

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.903 OF 2006

The State of Maharashtra)
(Through Yerwada Police Station)
Pune)) ..Appellant

V/s.

Sou. Rita Ankush Indrekar)
Aged 37 yrs., Occu: Nil)
R/a – S. No.8/1, Bhat Vasti,)
Yerwada, Pune – 6) ..Respondent

Ms. P. N. Dabholkar, APP for State
None for Respondent

CORAM : K.R.SHRIRAM, J.
DATED : 5th MARCH 2021

ORAL JUDGMENT:-

1 This is an appeal impugning an order and judgment dated 3rd May 2006 passed by Learned Special Judge, Pune acquitting respondent (accused) of offence punishable under Section 20(b)(ii)(A) of the Narcotic Drugs And Psychotropic Substances Act, 1985 (NDPS Act).

2 The charged Section 20(b)(ii)(A) of NDPS Act read as under:-

“20. Punishment for contravention in relation to cannabis plant and cannabis – whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder:-

(a).....

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable -

(i).....

(ii) Where such contravention relates to sub-clause (b), -

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to (one year), or with fine which may extend to ten thousand rupees, or with both;
 (B).....
 (C).....”

Small quantity is defined under Section 2(xxiii a) and it reads as under:

“2(xxiii a) “small quantity” in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette.”

In official gazette, small quantity of Ganja means upto 1000 gms and commercial quantity is 20 KG.

3 It is prosecution’s case that in the year 2002, complainant PSI Dogre was attached to Yerwada police station. On 20th April 2002, he and other police personnel left the police station in the morning hours with necessary stationery and articles meant for seizure of contraband articles-drugs and psychotropic substances. Complainant received a secret information at Gadi Tal Chowk, that accused was possessing contraband Ganja and she was dealing with the business in contraband at her house. Complainant received that information into writing at 9.15 a.m and prepared his first information addressed to PI of Yerwada police station. Carbon copy of that information was sent alongwith first information report through PHC Shirke to Yerwada police station. Complainant and other members of raiding party started proceeding towards the house of accused. Two persons namely; Sunita Sawant and Somnath Sable were called as panchas. Gist of that information

was explained to them. They agreed to act as panchas. Meanwhile, PHC Shirke returned from Yerwada police station and handed over the first information report to complainant which was bearing the endorsement and signature of the Police Inspector authorizing the complainant to carry out the raid at the relevant spot. Complainant, members of raiding party and panchas reached the house of accused. Complainant called out accused. Accused responded and came out in front of her house. Complainant disclosed that information and explained the purpose of raid giving option to accused of her personal search in presence of some other gazetted officer or a Magistrate which she declined. Notice to that effect was given to accused and its copy was retained by complainant. The search of the house of accused was then effected in presence of panchas. Accused was present throughout. While effecting search in the bed on first floor, complainant found a bag kept in southern-west corner. It was opened in presence of panchas. Complainant found contraband Ganja therein. It was weighing 900 grams. Two samples weighing 50 grams each were taken out and they were separately packed and sealed. Remaining quantity of contraband was also packed separately. Those three articles were then seized under seizure panchnama in presence of panchas. Accused was asked to produced electricity bill and other documents showing title to that house and accordingly she produced current electricity bill and the house tax receipt. Accused was then taken to Yerwada police station alongwith muddemal. Complainant lodged his complaint upon which the offence came to be

registered.

4 During the course of investigation, samples were sent to Regional Forensic Science Laboratory, who submitted a report as required under Section 57 of the NDPS Act. After completion of investigation, charge sheet was submitted and charges were framed. Accused pleaded not guilty and claimed to be tried. Defence of accused is of total denial and she has been falsely charge-sheeted without any evidence regarding possession of contraband.

5 In order to prove its case, prosecution has examined in all three witnesses, viz, Sunita Sawant (P.W.-1) who is pancha to the alleged seizure of contraband, Somnath Sable (P.W.-2) who is another pancha of that seizure panchanama and PSI Dogre (P.W.-3) who conducted that raid and carried out the investigation into that crime.

6 Some of the important documents upon which the prosecution relies are; seizure panchnama (Exhibit 10), electricity bill (Exhibit 15), house tax payment receipt (Exhibit 16) information under Section 42(1) of NDPS Act (Exhibit 18), first information to PI (Exhibit 19), complaint (Exhibit 20) and C.A. report (Exhibit 24).

