

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 647 OF 2008

1. Komalprasad s/o Shyamraoji Mundafale,
aged about 25 years, R/o Bharatmata nagar,
Plot No.25, P.S. Kuhi, District Nagpur.
(Abated as per Court's order dated
08/01/2020).
2. Firozkhan @ Washimkhan s/o Iqbalkhan,
aged about 20 years, R/o Motha Tajbag,
Sindhivan, P.S. Sakardara, Nagpur.

...APPELLANTS

Versus

State of Maharashtra,
through P.S.O. Imamwada, Nagpur.

...RESPONDENT

Shri S.S. Das, Advocate (appointed) for the appellants.
Shri H.D. Dubey, A.P.P. for the State.

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CORAM : PUSHPA V. GANEDIWALA, J.
DATED : JANUARY 14, 2021.

ORAL JUDGMENT :

Heard.

2. This appeal is directed against the judgment and order dated 12/08/2008 passed by the District Judge – 6 & Additional Sessions Judge, Nagpur in Spl. Case No. 12/2003,

whereby the appellants/accused are convicted for the offence punishable under Section 20 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “NDPS Act”), and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.2,000/- (rupees two thousand) each, in default, to suffer simple imprisonment for three months each.

3. The case of the prosecution, in nutshell, is as under :

i. On 19/02/2003, the complainant Deorao Thorat, Police Head Constable, Anti Narcotics Cell, Crime Branch, Nagpur (PW3) received secret information that two persons were coming towards Isolation Hospital, Nagpur by a scooter bearing registration No.MVI-9260 and that they were carrying Ganja. That, he took the said information in writing and forwarded the same to the Assistant Commissioner of Police, Nagpur through one Police Constable by name Sunil. Thereafter, the complainant along with the police party

proceeded towards the spot, and as per the information, the complainant noticed two persons coming on one scooter. The complainant and the staff led a trap, and both the appellants/accused were taken in custody. The police party declared their intention to take search of the appellants/accused. They conducted search in presence of two panchas, and in search operation, the complainant found one nylon bag in the dicky of the scooter containing 2 kg of Ganja. That sample of 24 grams of Ganja was taken out from that bag and was packed in a paper and was sealed.

Thereafter, personal search of appellant No.2 was taken. He was found in possession of a Jute bag, containing 2 kg of Ganja. From that also, 24 grams of Ganja was taken as sample, and the same was packed and sealed.

The remaining contraband of both the bags was also packed and sealed and was taken to the Police Station, Imamwada. Both the appellants/accused were also taken to the said Police Station.

ii. On the basis of written complaint given by the complainant, crime No.6045/2003 came to be registered against the appellants/accused by Police Sub-Inspector Khagendra (PW1). The aforesaid samples were sent for Chemical Analysis, report of which is positive.

iii. After investigation, chargesheet came to be filed against the appellants/accused before the Special Court. The Special Court framed charge against the appellants/accused and the same was read over and explained to them, to which they pleaded not guilty and claimed to be tried.

iv. To prove the charge against the appellants/accused, the prosecution examined in all three witnesses, one is police sub-inspector, who registered crime, second one is carrier of contraband to the Chemical Analyser and the third one is the complainant who also carried out investigation. The prosecution also brought on record necessary documents. The statements of the appellants/accused were recorded, on the incriminating material brought on record by the prosecution,

under Section 313 of the Code of Criminal Procedure, 1973. The defence of the accused is of total denial.

v. The Special Court found the evidence of the prosecution trustworthy, and held the appellants/accused guilty of the charge framed against them and accordingly, passed the judgment of conviction. This judgment is impugned in the instant appeal.

4. During the pendency of appeal, appellant No.1 died, and hence, the appeal against him stood abated.

5. Shri Das, learned counsel for the appellant No.2/accused, brought to the notice of this Court various material irregularities during investigation, which caused prejudice to the appellant. His main contention is with regard to the right of NDPS accused for fair trial in view of reverse burden of proof as is provided in the NDPS Act.

The learned counsel submitted that the prosecution could not prove the compliance of mandatory provision of Section 42(2) of the NDPS Act so the trial is vitiated against the appellant/accused. He further submitted that the prosecution also failed to prove the compliance of provisions of Sections 52-A and 57 of the NDPS Act.

6. He placed reliance on the judgment of the Hon'ble Supreme Court in the cases of *The State of West Bengal & Ors. Vs. Babu Chakraborty* (Criminal Appeal No. 426/1998 decided on 02/09/2004) and *Mohan Lal Vs. The State of Punjab* (Criminal Appeal No. 1880/2011 decided on 16/08/2018). He urged for acquittal of the appellant.

