

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.717 OF 2002

Hanmantrao Masaji Banduke,
Age : 48 years,
Occ. Ex Police Constable,
r/o. Shri. Krishna Nagar, Nanded

..Appellant

Vs.

State of Maharashtra

..Respondent

Mr.S.S.Bora, Advocate for appellant
Mrs.G.L.Deshpande, APP for respondent

**CORAM : R.G. AVACHAT, J.
RESERVED ON : FEBRUARY 04, 2022
PRONOUNCED ON : APRIL 18, 2022**

JUDGMENT :-

The challenge in this appeal is to the judgment of conviction and order of sentence dated 02.12.2002 passed by learned Adhoc Addl. Sessions Judge, Nanded, in Special Case (NDPS) No.8 of 2002. Vide the impugned judgment and order, the appellant has been convicted for the offence punishable under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1986 ("NDPS Act", for short) and sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.50,000/-. In default of payment of fine, he was directed to undergo further rigorous imprisonment for one year.

2. It is the case of prosecution that on 22.08.2000 by 2:30 p.m., the appellant came to Nanded Railway Station in a passenger train. He had with him a suitcase and a bag. PW 5 – Eknath was Constable with the Railway Protection Force (RPF), Nanded Police Station. He was present on duty at the RPF police station. A railway employee came to him and informed that a person of a particular description (appellant) was present on the platform and the suitcase and the bag with him contained Ganja. He, therefore, went to the appellant and brought him to the RPF chowki along with a coolie to carry those bags. PW 5 – Eknath then informed the same to PW 1 - Bhimrao, another RPF constable on duty and left to inform his Officer, PW 6 – Shailesh Kumar. PW 6 – Shailesh Kumar, in turn, came to the RPF chowki.

3. The appellant was a Police Constable serving with Dharmabad Police Station, Nanded. PW 6 – Shailesh Kumar, therefore, approached Police Inspector (P.I.) – Shri Gaur, attached to Vazirabad Police Station. P.I. – Gaur came to R.P.F. chowki, at Nanded Railway Station. Then they approached the Superintendent of Police, Nanded. The Executive Magistrate, Nanded (PW 2 – Sanjay Sarwade) arrived in response to the requisition. In his

presence, search of the person of the appellant and the bags with him was made. PW 3 – Tatyrao was present as a panch witness. During search, the suitcase and the bag were found to have contained Ganja of 15 kgs. each. Requisite quantity of Ganja was, therefore, obtained as sample for analysis. PW 6 – Shailesh Kumar lodged the FIR (Exh.28) with Purna Police Station. A crime vide C.R. No.6003 of 2000, came to be registered. It was investigated. The seized article was sent to Forensic Science Laboratory, Aurangabad, to find it to be Ganja (contraband) (C.A. report is at Exh.32). On completion of the investigation, the appellant was proceeded against by filing charge sheet.

4. Learned Judge of the Special Court framed Charge (Exh.5). The appellant pleaded not guilty. It was his defence that on the given day, he was on duty rest. He had come to Nanded to pay college fee of his son. At Railway Police Station, Nanded, on 2:30 p.m., he saw two youngsters carrying a suitcase and a bag. He intercepted them on suspicion. Both of them were found disturbed and confused as well. At that time, some crowd gathered. The appellant asked one of the person in the crowd to call somebody from RPF chowki. In the meanwhile, PW 5 – Eknath arrived. The

appellant asked him to verify whether the suitcase and the bag contained Ganja. Services of Coolie were availed to carry both the articles to R.P.F. Police Station. The RPF Sub Inspector – Raju arrived in the meanwhile. He permitted the appellant to go to college for depositing fee of his son. In the meanwhile, Police Inspector – Gaur attached to Vazirabad Police Station, was contacted. He came. Police Inspector – Gaur had been the appellant's superior at Bhagyanagar Police Station, Nanded. Both appellant and Gaur had differences *inter-se*. According to the appellant, a false case, therefore, has been filed against the appellant at the instance of Police Inspector – Gaur.