7 Two primary issues were framed. a) Whether prosecution is vitiated for want of compliance under Section 42(1) and 42(2) of the NDPS Act ? and b) Whether prosecution proved that accused was possessing contraband in contravention of the provisions of the NDPS Act? Trial Court answered both these issues and acquitted accused.

8 Having considered the evidence and the Trial Court judgment, I am in
total agreement with the judgment of the Trial Court.

9 Section 42 of the NDPS Act reads as under:

“42. Power of entry, search, seizure and arrest without warrant or authorisation.— (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector.

Provided that if such officer has reason to believe that a search

warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

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

10 PW.-3, I.O. in his examination-in-chief says that the secret information that accused received was recorded by him in writing and he put signature thereon (Exhibit 18). While reducing the information into writing, carbon paper was placed below and the carbon copy was sent alongwith the report to the Police Inspector. The carbon copy of the report according to PW.-3 contains the endorsement and signature in the margin of the Police Inspector. In his cross-examination, PW.-3 admits that the station diary entry with respect to receipt of Exhibit 19 was not effected. But the perusal of Exhibit 18 does not indicate that the Police Inspector has received the same or copy of the same through Police Head Constable Shirke. It does not even mention concerned station diary entry number against which that information was entered in the station diary. Just because there is an endorsement on Exhibit 19 which is the carbon copy, it cannot be accepted that the copy of that information was infact sent to the Police Inspector and entry regarding the information was made in the station diary. Therefore, it cannot be safely stated that the mandatory requirement under Section 42(1) of the NDPS Act has been complied with and information simpliciter does not take the place of valid information reduced to writing of which the copy is sent to the immediate official superior. Therefore, there is no compliance

of the mandatory provisions of Section 42 of NDPS Act. Section 42 (2) requires PW-3 to send the copy of the information that he has reduced in writing, which has not been complied with. Bombay High Court in ***Gangaram Rama Gundkar & Anr. Vs. The State of Maharashtra***¹ has held that the provisions of Section 42 are mandatory and non-compliance is fatal to prosecution. In that case, the prosecution submitted that Investigating Officer sent wireless message to immediate official superior in respect of the information entered by him in the station diary for showing compliance of Section 42(2) of the Act. The court held that even that was not sufficient compliance with the mandatory provisions of Section 42(2) of the Act and a wireless message would be on the same footing as an oral information. Bombay High Court in ***Sayed Yusuf Syed Noor Vs. State of Maharashtra***² in paragraphs 6, 7, 8 and 9 has held as under :-

6. Section 42(1) of the NDPS Act, inter alia, postulates the concerned officer, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, in respect of which an offence punishable under Chapter IV has been committed, he may enter such premises, conduct search and effect seizure and arrest without warrant or authorisation. Section 42(2) stipulates that where an officer takes down any information in writing under Sub-Section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Section 42 has been held to be mandatory (See State of Punjab v. Balbir Singh 1994 (3) SCC 99.

7 Turning to the facts of the present case, looking from any angle, i.e., whether the officer concerned, for the purposes of Section 42(1) of the NDPS Act, was SDPO, Shri Shekhar, or it was Police Inspector, PW. 6 Raut, clearly there has been total noncompliance of Section 42. It deserves to be noticed that SDPO, Shri Shekhar was not examined as a witness by the prosecution. Further, as already noticed, the information to immediate official superior, namely, SP, was given on telephone only. According to PW. 6, no record of any such information was prepared or kept, or if it was so prepared, it was not produced by