7. As against this, Shri Dubey, learned A.P.P., while supporting the judgment of conviction, submitted that the prosecution could prove the trap and that during search, the procedure was followed as contemplated in the NDPS Act.

He further submitted that the CA report supports the case of the prosecution. He further submitted that the

panchas could not be examined, as they were dead at the time of examination. He lastly submitted that the testimony of the complainant-cum-Investigating Officer is sufficient to inspire confidence of this Court.

8. I have considered the submissions put forth on behalf of both the sides, and perused the record and proceedings with the assistance of learned both the counsel.

9. At the outset, firstly, it is necessary to examine the compliance of mandatory provision of Section 42(2) of the NDPS Act by the prosecution. Vide Section 42(2), the empowered officer who takes down information in writing, shall forthwith send a copy of the same to his immediate official superior. The Hon'ble Supreme Court in the case of *Babu Chakraborty (supra)*, in para 23, has held as under :

“23. Great significance has been attached to the mandatory nature of the provisions, keeping in mind the stringent punishment prescribed in the Act. This Court has attached great importance to the recording of the information and the ground of belief since that

would be the earliest version that will be available to a Court of law and the accused while defending his prosecution. This Court also held that failure to comply with Section 42(1), proviso to Section 42(1) and Section 42(2) would render the entire prosecution case suspect and cause prejudice to the accused.”

In the said judgment, the Hon’ble Supreme Court, relying on the case of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, has held that the onus to prove compliance lies on the prosecution and in the absence of any prosecution evidence about the compliance with the mandatory procedure, the presumption would be that the procedure was not complied with.

10. In the instant case, the complainant Deorao (PW3) deposed that after receipt of the secret information, he recorded the same in writing, and forwarded a copy of the same to the Assistant Commissioner of Police through the Police Constable Sunil. However, as rightly pointed out by the learned counsel for the appellant/accused that the Police Constable Sunil as well as the Assistant Commissioner of Police have not been examined, and therefore, there is no meaningful

compliance as contemplated under Section 42(2) of the NDPS Act.

11. Apart from the above irregularity, which would go to the root of the case, both the panchas, in whose presence the entire trap proceedings were done, could not be examined on account of they being expired. The sole testimony of the complainant (PW3), who acted as an Investigating Officer, would not be sufficient to fix the charge under the NDPS Act, for which the minimum sentence prescribed is three years, which may extend up to ten years with fine.

12. Furthermore, the learned counsel for the appellant/accused also brought to the notice of this Court the nature of seized contraband i.e. wet, which again creates doubt with regard to quantity of the contraband, as it was not dried.

13. Apart from this, the learned counsel also brought on record non-compliance of the provisions of Sections 52-A and 57 of the NDPS Act. Though, they are not of mandatory

nature, however, the complainant (PW3), being a member of the Narcotic Cell, Crime Branch, is expected to comply with the provisions as per the NDPS Act. There are special reasons for bringing all these compliances in the NDPS Act, considering the fact that the seizure of contraband is always through police party, which is a decisive factor in fixing the criminal liability.

14. Apart from above, the learned counsel also brought to the notice of this Court the major discrepancies with regard to timings as to when the police party received the information, left the police station, preparation of panchnama etc.

15. The Hon'ble Supreme Court in the case of *Mohan Lal (supra)*, in para 5, has observed that in a criminal prosecution, it will be in consonance with the principles of justice, fair play and a fair investigation, if the informant and the investigating officer were to be the same person. In such a case, is it necessary for the accused to demonstrate prejudice, especially under laws such as NDPS Act, carrying a reverse burden of proof.

16. In the instant case, considering the aforesaid major irregularities, the appellant/accused could demonstrate prejudice caused to him, as the Investigating Officer and the complainant were one and the same person.

17. Considering the truncated nature of material brought on record by the prosecution, in the opinion of this Court, the appellant/accused deserves benefit of doubt. Hence, the following order :

ORDER.

- i. The Criminal Appeal is allowed.
- ii. The judgment and order dated 12/08/2008 passed by the District Judge – 6 & Additional Sessions Judge, Nagpur in Spl. Case No. 12/2003, is quashed and set aside. Appellant No.2 is acquitted of the offence punishable under Section 20 read with Section 29 of the NDPS Act.

18. Fees of the Advocate (appointed) for the appellant/
accused is quantified at Rs.5,000/- (rupees five thousand).

JUDGE

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