
(1996) 07 BOM CK 0041
In the Bombay High Court
Case No : Criminal Appeal No. 419 of 1993

Lamin Bojang

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 18-07-1996

Acts Referred:

Constitution of India, 1950 — Article 141
Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 42, 42(1), 42(2)

Citation : (1996) 4 BomCR 524 : (1996) 98 BOMLR 148 : (1997) CriLJ 513 : (1997) 2 RCR(Criminal) 294

Hon'ble Judges : Vishnu Sahai, J;S.S. Parkar, J

Bench : Division Bench

Advocate : M.P. Tewari, for the Appellant; D.A. Nalawade, for the Respondent

Judgement

Sahai, J.—The appellant aggrieved by the judgment and order dated 13-5-1993, passed by the Special Judge, Greater Bombay in NDPS Special Case No. 947/1990, convicting and sentencing him to undergo 10 years RI and to pay a fine of Rs. 1,00,000/- (Rupees one lakh) in default to further undergo RI for 1 year u/s 21, read with S. 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 hereinafter referred to as the NDPS Act, has come up in appeal before us.

Along with the appellant, three others namely Jose Carlos Ca, Pauline Viera and Mrs. Nazma @ Ruksana Ibrahim, were also prosecuted and tried, but, they have been acquitted vide the impugned judgment. Against their acquittal, the State of Maharashtra has preferred no appeal in this Court.

2. Briefly stated the prosecution case is that on 20-6-1990, at about 7.30 a.m. PSI Madhukar Khangte PW 1 of Antop Hill Police Station, received an information that some Negroes were dealing in drugs in Sector No. VII in Central Government Servant's Colony, Antop Hill. He conveyed the said information

orally to his superior officer Senior Inspector of Police PI Chandrakant Chaugule PW 6. At 8.15 a.m. i.e. 45 minutes after receiving the information, he recorded the same in Station Diary of Police Station Antop Hill vide Exhibit 27 (English translation of the said entry is Exhibit 27-A). The said entry reads thus :-

"(20) On receiving the special information about the persons possessing "Gard" powder Police Inspector Chaugule, Police Sub-Inspector Khangte, Ram Kadam, Rajan Chaugule and staff set out for making enquiries at Sector 7, CGS Quarters, Antop Hill."

Immediately thereafter, Sr. P.I. Mr. Chaugule called for two persons to act as panchas, who came at the Antop Hill Police Station. Thereafter he along with PSI Khangte the panchas and others proceeded for carrying out the raid. They took with them drug identification kit. They went to Building No. 91, in Sector VII of Central Government Servant's colony, Antop Hill. They reached the said building at about 11.50 a.m. the same day. They surrounded the said building. They went to the room situated on the ground floor. The same was opened by a negro. After disclosing their identity to the three occupants, in the said room, namely appellant, Jose Carlos Ca and Pauline Viera, they explained to them the purpose of their visit. They offered their search but, the appellant and the two accused persons declined to take it. PI Chaugule enquired from the appellant and others as to what was in the three suit cases lying in the said room. All of them were locked and were of different sizes. The suit case of the size of 18" x 10" approximately belonged to Jose Carlos Ca. Jose produced the key of the suit case. Consequently, SI Chaugule opened the lock of the suit-case. The cloth lining of bottom of the suit case was ripped open by PI Chaugule and thereafter a polythene bag in a sealed condition was found in the false bottom of the suit-case. The said bag was opened and was found to contain some powder. When it was tested with the drug identification kit, which they were carrying, it was found to be heroin. Thereafter they took the second suit case which was said to belong to Pauline Viera. That was also locked. Viera produced the key of the lock. The lock was opened. PSI Khangte ripped opened the cloth lining of the bottom of the suit-case and found a polythene bag in the false bottom. The bag was found to contain some powder. A small quantity of powder was tested by the drug identification kit by PI Chaugule and was found to contain brown sugar. Thereafter, they enquired about the third suit-case. The appellant claimed it as his. It was also locked. He gave its key. After opening the lock and ripping opening the cloth lining at the false bottom of the suit-case by PI Chaugule, three polythene bags were found therein. The bags were opened. A small quantity of powder from each of them was tested by the drug identification kit and was found to be heroin (brown sugar).

