

(1993) 02 BOM CK 0017

In the Bombay High Court

Case No : Criminal Appeal No. 547 of 1991

Manohar Peeraji Vasudeo (Bagadi)

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 10-02-1993

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 50, 55, 8(c)

Citation : (1993) MhLj 782

Hon'ble Judges : M.L. Dudhat, J;M.F. Saldanha, J

Bench : Division Bench

Advocate : Sanjeev P. Kadam, for the Appellant; S.J. Pingulkar, Assistant Public Prosecutor for State, for the Respondent

Final Decision : Allowed

Judgement

M.F. Saldanha, J.—The sanctity and scrupulousness in respect of procedural compliance where offences under the Narcotic Drugs and Psychotropic Substances Act are concerned, has been seriously canvassed in the present appeal and having regard to the considerable case law on the subject we consider it necessary to examine the issue in the light of some of the special features of this appeal. To start with, the facts:

2. The Prosecution alleges that the Market Yard Police Station. Sangli, received information on the morning of 2-2-1991 that the accused was alleged to be selling brown sugar on the 100 ft. road. The information was recorded and the Police party in the company of two panchas and P.W.2 a Goldsmith proceeded to that spot. They alleged that the accused was passing by on a bicycle and that he was apprehended. Pursuant to a search, a sum of Rs. 1, 320/ in cash was found in his pocket, and a packet containing five grams of powder which appeared to be brown sugar was recovered from him. The Police had the powder weighed by the Goldsmith and recorded in a panchanama that five grams of brown sugar had been recovered from the accused. They also sealed the packet and thereafter

took the accused along with the material and his bicycle to the Police Station. The investigations were completed, the accused was put on trial and the learned 3rd Additional Sessions Judge, Sangli, accepted the prosecution evidence and convicted the accused u/s 21 read with section 8(c) of the N.D.P.S. Act and sentence him to rigorous imprisonment for 10 years and to pay a fine of Rs. 1 lac in default rigorous imprisonment for six months. It is against this conviction and sentence that the present appeal has been preferred.

3. Mr. Kadam, learned counsel appearing on behalf of the appellant has impressed us by the thoroughness with which he has applied himself to the record and the manner in which he has presented his submissions. He has taken us through the evidence of P.W.1 Shirish Ukidive who is the pancha and Raghunath Karyakar P.W.2 the Goldsmith. In respect of these two witnesses, Mr. Kadam advances the submission that the evidence of P.W.2 the Goldsmith is of no assistance to the prosecution because he has admittedly stated in the course of his evidence that he is unable to identify the accused before the Court as the person from whom the contraband was recovered. The fact that it might have weighed 5 grams or a little more or less is not in dispute, and therefore, Mr. Kadam submits that this evidence is of no consequence. As far as the pancha is concerned, Mr. Kadam advances the submission that there is a very unusual feature present in this case namely that the pancha who is one of the two persons who witnessed the seizure on that day happens to be only other independent witness produced by the prosecution. He has stated in his examination-in-chief that he had gone to the Police Station to lodge a complaint in connection with a theft that had taken place at his house. He has also stated that pursuant to his complaint at the Police Station that the Police Party has accompanied him to his house to examine the situation there and that they thereafter took him along as a pancha. Mr. Kadam has pointed out to us that the Police Officer who is the Investigating Officer in this case P.W.3, Balkrishana Kanade, as also P.W.5, P.S.I. Shaikh have both put out the version that the panchas had been called for. He states that quite obviously, the P.S.Is. were conscious of the fact that they were not doing the right thing in taking a person who had come to the Police Station as a complainant along with them for the raid and asking him to act as a pancha because he does not answer to the description of an "independent person". It is Mr. Kadam's contention that where it is a requirement of law that the evidence of the raiding party be fully corroborated by that of an independent pancha; and if it is demonstrated that the person who has acted as a pancha cannot be categorised as an independent person, then serious doubt is cast with regard to the validity of the procedure adopted and the inevitable sequetor is that a conviction cannot be based on the evidence relating to such a seizure.

4. Smt. Pingulkar, the learned A.P.P. has vehemently countered this line of argument by pointing out that the term independent person will have to be construed as being a person who has no interest whatsoever in the present case or in the prosecution i.e. the subject matter of the charge before the Court. She

contends that if in a given situation a respectable citizen approaches the Police Station in connection with some work or in connection with some information or to lodge a complaint, that it would be perfectly legitimate for the department to use the services of that person as a pancha. She has further submitted that in the present case admittedly P. W. 1 is not known to the accused nor does he have any animus against him nor for that matter has it has been demonstrated that P.W. 1 is biased in favour of the department and under these circumstances it is her contention that as far as the present proceeding is concerned- he can safely and correctly be categorised as an independent person.

