
(2002) 07 BOM CK 0100
In the Bombay High Court
Case No : Criminal Appeal No. 527 of 1998

Benard Chapanga

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-07-2002

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 22, 23, 28, 29, 30

Citation : (2003) 2 ALD(Cri) 121

Hon'ble Judges : J.G. Chitre, J

Bench : Single Bench

Advocate : F.E. Saldanha, for the Appellant; Prakash Thakur, Public Prosecutor for the respondent No. 1 and D.P. Adsule, Assistant Public Prosecutor for respondent No. 1 N.C.B., for the Respondent

Final Decision : Allowed

Judgement

J.G. Chitre, J.—The appellant is assailing correctness, propriety and legality of the order of conviction and sentence passed against him by the Additional Sessions Judge Special Judge in Special Case No. 15 of 1995, for offence punishable u/s 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (N.D.P.S. Act) and sentencing him to undergo rigorous imprisonment for 12 years and to pay a fine of Rs. 2 Lacs, in default to suffer further rigorous imprisonment for one year. By the said judgment the learned trial Judge had also convicted the appellant for the offence punishable u/s 23 of N.D.P.S. Act and sentenced him to undergo rigorous imprisonment for 12 years and to pay a fine of Rs. 2 lacs in default to suffer further rigorous imprisonment for one year. Likewise, the learned trial Judge convicted the appellant for committing the offences punishable under Sections 22, 23 and 28 r/w Section 29 of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for 12 years and to pay a fine of Rs. 2 lacs, in default to undergo further rigorous imprisonment for one year. In the same way the learned trial Judge had convicted the appellant for offence punishable u/s 30 of N.D.P.S. Act and sentenced him to undergo rigorous

imprisonment for 10 years and to pay a fine of Rs. 1 lac, in default to undergo further rigorous imprisonment for six months. The Substantive sentences have been directed to run concurrently.

2. The prosecution case in brief is that P.W. Kale and his colleague got information that some suspected persons are likely to travel by Ethiopia Airlines Flight No.ET-611/25.10.94/STD: 0445. The said information was reduced into writing and it was sent to Shri Om Prakash through Singh. Under the direction of Om Prakash raiding party abashed in the building of Air Port and when the appellant and his associate came near the Customs Counter, they were apprehended and their passports, air tickets and boarding passes were seized by the members of raiding party. The bags checked in were identified by the appellants and his associate respectively. The key was demanded but the present appellant stated that the key was lost. Hence the said bag was torn open. It was found to contain 18 polythene bags which were containing mandrax tablets (Methaquilon Powder Tablets). Thereafter the appellant and his associate were told that they were entitled to get searched before a Gazetted Officer or a magistrate but they preferred to be searched by the members of raiding party and they were searched so in presence of panch witnesses who were present there when the appellant and his associate were apprehended. Except some Dollars nothing was found with the appellant. The panchanama was drawn and the appellant was arrested. The seized mandrax, after being tested, was deposited in the office of N.C.B. The investigation continued and the appellant was interrogated for collecting the information. Thereafter the appellant was put to trial and after appreciating the evidence on record in view of the arguments submitted, the learned trial Judge passed the order of conviction and sentence as mentioned above, which has been hereby assailed.

3. Shri Saldanha Counsel appearing for the appellant, very vehemently defended the appellant and submitted that in the present case the important provisions of law have not been complied with and therefore, the evidence which has been collected by the Investigating Agency cannot be accepted for basing conviction. He submitted that the panch witnesses had acted as panch witnesses in previous cases and therefore, their evidence cannot be believed. Shri Thakur, Counsel appearing for respondent No. 1, submitted that it would not be proper to conclude that only because the panch witnesses gave evidence in some cases prior to the case in question, their evidence should be discarded. He submitted that on the contrary, in the matter of Pon Adithan Vs. Deputy Director, Narcotics Control Bureau, Madras, the Supreme Court has held that absence of independent witnesses and documentary evidence to establish the fact that the requirement of Section 50(1) was complied with does not damage the credibility of the prosecution evidence.