The total weight of heroin found in all the polythene bags recovered from the appellant and others was about 6.710 kgs. After completing the formalities, PI Chaugule and others along with the accused persons came to the Antop Hill Police Station.

3. The FIR of the incident was lodged by PSI Madhukar Khangte PW 1 at 12.15 noon on 20-6-1990 at police station Antop Hill. On the basis of the same, a case under Sections 8(c) and 21 of the N.D.P.S. Act was registered against the appellant, Jose Carlos Ca, and Pauline Viera.

4. During the course of the investigation, complicity of the fourth accused Mrs. Najma @ Ruksana Ibrahim was also revealed. She was also arrested.

During the course of the investigation, samples of the contraband seized from the appellant and others were sent to the Chemical Analyst. The report of the Chemical Analyst is Exhibit 29, and the same reveals that they contained herein.

After completing the investigation, the appellants were charge sheeted under Sections 21 and 29 read with S. 8(c) of the N.D.P.S. Act.

5. The appellant and others were put up for trial in due course. In the trial Court, charges u/s 8(c) read with Ss. 21 and 29 of the NDPS Act were framed against them. To the said charges, they pleaded not guilty and claimed to be tried. Their defence was that of denial. In the trial Court, apart from tendering and proving some documentary evidence, the prosecution examined as many as 7 witnesses. Out of the said witnesses, one public punch of the recovery, namely Avinash Chari, was also examined. Remaining witnesses included the police witnesses of recovery.

After recording the evidence of the prosecution witnesses, the statement of appellant and others u/s 313, Cr.P.C. and hearing the learned counsel for the parties, the learned trial Judge convicted and sentenced the appellant in the manner stated above. As mentioned earlier, he acquitted co-accused Jose Carlos Ca, Pauline Viera and Mrs. Nazma @ Ruksana Ibrahim. Hence, this appeal.

6. We have heard Mr. M. P. Tewari for the appellant And Mr. D. A. Nalawade, Additional Public Prosecutor for the State of Maharashtra-Respondent. We have also perused the depositions of the material witnesses, the relevant exhibits, the statement of the appellant recorded u/s 313, Cr.P.C. and the impugned judgment. After giving our anxious consideration to the matter, we are squarely satisfied that there is substance in this appeal and it deserves to be allowed.

7. The main submission of Mr. Tewari, learned counsel for the appellant is according to the prosecution, information pertaining to the recovery of contraband was recorded in writing by PSI Khangte in the station diary entry vide Exhibit 27 and it was mandatory on the part of PSI Khangle to have forthwith sent a copy of Exhibit 27, he enjoined by Section 42(2) of the NDPS Act, to his immediate superior officer PI Chaugule PW 6. Section 42 of the NDPS Act reads thus :-

Section 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."

8. We now propose examining the contention of Mr. Tewari. In view of the fact that prosecution itself has proved Exhibit 27, it admits of no doubt that prior information received by PSI Khangte was reduced by him in writing. In para 2, we have quoted in entirety the contents of Exhibit 27. A perusal of Section 42(2), which has been extracted above would show that it was obligatory for PSI Khangte to have forthwith sent a copy of Exhibit 27 to his immediate superior official PI Chaugule PW 6.

9. The provisions contained in Section 42(2) of the NDPS Act were interpreted by the Apex Court in para 26(3) of the judgment reported in State of Punjab Vs. Balbir Singh, . In the said para, their Lordships observed thus (Para 26) :-

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.

A perusal of the aforesaid passage from the decision of the Apex Court, extracted above, would show that in case an information received u/s 42(1) of the NDPS Act, by an officer, has been reduced in writing and the same has not been sent by him, to his immediate superior official, u/s 42(2), the prosecution case would be affected because, the provisions contained in Section 42(2) are mandatory.

