

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

CRIMINAL APPEAL NO. 9 OF 2018
WITH
INTERIM APPLICATION NO. 4651 OF 2023
IN
CRIMINAL APPEAL NO. 9 OF 2018

Bhagwan Maruti Patil
Age 48 Years, Occu- Convict Presently At
K.C.P. Kalmaba, Kolhapur.

... Appellant (Org
Accused No. 1).

Vs.

The State of Maharashtra
(At the instance of Anti Narcotic Cell
Ghatkopar Unit, Mumbai)

... Respondent

WITH
CRIMINAL APPEAL NO. 33 OF 2017

Shashikant Chandrakant Thorat
Indian National, Age-50 years,
R/o- Village- Vairag, Taluka Barshi
District Solapur
(At present undergoing sentence at Kolhapur
Central Prison, Kolhapur)

... Appellant (Org.
Accused No. 2)

Vs.

The State of Maharashtra
(Anti Narcotic Cell CR. No. 266/14
dated 15/05/14).

... Respondent

Adv. Munira Palanpurwala Shaikh a/w Adv. Deepa Amati Muttagi, for the
Appellant in Appeal No. 9 of 2018.

Adv. Mallika Sharma i/by Adv. Ayaz Khan & Adv. Zehra Charania, for the
Appellant In Appeal No. 33 of 2017.

Mrs. M. R. Tidke, APP for the Respondent/State.

CORAM : **KISHORE C. SANT, J.**

DATE OF RESERVED : **22nd APRIL, 2024**

DATE OF PRONOUNCEMENT : 10th MAY, 2024

:: JUDGMENT ::

1. Heard learned Advocates for the parties.
2. Since both these appeals are arising out of the same Judgment and Order dated 20.12.2016, passed by learned NDPS Special Judge, City Civil & Sessions Court Greater Bombay, in NDPS Case No. 165 of 2014, therefore are taken together.
3. The Criminal Appeal No. 9 of 2018, is filed by Original Accused No. 1 and Criminal Appeal No. 33 of 2017, is filed by Original Accused No.2.
4. By way of Judgment under challenge Appellant/Original Accused No. 1 is convicted under Section 8(c) r/w. 20(b) (ii) (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and he is sentenced to suffer Rigorous Imprisonment for 20(twenty) years and to pay fine of Rs. 2,00,000/- (Rs. Two Lakhs Only), in default to suffer S.I. for 1 year. Original Accused No. 2 is convicted under Section 8 (c) r/w. 20 (b) (ii) (B) of the NDPS Act and he is sentenced to suffer Rigorous Imprisonment for 10(ten) years and to pay fine of Rs. 1,00,000/-

(Rs. One Lakh Only), in default to suffer S. I. For 6 (six) months. They are acquitted of the offence punishable U/sec. 29 of the NDPS Act.

5. The facts in short are that on 15.05.2014, at about 9:30 a.m. PSI Sanap received a secret information that Accused No. 1, dealing in business of Ganja would come along with his colleague, Accused No. 2 for selling Ganja in between 1:30 p.m. to 2.30 p.m. near Bhandup Udanchan Kendra, BEST Bus Stop, on route No. 500, 509, 512 near Airoli Bridge Junction, Vasant Rao Naik Mahamarg, Mumbai along with description of both the accused. The Officer recorded the information in the Information Book and station diary and gave copy of information to Police Inspector one Mr. Belge. The information was sent along with letter through one police constable Bhovlekar to ACP Kale, ANC, Cuff Parade. After receipt of such information PI. Belge passed on the information to ACP Kale on a phone. PI. Belge then called API Rikame and other police staff and in the presence of PSI Sanap he disclosed the information received from PSI Sanap and the direction received from ACP Kale. On such instructions one PN Edke brought 2 panch witnesses in the office of the police station the raiding material was obtained it was verified that the panch are independent witnesses and they were ready to act as panch witness. PSI Sanap took search of panch witnesses the panch witnesses took search of police and members raiding party. Nothing objectionable was found in the said search.

A pre trap panchanama was prepared.

