evidence then shows that all those four persons were surrounded by the members of the raiding party. PI Dhavale then informed that they were suspecting for the narcotics in their possession and for the said search, if they required, they could be taken before any Gazetted officer or Magistrate but those persons declined the offer.

14. His evidence further shows that A-1 was firstly searched. He had black polythene bag in his hand and in that bag three boxes were there. After opening boxes polythene bags were found and on opening plastic packet the powder was found in the paper covers in all three boxes. On his personal search Rs. 500/- were found.

15. Similarly, A-2 was searched who was having the similar types of three boxes and after opening boxes the brown powder was found in the polythene covers inside. He was also found in possession of Rs. 500/-. All these articles came to be seized under seizure panchnama at Exh. 24.

16. A simple reading of the evidence of this panch witness would show that the raiding party left Andheri office after recording pre-trap panchnama at 09.00 a.m. However, according to panchnama, pre-trap panchnama was written between 08.15 a.m. to 9.30 a.m. and the raiding party left at 09.50 a.m. and this is apparent from the post-trap panchnama (Exh. 24). Thus, as far as the time factor is concerned, it appears to be on the erroneous side.

17. Further, according to his evidence, first pair of accused persons, namely, A-1 and A-4 arrived at about 10.15 a.m. However, according to post-trap panchnama, although the raiding party reached the spot at 10.10 a.m., the first pair arrived at 11.30 a.m. i.e., after raiding party had waited for more than an hour. Apart from above, we would like to point out here that the testimony of this witness is not in consonance and conformity with the prosecution case.

18. To begin with his examination-in-chief shows that the informer had visited PI Dhavale and left before arrival of first pair of accused persons at 10.15 a.m. It is not at all his evidence that A-1, A-3 and A-4 were identified by the informer by their names. In fact, according to prosecution, informer had arrived before arrival of the first pair of

accused and he left only after second pair arrived and he had identified three accused persons by names. This clearly goes to show that he was not aware of informer having identified three out of four accused persons by names, although it is his tall claim that he was very much by the side of PW-4 PI Dhavale when they reached the spot.

19. After having noted the above serious infirmities, we come to the crucial aspect of the prosecution case i.e. the alleged recovery.

20. Here also we note with dismay that this witness has come out with an inconsistent and totally new story against prosecution.

21. It appears that paragraph Nos. 3 and 4 of his evidence was recorded on 20th March, 1997. In the evidence, he claimed that on search of bags, which were in the custody of A-1 as well as A-2, three boxes were recovered and the contraband was found in polythene bags kept inside the boxes. Admittedly, in paragraph No. 8, while under cross-examination on 2nd April, 1997 this witness admitted that he had erroneously stated about three boxes in his earlier deposition. It can be seen that the error was realized on the subsequent date of hearing and only after he was invited to explain

as to why panchnama does not make any reference to recovery of three boxes in the bags of A-1 and A-2.

22. Not only this, this witness is at variance vis-a-vis the amounts recovered from A-2. According to him, there was recovery of about Rs. 500/- but in fact an amount of Rs. 200/- only was recovered from A-2.

23. The credibility of this witness can also be questioned when his evidence shows that he was not certain about the number of members in the raiding party. His cross-examination shows that there were only 10 to 15 persons in the raiding party and no lady constable or a female was member of raiding party. Quite contrarily, pre-tap panchnama shows that there were 23 members in raiding party inclusive of officers and constables and it included lady PSI More and as also lady police constable Buckle No. 398 who happened to be carrier in the case and was examined as second prosecution witness.

24. Above being the dismal shape of evidence, we are absolutely not satisfied with the testimony of this witness and in such circumstances we are not prepared to place reliance on the same.

Needless to say, his evidence deserves anything but acceptance.

25. In our considered opinion, the trial Court has rightly observed that apart from recovery of contraband being not satisfactory, the evidence of panch witness is also not consistent vis-a-vis panchnama (Exh. 24).

26. An important question which is staring at us now is whether failure to comply with the conditions laid down in Sections 42 (2) and 50 of the NDPS Act, 1985 by empowered or authorised officer while receiving the information and conducting the search, affects the prosecution case.

27. Section 42 (2) mandates that where an officer takes down any information in writing under sub-section (1) or records the grounds for his belief under the proviso thereto, he shall within seventy two hours send a copy thereof to his immediate official superior.

