

(1999) 10 BOM CK 0062
In the Bombay High Court
Case No : Criminal Appeal No. 340 of 1996

Syed Yusuf Syed Noor

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 25-10-1999

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 20, 20(1), 21, 27

Citation : (2000) CriLJ 3409 : (2000) 1 MhLj 50

Hon'ble Judges : Y.K. Sabharwal, C.J.; J.N. Patel, J

Bench : Division Bench

Advocate : M.S. Deshpande, for the Appellant; S.S. Wandile, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Y.K. Sabharwal, C.J.—The appellant was prosecuted for an offence punishable u/s 20(b)(ii) and Section 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act"), on the allegations that on 29th February, 1996, an information was received that he was possessing and selling brown sugar in his residence. After compliance of the provisions of the NDPS Act, according to the prosecution, the raid was conducted at the house of the appellant and during search, brown sugar weighing 31/2 Grams was found in his possession. It was seized and sealed in presence of the Panchas and the appellant was arrested. The charge u/s 20(1)(b) of the NDPS Act was framed against the appellant by the learned Additional Sessions Judge, Akola, on 8th July, 1996. The prosecution examined six witnesses, including Panch, PW. 1 - Uday s/o Manohar Fase, and the Investigating Officer, P.W.6 - Vinod s/o Ganpatrao Raut. The learned Additional Sessions Judge, considering evidence on record, has come to the conclusion that the offence u/s 20(b)(ii) of the NDPS Act stands proved against the appellant, who has been sentenced to suffer rigorous imprisonment for ten years and fine of Rs. 1,00,000/-. The appellant is in appeal before us.

2. At the outset, we may note that though the charge states that the accused has "committed an offence punishable u/s 20(1)(b) of N.D.P.S. Act...", but Section 20 of the NDPS Act does not have any Sub-section (1). That seems to be a typographical error and we would assume that the appellant was charged for offence punishable u/s 20(b)(ii) of the NDPS Act, for which he has been ultimately convicted and sentenced. On this count further, it deserves to be noticed that as per the evidence, including the report of the Chemical Analyst, the appellant was found in possession of brown sugar which, from material on record, would clearly come within the definition of "manufactured drug" within the meaning of Clause (xi) of Section 2 of the NDPS Act and, thus, punishable u/s 21 of the said Act. But for the view we have taken in the present case, it is not necessary to dwell any more on the present question, or to consider reframing of the charge under the relevant provisions of the NDPS Act.

3. The learned counsel for the appellant has challenged the impugned judgment on various grounds, contravention of Section 42, Section 50, absence of proof of ownership and possession of the house from where, according to the prosecution, the appellant was apprehended with the contraband; absence of noticing weight of the contraband in the report of the Chemical Analyst and doubts on the sealing of the contraband.

4. On perusal of evidence on record, including the testimony of P.W. 1 and P.W.6, we find no substance in the half-hearted argument addressed to create doubt in the sealing. Likewise, there is also no substance in the contention about the weight being not mentioned in the Report of the Chemical Analyst. A perusal of the Report Exhibit 35, when seen with Exhibits 31 and 32, makes it evident that the prosecution has amply proved that the entire brown sugar weighing 3 1/2 Grams was forwarded for chemical analysis. In the present case, the question of ownership or possession of the house from where the appellant was apprehended is of no consequence, since the brown sugar was found from the person of the appellant. We also see no substance in the contention based on non-compliance of Section 50 of the NDPS Act. The thrust of the argument was that, according to the P.W. 1, the appellant was asked, whether he wanted to be searched in presence of "Tahsildar" and not "Magistrate", which is the requirement of Section 50 of the NDPS Act. What the learned counsel, however, misses is that P.W. 1 at the same time has also stated that Memorandum Exhibit P-15 was prepared while making enquiry with the accused (appellant herein), whether he wanted to be searched in presence of a Gazetted Officer. The Memorandum Exhibit P-15 is signed by P.W.1, P.W.6 as also the appellant. It records that the appellant was asked that he has legal right to give personal search in the presence of a Gazetted Officer or a Magistrate, if he so desires. The appellant expressed in negative. This fact further finds support from the House Search Panchanama (Exhibit 13). In this view, we find that there was compliance of Section 50 of the NDPS Act.