¹ 2002 ALL MR (cRI) 1356

² 2016 (1) Bom.C.R. (Cri) 270

the prosecution for the reasons best known to it. Exhibit 28 though records that intimation in writing was given to superiors, no such writing has been produced. This very document, in fact, notices that SDPO Shekhar was dealing with the matter. It was at his direction that the police party went to the residence of the appellant. He is stated to have told PW. 6 to inform his immediate superior, namely, SP, who is said to have been informed on telephone, as per the testimony of PW. 6, and in writing, as per Exhibit 28, though none was produced. In fact, there has been non-compliance both of Sub-section (2) and Sub-section (1) of Section 42 of the NDPS Act. On the facts of the present case, Exhibit 28 cannot be pressed into service to show compliance of Section 42(1) of the NDPS Act. It is only a document recording and showing departure of the police party from the Police Station. It does not record the reason of belief contemplated by Section 42(1) of the NDPS Act. Alternatively, assuming that the officer to whom the information was given about the appellant selling narcotic drug at his residence was PW. 6, in that eventuality, he was required to record reasons to believe and was required to send a copy thereof to the immediate official superior in terms of Section 42(2) of the NDPS Act. In fact, PW. 6 does not even claim to be an officer to whom such information was given. According to PW. 6, SDPO told him that he should inform about the receipt of information to SP, which he informed to SP on telephone. On these facts, we find no substance in the contention of the learned Additional Public Prosecutor that since information was given to PW. 6 by SDPO Shekhar, on the facts and circumstances of the case it was neither necessary to comply with Section 42 of the NDPS Act, nor there has been substantial compliance thereof. Section 42 of the NDPS Act is mandatory. The object of the NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1), and to that extent, they are mandatory. Consequently, the failure to comply with these requirements affects the prosecution case and, therefore, vitiates the trial. [See Balbir Singh's case (supra)].

8 Reference may also be made to the two decisions on which reliance has been placed by the learned Counsel for the appellant. The first of such decisions is that of Mahinder Kumar v. State, Panaji, Goa, 1999 SCC (Cri) 79, where the Supreme Court held that since the officer had, admittedly, not recorded the grounds of his belief at any stage of the investigation subsequent to his realising that the accused persons were in possession of Charas and did not forward a copy of the grounds to his superior officer, as required by Section 42(2) of the NDPS Act because he had not made any record under the proviso to Section 42(1), as such the prosecution had to fail. The second is a Division Bench decision of this Court in Lamin Bojang v. State of Maharashtra, 1997 Cri. LJ 513, holding that forwarding of the information under Section 42(2) of the NDPS Act was mandatory and

the written documentary information is to be forwarded to the superior officer and not oral information and that the provisions had to be strictly complied with, and the question whether the prejudice is caused to the accused or not is entirely extraneous.

9 In view of our aforesaid conclusion about the non-compliance of Section 42 of the NDPS Act, the trial of the appellant stands vitiated and, consequently, the conviction and sentence of the appellant is set aside. In this view, we direct forthwith release of the appellant, if not wanted in some other case. In case he has paid fine, the same shall be refunded to him.”

The court has held that the officer should not only reduce information received to writing but also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1) and to that extent, they are mandatory. Failure to comply with these requirements would affect the prosecution's case and vitiate the trial. In ***Gangaram Rama Gundkar*** (*Supra*) the court observed that such entry in the station diary was also not in compliance with provisions of Section 42.

11 Since this mandatory provision of Section 42 of the NDPS Act has not been followed in the instant case, the trial itself is vitiated.

12 On the issue of recovery of contraband from possession of accused, P.W.-1 the panch witness has turned hostile. P.W.-1 has even denied that she ever accompanied the raiding party and she only signed the papers without knowing the contents because the police asked her to sign. P.W.-1 has denied the seizure itself.

13 P.W.-2 in his cross-examination admits that there was nobody in the room when the bag containing contraband was located by P.W.-3.

In his cross-examination, P.W.-2 says that while search and seizure was

going on, panchnama was being written but he does not know who was dictating and who was writing it down. PW.-2 also admits that the electricity bill (Exhibit 15) and house tax bill (Exhibit 16) are not in the name of accused. The electricity bill and house tax bill, Exhibit 15 and Exhibit 16, respectively, are in the name of one Ankush Indrekar and not in the name of accused. Prosecution has not explained why Ankush Indrekar was not prosecuted. That also indicates that accused was not the sole occupier of the house or being in sole possession of the house. I must say that contraband was found not on the search of accused but in the house of accused. Nothing has come on record in evidence to show that accused was in conscious possession of the bag containing contraband and, therefore, Trial Court has rightly concluded that prosecution has failed to establish that accused was possessing contraband Ganja weighing 900 grams.

14 I have perused the impugned judgment, considered the evidence and also heard Ms Dabholkar, learned APP. I do not find anything palpably wrong, manifestly erroneous or demonstrably unsustainable in the impugned judgment. From the evidence available on record, there is nothing to substantiate the charge leveled against accused.

15 There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to the accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by

a competent court of law. Secondly, accused having secured their acquittal, the presumption of their innocence is further reinforced, reaffirmed and strengthened by the Trial Court. For acquitting accused, the Trial Court rightly observed that the prosecution had failed to prove its case.

16 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.

17 Appeal dismissed.

(K.R. SHRIRAM, J.)