

Shailaja

*This judgment is corrected vide speaking to minutes of the order dated 25th October, 2021***IN THE HIGH COURT OF JUDICATURE AT BOMBAY****CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO.457 OF 1996**

Shri D. Bhambri]
 Intelligence Officer, Narcotics]
 Control Bureau, Exchange Building]
 Ballard Estate, Mumbai – 400 038.]
 through Public Prosecutor for]
 Union of India.] **Appellant**

Vs.

1. Eknath Marutirao Kalmetkar,]
 r/o Bungalow No.147,]
 Ballaleshwar Co-Op Society]
 Kalyan Karjat Road, Kulgaon]
 Dist. Thane.] **Respondent No.1**
(Original Accused)

R/o Tera Warshya Apartments,]
 3rd Floor, Mangshit, Beleshi,]
 Badlapur (West),]

2. The State of Maharashtra] **Respondent No.2**

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Ms. Ameeta Kuttikrishnan, for Appellant.

Mr. Rajendra Bidkar, for Respondent No.1.

Ms. Geeta Mulekar, A.P.P for Respondent No.2-State.

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**CORAM : SMT. SADHANA S. JADHAV &
PRITHVIRAJ K. CHAVAN, JJ.
RESERVED ON : 27th SEPTEMBER, 2021.
PRONOUNCED ON: 12th OCTOBER, 2021.**

JUDGMENT: [Per Prithviraj K. Chavan, Judge]:

1. An Intelligence Officer, Narcotics Control Bureau, Mumbai has preferred this appeal impugning the judgment and order of acquittal by Special Judge (NDPS Court), Greater Mumbai dated 26th March, 1996, by which the respondent-original accused came to be acquitted of the offences punishable under sections 8 (c) r/w 22, 23, 28 and 29 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS' Act') as well as of the offences punishable under sections 135 (1) (a) r/w 135 (1) (ii) of the Customs Act, 1962. Facts of the prosecution case, as emerged from the record, can be summarized as follows.

2. On 29th August, 1991, a reliable information was received by P.W.3 - Shastrinath Sawant, Superintendent, Central Excise that a consignment of Mandrax tablets is being carted in MOD shed No.1 at Mumbai. It was to be carted on the very next date i.e on 30th August, 1991 at about 11.00 a.m in the morning which was to be transported in a tempo bearing No. MMS-1580. The information further revealed that Mandrax tablets would be concealed in the goods. P.W.3 - Shastrinath Sawant passed the said information to his Deputy Director R.L. Kakkar for further necessary action. The said information was forwarded in writing.

3. Some officers of the NCB were called in the chamber of the Deputy Director- Mr. R.L. Kakkar including P.W.1-Vijay Shahasane, Intelligence Officer attached to NCB. Suitable instructions were given to all of them and it was decided to intercept the said tempo at the time of its entry into Bombay Port Trust shed when the consignment was to be carted.

4. Accordingly, on the next date, raiding team comprising of the officers left the office for the purpose of conducting the raid. P.W.1- Vijay Shahasane had collected the sealing and weighing material, drug identification kit and the stationery. All of them reached near the gate of B.P.T. The officers spread over in two different groups.

5. Around 10.50 a.m, the team noticed a tempo bearing No. MMS-1580 entering the gate. All of them followed the tempo. The Driver of the said tempo stopped it at the B.P.T shed No.1. It was noticed that three people alighted from the cabin. All of them had unloaded the consignment consisting of 18 packages in the shed. The packages were stacked in the godown after unloading the consignment. The Driver and the cleaner sat in the tempo and were about to leave, when the tempo was intercepted.

6. P.W.1-Vijay Shahasane apprehended the person standing beside the consignment with some papers in his hand. He was the respondent accused namely Eknath Kalmetkar. On the basis of the information furnished by Eknath Kalmetkar, a trap was laid to apprehend one Shri Rane who was to arrive at the spot at about

12.00 in the noon. Around 12.30 hours when a person came over there and met Eknath, Eknath handed over the documents to the said person. The said person was immediately apprehended. On being asked, he told his name as Rane and that he was there to clear the consignment consisting of 18 packages.

7. The raiding team appraised both of them that they wanted to take search of the consignment as it was suspected to be containing some drugs. Both of them showed their willingness for examination of the consignment. Both of them were taken to the shed where the consignment was stacked.