4. Shri Thakur, Counsel appearing for the prosecution submitted that there was no need of complying with the provisions of Section 50 of N.D.P.S. Act when the "baggage" of appellant was brought from the checked in spot and was opened by

the appellant voluntarily by saying that he had lost the keys, because, according to the judgment of the Supreme Court in *State of Punjab Vs. Baldev Singh, etc.* etc., it was not necessary. Shri Thakur submitted that before the person of the appellant was searched, he was informed that he had a right to get himself searched before a Gazetted Officer or a Magistrate, but he preferred to be searched by the members of raiding party and after his personal search, nothing was found on his person. Shri Thakur submitted that, in view of the observations of the Supreme Court in Baldev Singh's case (Supra), there was no need to comply with the provisions of Section 50 in the present case though the officers were having prior information. He submitted further that, in view of the observations of Supreme Court in Baldev Singh's case, it was not necessary to reduce the same information into writing.

5. Shri Thakur submitted that it is not necessary that the evidence of panch witness should be discarded only because he happens to be a person who had acted as panch witness in previous cases. He submitted that the view taken by Bombay High Court in some cases on which Shri Saldhna placed reliance, are dealing with different set of facts. This Court would be adverting its judicial attention towards the points urged by the Counsel appearing for the appellant and the prosecution on the point whether the provisions of Section 50 were necessary to be complied with in the present case when the baggage of the appellant was searched.

6. In paragraph 55 of the judgment in Baldev Singh's case (Supra), the Supreme Court pointed out its final conclusions after discussion on important aspects of the points involved for discussion and adjudication. In sub-para (1) of para 55 the Supreme Court held that:

"That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing".

Sub-para (3) indicates that:

"That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act".

Therefore, if the conclusions drawn in sub-para (1) and sub-para (3) are summed up and properly understood, it shows that it is necessary to comply with

the provisions of Section 50 when "person" of a suspect is to be searched but not the baggage, which happens to be separate from his body. There has to be nexus established by the prosecution between the suspect, accused and said separate baggage by legal and reliable evidence. In the present case, the bag was kept at a spot which pertained to checked in zone. It was bearing necessary tags and furthermore, when brought, it was identified by the present appellant as belonging to him. Not only that but he stated that he had lost the keys of that bag which was "his baggage" which was having a particular locking system. Furthermore, it is important to note that he voluntarily opened the said bag, though he had retracted it after 48 days. His statement has been retracted by him after 48 days, which needs to be specially pointed here at this juncture. During this period he must have been produced before the Magistrate and he had ample opportunity of retracting his said statement. Therefore, this period of 48 days assumes importance in this case. When his said bag was searched and 18 plastic bags were found containing mandrax tablets ("Methaquilon Powder Tablets"). The said baggage must have been sent in after being checked in, in his presence and furthermore, that has been identified by him before the prosecution witnesses examined in this case on that point. Retraction is delayed and not reasonably, prompt. In these circumstances, as pointed out in sub-para (1) of paragraph 55 of the judgment of Supreme Court in Baldev Singh's Case (Supra), the prosecution was not obliged to comply with the provisions of Section 50, because the said bag was not on person of the appellant but was lying separately from him and the prosecution has established a nexus between the said bag and the present appellant in this case.

7. When the person of the accused was to be searched, in this case, the Investigating Agency had informed the appellant that, he was entitled to get searched before a Magistrate or a Gazetted Officer. But he opted to be searched by the members of raiding party. But in his personal search no incriminating article was found. Therefore, this Court need not advert its attention to this point further, when this Court dismisses the submissions advanced on behalf of the appellant on this point assailing the order of conviction.

