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**(2013) 05 BOM CK 0011**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 32 of 2010**

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|----------------------------------------------|------------|
| Mohd. Gulam Hussein Mohd Meghu Shaikh @ Nana | APPELLANT  |
| Vs                                           |            |
| State of Maharashtra                         | RESPONDENT |

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**Date of Decision :** 09-05-2013

**Acts Referred:**

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 22, 29, 42, 52A, 53

**Citation :** (2013) ALLMR(Cri) 2842 : (2013) 4 BomCR(Cri) 505

**Hon'ble Judges :** Sadhana S. Jadhav, J

**Bench :** Single Bench

**Advocate :** Dilip Mishra, for the Appellant; P.P. Shinde, APP, for the Respondent

**Final Decision :** Allowed

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## Judgement

Sadhana S. Jadhav, J.—The appellant herein stands convicted for the offence punishable u/s 22 read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "NDPS Act") and is sentenced to suffer R.I. for a period of ten years and to pay fine of Rs. 1 lakh in default S.I. for six months in NDPS Special Case No. 116 of 2007 by the Special Judge under NDPS Act for Greater Mumbai, Vide Judgment and order dated 24th December, 2009. Being aggrieved by the said judgment and order, the original accused No. 1 (hereinafter referred to as "the appellant") has filed the present appeal. Such of the facts, which are necessary for the decision of this appeal, are as follows:-

In the intervening night of 5.1.2007 and 6.1.2007, PI Raut working as Senior Police Inspector in Shivaji Nagar Police Station was on a combing operation along with the other police personnel. At about 1.45 a.m. her patrolling party came near Madina Masjid. They saw light in one of the huts which was covered with polythene sheet and it was having wooden door. Senior PI Nimhan saw one person in suspicious condition in that hut. He, therefore, summoned two panchas to act as witnesses. The patrolling party then decided to take search of the hut in

the presence of both panchas. They enquired with the occupant of the hut. He disclosed the name as Mohd. Gulam Shaikh @ Nana. The police personnel noticed three large trunks in the said hut and one polythene bag. The blue coloured polythene bag was containing tablets. PI Nimhan suspected that it was a contraband covered under the NDPS Act and, therefore, sent PSI Chaskar to the Police Station for bringing the testing kit, weighing machine and other material required for preparing samples.

(b) PI Nimhan then apprised the said person of his right to be searched in presence of a Gazetted officer or Magistrate, the said offer was denied. The police officer then seized the bag containing ash colour tablets. On one side of the tablet letter "M" was engraved and on the other side "\*". The tablets were weighing about 10 kgs. PI Nimhan, after testing one tablet, had realized that the tablets were mandrax tablets. PI Nimhan then opened the three trunks one after another. In the first trunk, he found similar tablets weighing about 28 kgs. in the second trunk 26 kgs of similar tablets were found and the third trunk was containing 26 kgs. of similar tablets. PI Nimhan had then drawn the samples from each trunk weighing about 100 gms and had sealed them. After seizure, PI Nimhan had asked the accused to put his identification mark or signature on the sealed articles. However, the accused refused to oblige the officer.

(c) PI Nimhan had affixed seal on the forwarding letter for sending the samples for chemical analysis. Thereafter, along with the staff, the seized articles, accused Gulam and PI Nimhan returned to Shivaji Nagar Police Station. API Hankare had lodged the report of the said incident of seizure of contraband and on the basis of the said report, PI Raut had registered the crime against the accused persons. PI Raut then submitted a report of the incident to ACP and DCP as contemplated u/s 42 of the NDPS Act. PI Raut had prepared a deposit memo and deposited the seized articles with Senior PI of the Police Station. He had then instructed Police Constable Mandale for collecting samples from the Senior PI of Police Station in order to carry the same to C.A. Office. PC Mandale had carried the said packets to the C.A. It is alleged that while in custody, on 7.1.2007, the appellant had given a memorandum statement which led to the complicity of one Imtiyaz (since acquitted). It had transpired in the course of investigation that the tablets were given to the present appellant by Paul Raj through Imtiyaz. It is pertinent to note that the accused Paul Raj was discharged in the present case. After investigation, charge-sheet was filed on 3.4.2010. The case was committed to the said Court and registered as Special Case No. 116 of 2007. The prosecution has examined 8 witnesses to bring home the guilt of the accused.