5. Now, we revert to the main challenge based on non-compliance of Section 42

of the NDPS Act. According to the testimony of P.W.6, while he was sitting in the Office of the SDPO, as he was called by him along with other Police Officers, the information, that the appellant is selling brown sugar at his residence, was received. The SDPO told P.W. 6 that he should inform about this information to the SP, and he left. P.W.6 further states that he informed the SP about it on telephone and thereafter the Police Staff, Panch witnesses and Video Cameraman left for the residence of the appellant. At this stage, reference may also be made to the copy of Station Diary Entry No. 25, dated 29th February, 1996 (Exhibit No. 28), recorded at 11.20 hrs. It, inter alia, records that as per the directions of Shri Shekhar, the Sub-Divisional Police Officer (SDPO), Police Inspector V. G. Raut (P.W.6), along with other officers, two Panchas and Video Cameraman left the Police Station at Old City, Akola, District Akola, in order to lay a raid in Khidkipura Locality, on the basis of information that the appellant possessed and sold brown sugar at his house, after giving intimation in writing to Panchas and Video Cameraman as well as to the Superiors. This is the only document on which reliance has been placed by the learned Additional Public Prosecutor to show that Section 42 of the NDPS Act was complied with.

6. Section 42(1) of the NDPS Act, inter alia, postulates that the concerned officer, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, in respect of which an offence punishable under Chapter IV has been committed, he may enter such premises, conduct search and effect seizure and arrest without warrant or authorisation. Section 42(2) stipulates 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. Section 42 has been held to be mandatory (See State of Punjab Vs. Balbir Singh, .

7. Turning to the facts of the present case, looking from any angle, i.e., whether the officer concerned, for the purposes of Section 42(1) of the NDPS Act, was SDPO, Shri Shekhar, or it was Police Inspector, P.W.6 Raut, clearly there has been total non-compliance of Section 42. It deserves to be noticed that SDPO, Shri Shekhar was not examined as a witness by the prosecution. Further, as already noticed, the information to immediate official superior, namely, SP was given on telephone only. According to P.W.6, no record of any such information was prepared or kept, or if it was so prepared, it was not produced by the prosecution for the reasons best known to it. Exhibit 28 though records that intimation in writing was given to superiors, no such writing has been produced. This very document, in fact, notices that SDPO Shekhar was dealing with the matter. It was at his direction that the police party went to the residence of the appellant. He is stated to have told P.W.6 to inform his immediate superior, namely, SP, who is said to have been informed on telephone, as per the testimony of P.W.6, and in writing, as per Exhibit 28, though none was produced. In fact, there has been non-compliance both of Sub-section (2) and Sub-section (1) of Section 42 of the NDPS Act. On the facts of the present case, Exhibit 28 cannot be pressed into

service to show compliance of Section 42(1) of the NDPS Act. It is only a document recording and showing departure of the police party from the Police Station. It does not record the reason of belief contemplated by Section 42(1) of the NDPS Act. Alternatively, assuming that the officer to whom the information was given about the appellant selling narcotic drug at his residence was P.W.6, in that eventuality, he was required to record reasons to believe and was required to send a copy thereof to the immediate official superior in terms of Section 42(2) of the NDPS Act. In fact, P.W.6 does not even claim to be an officer to whom such information was given. According to P.W.6, SDPO told him that he should inform about the receipt of information to SP, which he informed to SP on telephone. On these facts, we find no substance in the contention of the learned Additional Public Prosecutor that since information was given to P.W.6 by SDPO Shekhar, on the facts and circumstances of the case, it was neither necessary to comply with Section 42 of the NDPS Act, nor there has been substantial compliance thereof. Section 42 of the NDPS Act is mandatory. The object of the NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1), and to that extent, they are mandatory. Consequently, the failure to comply with these requirements affects the prosecution case and, therefore, vitiates the trial. (See *State of Punjab Vs. Balbir Singh*,).

8. Reference may also be made to the two decisions on which reliance has been placed by the learned counsel for the appellant. The first of such decisions is that of *Mohinder Kumar Vs. The State, Panaji, Goa*, , where the Supreme Court held that since the officer had, admittedly, not recorded the grounds of his belief at any stage of the investigation subsequent to his realising that the accused persons were in possession of Charas and did not forward a copy of the grounds to his superior officer, as required by Section 42(2) of the NDPS Act because he had not made any record under the proviso to Section 42(1), as such the prosecution had to fail. The second is a Division Bench decision of this Court in *Lamin Bojang Vs. State of Maharashtra*, , holding that forwarding of the information u/s 42(2) of the NDPS Act was mandatory and the written documentary information is to be forwarded to the superior officer and not oral information and that the provisions had to be strictly complied with, and the question whether the prejudice is caused to the accused or not is entirely extraneous.

9. In view of our aforesaid conclusion about the non-compliance of Section 42 of the NDPS Act, the trial of the appellant stands vitiated and consequently, the conviction and sentence of the appellant is set aside. In this view, we direct

forthwith release of the appellant, if not wanted in some other case. In case he has paid fine, the same shall be refunded to him.

The appeal is allowed in the above terms.