8. There is an attack from the side of appellant to the correctness and legality of the order of conviction and sentence on the ground that in the present case the panch witness in his cross-examination has admitted that he had acted as panch witness in some cases prior to the present one. The Counsel appearing for the appellant submitted that the happens to be a habitual panch witness and under the thumb of the investigating agency. He placed reliance on the judgments of this Court in following cases:--

(1) Usman Haidarkhan Shaikh Vs. The State of Maharashtra, , wherein the Division Bench of this Court held that,

"when the evidence of panch witness who acted as panch in connection with raids carried out by same Head Constable, evidence of such witness must be accepted only after carefully scrutiny"

(2) Mohd. Hussain Babamiyan Ramzan v. State of Maharashtra, reported in (1994) 2 CCR 1223 the Division Bench of this Court held that:

"Normally, it is expected that the Investigating Officer will take independent Panch witnesses and if knowingly he has taken pliable witnesses as panch witnesses the entire raid would become suspect and in such a case it would not be possible to hold that the evidence of Police witnesses by themselves would be sufficient to base a conviction. Therefore, really speaking, on this ground itself the conviction cannot be sustained."

(3) Shri Bhagwatsingh Gaud v. State of Goa reported in 1998 Com. C.R.485 wherein the Division Bench of this Court held that:

"Panch witness is pliable witness, veracity of his evidence in N.D.P.S. cases would be doubtful. When such panch witness was acting as police witness for 4 to 5 years and earlier known to have been witness in other N.D.P.S. cases, it creates doubt that the witness is pliable witness, who had earlier tried to conceal of the fact that he acted as panch in other cases. The evidence cannot be relied upon."

Shri Thakur placed reliance on the judgment of Supreme Court in the matter of State of U.P. Vs. Zakauallah, wherein the Supreme Court held that:

"The necessity for "independent witness" in cases involving police raid or police search is incorporated in the statute not for the purpose of helping the indicated person to bypass the evidence of those panch witnesses who have had some acquaintance with the police or officers conducting the search at some time or the other. Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty are not independent person. If the police in order to carry out official duties, have sought the help of any other person he would not forfeit his independent character by giving help to police action. The requirement to have independent witness to corroborate the evidence of the police is to be viewed from a realistic angle. Every citizen of India must be presumed to be an independent person until it is proved that he was a dependent on the police or other officials for any purpose whatsoever."

Thus, summing up the ratio of the judgments cited above, and proper interpretation of the independent character of the witnesses, some important aspect will have to be considered and kept in view, it can be enumerated for consideration. Its limited listing would not be a proper one. There would be other factors also which would weigh at the time of considering the independent or dependent character of the witness who had acted as a panch witness for police in raids or seizures. They can be numbered but cannot be limited. (1) the status of such witness in the society, (2) whether such witness is amenable to police influence, (3) whether such witness has ground to be afraid of police or such reading agency - Whether such person has any cause to beg for the favour of

police or such raiding agency, (4) whether such person can afford to displease the police or such raiding agency, (5) whether such person can remain fearless and can refuse the request of police or such agency to act as panch witness for untruthful case but has accepted to act as panch witness only for helping the cause of law and justice in truthful case. (6) whether such person has any independent source of livelihood or whether he is dependent on police or such raiding agency for his livelihood or his status in the society, (7) whether the witness has regard to the rule of law and therefore has acted as a panch witness or a witness, (8) whether such a witness is law abiding person and himself happens to be a disciplined and law regulated person, (9) whether he is found to be law breaking person, whether there is any suspicious things in his ways of livelihood, behaviour or conduct. (11) whether police or such raiding agency had asked him the questions about his impartiality to acting as a panch witness or his participation in former cases of traps, raids and seizures.

9. On these and other relevant grounds the Court should examine evidence of such witness cautiously and carefully when it has come in the evidence that such witness has acted as panch witness in some other cases prior to the case in question. If he happens to be a person convicted or if he happens to be a Court bird or happens to be tainted on above mentioned points, the Court has got to be on its guard in accepting his evidence. Acting as panch witness in previous cases does not by itself and alone disentitle him of creditworthiness. A citizen cannot be stamped to be a liar unless his evidence has been examined with proper approach guarded by normal human experience and prudence of prudent person.