8. By that time, P.W.1- Vijay Shahasane and other officers came to the shed along with Driver and Cleaner of the tempo, some custom officers had also arrived by that time.

9. P.W.3-Shastrinath Sawant summoned two persons as panch witnesses. The team had disclosed their identity to the accused. While examining the packages, the team had noticed that the packages contained *lungis* and beneath those *lungis*, they found certain off white colour tablets kept in polythene packets. Since it was not convenient to examine all the 18 packages in the shed, entire consignment was taken to the examination hall of the customs examination shed i.e shed No.2.

10. At the time of examination of the packages in the presence of the accused, Driver, Cleaner of the tempo as well as Shri Rane and two panchas, it was noticed that packages No.1 to 4, 16, 17

and 18 contained contraband. No contraband was found in the packages 5 to 15.

11. The tablets found in those plastic bags had a specific marking i.e there was a '*swastik*' mark on one side and '*M*' mark on the other side. Similarly, they noticed different markings on the other set of the tablets. There was marking of letter '*M*' and '*Swastik*' on one side of the tablets and on the other side of the tablets, there was a marking '*R/L*'. A few random tablets were collected and examined by carrying out drug identification test. The result was positive for Methaqualone. All the packets were weighed and found to be about 480 kg. 42 tablets were taken as samples from packets No.1 to 4 and 16 to 18. They were divided into two groups i.e in 20 and 22 tablets. From each group, two representative samples were drawn and were weighed about 10 grams each and 11 grams each, respectively. Sample packets were put in polythene paper and thereafter in paper envelope. All the four sample packets were duly packed, sealed and labeled. The seal was of NCB and "O No.3".

12. Rest of the bulk quantity of the contraband was packed in their respective packages, duly sealed and labelled. Signatures of Panchas as well as Mr. Vijay Shahasane were obtained. The *lungis* were taken separately and packed in a carton.

13. The documents received by Shri Rane from the accused were taken charge of under the *panchanama*. The entry pass found in possession of the accused was also taken charge of. The temporary

pass issued by the BPT in favour of the Driver and Cleaner was also collected. A detailed *panchanama* was drawn at the spot. Entire *muddemal* property together with sample packets was seized under *panchanama* which was kept in the custody of P.W.1-Vijay Shahasane who is the Investigating Officer. Seizure panchanama is at **Exhibit 6**. The documents which were seized are marked as **Exhibit A to F colly** and **Exhibit 30**.

14. A detailed report of the search and seizure was prepared by P.W.1-Vijay Shahasane. Signature of Mr. Kakkar was also obtained. It is at **Exhibit 31**.

15. Further investigation was carried by P.W.2-Deepak Bhambri another Intelligence Officer of NCB and the appellant herein.

16. Statements of the accused came to be recorded on 30th August, 1991 and 31st August, 1991 which are at **Exhibit 13** and **Exhibit 14**. The statements are in the handwriting of P.W.2- Deepak Bhambri. The statements were signed by the accused.

17. The residential premises of the accused was searched on 1st September, 1991. Certain documents were seized under a *Panchanama*. Further statement of the accused came to be recorded on 17th September, 1991.

18. On 4th September, 1991, P.W.2-Deepak Bhambri had deposited the seized drugs in the customs godown. Accused was arrested on 31st August, 1991. Before arresting the accused on 31st

August, 1991, grounds of arrest were were informed to him and he was given in the custody of Senior Police Inspector, Azad Maidan Police Station. After investigation, a charge-sheet was filed against the accused in the Special Court.

19. After framing a charge against the accused under sections 8 (c) r/w 22, 23, 28 and 29 of the NDPS Act as well as of the offences punishable under section 135 (1) (a) r/w 135 (1) (ii) of the Customs Act, 1962, accused pleaded not guilty and abjured the guilt.

20. Nine witnesses came to be examined by the prosecution to substantiate its case. The learned Special Judge after going through the evidence of prosecution witnesses, by the impugned judgment acquitted the accused of all the offences with which he has been charged.

21. Heard Ms. Ameeta Kuttikrishnan, learned Counsel appearing for the appellant, Mr. Rajendra Bidkar, learned Counsel for respondent No.1 and Ms. Mulekar, learned A.PP, for respondent No.2-State.

22. It is pertinent to note that the accused in companion appeal i.e Criminal Appeal No. 456 of 1996 namely Zafar Khan died on 17th June, 2014 and, therefore, the appeal came to be dismissed as abated by an order of this Court (Coram: P. V. Hardas and Dr. Shalini Phansalkar-Joshi, JJ) dated 12th February, 2015.

