
(1994) 07 BOM CK 0118
In the Bombay High Court
Case No : Criminal Appeal No. 94 of 1993

Nazir Babalal Makandar

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 07-07-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100, 165, 41, 42, 50
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 21, 22, 41, 42

Citation : (1995) 97 BOMLR 828

Hon'ble Judges : Vijay Bahuguna, J; V.A. Mohta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Vijay Bahuguna, J.—Appellant-Nazir Babalal Makandar has been convicted under Sections 8(c) and 20(b) read with Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 by the Sessions Judge, Sangli and awarded sentence of ten years rigorous imprisonment and to pay a fine of Rs. 1,00,000 in default to undergo R. 1. for another six months. The accused is in jail.

2. The prosecution story in a nut shell is that Police Inspector Kulkarni was attached to Sangli City Police Station when on 7th January, 1992 he received an information that the accused-Nazir was selling brown sugar on a cycle in the vicinity of Sangli Old Railway Station. On receiving the information P. I. Kulkarni in the company of the informant and two panch witnesses, viz., Manohar Vithoba Shinde and Appasaheb Baburao Saudi left the police station in jeep to Madhavnagar bus stop. They found the accused standing with the bicycle near Srikrishna Hotel and he was apprehended and P. I. Kulkarni disclosed his identity and on his search found one match box in the pocket of the bush-shirt of the appellant and Rs. 150 in his pocket and also cassette in the pocket of the trousers and 8 small packets of brown sugar. The goldsmith in the presence of the accused and witnesses weighed the brown sugar and weight of the brown

sugar which was found to be 500 mg. and weight of the plastic cover was 150 mgs. After weighing the brown sugar it was kept in a plastic cover and the papers in which brown sugar was kept were kept in one plastic cover and all these articles were sealed and signature of the panch witnesses were obtained on the spot. Police Inspector Kulkarni drew detailed panchanama in the presence of the appellant and thereafter brought him to Sangli City Police Station and complaint was lodged with the Police Station Officer, Sangli City Police Station i. e, P. H. C. Patil and the complaint is Exhibit 19. P. S. I Patil registered the Crime No. 13/91 under the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 under Sections 8(c). 20(b) and 22. The complaint was registered at about 3.45 p.m. The sealed packets of brown sugar were given in the custody of A. S. I. Shinde and entries were made in the record of Muddemal register and next day with his forwarding letter sealed brown sugar was sent to the office of C. A., Pune for analysis and the report was received on 25th June, 1992. The defence of the appellant was one of denial.

3. In support of prosecution case P. W. 1- Manohar Vithoba Shinde, Panch witness P. W. 2 - Vilas Shankar Asagaonkar a gold smith who weighed the brown sugar, A. S. I. Shinde-P. W. 3, P. W. 4-the Police Constable who issued the forwarding letter with the sealed brown sugar to the office of the C. A. and P. W. 5 - Police Inspector Kulkarni, complainant and Investigating Officer of the crime were examined.

4. P. W. 5 - Police Inspector Kulkarni in his testimony has told that he had received prior information that the accused-Nazir Babalal Makandar was selling heroin in the area of Sangli Old Railway Station, on his bicycle and it was on receiving this information that he thereafter called two panch witnesses viz. Manohar Vithoba Shinde and Appasaheb Baburao Saudi and after disclosing the information to the panch witnesses he left the Sangli City Police Station and apprehended the appellant with brown sugar in the presence of the panch witnesses. He has reiterated the prosecution story as narrated above. P. W: 1 - Manohar Vithoba Shinde the panch witness deposed that on 7-1-1992 at about 2.00 p. m. he was called in Sangli City Police Station alongwith other panch witnesses Appasaheb Baburao Saudi and was informed by Police Inspector Kulkarni that they were to act as panch witnesses on the seizure and search which was going to be made pursuant to the information received by him and that the appellant was in possession of and selling brown sugar near old Sangli Railway Station. He too has supported the prosecution story in its entirety .P. W. 2 - Vilas Shankar Asgaonkar, the goldsmith was examined and he has deposed that he had weighed the plastic cover containing brown sugar which was seized from the packet of the appellant. P. W. 3-Bajrang Shinde A. S. I. who was attached to Sangli City Police Station has also been examined and his deposition is with regard to handling the brown sugar to him on 7th January, 1992 and the entry which he has made in the register of Muddemal.

5. Heard counsel for the appellant and the standing counsel. The primary

question which calls for consideration in the case is as to whether prosecution has complied with the mandatory provisions of Sections 42 to 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

6. The Apex Court in the case of State of Punjab v. Balbir Singh, reported in 1994 AIR SCW 1802, have scanned the provisions of the N. D. P. S. Act and have held as under :-

26(1) If a Police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr. P. C. and when such search is completed at that stage, Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance (of) recovery of any narcotic drug or psychotropic substance then the Police Officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) u/s 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal.

Likewise only empowered officers or duly authorised officers as enumerated in Sections 41(2) and 41(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by any one other than such officers, the same would be illegal.

(2-B) u/s 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention that would affect the prosecution case and vitiate the conviction.

(2-C) u/s 42(1) the empowered officer if has prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of the belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(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, 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.

(4-A) If a Police Officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr. P. C. fails to strictly comply with the provisions of Sections 100 and 165, Cr. P. C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer u/s 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr. P. C. namely Sections 100 and 165, Cr. P. C. and if there is no strict compliance with the provisions of Cr. P. C. then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the Courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information, the empowered officer or authorised officer while acting u/s 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not, would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc., then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

7. The counsel for the appellant contended that in the facts of the present case the prosecution have contravened the mandatory provisions of Section 42(1) of the Act inasmuch as the Police Inspector Kulkarni did not take down in writing and make any entry in the records of the Police Station of the information which

he had received before leaving the Police Station for the purposes of effecting the arrest of the appellant and seizure of brown sugar from his person. The entry in the case diary pertaining to this crime is Exhibit 18. We examined the entries of Exhibit 18 and perused the original and we find that no entry was made by Police Inspector Kulkarni of the information which he had received before he left the police station in the company of the panch witnesses to arrest the appellant in connection with possession of brown sugar. The learned standing Counsel could not place any document before this Court which contains the necessary entry in terms of Section 42(1) of the Act. That being so the appellant's case is covered by the aforesaid decisions of the Apex Court and the law laid down in Para 26 (2C) of the Judgment. Non-compliance with the provisions of Section 42(1) of the Act vitiates the entire proceedings and the trial. The prosecution and the trial is further vitiated by non-compliance of Section 50 of the Act which has also been held to be mandatory by the Supreme Court in the case of Balbir Singh referred to above. It was mandatory for the Police Inspector Kulkarni to inform appellant that if he so required, he could be produced before a Gazetted Officer or a Magistrate for the purpose of his search. There is nothing in the evidence of Police Inspector Kulkarni that he informed the appellant of his right u/s 50 of the Act.

8. For the above reasons, the appeal is allowed. The conviction of the appellant is set aside. The appellant shall be released forthwith from jail unless wanted in some other matter.