
(2000) 03 BOM CK 0007

In the Bombay High Court

Case No : Criminal Appeal No. 463 of 1996

Ganesh Lingam Tevar Rajan and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-03-2000

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 42, 50, 8

Citation : (2001) ALLMR(Cri) 1611 : (2000) 102 BOMLR 911

Hon'ble Judges : Vishnu Sahai, J;P.V. Kakade, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Vishnu Sahai, J.

(1) Through this Appeal the Appellants challenge the judgment and order dated June, 26, 1996 passed by the Special Judge, Greater Bombay in N.D.P.S. Special Case No. 47 of 1991 convicting and sentencing each of them in the manner stated hereinafter:

(a) u/s 21 read with Section 8(c) of the N.D.P.S. Act, 1985 to undergo 10 years R.I. and to pay a fine of Rs. 1 lakh in default to suffer 6 months R.I.: and

(b) u/s 29 of the N.D.P.S. Act, (but awarding no separate sentence).

2. In short the prosecution case runs as under:

On 13.12.1990 the informant Police Inspector Kashinath Kachare P.W. 1 was posted at Narcotic Cell, C.B.C.I.D., Bombay. At about 8.20 a.m. while he was on duty one of the informers came and informed him that some persons were going to indulge in narcotic activities in Matunga Mansion. Bhandarkar Road, Matunga, Mumbai 19. He also informed that they were wearing turbans and were in the age group of 25 to 26 years and were short in height P. 1. Kachare P.W. 1 reduced the said information in writing and passed it on to his superiors A.C.P.,

and D.C.P. Under their guidance the trap was arranged. Two panchas, out of whom one viz. Gulam Farukee has been examined as P.W. 3 were called. They were informed about the information and were requested to act as panchas. They expressed their willingness. The officers and the said panchas took mutual searches. Thereafter the vehicles in which they were to proceed, were also searched. In the searches nothing incriminating was found. Thereafter, after collecting the sealing materials, weighing material, identification kit and portable typewriter etc. P.I. Kachare P.W. 1 and others proceeded for the spot at about 9.50 a.m. At about 10.35 a.m. they reached Matunga Mansion. After some time they noticed five persons whose description tallied with the information which they had received. Since their movements were suspicious they were immediately apprehended. Thereafter P.I. Kachare P.W. 1 and others disclosed to them their identity and asked their names. They gave their names as (1) Ganesh Lingam Tevar, (2) Amriksingh Avtarsingh Chaddha, (3) Lakhwinder singh Tyag, (4) Vinod Vijay and (5) Satwaindersingh Amriksingh Chaddha. Ganesh Lingam Tevar and Amriksingh Avtarsingh Chaddha were having plastic bags in their hands. P.I. Alimullah Khan P.W. 4, who was one of the members of the raiding party informed them, as also the other accused, whether they desired to be searched before a Gazetted Officer or Magistrate but they declined the offer. Thereafter the plastic bags which Ganesh Lingam Tevar and Amriksingh Avtarsingh Chaddha were carrying were cut open and in each of them 1 kg, powder was found. The said powder was kept in packets which were sealed. Labels were put and signatures of panchas obtained thereon. Personal searches of the other accused persons were also taken but no drugs were recovered from them. Thereafter all of them were apprehended. P.I. Kachare P.W. 1 along with them came to the office.

3. The F.I.R. of the incident was recorded by P.I. Khan P.W. 4 on the information given by P. 1. Kachare P.W. 1. On the basis of the F.I.R. on the same day, at about 1.40 p. m., a case under Sections 8(c), 21 and 29 of the N.D.P.S. Act was registered at Narcotic Cell, C.B., C.I.D., Mumbai against the appellants and others.

4. The investigation was conducted in the usual manner by P. 1. Khan P.W. 4. During the course of it he sent the powder collected from the Appellants Ganesh Lingam Tevar and Amriksingh Avtarsingh Chaddha to the Chemical Analyser who found it to be heroin. He also recorded the statements of the witnesses. On completion of the investigation he filed charge-sheet against the Appellants and three others. They were put up for trial in due course.

5. In the trial, the Appellants and others were charged on a dual count viz. under Sections 8(c) read with 21 of the N.D.P.S. Act and 29 of the N.D.P.S. Act, to which charges they pleaded not guilty and claimed to be tried.

During trial in all the prosecution examined 4 witnesses three out of them viz. P.I. Kachare P.W. 1, Gulam Farukee P.W. 3 and P.I. Khan P.W. 4 were examined as witnesses of fact. The latter was also examined to prove the investigation.

Although Gulam Farukee P.W. 3 (public punch)turned hostile, the learned trial Judge believed the prosecution evidence vis-a-vis the Appellants - Ganesh Lingam Tevar and Amriksingh Avtarsingh Chaddha, and convicted and sentenced them in the manner stated in para 1. He however, acquitted the other three accused persons.

Aggrieved by their convictions and sentences the Appellants have preferred the present appeal.

6. We have heard learned Counsel for the parties and perused the entire evidence on record. In our view this appeal deserves to be allowed.