2. PW-1 Sanjay Mandale was working as Assistant Store Keeper at Shivaji Nagar Police Station during the relevant period. He has deposed before the Court that on 6.1.2007 at about 9.30 a.m. PI Raut had instructed him to carry sample to C.A. Office. At about 2 p.m. PI Raut had handed over four envelopes to PW-1 and one letter in duplicate for carrying the samples to C.A. Office. The letter written to the CA was signed by Senior PI Nimhan. The evidence of PW-1 was being

recorded on 16.3.2009. On that day, the Muddemal property was not yet received by the Special Court. On 25.3.2009, the envelopes which were carried to the C.A. Office were shown to the witness and the witness identified the same as the envelopes which he had carried to the C.A. Office. The original letter was signed by Senior PI Nimhan. It is elicited in the cross-examination that Senior PI Nimhan was a Senior PI of Govandi Police Station, that Mr. Raut was PI-Administration and is in charge of the Store Room of Shivaji Nagar Police Station. It is further elicited in the cross-examination that the sample envelopes in the present case were not kept in the godown or the store room, but were kept under the safe custody of Senior PI Nimhan and that PW-1 has admitted to have collected the sample packets from Senior PI Nimhan and not from PI Raut. The witness was confronted with the letter at Exhibit 17 which is a letter purportedly signed by PI Raut for obtaining sample envelopes from the store room. In the cross-examination, PW-1 was unable to identify the signature of the officer above the signature of Senior PI Nimhan. He has further admitted that at the time of recording of his substantive evidence, there were no seals on the sample envelopes (articles A-1, B-1, C-1 and D-1).

3. It is pertinent to note that the prosecution, for the best reasons not disclosed, has not examined PI Nimhan and hence there is no substantive evidence of PI Nimhan, who was instrumental in the seizure of contraband, initiation of prosecution and signing the letters sent for chemical analysis.

4. PW-2 Dattatraya Hankare, acting as API of Shivaji Nagar Police Station, upon instructions of Senior PI Nimhan, had joined the combing operation in Mandala Mankhurd area. According to him, at about 1.45 a.m., they saw one person in the hut filling plastic bags. The door of the hut was partly open. The patrolling party saw the man filling in plastic bags with some material from the three tin bags. He had weighing scale and plastic pouches with him. On suspicion, they enquired into the activities and then realized that the tablets which he was filling in the polythene pouches was Mandrax. He has further deposed that it was Senior PI Nimhan who had apprised the accused of the fact that he himself was a Gazetted officer and whether he wanted the panchnama to be drawn in presence of a Magistrate or any other Gazetted officer, the person had declined the offer. He has deposed before the Court that police party had drawn samples and the pouches were closed by heat sealing. PW-2 had deposed before the Court that after drawing the panchnama of seizure, the Muddemal articles along with the accused were brought to Shivaji Nagar Police Station, Govandi. Thereafter, PW-2 lodged report against the accused alleging therein that he was found in possession of 90 kgs. of mandrax tablets. Crime No. 21/07 was registered under Sections 8(c), 22 and 29 of the NDPS Act.

5. According to PW-2, the Muddemal articles were kept in the safe custody of the chamber of Senior PI Nimhan. It is further pertinent to note that PW-2 has categorically deposed in his examination-in-chief that seized bulk quantity was shown to Special Metropolitan magistrate for disposal u/s 52A of the NDPS Act

and the rexin bag and packets were at the police station.

6. It is elicited in the cross-examination that there is a store room at Shivaji Nagar Police Station. A store room register is also kept. Senior PI is the in charge of the store room but Head Constable Mandale look after the work of store room as per instructions of Senior PI. Shri Raut was PI Administration.

7. At this stage, the learned Counsel for the appellant has drawn the attention of this Court to the provisions of Section 52-A of the NDPS Act. Section 52-A reads as under:-

[52-A. Disposal of seized narcotic drugs and psychotropic substances-

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered u/s 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-

section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]

The Court cannot be oblivious of the fact that the prosecution has not placed on record any application made to the Special Metropolitan Magistrate for disposal under Sec. 52A nor has placed on record the order passed by any Metropolitan Magistrate to that effect allowing investigating agency to dispose of the seized articles. Similarly, the bulk quantity of Muddemal property was not produced before the Court and hence non-production of Muddemal property of the seized contraband would be fatal to the prosecution.