10. Coming down to the brass facts of this case, we find that even according to the prosecution, a copy of the information (Exhibit 27) reduced to in writing by PSI Khangte was not sent by him to his immediate superior official, PI Chaugule. Even the learned Additional Public Prosecutor Mr. Nalawade does not dispute this. However, he strenuously urged that since in this case, oral information had been

sent by PSI Khangte to PI Chaugule, requirements of Section 42(2) were met.

11. We regret that we cannot accede to his contention. Way back as the year 1936, Judicial Committee of the Privy Council in the case of AIR 1936 253 (Privy Council) he observed in para 18 as 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."

It would be presumptuous on our part to observe that Nazir Ahmed's case continues to hold the field even today. Since the oral information according to Mr. Nalawade was only sent and the mandate of Section 42(2) is a copy of the information, meaning written information or documentary information should be sent, we repel the aforesaid contention.

12. Mr. Nalawade next urged that the requirements contained in Section 42(2) have been satisfied inasmuch as there is evidence to indicate that FIR was countersigned by the immediate superior official, PI Chaugule. We regret that we have to reject this submission also. A careful reading of Sections 42(1) and 42(2) would show that the information which is to be sent u/s 42(2) is the information, prior to the raid or that information in pursuance of which, a raid is to be carried out. The FIR admittedly was lodged after the raid had been conducted and the recovery panchnama had been prepared. We cannot persuade ourselves to accept that countersigning of the FIR by PI Chaugule PW 6 would satisfy the requirements enjoined by Section 42(1) r/w. Section 42(2) of NDPS Act. We accordingly, repel this submission of Mr. Nalawade also.

13. Mr. Nalawade, finally contended that inasmuch as the immediate superior official of PSI Khangte, PI Chaugule PW 6 was a part of the raiding party, no prejudice has been caused to the appellant. When an obligatory duty is cast by the statute, as Section 42(2) of the NDPS Act casts on the officer receiving information to inform his immediate superior officer, the question whether prejudice is caused or not to the accused on account of the non-performance of that duty is immaterial. What the Court has examine is whether the mandatory obligation has been strictly carried out by the authority enjoined in law to carry out. In the instant case, the mandatory requirement u/s 42(2) was to send a copy of the information (Exhibit 27). That was not sent. The question whether prejudice was caused or not is entirely extraneous to Section 42(2) of the NDPS Act. The Apex Court in the decision reported in Deoraj Deju Suvarna and etc. Vs. State of Maharashtra, has observed in para 16 that provisions of NDPS Act, have to be observed strictly.

We should also not be oblivious to the fact that inasmuch as Section 42(2) of the NDPS Act prescribes a mandatory obligation on the part of the authorities to proceed in a certain manner in respect of offences under the NDPS Act, which is a penal statute, the principle of strict construction has to be followed while construing it.

Way back as the year 1952, the Apex Court laid down this principle in para 6 of its judgment reported in W.H. King Vs. Republic of India and Another, , wherein, their Lordships observed thus :-

"As the statute creates an offence and imposes a penalty of fine, and imprisonment, the words of section be strictly construed in favour of the subject. We are not concerned so much with what might, possibly have been intended as with what has been actually said in and by the language employed."

The mandate of the Apex Court is binding on us by virtue of Article 141 of the Constitution of India which stipulates that the law declared by the Supreme Court shall be binding on all the Courts in India. Hence, we have no option but, to reject the submission of Mr. Nalawade.

14. Since on account of non-compliance of the mandatory provisions contained in Section 42(2) of the NDPS Act, trial of the appellant is vitiated, this alone in our view, is sufficient to allow this appeal. Consequently, we are not examining the many other submissions canvassed by Mr. Tewari.

15. In the result, this appeal is allowed. The conviction and sentence of the appellant u/s 21 read with S. 8(c) of the NDPS Act, 1985, is set aside. He is acquitted of the said offence. He is in jail. He shall be released forthwith unless wanted in some other case. In case he has paid fine, same shall stand refunded to him.

Before parting with this judgment, we would be failing in our fairness, if we do not put on record the enormous assistance which we have received in the decision of this appeal, from learned counsel for the parties.

16. Appeal allowed.