5. To establish the Charge, the prosecution examined eight witnesses and produced in evidence certain documents. Learned Judge, on appreciation of the evidence, convicted the appellant, as stated above. Learned Judge had summoned some record from the concerned police station, with which the appellant was attached, to find that Police Inspector – Gaur had made some adverse remarks against the appellant. The remark pertained to the appellants dereliction in duty, specially in financial matter. The remarks indicate the appellant to have not written cash book on time.

Learned Judge found the entries to have been made by a responsible Officer. Learned Judge held that the responsible Officer like Shri.Gaur must have done his duty and the remarks against the appellant must have been made on the basis of the material in its support.

6. The impugned judgment appears to be replete of citations. The appellant was held to have been in conscious possession of the contraband. According to learned Judge, Police Inspector – Gaur came on the scene of the alleged offence at a later stage and therefore, the defence raised by the appellant that a false case was lodged at the instance of Gaur, was not cogent and convincing.

7. Learned counsel for the appellant would submit that there is breach of the mandatory provisions of Sections 42 and 50 of the NDPS Act. Both suitcase and bag were opened more than two times before personal search of the appellant along with the suitcase and bag was made in the presence of the Executive Magistrate. The appellant had been to a college at Nanded to deposit fee of his son. The person who had informed PW 5 – Eknath about presence of the appellant at the railway platform has not been examined. The RPF

Sub Inspector, Raju, with whose permission the appellant went to the college to deposit fee, has also not been examined. The adverse remarks made by Police Inspector - Gaur indicate that he had axe-to-grind against the appellant. Search under Section 50 of NDPS Act was made at 10:30 p.m., i.e. after about seven hours of taking charge of the suitcase and the bag, more so, when the appellant was allowed to leave the RPF chowki. According to learned counsel, the appellant was expected to make out his defence on preponderance of probabilities. There was no reason to doubt the defence of the appellant. As such, the prosecution could not prove the charge beyond reasonable doubt, submitted by learned counsel. He, therefore, urged for allowing the appeal.

8. Learned APP would, on the other hand, submit that admittedly, the suitcase and the bag found in possession of the appellant contained Ganja. The defence raised by him was improbable. As such, it was a case of conscious possession. The trial Court imposed inadequate sentence since minimum sentence prescribed for the offence is of ten years. She, therefore, urged for dismissal of the appeal. According to her, it was commercial quantity of contraband found in possession of the appellant.

9. Considered the submissions advanced. Perused the entire evidence in the case. Gone through the documents relied on.

10. C.A. report (Exh.32) indicates that it was a contraband, Ganja. Almost all the facts are not in dispute. The question is, whether the defence raised by the appellant is probable one. Admittedly, no investigation in that regard appears to have been made.

11. The appellant was serving as a Police Constable with Dharmabad Police Station. On 22.08.2000, he was on duty rest. He had, therefore, come to Nanded. According to him, he had come to deposit the college fee of his son. He arrived at Nanded Railway Station in a passenger train. It was about 02:30 p.m. PW 1 – Bhimrao and PW 5 – Eknath were present at RPF Chowki. According to PW 5 – Eknath, a Railway employee had come to him and informed that a person wearing Safari dress arrived by a passenger train and the bags with him contained Ganja. Admittedly, the railway employee, who gave PW 5 – Eknath the tip off, has not been examined. His identity has also remained undisclosed. It is true that by virtue of Section 125 of the Evidence Act, no police officer shall be compelled to say whence he got the information as to

commission of any offence. It is, however, the case of the appellant that while he arrived on the railway station, he noticed two youngsters carrying the suitcase and bag. He intercepted them. Both of them got disturbed and ran away. Suspecting something amiss, the appellant took charge of the suitcase and the bag. Some crowd gathered and therefore, the appellant asked one person from the crowd to go to RPF chowki and inform. The appellant has raised this defence no sooner PW 5 – Eknath had been to him pursuant to the information received by him. The defence raised by the appellant, therefore, cannot be said to be afterthought. Needless to mention, an accused can make out his defence on the basis of preponderance of probabilities.