5. We need to take note of one fact that has been often repeated by this Court while dealing with the N.D.P.S. cases namely that the punishments prescribed under the law for these offences are extremely harsh and heavy. This Court has therefore also laid down that not only as a Rule but as a matter of necessity that the procedures as prescribed and the evidence produced will have to pass the strictest test of scrutiny.

6. It is in these circumstances that we are required to examine the unusual and interesting point that has arisen in this appeal namely the question as to whether P.W.I Shirish who admittedly had come to the Police Station in his capacity as a complainant car, be categorised as an independent person and secondly whether using him as a pancha was justified. As far as the first aspect is concerned, we need to observe that P.W. 1 had come to the Police Station not as a disinterested party to convey some casual information in respect of an offence that did not concern him but that on the contrary he had come to the Police Station to lodge a complaint in respect of a theft that had taken place in his own house. In these circumstances, he was most interested in the police attending to his complaint satisfactorily and obviously in their detecting the offence and recovering the stolen property. Placed in such a position, when the Police Officers agreed to accompany him to his residence and thereafter asked him to come along with them for a raid, we find it impossible to hold that he can be equated with a member of the general public who can be categorised as being completely disinterested, or independent. Dealing with the second aspect, we do not see what difficulty there was in the way of the investigating authorities, particularly in the case of the Market Yard Police Station located in the heart of a crowded city, as far as the procurement of two independent panchas was concerned. There was certainly no need to have taken a person who had approached the Police Station in connection with a complaint of his own to act as a pancha, that too in a raid pertaining to a serious offence under the N.D.P.S. Act. In our considered view, where the entire prosecution rests heavily on the seizure of the contraband and the evidence thereof, if the Police authorities choose to pick as a pancha a person who does not answer to the description of an independent person, there can be no two opinions about the fact that the evidence of seizure would-not be beyond doubt.

7. As far as the evidence of the two Police Officers is concerned, it is mainly

narrative and they have stated that they had apprehended the accused, that the panchanama was drawn up, that the contraband was taken to the Police Station and thereafter that it was sent for Chemical Analysis. The C.A. Report in the present case Exh. 8 indicates that on an analysis heroin and other opium alkaloids were detected in the powder that was seized, allegedly from the accused.

8. Mr. Kadam has contended that as far as this aspect of the evidence is concerned one significant factor emerges namely that even though the panch P.W.I Raghunath Karyakar, the Goldsmith P.W.2 and the panchanama do not mention about the manner in which the accused was searched that in cross examination, P.S.I. Shaikh has attempted to cover up for certain lapses by stating that he informed the accused that he has a right to be taken before a Gazetted Officer or a Magistrate for being searched. We have noted that the Police Officers have not even stated in examination-in-chief that this procedure was followed by them, and it is in these circumstances that Mr. Kadam submitted that it is a clear cover up action on the part of the P.S.I. who being conscious of the lapse had tried to make up for it. We have noted another feature of the evidence of P.S.I. Shaikh namely the fact that he has gone to the extent of stating that he asked the accused about the Gazetted Officer etc. but there is not a word as to what exactly the accused replied. Invariably it is the case of the prosecution that on the option being given to the accused that he can be taken before a Gazetted Officer or a Magistrate that the accused declined. In the present case such a reply is not forthcoming. Mr. Kadam, therefore, submits that as far as this aspect of the matter is concerned, that there is complete non-compliance of the provisions of section 50 of the N.D.P.S. Act.

9. The learned A.P.P. has countered the argument by contending that it is pursuant to questions put in cross-examination that the position has been clarified. She contends that it must be presumed that the Officers had acted in keeping with requirements of law and to the limited extent that some questions were put in cross-examination that the officer confirmed in an equally limited manner that he had complied with the requirement of section 50. We need to emphasise here that unlike several other statutes, the N.D.P.S. Act prescribes certain special procedures, and in these circumstances, to our mind whether these procedures have not been complied with or whether it is the prosecution case that it was not essential to comply with them, such as in a situation where the accused states that he does not insist on being searched before the Gazetted Officer or a Magistrate, that the position must be stated clearly so that it comes on record. Reading between the lines as far as the present record is concerned, we have no hesitation in holding that the accused was never asked as to whether he desires to be searched in keeping with the requirements of section 50.

10. Mr. Kadam has also advanced certain arguments with regard to the condition of the packet. He contends that P.W.4 has admitted that there is no entry in the record to the effect that the packet in question was sealed. He has relied on

certain decisions of the Delhi High Court, the first of them reported in *State of Himachal Pradesh Vs. Sudarshan Kumar and etc.*, , and the second one reported in *Mohd. Shamim Vs. The State*, , wherein the view has been upheld that as far as section 55 of the N.D.P.S. Act is concerned that it is essential when the property is handed over to the Officer in charge of the Police Station that the same must be sealed by the Officer in question. It is Mr. Kadam's contention that this procedure was not followed and that therefore there is a breach of section 55. We are unable to accept this contention. The evidence before us indicates that P.W.4 has very clearly stated that the packet was a sealed packet even though the entry in the register does not say so. The C.A. Report confirms the fact that the packet was sealed and the seal was intact. This aspect of the matter therefore does not require any further consideration.