10. In the present case the panch witness Kotiyan happens to be a person who is working with Ethiopian Airlines. When the raiding party entrusted with the duty of catching the persons involved in trafficking in narcotic drugs for witnessing such detection and for drawing panchanama they are bound to request the persons working in the Air Port premises itself to act as a panch witness and therefore, there was nothing wrong in asking Kotiyan to act as a panch witness. In the present case, evidence on record does not show that there was any special reasons for the raiding agency to pick up Kotiyan only as a panch witness. There is nothing on record to show that Kotiyan was dependent on the raiding agency for his livelihood or his status in the society or for continuation of his service. Therefore, there is nothing on record to show that Kotiyan was afraid of the raiding agency and his well being was dependent on it. The judgments cited by Shri Saldanha, Counsel appearing for the appellant, to justify his submissions are speaking of different facts and circumstances of the case. In Bhagwatsingh Gaud's Case (Supra) the raiding agency had asked the panch witness about his performance as panch witness in previous case and the observations of the Court shows that he had not admitted that at appropriate stage. In Usman Haidarkhan's case (Supra) the panch witness had acted as panch witness for the same Head Constable in previous cases and the record was showing that he was a regular panch witness of that particular police station. Therefore, on such grounds, this Court thinks, the Court had made observations in such ways. In

Zakullah's case (Supra), the Supreme Court pointed out that it is not proper to stamp a witness a liar, only because he happens to be a panch witness or a witness in some previous cases. The Supreme Court has said about the dependence or independence of such witness when the Court was discussing the point in respect of a case connected with provision of Prevention of Corruption Act, which requires altogether a different approach on account of there being a trap. In that case also, the Supreme Court pointed out the necessity of taking realistic approach in weighing the evidence of such witnesses. Thus keeping in view the facts and circumstances of this case, this Court dismisses the submission of the Counsel appearing for the appellant for discarding the evidence of panch witness Kotiyan on the ground that he had given evidence in previous cases, may be pertaining to the provision of N.D.P.S. Act. This Court dismisses the criticism levelled by Shri Saldanha, Counsel for the appellant, in respect of the evidence of Kotiyan, because if tested on other points, his evidence satisfies the test of truth in a satisfactory way.

11. The prosecution has examined, in the present case, P.W. Kale, S.P. Singh and Vishiraj on the point of prior information, acting on it, accosting the appellant and his act of identifying his baggage and thereafter voluntarily opening it and the members of raiding party finding 18 plastic bags each containing mandrax tablets. The evidence of these witnesses is consistent with each other and consistent with the evidence of P.W. Kotiyan, panch witness. The evidence of P.Ws. Kale, Singh and Vishiraj shows that the said information was obtained from the informant and thereafter it was recorded in the concerned office at Ballard Estate at the time when the office was in closing hours. Shri Saldhana, Counsel appearing for the appellant, has put the blame on the prosecution on account of this delay in recording the said information in writing. But on this point alone the evidence of the prosecution cannot be discarded in this case, because in Baldev Singh's case (Supra) it has been held by the Supreme Court that it is not necessary to reduce such information in writing. Reducing of such information into writing renders assurance to the Court about the truthfulness of the information qua particular case. It helps the Court in removing doubt in respect of identity of a particular person - suspect - accused, qua particular bag of the article held by him on his person. It avoids the possibility of mistaken identity. If the evidence on other points is very much sound and inspires the confidence in judicial mind, it cannot be discarded only on account of non reducing the information into writing at prior time. The Court would be definitely adverting its attention to inordinate delay in reducing such information when it has been so reduced into writing and at that time the Court would be putting a reasonable probe of delay for the purpose of satisfying about the veracity of the prosecution witnesses and their tendency to give evidence before the Court.

