



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 519 OF 2004

Rajendra s/o Jagannath Rathod,
Age : 30 years, Occ : Labour,
R/o Village Khanapur Tanda,
Tal : Ausa, Dist: Latur.

... Appellant

Versus

The State of Maharashtra,
Through Police Station, Udgir.

... Respondent

.....
Mr. Shashikiran N. Patil, Advocate for the Appellant.
Mr. S. M. Ganachari, APP for the Respondent-State.
.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 13.09.2024

Pronounced on : 20.09.2024

JUDGMENT :

1. Instant appeal arises out of judgment and order of conviction dated 09.08.2004 rendered by Special Judge, Latur in Special Case No. 14 of 2003, by which guilt of the appellant for contravention of Section 8(c) r/w Section 20(1)(b) of Narcotic Drugs and Psychotropic Substances Act, 1985, (hereinafter referred to as, "NDPS Act") has been recorded.

PROSECUTION CASE

2. Case of prosecution before trial court in nutshell is that, PW6 PSI Sharma, while on duty, received secret information that a person in possession of *ganja* would be arriving on ST Stand. He immediately, after conveying received information to superiors, summoned constable Birajdar and directed him to arrange panchas, whereas, another constable Kendre was directed to arrange trader possessing weighing scale. Naib Tahsildar was contacted, as Tahsildar was not available. On arrival of all above at police station, they were appraised and briefed about the secret information and raid was planned and accordingly they all proceeded to the vicinity of ST Stand. On platform no.2, they noticed person whose description matched with the secret information. He was approached and his name was asked, which he gave as Rajendra Jagannath Rathod. A black bag was hanging on his shoulder and he was questioned about its contents, but he started evading answers. He was offered option as to whether search being conducted in presence of PI Shinde or any other Gazetted officer, and accused consented for search in presence of officers present there.

3. In presence of Naib Tahsildar PW3, search of his person and thereafter of the bag in his possession was carried out, which was

found to be containing 4 kg and 600 grams *ganja*. Out of it, 100 grams by way of sample was withdrawn by Naib Tahsildar. Bag was sealed, samples were sealed. Detailed panchanama to that extent was drawn at that spot itself. Raiding party carried accused and the seizure to the police station. On reaching there, PW6 lodged report Exhibit 38 on the strength of which, crime was registered. Necessary entry was taken in the station diary. Receipt of seizure was drawn (Exhibit 39). Previous to that, Exhibit 41 permission to raid was already received.

4. On completion of investigation, accused was chargesheeted and made to face trial before learned Special Judge, Latur, who examined in all 6 witnesses on behalf of prosecution. Accused denied to lead any evidence. On appreciating oral and documentary evidence, by judgment dated 09.08.2004, learned Special Judge held appellant guilty for contravention of Section 8(c) punishable under Section 20(1)(b) of the NDPS Act and sentenced him to suffer R.I. for four years and to pay fine of Rs.10,000/-.

Above judgment is now taken exception to, by filing instant appeal on various grounds mentioned in appeal memo.

SUBMISSIONS**On behalf of the appellant :**

5. Heard learned counsel for the appellant at length. The main plank of argument of learned counsel for appellant is that, mandatory procedure as laid down under NDPS Act has not been scrupulously and strictly adhered to, i.e. more particularly Sections 50, 52-A(2), 54, 55 of NDPS Act. Secondly, there are several lapses and infirmities in the investigation like, not providing copy of panchanama to the accused forthwith even when it was mandated by the statute. Thirdly, there is deviation at the time of drawing sample as said procedure is not carried out in presence of Magistrate. Fourthly, alleged seizure is not brought before the court to demonstrate that sample drawn was from contraband allegedly possessed by appellant. For above reasons, prosecution version comes under shadow of doubt. He pointed out that very seizure panchanama of contraband is without signature of very Investigating Officer. Lastly, prosecution did not demonstrate disposal of alleged contraband. In spite of above serious infirmities, learned counsel submitted that, learned trial court has accepted the prosecution version and hence he seeks intervention and indulgence at the hands of this Court by setting aside the impugned judgment and to allow the appeal.