12. When PW 5 – Eknath questioned the appellant about the suitcase and the bag with him, he offered PW 5 – Eknath those articles to find whether those contained Ganja. This conduct of the appellant too is found to be reasonable and probable as well. It was PW 5 - Eknath himself, who has testified in his examination-in-chief, that the appellant offered him both the articles to see whether those contained Ganja. PW 5 - Eknath opened the bags to find Ganja therein. The appellant then informed PW 5 – Eknath that he was

Police Head Constable serving with Dharmabad Police Station. PW 5 - Eknath, therefore, called a coolie (Balaji Mane). The coolie carried those bags to RPF chowki. PW 1 - Bhimrao was present in the RPF chowki. PW 5 - Eknath informed PW 1 - Bhimrao about the happenings and left to inform his Officer (Shailesh Kumar, RPF Sub-Inspector, PW 6). According to PW 1-Bhimrao, Shailesh Kumar came to RPF chowki within ten minutes. This police statement is, however, silent to state that Shailesh Kumar arrived immediately (within ten minutes). Admittedly, PW 5 - Eknath left the RPF chowki by 4:00 p.m. as his duty hours were over.

13. PW 5 - Eknath admitted that the RPF Sub-Inspector, Raju, had also arrived at RPF chowki immediately. He has admitted in no uncertain terms that the appellant had informed him to have seized Ganja and he wanted to lodge a complaint. The written report of the happenings was made by PW 5 - Eknath to his Officer, Shailesh Kumar. He admitted that said report was not placed before the Court.

14. On the lines of the evidence of PW 5 - Eknath, it is the evidence of PW 6 - Shailesh Kumar, RPF Sub-Inspector. It is in his evidence that on enquiry with the appellant, he (appellant) told him

to have come to Nanded in connection with an accidental death case. It was, however, found that the appellant had availed holiday (weekly rest). PW 6 – Shailesh Kumar, therefore, contacted with Vazirabad Police Station. The Police Inspector – Gaur, therefore, came to down to Nanded. All of them went to the office of the Superintendent of Police. It was lateron decided to lodge FIR against the appellant. He, therefore, lodged report (i.e. FIR Exh.28). PW 6 – Shailesh Kumar admitted that the FIR (Exh.28) is silent to state to have contacted Police Inspector - Gaur, who, in turn, came to the Police Station and interrogated the appellant. He admitted that his subordinate, RPF Sub Inspector - Raju was on duty. His evidence also indicate him to have verified the bags to find them to have contained Ganja.

15. PW 2 – Sanjay Sarwade was the Executive Magistrate, in whose presence, search of the person of the appellant, was made. The suitcase and the bag were seized. PW 3 - Tatyarao was present as panch witness. Under the panchnama (Exh.15), 200 gms. Ganja was obtained as sample for analysis. The question is whether, search and seizure have got very much relevancy in the facts and circumstances of the case.

16. Section 50 of the N.D.P.S. Act reads thus :-

50. Conditions under which search of persons shall be conducted.—

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has 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 any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy - two hours send a copy thereof to his immediate official superior.

The Hon'ble Supreme Court in the case of State of Rajasthan Vs. Parmanand and ors., AIR 2014 SC 1384, has held :-

Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 50 – Compliance of provision – Legality – Held – If merely a bag carried by a person is searched without there being any search of his person then section 50 of N.D.P.S. Act will have no application – But if bag carried by him is searched and his person is also searched then Section 50 will have application – Communication of said right to person who is about to be searched is not an empty formality – Communication of this right has to be clear unambiguous and individual.

