

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

CRIMINAL APPEAL NO.32 OF 2023

Sanju Paramguru Gauda
Versus
The State of Maharashtra

....Appellant

.... Respondent

Mr. Irfan A. Shaikh, Advocate (appointed) for the Appellant.
Smt. M.R. Tidke, APP, for the Respondent-State.

CORAM : SARANG V. KOTWAL, J.

DATE : 24th JANUARY, 2023

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 28.3.2013 passed by the Special Judge under NDPS Act, Greater Bombay in NDPS Special Case No.101/2011. There were two accused in the trial. The appellant was the accused No.1.
2. The appellant was convicted for commission of offence punishable under Section 8(c) read with 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act') and was sentenced to

suffer RI for twelve years and to pay fine of Rs.1 Lakh and in default of payment of fine to suffer SI for one year. The other accused Krishna Singh was convicted for the same offence, but, he was sentenced to suffer RI for ten years besides payment of fine of Rs.1 Lakh and in default of payment of fine to suffer SI for one year. Both the accused were given set-off under Section 428 of Cr.P.C.

3. Heard Mr. Irfan Shaikh, learned appointed advocate for the appellant and Smt. M.R. Tidke, learned APP for the respondent-State.

4. The prosecution case is that API Vinayak Vetel attached to Worli Unit of Anti-Narcotic Cell received a secret information in the morning of 12.4.2011 that the appellant was to come to Worli area for selling Charas. He was selling Charas at the behest of one Shafiq who was resident of Nashik and was dealing in Charas in Mumbai, Thane and Nashik. API Vetel then complied with the provisions of Section 42 of the NDPS Act. He informed his superiors. He sent written copy of the information to

his superiors. Arrangements were made to conduct a raid. Two panchas were called. The raiding party went to the spot in the afternoon. The appellant came to the spot. He was followed by the accused No.2. The raiding party members then apprised them of their right of being searched in the presence of the nearest Gazetted Officer or the Magistrate. Both the accused refused to exercise their right. Their search was conducted. The appellant was found carrying a bag which contained 12 Kgs of Charas. Accused No.2 was found having in his possession 2 Kgs of Charas. Samples were drawn. Pre-trap and post-trap panchnamas were signed by the panchas. The accused and the contraband were taken in custody. The officers then went to their Main Office at Cuffe Parade, Mumbai and lodged the offence vide C.R. No.49/2011 of Anti-Narcotic Cell at 8.15 p.m. on 12.4.2011. The seized contraband and the samples were deposited in the store room of their office at Azad Maidan. On the next day, the samples were taken out from the store-room and were sent for chemical analysis. The CA report showed the presence of Charas in the samples drawn from the contraband seized from both the

accused. The investigation was concluded and the charge-sheet was filed. Both the accused faced the trial for the same offences.

5. During trial, the prosecution examined seven witnesses including the raiding party members, a pancha, a carrier, the Chemical Analyst and the Store-Keeper. The defence of the accused-appellant was of total denial. Learned Judge considered the evidence on record and the defence of the accused and thereafter convicted and sentenced both the accused, as mentioned earlier.

6. The prosecution case unfolds through the evidence of PW-7 API Vinayak Vetal. He has deposed that on 12.4.2011 he was attached to Worli Unit of Anti-Narcotic Cell. In the morning, his informer gave him a secret information that one Shafiq, resident of Nashik dealt in Charas in Mumbai, Thane and Nashik through his agent i.e. the present appellant. PW-7 was further informed that the appellant was to come to Bandbox House, Worli between 1.00 p.m. to 1.30 p.m. for selling Charas. The informer also gave description of the appellant. PW-7 took down

this information in the Information Register and then in the Station Diary. Those documents are produced on record at Exhibits-50 & 51. He thereafter telephonically informed the ACP and Sr.PI. about the information. The ACP Kharpade directed him to take further action under the leadership of PI Jadhav who was the Unit in-charge. PW-7 then informed PI Jadhav about the information. PI Jadhav, in turn, told other police officers and staff members about the information. The Police Naik Shinde was asked to bring two panchas. PW-7 obtained computer print-outs of Station Diary entry in respect of the information and gave one copy to PI Jadhav which he acknowledged. The other copies were sent to ACP and Sr.PI through WPC Kule. The office copy of the print-out is produced on record at Exhibit-40. He sent the copies to the ACP and Sr.PI along with the covering letter. That covering letter is produced on record at Exhibit-54. The senior officers acknowledged the receipt of the information on Exhibit-40 itself. Search of the panchas was taken. Nothing objectionable was found. Preparations were made to conduct the raid. Pre-trap

panchnama was dictated by PW-7. It is produced on record at Exhibit-41. Brass seal was carried for further procedure and then the raiding party left to conduct the raid.