8. The learned Counsel for the appellant has drawn the attention of this Court to paras 25 and 26 of the Judgment of the Special Court and has submitted that the Special Court has fallen in grave error in assuming that only because the bulk quantity was voluminous, it was not produced before the Court and was sent for disposal to the Court of Magistrate. The Special Court has observed that the accused had not drawn the attention of PW-2 to the provisions of Section 52-A of the NDPS Act and, therefore, it cannot be taken into consideration although the Special Court has rightly considered that in the event the bulk-quantity is destroyed as per provisions of Section 52-A of the NDPS Act, it is incumbent on the prosecution to adduce evidence to that effect. It is clear that the prosecution has failed to discharge its onus to substantiate that the investigating agency had followed the provisions laid down u/s 52-A of the NDPS Act.

9. The learned APP has submitted that in the course of examination-in-chief of PW-1, the property was submitted to the Court on 16.3.2009 and at that time the samples and the bulk quantity was produced before the Court and the list of articles is at Exhibit 14 and, therefore, it cannot be said that the said Muddemal article were not before the Court. In fact, on 16.3.2009, the substantive evidence of PW-2 was recorded and in the examination-in-chief itself, he had deposed that the bulk quantity is sent to Special M.M. for disposal u/s 52A. Both these aspects cannot go together because at the time of following the provisions u/s 52A of the Act, an inventory is to be prepared and submitted to the Magistrate for orders thereon and, therefore, it is clear that PW-2 was not aware that on 16.3.2009 a list of articles was submitted to the Court. The substantive evidence assumes importance and we cannot rely upon the document at Exhibit 14 as the said document has been exhibited only for identification and has not been proved by any witness. No witness was confronted with Exhibit 14. Moreover, the Special Court has specifically held that the bulk quantity was not produced before the Court and there was no identification of the same. In these circumstances, we cannot place any implicit reliance on the document at Exhibit 14 to hold that Muddemal article was produced before the Court.

10. The Hon''ble Apex Court in the case of Jitendra and Another Vs. State of M.P., has held as follows:-

...The best evidence would have been the seized material which ought to have

been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their failures and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act.

It is settled law that Section 52-A mandates, preparation with inventory and certification thereof by the Magistrate. In the instant case, admittedly, no inventory was prepared and if prepared, has not been placed on record before the Court. The production of Muddemal property in the present case could have been dispensed with in the eventuality that the prosecution had placed before the Court the inventory prepared, submitted to the Metropolitan Magistrate and the orders thereupon. It is pertinent to note that the panchas in the present case i.e. PW-4 and 5 have not supported the prosecution and hence there is nothing on record to draw an inference that there has been the identification of the bulk quantity from which the samples were drawn and sent to the C.A. Hence, the failure on the part of prosecution to follow the provisions of Section 52-A is certainly fatal to the prosecution.

11. PW-3 Bandenawas Babu Pathan, who was residing in Mandala, Mankhurd area, was called upon to act as panch witness. He has deposed before the Court that at the time of seizure, PI Nimhan had not told him the actual information received by him. Similarly, he has deposed before the Court that all the packets were marked only once. The marking was made on the envelope and not on the label. He was shown article A-2 and he has admitted that there were no markings on the label.

12. PW-6 Nabiullah Khan was working as Secretary to the Madina Masjid Society since 1995. According to him, accused had erected a hut in the said area and was residing in that hut and had agreed to pay rent of Rs. 200/- per month. There was no electricity provided to that hut. It is elicited in the cross-examination that PW-6 had not stated before the police in the statement u/s 161 that he was working as Secretary of Madina Masjid since 1995. He had neither stated the name of the accused at the time of recording the statement. The witness has clarified that he was not knowing the name of the accused and therefore not stated the same. According to him, the police had told him the name of the accused. He has stated that accused had never paid rent to the Society, but the said fact was not disclosed to the police. It is further elicited that no person by name Gulam was residing in the area of Madina Masjid and that accused was not residing in any hut in that area.

13. The learned Counsel for the appellant has submitted that the prosecution has failed to prove the ownership of the hut and, therefore, it cannot be said that the appellant was in possession of the said contraband. It is difficult to agree with the submission of the learned Counsel for reason that although ownership of the house has not been established, the prosecution has established that the accused was taken into custody from the said premises and, therefore, the

failure on the part of the prosecution to establish the ownership of the house by the accused would not be fatal to the prosecution.

14. PW-7 Sandeep Chetti, the Assistant Chemical Analyser, who has analyzed the contents of the packets containing contraband sent to the office of the Chemical Analyzer. The said witness has been shattered in the cross-examination as he has admitted that the carrier Constable had not given sample packets to him. He had received it from the clerk and there was no evidence to show that he had received the sample packets from the clerk. He has further deposed that there is no documentary evidence to show that on that day he had opened the sample packets and counted tablets and resealed the sample packets. All the envelopes marked A1 to D1 were not in sealed condition. He has further admitted that he had tallied impression of seal with the forwarding letter and the impression of seal and the forwarding letter Exh. 16 is not legible.