6. After preparing for the raid they went in a police vehicle. The said vehicle was also searched by the panch witnesses. The vehicle stopped near the spot mentioned in the information at Airoli Bridge Junction. All the members of the team got down and proceeded towards Best Bus Stop by confirming the said spot. At about 1:40 p.m. one rickshaw came and stopped near the bus stop and 2 persons got down. One of the person took 2 bags from rickshaw the other person paid fare of the rickshaw both of them came to the spot. Looking at there suspicious movement PSI Sanap gave signal. On that the members of the team apprehended those persons. PI. Belge separately disclosed to both the accused about the information received by PSI Sanap and that they intend to take search. PI Belge separately informed the accused about their right of search in presence of nearest Magistrate or Gazetted Officer by giving letter separately to both the accused persons. The accused denied to exercise said option.

7. On taking search of Accused No. 1 first found in the bag on the shoulder of Appellant/Accused No. 1 some content was found in that black colour rexin bag with greenish strips. It was containing greenish leaves, stalks, seeds, fruiting tops with punjent smell. PSI Sanap confirmed that it was Ganja. It came to be weighed on weighing scale. It weighed 11 kg. Two samples of 25 grm. were taken separately and kept in transparent plastic

bag. The bag was closed by stapler pin. The packets were kept in 2 separate envelopes. A label came to be affixed by Mr. Sanap and panch witnesses. The said envelopes were binded by the thread and were marked as Exhibit A-1 and A-2. The other quantity was kept in original bag and the bag was closed by zip seals were affixed with label on the bag. After this procedure accused were asked about their positioning. They could not give satisfactory answer to the queries put by P.I. Belge.

8. After investigation and after filing of the charge-sheet these Accused persons came to be tried on the basis of evidence orally as well as documentary. The Court came to the conclusion that the prosecution has proved the case beyond reasonable doubt. The Accused were held guilty.

9. In the appeal the learned Advocate for Accused No. 2 vehemently argued submitting that there is no material sufficient to hold the accused guilty of the offence. No procedure under Section 52-A, which is mandatory is followed taking this Court to the evidence of the witnesses. Since the main ground is of non compliance of Section 52-A. She has taken this Court to the evidence of PW-1 and PW-2 to show non compliance of the provision. PW-1 is Rikame who was working as API. The relevant time was attached to Anti Narcotic Cell Ghatkopar Unit, Mumbai. He stated about the information received by the P.I. Belge. He stated about the raid. In his evidence it has come that P.I. Belge had separately informed the Accused

persons of their rights in respect of search and seizure under Section 50. The accused however refused to do so. It has come in para 22 that as per the directions of P.I. Belge sample of 25 g.m. each was taken into 2 polythin bags and those were closed by stapler and were kept separately. Labels with signature of PSI Sanap and the panch witnesses were affixed on the same. From the cross it is seen that it is taken that there is no mention of taking of the entry of the information in the station diary. He did not stated at the time of FIR that the information was received from PSI Sanap on 15.05.2014. It is further taken that the constable Bhovlekar was asked to attend the Court and was given documents at 9:15 a.m. and he left Cuffe Parade office at 11.00 a.m. However there is no entry of this constable Bhovlekar returning back to the unit. It is thus tried to show that Bhovlekar was not present as he was sent to attend the Court duty. The learned Advocate argued that thus it was impossible for constable Bhovlekar to immediately come back to the police station. From evidence of PW-4 it is submitted that PW-4 Baban Eknath Sanap PSI took the information that he two samples of 25 grm. from the substance for C.A. purpose he put those in 2 plastic transparent bag separately and closed the mouth of the bag with stapler pin. From the evidence she submits that there is no evidence showing that there is a compliance of section 52-A.

10. In the cross of PW3 it is stated that PI Belge did not take the

accused to a side. In the evidence of panch it has come that he did not remember as to whether the panchanama was written first. She thus submits that the panchanama was recorded only as formality without following due procedure.

11. Learned Advocate in Criminal Appeal No. 9 of 2018 adopted the arguments of the learned Advocate in Criminal Appeal No. 33 of 2017.