In support of his contentions, learned counsel placed reliance on the following rulings:

1. *Simarnjit Singh v. State of Punjab* 2023 (3) CriCC 160.
2. *Yousuf @ Asif v. State* AIR 2023 SC 5041.
3. *Hasan Imam Inamdar v. State of Maharashtra* 2003 ALL M.R. (Cri) 1889.
4. *State of Maharashtra v. Karunakar Kumarswami Ijjigiri* [Application for Leave to Appeal by State No.140/2020 decided by the Division Bench of this Court on 19.10.2023]

On behalf of the respondent-State :

6. Countering the above submissions and supporting the judgment of learned trial Judge, learned APP submitted that on receipt of secret information, raid was planned and executed. Appellant was found to be possessed with contraband *ganja*. **After following due procedure and offering opportunity to appellant to search the person of each of the raiding party** and after appraising him about the raid, he was questioned. He carried bag containing ganja. The same was weighed at the spot and quantity revealed was 4 kg 600 grams. Learned APP pointed out that this entire procedure was done in presence of Naib

Tahsildar who is Taluka Executive Magistrate. Therefore, procedure is being done in presence gazetted officer and as such, there is no deviation. That, after drawing sample, contraband was sealed. Seizure was sent for analysis. Its analysis yielded positive results. Therefore, according to learned APP, there was no deviation and infirmity as is tried to be posed, and consequently, canvassing in favour of the trial court judgment, he prays to dismiss the appeal for want of merits.

EVIDENCE BEFORE THE TRIAL COURT

7. The prosecution has examined following six witnesses in support of its case. Their role and status and the sum and substance of their evidence can be summarized as under :

PW1 Bhimraj, who acted as pancha, narrated that on 08.08.2003 around 11.45 a.m., he was called to police station along with another person namely Venkat Sabne. Secret information was shared with them by officer Birajdar. Person having scale was also present. They agreed to act as pancha and they all proceeded to S.T. Stand Udgir. On platform no.2, person matching with description received was spotted. On initial questioning, he refused to disclose contents of the bag in his possession. After informing him about search, his bag was opened by police officer, which contained another yellow gunny bag and after opening it, green colour leaves with seeds were

found, same were weighed, which turned out to be 4 kg 600 grams. 100 grams were drawn by way of sample and seized *ganja* was sealed. Panchanama was drawn, over which he and other pancha Venkat caused signature. He identified panchanama Exhibit 28.

In his extensive cross, he answered that second pancha Venkat is his old acquaintance. He also admitted his shop to be 100 meters away from police station. He is unable to give registration number of the vehicle in which they travelled up to S.T. Stand. He answered that they reached S.T. Stand vicinity at 12.15 p.m. Person arrested was already standing on platform no.2. The entire procedure continued up to 2.00 p.m. In his presence papers were not handed over to accused. He answered that in all he caused three signatures. He answered that panchanama was drawn by Birajdar. He denied previous acquaintance with Investigating Officer. Rest is all denial.

PW2 Police Constable Gharole stated that on 10.08.2003, sealed envelop containing *ganja* was handed over to him along with letter, which he carried to CA office and handed it over on 11.08.2003 and sought acknowledgment on the letter which he identified to be at Exhibit 30.

While under cross, he answered that there were holidays on 09.08.2003 and 10.08.2003. He answered that he received sample on 10.08.2003 at 8.00 p.m., whereas letter with endorsement to police station is of 11.08.2003. He answered that sample was received from PSI Sharma and at that time ASI

Gunale was in-charge of *muddemal*. That, the letter which was handed over to him, carried date as 08.08.2003.

PW3 Vitthal Khandapure, who is examined at Exhibit 32, stated that on 08.08.2003, he was acting as Naib Tahsildar and was a Class-II Gazetted officer. On receiving information from police, he went to police station and from there, along with police officers, panchas and a trader, they all proceeded to S.T. Stand and took positions at different locations. From platform no.2, person was accosted by PI Shinde and said person was in possession of rexine bag of black colour. On inquiry, said person avoided to answer and he was informed about search of his bag. Thereafter his bag was searched, which contained gunny bag and the same contained green leaves. Police informed him that it was ganja. Leaves weighed 4 kg 600 grams. 100 grams were drawn by way of sample and remaining was seized by drawing panchanama. He too signed the panchanama. In examination-in-chief itself, he answered that he does not recollect as to whether the accused sitting in the dock is the same person.