11. Mr. Kadam has also drawn our attention to certain other procedural irregularities which according to us are sufficient to vitiate the entire trial. He has to this extent placed strong reliance on two Division Bench judgments of this Court, the first of them reported in *Shankar Raju Banglorkar Vs. State Of Goa*, , and the second of them reported in 1991 Mh.L.J. 591 = 1991 (2) BCR 586, *Mainuddin Kasim Mulla vs. The State of Maharashtra*, to both which judgments one of us (Dudhat, J.) was party. It is true that in both these cases after examining the position in law the Division Bench held that since the evidence that was on record did not inspire confidence in the mind of the Court particularly in the light of several discrepancies, that coupled with the breaches of procedural requirements prescribed under the provisions of the N.D.P.S. Act would lead to the inevitable result of the conviction having to be set aside. Mr. Kadam contended that having regard to the ratio of these judgments in the present proceedings also the conviction is liable to fail.

12. Mrs. Pingulkar learned A.P.P. drew our attention to the Division Bench decision of this Court, reported in 1990 Mh.L.J. 990, in the case of *Abdual Karim Abdul Razzak vs. State of Maharashtra*, wherein a Division Bench of this Court following the decision of the earlier Division Bench in the case of *Abdul Sattar vs. The State of Maharashtra*, reported in 1989 (1) BCR 388, took the view that the trial or conviction is not vitiated on any technical or procedural breach unless prejudice is shown to have been caused thereby to the accused in his defence. Mrs. Pingulkar, also relied on another Division Bench of this Court, reported in 1991 (1) BCR 270 in the case of *Shakal Abdul Gaffor vs. Union of India* and another, wherein the same view has been upheld. The same is the view that has been enunciated in the decision in the case of *Wilfred Joseph Dawood Lema Vs. State of Maharashtra*, and the learned A.P.P. points out to us that the matter was referred to a third Judge Kurdukar, J. who has upheld this view. In sum and substance, therefore, what is contended by Mrs. Pingulkar, is that the breaches complained of by the learned counsel on behalf of the appellant are not of such consequence that this would not affect or vitiate the proceeding. She has further vehemently submitted that none of the witnesses examined by the prosecution can be called into question as far as their veracity is concerned and if one

brushes aside what she terms as a technical argument on the question of the pancha not being an independent person, canvassed by Mr. Kadam. that there is no reason why this Court should interfere with the present conviction. Mrs. Pingulkar further points out that the accused has stated that he was a carpenter, that he had obtained his salary and that he was on his way home when the Police had apprehended him and that this charge has wrongly been foisted on him. She points out that the accused has not even alleged that the Police were out to frame him nor has he indicated any reason why the Police or witnesses should falsely implicate him on a charge of the present type. The answers of these questions could be manifold and we are not required to go into that aspect of the matter. The short question before us is as to whether on the state of law, the present conviction can be sustained or not.

13. As indicated by us in the earlier part of this judgment, the unusual feature in the present case is that even though the Police claimed that the seizure was witnessed by two independent persons only one of them has been examined. We have also indicated our reasons on the basis of which we have held that P.W. 1 Shirish Ukidive cannot be categorised as an independent person. Under these circumstances, a degree of doubt is cast with regard to the crucial aspect of the prosecution case namely the seizure or the recovery of the contraband from the accused. To our mind, where it is an inflexible requirement of law that the seizure must be witnessed by an independent person and where the person examined by the prosecution does not answer to that description, the benefit of doubt will have to be given to the accused. The fact that the procedures that were required to be followed have not been complied with and the effect thereof is therefore rendered wholly inconsequential. We need to, however, observe that on the state of law, it is not open to the prosecution to breach the procedures with impugnt and to thereafter contend that they can still get away with that. In our considered view in cases of the present type, where there is a serious breach of procedure, it would be difficult to argue that no prejudice is caused to the accused.

14. In the light of this situation, the Appeal succeeds. The conviction and sentence awarded to the appellant are set aside. It is directed that the appellant who is at present in custody be set at liberty forthwith if not required in connection with any other offence. Fine, if paid, is directed to be refunded to the appellant.

15. Before parting with this judgment, we need to specially observe that we have been rather distressed by the quality of the judgment of the Trial Court which is almost unintelligible. This is a case of some seriousness and it will be appreciated if Judicial Officers dealing with cases of this type exercise due care and caution with regard to the drafting of the judgment, the reasoning, and in particular that as far as the findings that are contained in the judgment and the manner in which they are expressed, that a degree of clarity and careful choice of words is observed. The Registrar shall forward a copy of this Judgment to the Learned

Judge concerned with a request that he should be more cautious in future.
Appeal allowed accordingly.