12. The learned APP vehemently opposes the appeals by submitting that in the evidence of PW-1 Rikame stated that he was working as API and thus was a Gazetted Officer as per Government Notification 15.07.2013. The search was therefore taken in the presence of Gazetted Officer as per the said Notification the PI and API both are Gazetted Officers. Thus at the time of search and seizure they both were present and search was taken in the presence 2 Gazetted Officers as such it was not necessary to take the Accused to the Magistrate. This witness has specifically stated that the Accused were separately explained about there right in Marathi. On that both the Accused said that it is not necessary to take search in the presence of Gazetted Officer. It is submitted that from FIR also it is clear that entire procedure was followed and thereafter FIR was lodged and there is compliance of the procedure. PW-2 is also a Gazetted Officer he was working as P.I. Vijay Belge. The recovery was from Accused No. 1 of 22 k.g. of Ganja that is more than the commercial quantity.

Accused No. 2 was also possessing 3 k.g. of Ganja in commercial quantity. The evidence of P.W. 1 and P.W. 2 is corroborated by evidence of P.W. 4. The Exhibit-43 information was properly recorded, she submits that the Trial Court has rightly considered all this evidence.

13. She further submitting that the Court also considered that no questions were put to the witnesses in the cross examination by the accused persons. She submits that, if there was not compliance of Section 52-A then ought to have been put to the witnesses in the cross examination. The Trial Court has rightly considered that since the search was taken in the public place provision of the Section 42 of the Act are not attracted but it is Section 43 which is attracted in the present case. It is her submission that from the spot Panchanama it is clearly seen that prosecution has rightly brought on record the spot of incident is open place which is not denied in the cross examination. So far as language is concerned she submits that both the accused persons were conversant with Marathi as well as Hindi on or going on this points she submits that no interference is required at the hands of this Court in the appeal. She submits that the FSL Report is duly proved which shows that Exhibit 1 to 3 fall under Section 2, b(iii) of the NDPS Act, 1985. She thus submits that the prosecution has rightly proved the case.

14. In rejoinder the learned Advocate argued that in panchanama it has come that the language of accused is recorded as Hindi whereas they were apprised of their right in Marathi. She further submits that from the evidence of panch also it is clear that the accused were not apprised separately but were apprised jointly.

15. The learned Advocate for the Appellant in Criminal Appeal No. 9 of 2017, submits in rejoinder that there is nothing on record to show that there is compliance of Section 42 taken by inviting attention to the movement of constable Bhovlekar to show that he could not have been a member of the raiding party. The appellants relied upon in the Judgment in the case of *Mohammed Khalid And Another Vs. The State of Maharashtra* latest Judgment of the Supreme Court of 01.03.2024 in Criminal Appeal No(S). 1610 of 2023. Wherein the Hon'ble Apex Court has held that when there is non compliance of Section 52-A of the Act. The C. A. Report is merely a piece of paper and cannot be considered as evidence. This court has considered the Judgment in the case of Mohammad Khalid (supra).

16. This Court finds that the prosecution in the present case has not proved compliance of Section 52-A. Though it is a submission by the learned APP that in view of Notification P. I. And A.P.I. both are Gazetted Officers accepting the same position it was still necessary to follow the procedure under Section 52-A for destruction and storage of the contraband

material as per the guidelines in the case of *Union of India Vs. Mohanlal and Another Reported in 2016(3) SCC page 379*.

17. This Court finds that the prosecution has not complied with the mandatory requirement of the said Section and has thereby failed to prove the offence against the Appellants. This Court has no hesitation to hold that the conviction deserves to be set aside by allowing the appeal. Hence the following Order.

ORDER

- a) Both the Criminal Appeals are allowed.
- b) The Judgment and Order dated 20.12.2016, passed by learned Special Judge (NDPS), Sessions Court in NDPS Case No. 165 of 2014, Greater Bombay, is quashed and set aside.
- c) The sentence of both the Accused is quashed and set aside.
- d) The Appellants be set free, if not required in any other case.
- e) Both the Criminal Appeals are disposed of.
- f) Pending Applications, if any, stand disposed of.

(KISHORE C. SANT, J.)