
(1996) 03 BOM CK 0066
In the Bombay High Court
Case No : Criminal Appeal No. 147 of 1994

Ghanshyam Nathoo Kewat

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-03-1996

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 42, 42(1), 57

Citation : (1996) CriLJ 3421

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Advocate : K.V. Umre, for the Appellant; T.D. Khade, APP, for the Respondent

Judgement

1. The charge against the appellant-accused was that he was found in possession of one kilogram of Ganja on 18-1-1991 at night at 12.30 a.m., i.e., in the night between 17th and 18th January, 1991. It was the case of the prosecution that the Investigating Officer, Kiran Dhote (P.W. 2) got an information through one informant that accused was in possession of Ganja and was living in a slum near Ashtabhuja Temple. He, therefore, called two Panchas of Shastrinagar, arranged a raiding party and Straightway went to the spot. He called the accused by his name, who came out, and it was confirmed that it was accused Ghanshyam. The raiding party offered its search, which was declined to be taken by the accused, and thereafter the search of the said hut was taken whereunder a Farahi (tile) which was newly fixed, one kilogram of Ganja was found. The investigating Officer immediately conducted the spot panchanama vide Exhibit 9. He also gave an opportunity to the accused for being searched in presence of the Magistrate, but the accused declined the same. He, thereafter, arrested the accused and brought him alongwith the Ganja found, to Ramnagar Police Station, where an offence under Crime No. 22/91 was registered against the accused. The information of this raid was sent by P.W. 2 to his superior officers like PI and SDPO on the next day vide Exhibit 16. He deposited the property in the Malkhana and thereafter sent the said Muddemal property to the Chemical Analyser and

got it confirmed that the sample was that of Ganja. On this basis, a charge-sheet came to be filed for an offence u/s 21(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act", for short) as also u/s 66(1)(b) of the Bombay Prohibition Act.

2. At the trial, the prosecution relied on the evidence of P.W. 2-Kiran Dhote and P.W. 1-Parimal Mandal, a panch. The panch proved the spot panchanama (Ex. 9) and fully supported the prosecution. The defence of the accused was that of denial. He pleaded that there was no connection established by the prosecution between the place which was raided and himself. In that, he contended that the ownership or the exclusive possession of the hut was not established by the prosecution. He further contended before the trial Court that, in fact, this was a frame-work and all the principles of the search and seizure were ignored by the Investigating Officer which resulted in prejudice to the accused. This defence did not prevail and the accused came to be convicted, necessitating the present trial.

3. Shri Umre, learned Counsel on behalf of the appellant accused, contended that the investigation itself is faulty and in that the investigating officer had flouted the mandatory provisions of Section 42(1) of the NDPS Act. He pointed out that the Investigating Officer had not reduced the information in writing, which he was required to do. He further pointed out that the Investigating Officer had also not recorded his reasons for conducting the raid in between the sun-set and sun-rise, which he was bound to do under the provisions of Section 42(1) of the NDPS Act. Shri Umre relied upon the reported decision in State of Punjab Vs. Balbir Singh, , and more particularly on the observations by the apex Court in paragraph 26.

4. Smt. Khade, learned Addl. Public Prosecutor, however, supported the Judgment of the trial Court and contended that as far as possible all the provisions were complied with and she further contended that the accused had not raised these grounds before the Special Judge.

5. Considering the evidence of P.W. 2-Kiran Dhote, it will have to be seen that he has nowhere stated that he, on receipt of the information regarding the Ganja being possessed by the accused, he took down the said information in writing. Shri Dhote specifically says in the first paragraph of his deposition :

"When I was at outpost, one informant gave information that accused Ghanshyam is in possession of Ganja, who resides near Ashtbhuja temple in slum."

Now, this was, therefore, definitely a case where the Investigating Officer was given an information by a person. He was, therefore, bound to take down the same in writing. In whole of his evidence, Shri Dhote has not reiterated that he had taken down this information in writing in any manner. Shri Dhote then goes on to suggest that he had executed this raid at 12.30 on the night between 17th and 18th January, 1991. Now, a proviso to Section 42(1) of the NDPS Act specifically provides as under :

"Provided that if such officer has reason to believe that the search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief."