7. Mr. Sachin Shetye, learned Counsel for the Appellants strenuously urged that since the recovery from the Appellants was made on prior information received through informer by P.I. Kachare P.W. 1, P.I. Kachare should not only have recorded that information in writing as mandated by Section 42(1) of the N.D.P.S. Act but also sent a copy of the said information forthwith to his immediate official superior as mandated by Section 42(2) of the N.D.P.S. Act. Mr. Shetye urged that in the instant case P.I. Kachare discharged the obligation u/s 42(1) of the N.D.P.S. Act but not that u/s 42(2). In his contention the obligation u/s 42(2) of the N.D.P.S. Act was also mandatory in nature and failure of P.I. Kachare to discharge it would result in acquittal of the Appellants.

8. We have reflected over the said submission of Mr. Shetye and find merit in it. Section 42 of the N.D.P.S. Act reads thus:

42. Power of entry, search, seizure and arrest without warrant or authorisation - (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue, intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise police or any other department of a State Government as is empowered in this behalf by general or special order of State Government if he has reason to believe from personal knowledge of information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance, or enclosed place, may between sunrise and sunset....

(2) Where an Officer takes down any information in writing under Sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.

9. A perusal of Section 42(1) would show that the information received by the empowered officer should be taken down in writing by him and that of Section

42(2) would show that a copy of the said information should be sent forthwith to his immediate official superior.

10. In the instant case it is evident from a perusal of the evidence of P.I. Kachare P.W. 1, who had received the information that Section 42(1) has been complied with but 42(2) not.

P.I. Kachare P.W. 1 in his examination in chief, in para 1, stated that at about 8.20 a. m. on 13.12.1990 an informant came and informed him that some persons were going to indulge in narcotic activities at Matunga Mansion, Bhandarkar Road, Matunga, Mumbai 19 and also gave description of those persons. He further stated in the said paragraph that he reduced the said information in writing and passed it on to his superior officials, the A.C.P., and D.C.P. However, a perusal of his cross-examination (para 5) makes it explicit that he did not send the copy of the said information forthwith to his superior official. In the said paragraph he admitted that the information which he had recorded in the information book was sent by him orally to his superior officials, A.C.P. and D.C. P, and he did not have any document to say that he had passed on the said information to his superior official

11. In our view, since the mandate of Section 42(2) is that the officer who takes down the information in writing should send its copy forthwith to his immediate official superior and in the instant case copy of the information was not sent and only oral information was sent by P.I. Kachare to the immediate official superior, the provisions contained in Section 42(2), were not complied with.

12. The provisions contained in Section 42(2) of the N.D.P.S. Act are mandatory in nature. And this is clearly apparent from the language of the provision, which we have extracted earlier.

We are fortified in our view by the judgment of the Constitution Bench in State of Punjab Vs. Baldev Singh, . etc. wherein in paragraph 17 the Supreme Court has observed thus:

17(3) u/s 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is a total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(emphasis supplied)

Assurance is also lent to our view by the decision of the Supreme Court in State of Punjab Vs. Balbir Singh, Here italicised wherein in paragraph 26(3) the Supreme Court observed thus:

Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith

send a copy thereof to his immediate officer superior. If there is total non-compliance of this provision, the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not will be a question of fact in each case.

(emphasis supplied)

13. In our view the said decisions of the Supreme Court make it explicit that Section 42(2) of the N.D.P.S. Act is mandatory.

14. Ms. Kejriwal, learned APP strenuously urged that since the information was received by P.I. Kachare P.W. 1 on 13.12.1990 at about 8 a.m. and he proceeded for recovery along with panchas etc. the same day at 9.50 a.m. he had no time to forward a copy of the said information and since he had orally conveyed the said information to his immediate superior officials, substantial compliance of Section 42(2) of the N.D.P.S. Act has been made and no prejudice has been caused to the accused. We regret that we cannot accede to her submission.

15. Section 42(2) of the N. D, P.S. Act casts a mandatory obligation on the officer who has recorded the information in writing to send its copy forthwith to his immediate official superior. We wish to emphasise that where the legislature in all its wisdom enacts a provision it is with the avowed object that it should be enforced in the manner intended by it. It is manifest from a perusal of Section 42(2) that the legislative intent is that the officer recording the information in writing, received u/s 42(1) of the N.D.P.S. Act should forthwith send its copy to his immediate official superior. In our view, that imperative would not be discharged if orally that information is conveyed by him to his official superior.

We wish to emphasise that where the statute specifies that an obligation has to be performed by an officer in a certain manner he shall only perform it in that manner and in no other manner. In this connection-it would be appropriate to refer to the relevant part of para 18 of the decision of the Privy Council in AIR 1936 253 (Privy Council) which reads thus:

Where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

16. We wish to emphasise that Courts have to strictly insist on compliance of mandatory provisions like those contained in Sections 42(1), 42(2) and 50 of the N. D, P.S. Act because the punishment prescribed under the N.D.P.S. Act is very stringent. The legislative intent in providing for these mandatory provisions is to ensure that persons are not falsely implicated in such cases.

17. For the said reasons we reject this submission of Ms. Kejriwal.

18. Since the mandatory provisions contained in Section 42(2) of the N.D.P.S. Act have not been complied with we are left with no option but to allow this appeal.

19. In the result this appeal is allowed. The convictions of the Appellants for offences under Sections 8(c) and 29 of the N.D.P.S. Act are set aside. Their sentence on the former count is also set aside. They are acquitted of the said offences. They are in jail and shall be released forthwith unless wanted in some other case. In case they have paid the fine it shall stand refunded to them.