23. Before analyzing the oral evidence adduced by the appellant, it is apparent that the prosecution case itself stands vitiated on account of non compliance of section 42 (2) and section 50 of the NDPS Act.

24. It is equally important to note that except officials of the NCB, there is no evidence of any independent witness except the owner of the tempo, P.W.8-Ankush Bhoite, who turned hostile. The appellant emphasized on the testimony of it's witnesses coupled with statements of the accused recorded by them.

25. In so far as compliance of section 42 (2) of the NDPS Act is concerned, evidence of P.W.2- Deepak Bhambri would be relevant who in his cross-examination unequivocally admitted that writing of the information and showing the gist thereof to the superior official is an important circumstance. Admittedly, this witness had neither visited the spot nor had received any information. The role which appears to have been played by this witness is only to give suitable instructions to the Public Prosecutor for drawing a complaint. He admits that he did not possess gist of the information and the record indicates the same was either sent by superior officers or sent to the officers when he gave those instructions to the Public Prosecutor. This admission would reveal that on the date of drafting the complaint, this witness did not possess with himself either gist of the information received by the Officer or any other document indicating that the information was sent by the superior officers.

26. PW.3-Shastrinath Sawant is another important witness of the appellant who had accompanied the raiding party at the scene of occurrence. His evidence reveals that when the Investigating Officer is appointed, all necessary case papers and documents were handed over to him. He admitted during the course of cross-examination that recording information and sending the copy thereof to the superior officials is an important task. A perusal of copy of the information and the record, in fact, indicates that the said information was sent to the superior official and was also handed over to Deepak Bhambri along with other case papers. It is apparent that these two witnesses contradict each other on this material aspect namely PW.1-Vijay Shahasane and PW.2-Deepak Bhambri. If at all, copy of the information had been shown to the Public Prosecutor, there ought to have a reference made in the complaint.

27. Astonishingly, the complaint is *sans* any reference of sending copy thereof to the superior officials. Stand of the accused that evidence was collected showing that copy was sent to the superior officials is fabricated one cannot be said to be a suggestion without substance. Section 50 of the NDPS Act is an important provision in the Act conferring a valuable right upon the accused, in the sense, to appraise him about his mandatory right to get searched by nearest Gazetted Officer of any Department mentioned in section 42 or to the nearest Magistrate.

28. This is not an empty formality and the law on that aspect is no more *res integra*. It is in the form of a safeguard with a view to

see that the authorized officers do not misuse the powers conferred upon them by the Statute.

29. There is no evidence in the complaint that the copy of the information received by the officer was forwarded to the superior official. The complaint is also silent as regards appraisal of the legal right to the accused and that thereafter his search was made. In his cross-examination, P.W.3-Shastrinath Sawant though had stated that the accused was appraised of his legal right, nevertheless, it does not find place in the complaint and, therefore, it can safely be inferred that P.W.3-Shastrinath Sawant, by way of an afterthought, stated about the said fact only with a view to suit the prosecution story. This indeed goes to the root of the prosecution case.

30. It reveals from the record that most of the evidence of the prosecution comprises testimonies of their officers from NCB. Statement of the accused came to be recorded on four occasions which the prosecution wants this Court to rely upon and accept as a voluntary statement made while in their custody. Confessional statement alleged to have been given by the accused is essentially a weak piece of evidence which does not have any corroboration from the other evidence on record. *Ipse dixitism* of the prosecution witnesses cannot be accepted as a gospel truth, more particularly, in light of the fact that the prosecution has failed to establish that the accused, in fact, was in conscious possession of the contraband. A useful reliance can be placed in that regard upon the judgment of this Court.

31. In case of **Premnarayan Prabhulal Mina and another Vs State of Maharashtra, 2008 ALL Mr (Cri) 599**, ratio laid down by the learned Single Judge of this Court is that in order to prove “conscious possession” of the contraband (in the said case bundles of ganja), it is necessary for the prosecution to establish direct control of the accused over the articles. Mere fact that the bundles were found in the truck will not by itself show that the accused were actual possessors of those bundles. Mere presence of the accused in the truck would not clinch the issue of “conscious possession”. The learned Single Judge has referred the well known judgment of the Hon’ble Supreme Court in the case of **Avtar Singh and others Vs. State of Punjab, AIR 2002 Supreme Court 3343**. Relevant portion from the said judgment is extracted as under;

“Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three appellants –one of whom was driving the vehicle and other two sitting on the bags, were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence that the appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after

seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be the custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. For instance, if they are labourers engaged merely for loading and unloading purposes and there is nothing to show that the goods were at least in their temporary custody, conviction under S.15 may not be warranted. At best, they may be abetors, but, there is no such charge here. True, their silence and failure to explain the circumstances in which they were travelling in the vehicle at the old hours, is one strong circumstance that can be put against them”.