The further evidence of Shri Dhote does not suggest that he has recorded the grounds of his belief and, for that purpose, has chosen not to obtain a warrant. It has also come in his evidence that after he called the accused, he came out and it was confirmed that it was accused Ghanshyam.

6. In this behalf, it would be interesting to see the evidence of P.W. 1-Parimal as also the contents of the spot panchanama (Exhibit 9), parimal also confirms that he had accompanied P.W. 2-Kiran Dhote alongwith another panch Sapan Chakravarti to the house of the accused which was in the slum near Ashtbhuj temple on Ballarsha Road at Chandrapur. He thereafter confirms that they called the accused and asked him whether there is Ganja in his house and the accused had denied and thereafter P.W. 2 had taken the search of the house of the accused. Interestingly enough, the panch nowhere suggests that the police offered their own search to the accused. He further confirms that Ganja was found. In his cross-examination, it has come out that he is not a resident of any place nearby and resides two kilometers away from the house of the accused. He did not even remember whether there was any sufficient moon-light. He also confirms that he did not ask the name of the accused. He also confirms that the police did not record the statements of the adjoining occupiers in his presence. What is more significant is the fact that in the spot panchanama (Exhibit 9), it is suggested that there were more than one person in the house. However, strangely enough only accused has been proceeded against.

7. From the further evidence of the Investigating Officer it becomes clear that the Investigating Officer had not chosen to immediately send the report to his superiors. Sub-section (2) of Section 42 of the NDPS Act requires that 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. Now, it is clear that the officer here has neither taken down the information nor has he recorded the grounds of his belief as he was required to do under the proviso to sub-section (1) of Section 42 of the NDPS Act. Therefore it is obvious that he had not bothered to send the information to his immediate official superior. Shri Dhote, Investigating Officer, however, asserted in his examination-in-chief that he had reported the arrest to his superior officer within 48 hours, which he was required to do u/s 57 of the NDPS Act. It seems that he had sent this information, (vide Ex. 16), on the next day at about 11.00 a.m. However, the fact remains that there has been a complete breach of the provisions of Section 42 of the NDPS Act. In the ruling (cited supra) relied upon by Shri Umre, the apex Court has specifically held that the provisions of Section 42(1) of the NDPS Act are mandatory in nature.

Therefore, even a slight infraction of those provisions would be fatal to the prosecution. In this case, it is clear that the Investigating Officer had prior information given by a person and, therefore, he should have necessarily taken it down in writing. Moreover, under the proviso, if the officer had to carry this search between the sunset and sunrise, he had to record the grounds of his belief. The apex Court holds even this provision to be mandatory. It is clear that the officer here has not complied with this provision and, therefore, this would be fatal to the prosecution. Unfortunately, this ruling was not brought to the notice of the learned Special Judge and he has not chosen to go into these mandatory aspects. The conviction of the appellant-accused therefore, u/s 20(b)(i) of the NDPS Act will have to be set aside.

8. Smt. Khade thereafter points out that the accused was alternatively charged for the offence u/s 66(1)(b) of the Bombay Prohibition Act and, therefore, even if his conviction u/s 20(b)(i) of the NDPS Act is set aside, he could still be convicted u/s 66(1)(b) of the Bombay Prohibition Act. Unfortunately, the learned Special Judge has not considered the charge u/s 66(1)(b) of the Bombay Prohibition Act at all. He has also not chosen to convict the accused under that section. Apart from that, there is no independent charge under that section. The charge is only in the alternate. Therefore, it would not be possible for this Court, for the first time, to go into that charge. That apart, even on merits, it cannot be said that the charge was proved to the hilt. In his evidence, the Investigating Officer has clearly admitted that he had not collected evidence regarding ownership or the possession of the said hut of the accused. The first information report as registered by the Investigating Officer clearly suggests that there were more persons present in the hut. It is not, therefore, known as to whether the accused alone was responsible for something which was found in the hut. Unfortunately, who the other persons were has not been clarified by the Investigating Officer. Therefore, it will not be safe to convict the accused u/s 66(1)(b) of the Bombay Prohibition Act.

9. In the result, the appeal is allowed. The order of conviction and sentence of the appellant accused passed by the Special Judge is set aside and the appellant accused is acquitted of the offences with which he was charged and of which he was convicted of. His bail bond stands cancelled. Fine, if any paid, be refunded to the appellant-accused.

10. Appeal allowed.