His relevant cross is as under :

The police came to him at 12.00 noontime. Around 12.10 p.m. they left for police station which is 5 to 10 minutes walking distance from Tahsil office. In all 10 persons left for raid. Accused was found standing on the southern side of the platform. Platform no.2 was in use for parking of buses proceeding towards Nilanga. Accused was questioned around 1.00 p.m. *Ganja* with gunny bag was weighed on the platform

itself. He answered that there were no talks between him, panchas and accused at the bus stand. He answered that his statement was not recorded.

PW4 Pathan Asif Khan, the trader, allegedly summoned with weighing scale, has not supported prosecution, as he denied being called at police station. However, he identified signature, but again answered that he does not know the contents of the panchanama. Finding him not supporting, he was cross-examined by learned APP, but he denied all suggestions.

While under cross at the hands of defence counsel, he answered that he has appeared in one more NDPS case.

PW5 API Murkute, Investigating Officer (IO) stated that investigation of crime no. 3080/2003 was handed over to him. Complaint, seizure panchanama, office copy of permission from SP office and copy of letter to CA was handed over to him. He recorded statements. CA report received was made part of the investigation papers.

PW6 PSI Sharma narrated about secret information received on 08.08.2003, summoning panchas, trader with weighing scale and Naib Tahsildar through constables and they being appraised about the secret information and on their agreement to participate, they all proceeded to S.T. Stand. A person as per description was spotted standing on platform no.2. He was questioned, who gave his name as Rajendra Jagannath Rathod. On his right shoulder, there was a bag. He avoided to disclose

its contests. He was asked whether he was willing for search to be conducted in presence of any other gazetted officer. Said person consented for search in presence of officer present there. During search, ganja in the bag was weighed. It weighed 4 kg 600 grams. Detail panchanama was drawn. They all came back to police station and he lodged report Exhibit 38. He identified *muddemal* receipt; copy of wireless message sent to Superintendent of Police; original letter seeking permission.

He is also extensively cross examined during which he answered that he is unable to state who recorded information in station diary. He answered that when person was spotted standing on platform no.2, at that time 8 to 10 persons were seen standing near him. He answered that panchanama is in the handwriting of constable Birajdar and he admitted that said constable Birajdar has not caused signature over it. He answered that photocopies were prepared at a shop outside the S.T. Stand. That, 3 copies of panchanama were prepared, 2 to be photocopies and 1 to be original. One was given to accused and one was retained for record of police station. He answered that writer constable was always possessed with blank papers, carbon and other material. He further answered that sealing was done by applying wax and sample was handed over to Mohrir at police station. **He admitted that after handing over sample at police station, seal was not affixed.** The rest is all denial.

ANALYSIS

8. During argument, fundamental objection raised, thereby questioning the veracity of prosecution version is that, there is utter disregard to the mandatory procedure laid down in the NDPS Act, more particularly there is contravention and violation of Sections 52, 52-A of NDPS Act, not handing over copy of panchanama to the accused. In support of such case, reliance is sought on above rulings.

9. In order to gauge and test veracity of the above submissions, it would be relevant to reproduce Section 52-A of the NDPS Act in its entirety.

“52A. Disposal of seized narcotic drugs and psychotropic substances.—

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner

as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

- (a) certifying the correctness of the inventory so prepared;
or*
- (b) taking, in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or*
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.*

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

10. The above discussed provision describes procedure and manner of seizing, preparing inventory of seized articles, forwarding the sealed seizure and further getting inventory certified through Magistrate, that too forthwith. The above provision also deals with procedure of disposal of seized contraband. It also provides for snapping photographs of the seizure and drawing of sample in presence of Magistrate.

11. Considering the rigors of the NDPS Act, the Hon'ble Apex Court in numerous judgments has casted a duty on prosecution to strictly and scrupulously adhere to the mandatory requirements referred

above, with sole intention to ensure fair play in the process of investigation, more particularly in the backdrop of magnanimity of the punishment provided under it. The obvious reason for insistence of strict compliance of mandatory procedure is to make the best evidence available for appreciation.

12. The mandate of strict compliance of statutory provisions and procedure is echoed in numerous landmark judgments like *Noor Aga v. State of Punjab* (2008) 16 SCC 417, *Union of India v. Mohanlal AIRONLINE* 2016 SC 606, *Jitendra v. State of MP* (2004) 10 SCC 562, *Union of India v. Jarooparam* (2018) 4 SCC 334, and recent rulings in the case of *Mangilal v. State of M.P.* 2023 INSC 634 and *Yousuf @ Asif v. State* 2023 INSC 912, wherein above and previous settled judicial pronouncements are reiterated.