15. PW-8 Vijay Raut has deposed before the Court that he was working as Senior PI and attached to the Shivaji Nagar Police Station. He was a member of combing operation which was arranged at Mandala in the intervening night of 5th and 6th January, 2007. He has stated before the Court that the accused was found in the hut with the huge quantity of contraband (Mandrrex tablets). The accused was having balance and weights. They were seized and kept in a plastic bag and then sealed. It is pertinent to note that the said balance and weights is also not produced before the Court. PW-8 has further stated that the seized articles were given in the custody of Senior P.I. by giving an application in that respect. The attention of the witness was drawn to Exh. 38 in which it is stated that Muddemal property was deposited in the store room and the samples were sent for chemical analysis. It is pertinent to note that Exh. 38 is a letter sent to the Assistant Commissioner of Police and is signed by P.I. Shivaji Nimhan who has not been examined by the prosecution. At this stage, the learned Counsel for the appellant has rightly submitted that it was incumbent on the prosecution to place on record the entries in the register showing that bulk quantity was deposited in the store room. PW-8 has further proved the contents of Exh. 39. It is a letter signed by PW-8 written to the Senior PI of Shivaji Nagar Police Station requesting Senior PI to take charge of the Muddemal and keep it in the store room.

16. PW-8 had filed the charge-sheet after completion of investigation. PW-8 has admitted in the cross-examination that at the time of incident, he was in charge of godown of Shivaji Nagar Police Station as he was Senior PI attached to the said Police Station. He has further admitted that in Exhibit 39, there is no mention which property number was given to the articles. He has further stated that although as per Exhibit 39, articles were deposited with him, they were not actually deposited with him and they remained in the custody of Senior P.I. He has further admitted that the property was not deposited on that day in the godown and the said Muddemal property was never given in his custody. He has further stated that the article numbers mentioned in Exhibit 39 were given to

them at the time of panchnama. He has categorically stated before the Court that the Constable who had carried the sample packets to the office of C.A. had taken custody of the said packets from Senior P.I. Nimhan. Exhibit 17 is a clear indication that the direction was given by PI Nimhan to that Constable. PW-8 has not stated in his substantive evidence that the bulk quantity was sent to the Metropolitan magistrate to comply with the provisions of Section 52-A of the NDPS Act. Non-production of the seized contraband before the Special Court is fatal to the prosecution. Similarly, noncompliance of the mandatory provisions contemplated u/s 55 of the NDPS Act would also entitle the accused to acquittal.

17. The learned Counsel for the appellant has submitted that the punishment and penalty for the offences under the NDPS Act are extremely stringent and therefore, it is incumbent on the prosecution to comply with the mandatory provisions of the said Act. It is further submitted that the directory provisions also need to be followed by the prosecution as long as they do not cause serious prejudice to the defence of the accused. To substantiate the said submissions, the learned Counsel has placed reliance on several judgments of this Court as well as the Apex Court. He has placed reliance on the Judgment in the case of Sajjanbai w/o Subhashchandra Pokarna vs. The State of Maharashtra (Criminal Appeal No. 69 of 1999) (Aurangabad Bench). It is true that despite the panch witnesses PW-4 and PW-5 being declared hostile, the prosecution has not examined P.I. Nimhan whose evidence would be instrumental to prove that the Muddemal property was in his custody and the recitals of Exhibits 38 and 39 were only on paper and were not followed. Therefore, non-examination of PI Nimhan and non-production of the seized contraband, the conviction under the NDPS Act would necessarily fail. The Counsel has placed reliance on the Judgment of the Apex Court in the case of Jitendra & Ann (supra). He has drawn the attention to para 6 of the said Judgment which is squarely applicable to the case at hand. The Apex Court has held as follows:-

...despite the pancha witnesses having turned hostile, the non-examination of the Investigating Officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far fetched.

For all the abovementioned reasons, the following order is passed:-

#### ORDER

- (i) The Appeal No. 32 of 2010 is hereby allowed.
- (ii) The Judgment and Order dated 24/12/2009 passed by Special Judge (NDPS Act) Greater Bombay in NDPS Special Case No. 116/2007 is hereby quashed and set aside.
- (iii) The appellant is acquitted u/s 22 read with Section 8(c) of the NDPS Act levelled against him.
- (iv) The appellant be set at liberty forthwith if not required in any other offence.

(v) Fine amount if deposited shall be refunded to the appellant.