7. They reached Worli bus-stop at around 12.30 p.m. They divided themselves into two groups. The spot was visible to all the raiding party members. At 1.20 p.m. the appellant came there and waited for somebody. The appellant had black and red rexine bag on his right shoulder. He was also having gray coloured sack in his right hand. After some time the accused No.2 came there. They had some talk. The appellant handed over the gray coloured sack to the accused No.2. PW-7 was satisfied that the appellant was the person for whom the trap was laid. He gave signal to PI Jadhav. The raiding party went to both the accused. PI Jadhav then enquired with both the accused. They gave their details. PW-7 has identified both the accused in the Court. PI Jadhav then individually explained to both the accused about their individual right under Section 50 of the NDPS Act to be searched before the nearest Gazetted Officer or the nearest

Magistrate. He further individually told them that in case they demanded likewise, the arrangement would be made in that behalf. Before this oral appraisal, individual letters were given to them in Hindi. Both the accused acknowledged receipt of those letters by signing on the office copies of the letters. Those copies were signed by both the panchas and PI Jadhav. PI Jadhav offered to give search of the raiding party members to both the accused. They refused. Then the appellant's black and red rexine bag was searched. It contained one blue plastic bag having a knot. It was opened. There were 201 small balls. A little portion from those balls was taken and tested in Field Testing Kit. The result was positive for Charas. The total weight of the contraband was 12 Kgs. From the entire contraband two samples of 25 grams each were drawn. They were separately kept in two pouches. They were stapled and kept in brown envelopes. They were closed. The labels bearing signatures of PW-7 and the panchas were affixed on those envelopes. They were tied with a thread. Three wax seals were put on each of the envelopes. The remaining bulk was kept in the same packets and they were wrapped in white

cloth. It was stitched. The labels were also put on that packet bearing signatures of PW-7 and the panchas. Seven wax seals were put on it. On further search of the appellant, Rs.700/- were found in his left pocket.

The gray coloured bag in the hand of the accused No.2 Krishna Singh was searched. It was found to contain 67 balls weighing 2 Kgs. It was also Charas as was found from the Field Testing Kit. Two samples of 25 grams each were taken from this contraband as well. It was similarly packed and sealed. PI Jadhav then put ink seal impressions on two blank forms to be sent to FSL Kalina. Post-trap panchanama was drawn. It was completed at 4.00 p.m. It is produced on record at Exhibit-41A. The seized property and the accused were taken to the Head Office at Cuffe Parade. ACP Kharpade was present there. The accused and the seized property were produced before him. PHC Adhate lodged FIR before PW-7. He registered the crime and carried out further investigation. The FIR is produced on record at Exhibit-37. The seized articles were deposited with the Store-Keeper in their Azad

Maidan Store.

8. On the next day, PC Shinde was deputed to withdraw the samples and deliver them to FSL Kalina. PW-7 gave him the sample withdrawal letter. It is produced on record at Exhibit-20. The samples were taken to FSL, Kalina. After the CA report was received, the charge-sheet was filed.

In the cross-examination of PW-7, he deposed that the spot was not thickly crowded place but there was some traffic. Till conducting search of the accused he did not know how much quantity of Charas was being brought by them. He thereafter denied all the suggestions that the procedure for raid etc. was false.

9. PW-5 PI Jadhav had supervised the raid. He has substantially corroborated the evidence of PW-7. All the details mentioned by PW-7, which were to the knowledge of PW-5; were deposed by him. PW-5 himself had individually explained the accused their right of getting searched before the nearest Gazetted Officer of the nearest Magistrate. They were individually made

aware of their right. They were also given separate letters in Hindi. They had acknowledged those letters by signing the copies of those letters. Those copies are produced on record at Exhibits-42 and 43. Thereafter the procedure for search was conducted. The contraband was seized. The samples were drawn.