13. Keeping the above discussed legal position in mind, and on careful re-appreciation of the evidence, the patent infirmity which is noticed here is that, after alleged seizure, PW6 PSI Sharma was not diligent in adhering to the requirements spelt out in Section 52-A of the NDPS Act. It is emerging that he has failed to approach Magistrate having jurisdiction forthwith, to comply with Section 52-A(2)(a), (3) and (4). What he has done is that he has secured presence of only

Naib Tahsildar, who admittedly was a mere Gazetted officer, but above discussed provisions mandate presence of Magistrate. Only those samples which are shown to be drawn in presence of a Magistrate are permitted to be declared as primary evidence. No application has been made to the Magistrate and procedure of drawing sample is apparently not done in presence and under the eyes of the Magistrate. This is a serious infirmity and deviation, inviting doubt about the very seizure. Therefore, even if CA report is positive, above procedure not being followed, the seizure cannot be said to be primary evidence. Admittedly, even remaining seizure i.e. after drawing sample, is not before the court and in what manner it was disposed, has neither come in Investigating Officer's evidence nor in the evidence of PW6 PSI Sharma. Admittedly, seizure, sampling, sealing is shown to be done at the platform itself and not before Magistrate, as is mandatorily contemplated. Resultantly, there is force in the submission in appeal that there is utter disregard and non-compliance of mandatory procedure.

14. Apart from above serious lapses, it has also come on record that copy of panchanama, which is expected to be extended to accused forthwith, is not demonstrated to be handed over. Pancha PW1 Bhimraj, in his cross, has admitted that no papers were handed over

to accused in his presence. This Hon'ble court in the case of ***Hasan Imam Inamdar*** (supra), has considered failure of supply of copy of the panchanama to the accused immediately as a serious prejudice to the accused.

15. Apart from there being no distinct evidence of handing over copy of panchanama to the accused immediately, the scribe to the panchanama namely, Birajdar, has not been examined. Equally, constable Kendre, who arranged for trader with weighing scale, has not been examined. Serious dent is inflicted to the prosecution version as PW4 Pathan Asif Khan, whose services were said to be extracted for weighing contraband, has not supported prosecution.

16. Very informant PSI Sharma admitted in cross that after seizure was handed over at the police station, seal was not affixed. His such answer creates doubt about the integrity of seizure. PW2 carrier claims to have received *muddemal* on 10.08.2003 and though he handed over *muddemal* at CA Aurangabad on 11.08.2003, he has admitted in cross that the letter addressed to the CA was dated 08.08.2003.

17. Therefore, even if, as version of PW2, there were holidays on 09.08.2003 and 10.08.2003, contraband has not been handed over forthwith. Another point which needs to be highlighted is that, Gazetted officer PW3 Vitthal Khandapure, even at the time of very raid, i.e. at initial stage, claims to have learnt from police i.e. raiding party that the bag contained *ganja*. How, without CA analysis report, it was open for police to inform him above, further creates doubt about the very procedure of receipt of secret information and raid being successfully executed. Another blow that is inflicted to the prosecution story is by their own witness PW3 Gazetted officer, who in his examination-in-chief, after identifying his signature over the panchanama, deposed that he does not recollect as to whether accused sitting in the dock is the said person. Such evidence of star and independent witness creates a cloud of doubt over the apprehension of accused.

18. To sum up, here, from above discussed analysis, it is clear that mandatory procedure has not been adhered to and followed. Coupled with above infirmities, it is manifest that prosecution case is full of serious doubts which go to the very root of the matter. Consequently, appellant succeeds. Hence, the following order is passed :

ORDER

- I. The appeal is allowed.
- II. The conviction awarded to the appellant Rajendra s/o Jagannath Rathod, by learned Special Judge, Latur in Special Case No. 14 of 2003 for contravention of Section 8(c) r/w Section 20(1)(b) of NDPS Act on 09.08.2004 stands quashed and set aside.
- III. The appellant stand acquitted of the offence of contravention of Section 8(c) punishable under Section 20(1)(b) of the NDPS Act.
- IV. The bail bond of the appellant stands cancelled.
- V. Fine amount deposited, if any, be refunded to the appellant after the statutory period.
- VI. It is clarified that there is no change as regards the order regarding disposal of *muddemal*.

[ABHAY S. WAGHWASE, J.]