17. Admittedly, the appellant was intercepted (so to say) at 2:30 p.m. by PW 5 – Eknath. Immediately, he was brought to the RPF chowki. The report (FIR) was lodged post 10:30 p.m. Search and seizure under Section 50 of NDPS Act was made at 10:30 p.m. Before the search and seizure, the suitcase and the bag had been opened more than twice to find it to have contained Ganja. In the factual scenario, the evidence of PW 2 – Sanjay Sarwade, that he opened the suitcase with the key obtained from the appellant, is found to be unreliable. The panchnama and his statement is also silent to state that the suitcase was unlocked with the key obtained from the appellant.

18. It is the case of the appellant that little past 3:00 p.m., RPF Sub Inspector - Raju had allowed him to go to college to deposit fee. It was his very stand before learned Special Judge before whom he was produced for first remand. Learned Judge, therefore, did not send him to the police custody even for a day. When the appellant was examined under Section 313 of the Code of Criminal Procedure, he produced on record a receipt of payment of college fee of his son. Same suggests that the appellant might have been allowed to leave the RPF chowki for college. He must have returned at least an hour thereafter. What happened in his absence can only be anybody's guess. The Investigating Officer did not make any investigation so as to find whether the defence raised by the appellant was false one. He could have examined even the coolie or any person present on the railway platform, to ascertain as to whether the appellant had, in fact, intercepted two youngsters and took charge of two bags from them. No investigation was made to find wherefrom the appellant received the Ganja.

19. Learned Special Judge had called for some documents from the concerned police station to find the Police Inspector – Gaur to have made some adverse remarks against the appellant. The

remarks pertained to the appellants dereliction in duty, specially in financial matter. The remarks indicate the appellant had not written cash book on time. There was also remark that the appellant did not deposit the amount of Rs.2,450/- credited to him towards police welfare fund, etc. Since veracity of the said remark was not the subject matter of this case and the remarks being adverse, the appellant has every reason to contend to have had no good relations with Police Inspector – Gaur. It is not known as to why Police Inspector - Gaur was contacted when the appellant was attached with Dharmabad Police Station at the relevant time.

20. On appreciating the evidence on record, this Court comes to the conclusion that the moment the appellant was intercepted, he had his side of the story. Admittedly, he was Police Constable attached with Dharmabad Police Station. On the given day, he was on duty rest. Ostensibly, he had come down to Nanded to deposit the college fee of his son. Receipt of deposit of fee has been placed on record. In spite of the appellant having been brought to the RPF chowki, it appears that the RPF Sub Inspector, Raju (not examined as witness) allowed him to go to college for depositing fee. As such, the appellant was not present at the RPF chowki for at

least an hour. The suitcase and the bag had been opened by the RPF officials to find it to have contained Ganja before those were taken charge of under panchnama (Exh.15) drawn in the presence of the Executive Magistrate at 10:30 p.m. Taking search of the appellant and seizure of the bags with him seven hours after his so called interception and permitting him to leave the RPF chowki for about an hour's interregnum, leads this Court to hold that compliance of Section 50 of NDPS Act is not made out. Sanctity of Section 50 of the NDPS Act was flouted. Admittedly, no investigation was made to find whether the defence raised by the appellant was genuine. The evidence on record leads this Court to hold the prosecution to have failed to establish the charge beyond reasonable doubt. True, the defence raised by the appellant may not be true. Same is intelligent one. It was raised the moment the appellant was intercepted by the RPF Constable.

21. For all these reasons, this Court is not at one with the impugned order of conviction and resultant sentence. Benefit of doubt goes to the appellant. The appeal, thus, succeeds.

22. In the result, the following order :-

- (i) The appeal is allowed.
- (ii) The impugned judgment and order dated 02.12.2002 passed by learned Adhoc Addl. Sessions Judge, Nanded, in Special Case (NDPS) No.08 of 2002, is set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1986
- (iv) His bail bonds stand cancelled.
- (v) Fine amount deposited by the appellant, if any, be refunded to him.

[R.G. AVACHAT, J.]