32. It reveals from the record that during the course of investigation, the prosecution had not only recorded statement of the co-accused Jafar Khan (now deceased) but also one Borgaonkar who came to be discharged subsequently. In so far as statements of those accused were concerned, they being statements made by the co-accused cannot be totally relied upon against the appellant. Their statements, *per se*, cannot be said to be an evidence under section 3 of the Evidence Act. Even in his statement under section 313 of the Cr. P.C., no question was put to

the accused/respondent that he was found in conscious possession of Mandrax Tablets.

33. An adverse inference is required to be drawn against the prosecution for non examination of Mr. Rane from whose possession the document produced at **Exhibit 30** came to be seized and not from the possession of the accused. Withholding the evidence of Mr. Rane would indeed lead to draw an inference against the prosecution. His non examination would cause prejudice to the cause of the defence.

34. The prosecution has not adduced any evidence as to from which place the consignment was loaded and was destined to which foreign country. P.W.8-Ankush Bhoite who is the owner of the tempo bearing No MMS-1580 did not support the prosecution case. Sum and substance of his evidence is that he could not identify the accused in the dock as to the person who had engaged his tempo on hire at the relevant time for transporting goods. Rather, it is his evidence that on the date of the incident besides the cleaner, the person who was owner of that consignment were with him. It is an unsolved mystery as to who was the real owner of the consignment and what was his name. According to this witness, consignment was unloaded in the MOD gate which is an admitted position. Even during his cross on behalf of the appellant, nothing could be extracted which would be of any assistance to the appellant. He did not know that apart from *lungis* what else was stored in the tempo, more particularly, alleged contraband.

35. As such, evidence of P.W.8-Ankush Bhoite does not further prosecution case any more as his evidence is hardly of any use in proving the charge against the accused. During the cross-examination, P.W.8- Ankush Bhoite was not confronted with his previous statement which was recorded before P.W.7-Sunil Rohatgi.

36. There is one more glaring defect in the prosecution case. P.W.9-Kishor Dave failed to identify the accused in the dock by testifying that since there was a large crowd, it was not possible for him to identify any person. He makes it clear in so many words that he did not know whether person sitting in the dock is the accused. This indeed gives a big jolt to the prosecution case.

37. We have been fortified in our view with a latest pronouncement of the Hon'ble Supreme Court in the case of **Gangadhar alias Gangaram Vs. State of Madhya Pradesh (2020) 9 Supreme Court Cases 202**. It was a case under Sections 8 (c)/20 (b) (ii) (C) and sections 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The appellant-accused was held to be owner of a house from which ganja (48 kg 200 gm) was recovered relying upon the voters list of particular year by rejecting his defence that he had sold his house to co-accused in the subsequent year. The voters list entry being prior to sale is of no significance. It is not without reason that co-accused has absconded. It is held that in view of the evidence available, it is not possible to hold that prosecution had established conscious possession of house with the appellant so as to attribute presumption under the NDPS Act against him with regard to

recovered contraband. It is, *inter alia*, observed that conviction could not be based on foundation of conjectures and surmises.

38. Thus, there is no compliance of section 42 (2) of the NDPS Act which would go to the root of the matter and vitiate the trial. There are no independent witnesses. The overall evidence does not at all inspire confidence and, therefore, it is highly unsafe to rely upon such evidence. The learned Special Judge has rightly appreciated the entire evidence and circumstances on record and reached a legal and proper conclusion in acquitting the accused.

39. Consequently, we do not find any reason to interfere with the impugned judgment in view of the settled principle of law that while considering the appeal against acquittal, the Appellate Court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable and if the Court answers above questions in the negative, acquittal cannot be disturbed.

40. Corollary of the aforesaid discussion is that the appeal is devoid of merits. Hence, it is dismissed.

[PRITHVIRAJ K. CHAVAN, J.]

[SMT. SADHANA S. JADHAV, J.]