28. In *State of Punjab V Balbir Singh*¹, the Hon'ble Apex Court has held that under Section 42 (2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42 (1) should forthwith send a copy thereof to his

¹ JT 1994 (2) S.C. 108

immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

29. PW- 4 Investigating Officer in this regard states that after he recorded information in the information book, he informed DCP and ACP on phone. He also claimed that the extract of information was given to ACP and the said extract is produced at Exh. 27. According to this witness, it bears signature of DCP Karkare in token of receipt of extract.

30. So far as the version of recording of information by PW-4 Investigating Officer is concerned, the version gets corroboration from PW-1 informant and as also about information being informed telephonically to ACP and DCP by PW -4 Investigating Officer.

31. Some more important facts which are germane to the present aspect need extraction from the complaint of informant.

32. As per FIR (Exh. 11), the information was passed to PI Wadile, ACP Gaikwad and DCP Karkare. It is pertinent to note that at neither

of the three places the prosecution has disclosed the mode of transmission. Admittedly, the head office of Narcotic Cell is at Azad Maidan Police Station, Bombay, whereas the information was received at Andheri Unit office. It is also relevant to note here that the information was received on 25th and the trap was to be carried out on 26th. Thus, PW-4 Investigating Officer had sufficient time at his disposal and he could have carried Exh. 27 personally to the concerned. Interestingly, Exh. 27 does not bear signature of ACP and PI Wadile in acknowledgment of receipt of information.

33. Again, we repeat and note that Section 42 (2) requires that the copy of information taken down in writing shall be sent to the immediate superior official. DCP was certainly not the immediate superior official of PW-4 Investigating Officer. PW- 1 informant has admitted that Sr. PI Wadile was the Sr. Inspector of the Cell posted at Azad Maidan Police Station and the offices of ACP and DCP are also there. No evidence is forthcoming to show that Exh. 27 was delivered to Sr. PI Wadile, who was the immediate superior official. Moreover, it is the prosecution own case that DCP Karkare had put an endorsement “seen” and then signed Exh. 27. This also makes it clear that a copy was not delivered to DCP Karkare.

34. That being so, we are of the opinion that the requirements of Section 42 (2) are not complied with by the prosecution.

35. This takes us to Section 50 of the NDPS Act, 1985. It provides for search of a person by the empowered officer without taking him to the nearest Gazetted Officer or a Magistrate, if there is 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 contraband. The officer shall record such reason after search is over and send a copy of it within reasonable time to his immediate official superior.

36. It is the evidence of PW-1 informant that PW-4 had informed the accused persons about their rights under Section 50 of the NDPS Act, 1985 only after he was hinted by Special PP. The note of demeanor to that effect is taken by the learned Judge in paragraph No.2 of his evidence. Although informant, PW-3 panch and PW-4 Investigating Officer all have deposed in unison that the accused persons were informed about the purpose of search and their rights to be searched in presence of Magistrate or Gazetted Officer, on reference to contemporary documents viz. complaint (Exh. 11) and post-trap panchnama (Exh. 25), we find those documents silent as to

who apprised the accused persons. Pertinently enough, a careful reading of the documents would show that all the accused were jointly apprised of their right under Section 50 of the NDPS Act, 1985 and not individually.

37. In **Vijaysinh Chandubha Jadeja v. State of Gujarat**², the Constitution Bench held after considering earlier Constitution Bench relating to *State of Punjab v. Baldev Singh* (“Baldev Singh”) (1999) 6 SCC 172: (AIR 1999 SC 2378); *Karnail Singh v. State of Haryana*, reported in (2009) 8 SCC 539: (2009 AIR SCW 5265), observed as follows:-

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which 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 persons 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. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the 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. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision”.

² (2011) 1 SCC 609: AIR 2011 SC 77 para 22

38. Needless to say, there was non-compliance of mandatory provisions at the hands of PW- 4 Investigating Officer.

39. From the evidence as discussed herein above, it is evident that there happens to be inconsistency between the evidence of informant and panch witness with regard to timing of raid and seizure of contraband. At the same time deficiency over proper compliance of mandatory provisions of law is writ large.

40. For the aforesaid reasons, we do not find any merit in the appeal and the same is liable to be dismissed and accordingly stands dismissed.

(V. G. BISHT,J.)

(PRASANNA.B.VARALE, J.)