In the cross-examination, he deposed that he had accompanied the raiding party in the capacity of in-charge of the Unit and that there was no other Gazetted Officer posted in the Unit, but, he denied the suggestion that he participated in the raid in the capacity of the Gazetted Officer. Thus, his cross-examination did show that he was a Gazetted Officer but he accompanied the raiding party in the capacity of in-charge of the Unit. He admitted that he did not obtain refusal of the accused to exercise their right under Section 50 of the NDPS Act in writing in the office copy of the letters. Before going to the spot he had not approached any nearest Magistrate.

10. PW-4 PHC Adhate had also accompanied the raiding party. He has deposed that when PI Jadhav explained their rights

to be searched in the presence of the nearest Magistrate, both the accused refused to exercise that option. He thereafter described the further procedure of seizure of the contraband and drawing of the samples. He had lodged the FIR before API Vetal.

11. PW-6 Imran Shaikh was a pancha in whose presence the raid was conducted. He along with his friend had gone to a bakery at Worli at about 9.45 a.m. The police constable Shinde approached him and requested to act as a pancha. He had then described the procedure of the raid. He has also deposed that the accused refused to exercise their right under Section 50 of the NDPS Act. He then described the procedure of seizure of the contraband and drawing of the samples. He has identified the letters at Exhibits-42 and 43 which were also signed by the accused. He identified the articles in the Court.

In the cross-examination, he deposed that all the wax seals were put in their presence on the spot itself. But he could not give the exact number of seals on those articles.

12. PW-1 Police Constable Tanaji Gadhave was a store-

keeper with Azad Maidan Office of the Anti-Narcotic Cell. The offence, as mentioned earlier, was registered vide C.R. No.49/2011. At about 8.45 p.m. on 12.4.2011 API Vetāl approached him with the deposit letters and deposited eight articles in sealed conditions. Those articles were the two bulk contrabands, four samples and the cash amount seized from the two accused. He took entry in the Muddemal register vide M.R. No.27/2011. The articles were kept in the safe-custody. On 13.4.2011, PC Shinde approached him at 12.30 p.m. with a withdrawal letter in duplicate. The samples bearing Exhibit Nos.A1 and B1 were handed over to Shri Shinde for taking them to CA office.

In the cross-examination, he stated that he himself did not weigh the articles. He denied the suggestion that the articles were not having any seals. He did not assign any reason as to why he did not sign or put his initial on the articles.

13. PW-2 PC Rajesh Shinde was a carrier, who had carried the samples to FSL, Kalina.

14. PW-3 Dr. Sandeep Chetti had conducted the chemical analysis on the samples. He has given details of the procedure which he had followed. He has produced the data sheet and finally produced the CA report which are produced on record at Exhibits-27-A and 28-A. Both these reports showed that Charas was found in both the samples.

. This, in short, is the evidence led by the prosecution in this case.

15. Learned counsel for the appellant submitted that there is discrepancy in the evidence of PW-4 & PW-6 on one hand and PW-5 & PW-7 on the other. PW-5 & PW-7 have not specifically deposed that the accused had refused to exercise their right under Section 50 of the NDPS Act.

16. Learned counsel further submitted that there is no evidence as to from where the testing kit was brought. It was not mentioned in the initial part of the deposition of any of the witnesses when they deposed about preparation for conducting the raid. There is a doubt as to which point exactly the panchas

left the scene. It is not clear whether they had accompanied the raiding party to the office at Cuffe Parade. ACP Kharpade was the superior police officer to whom the information was sent but he is not examined. This is a lacuna in the prosecution case. Lastly, he submitted that considering that the appellant is in custody since April, 2011 some leniency be shown to him by reducing the sentence.

17. Learned APP opposed these submissions. According to her, there was absolutely no discrepancy in the evidence of the prosecution witnesses. The procedure was properly followed. All the mandatory requirements of Sections 41, 42 and 50 of the NDPS Act were complied with. The accused had refused to exercise their option of being taken to a nearest Magistrate or a nearest Gazetted Officer.