12. In the present case the baggage was identified by the appellant and it was opened by him voluntarily by stating that he had lost the keys. It is pertinent to note that narcotic drug was found in the baggage. The members of raiding party when wanted to search the person of the appellant, informed him about his right

to be searched before a nearest Gazetted Officer or the nearest Magistrate. The appellant has retracted his statement later on and there has been inordinate delay in doing so. The statement of the appellant was recorded in view of provision of Section 67 of N.D.P.S. Act as for getting information about the commission of offence and it is not a couched confession by misusing the provision of Section 67 of N.D.P.S. Act. The intention behind that statement is to be seen and in the present case the prosecution has exonerated itself unblemishingly. In the present case the appellant was to travel with some associates and therefore, it was legitimate for the members of raiding party to know as to from where the narcotic drug was possessed by the appellant. It was legitimately for the Investigating Agency to know as to how other persons were involved in said narcotic drug traffic. It was legitimate for them to find out the source or to find out the distributing agency. It was also legitimate in this case for the Investigating Agency to find out as to what was to be done in respect of narcotic drug or in the course of collection of information by present appellant and his associates. It has come that said bag was belonging and was in possession of the appellant as a matter of normal course. If the text of his statement is read, the fabric of the statement is revealed and it puts no blame whatsoever on the prosecution so far as the present case is concerned. It is not an attempt to get the confession of the accused by using couching words, deceitful words, phrases or sentences.

13. Thus the prosecution witnesses in this case have acted consistent with provisions of law which they were required to follow while conducting a raid and thereafter doing investigation. Their evidence has been corroborated by panch witness who happens to be not under their influence. Follow up action has been taken in this case by the raiding party as contemplated by Sections 52, 55 and 57 of N.D.P.S. Act. Therefore, the entire course followed by the prosecution witnesses examined in this case is consistent with the provisions of law and they are unblemished and, therefore, their evidence is inspiring confidence in judicial mind.

14. The learned trial Court has followed the proper approach while appreciating the evidence on record and the conclusions drawn by it are consistent with the evidence on record and are borne out by it. The findings recorded by the trial Court are consistent with legal provisions and therefore this Court has no hesitation in coming to the conclusion that the said order of conviction and sentence is correct, proper and therefore legal.

15. This Court also dismisses the submission of Shri Saldanha in respect of striking out the conclusion drawn by the trial Court in respect of conspiracy, because the evidence proves that the appellant and his associate were acting together and were acting in furtherance of a conspiracy of trafficking in narcotic drugs. Shri Saldanha submitted that the sentences inflicted on the appellant are severe. Shri Thakur has been heard in the interest of justice on the point of sentence. Shri Thakur opposed the prayer for reduction of sentence. This Court

dismisses the prayer for reduction of sentence, because the present appellant and his associate were trafficking in narcotic drug in a systematic way and as a team. The narcotic drug was checked in, in bags, through different baggages of the appellant and his associate. The Court has to take a proper note of that.

16. Trafficking in narcotic drugs is a menace to the society. The sentence indicated by the provisions of law is severe and therefore, the law has provided necessary safeguards in protection of fundamental right of a citizen. The Courts seek for sterling evidence in such cases, only because the sentence happens to be severe. But once accused is proved to be guilty, the Courts are bound to keep in view the dangerous activities of such narcotic drug traffickers. They kill the members of society, who are innocent person which includes the growing youths. Growing generation of the nation is being killed by such slow poisoning. A person who is dealing with the lives of so many innocent persons cannot be permitted to pray for leniency once convicted for such an offence. The Courts would be giving due attention to the style in which the offence are being committed by such an offender. If offender happens to be acting in a systematic and well planned manner like a team the sentence has to be severe, so as to give an alarming deterrence to like minded persons. Therefore, this Court does not think of reducing sentence. In fact it cannot be done so, keeping in view the provisions of law relevant to the acts committed by the present appellant. Thus, the appeal is dismissed. The order of conviction and sentence is hereby maintained. The appellant to suffer the sentence in appropriate prison. No interference in other portion of the order regarding disposal of the property.

The parties are directed to act upon the copy of this order duly authenticated by the Sheristadar of this Court.