18. She further submitted that PW-5 himself was a Gazetted Officer. According to her, all the procedural requirements were complied with. The samples were drawn. There was no scope for tampering of the samples. According to

her the conviction and sentence were properly recorded.

19. I have considered all these submissions. As discussed earlier, the procedure right from the time when the information was received till the charge-sheet was filed is described in detail by PW-7. All the necessary documents and copies thereof are produced on record. The evidence shows that the secret information was taken down in writing. Its copies were made and copies were immediately sent to the immediate superior and other superior officers. The preparation was made for conducting raid. Two independent panchas were called. There is nothing to show that the panchas were habitual panchas or they had any personal interest in participating the raid.

20. PW-5 PI Jadhav had supervised the raid. He had apprised the accused of their right under Section 50 of the NDPS Act. The evidence of PW-4 and PW-6 specifically show that both the accused had refused to exercise their right. Thereafter their bags were searched and the Charas in different quantities, as mentioned earlier, was found from those bags. The quantity is

more than commercial quantity found from each of the accused. The samples were drawn. They were sealed with the labels bearing signatures of PW-7 and the panchas. Thereafter, FIR was lodged and the samples were stored in the store-room of the Anti-Narcotic Office at Azad Maidan. In all these procedures, there was no procedural lacuna and all the mandatory provisions were followed. The CA report shows that the samples were found to contain Charas. Therefore, the offence under Section 8(c) read with Section 20(b)(ii)(C) of the NDPS Act was proved. The evidence of the prosecution is consistent on material aspects.

21. Though learned counsel Mr. Shaikh tried to criticize the evidence of PW-7 and PW-5 on the ground that their evidence was exactly similar. However, that cannot be a criticism because it shows that their evidence was consistent and they were giving truthful versions of the events. The evidence of PWs-4, 5, 6 & 7 is supported by the documentary evidence as well. It is all quite consistent.

22. Considering these issues, I am of the opinion that the

prosecution has proved its case beyond reasonable doubt. The next question is about the sentencing part. While imposing the sentence, learned trial Judge himself has made a distinction between the role of the accused No.1 and the accused No.2. The appellant-accused No.1 was sentenced to suffer RI for twelve years as opposed to sentence of RI for ten years imposed on the accused No.2 mainly on the ground that the quantity found with the appellant was more than the quantity found with the accused No.2. The appellant was from a poor financial background. The prosecution case itself is that he was acting at the behest of one Shafiq; and hence he was used by said Shafiq. The appellant had sent an application dated 9.9.2014 seeking legal aid to file the appeal. However, his application remained unattended for inordinately long period for no fault of his. Because of all these circumstances, I am inclined to show some leniency to him. However, at the same time it cannot be overlooked that he was found with 12 Kgs of Charas. The commercial quantity for Charas is 1 Kg. Therefore, the substantive sentence will have to be more than the minimum sentence of ten years, but it can be reduced

from the period of 12 years which is imposed on him. Similarly considering his poor financial status and the continuous detention in custody since April, 2011 it is quite clear that he would not be in a position to deposit the fine amount and hence in default sentence can be reduced to a certain extent. Therefore, though I am maintaining the order of conviction, I am showing some leniency in reducing the sentence. Hence, the following order :

:: O R D E R ::

- i. The appeal is partly allowed. The impugned judgment and order dated 28.3.2013 passed by the Special Judge under NDPS Act, Greater Bombay in NDPS Special Case No.101/2011 is modified to the following extent.
- ii. The appellant's conviction under Section 8(c) read with Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 is maintained. However, instead of 12 years, the appellant is sentenced to suffer RI for eleven years and to pay a fine of Rs.1 Lakh. However, in default of payment of fine; instead of simple imprisonment for one

year as was imposed on him; he is directed to suffer SI for nine months in default of payment of fine. To that extent, the 'in default sentence' is also modified.

- iii. The appellant is granted set off under Section 428 of Cr.P.C.
- iv. The rest of the clauses of the operative part of the impugned order concerning the appellant, which are not contrary to this order, are maintained.
- v. Criminal Appeal is accordingly disposed of.

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(SARANG V. KOTWAL, J.)

Deshmane (PS)