

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
DIVISION BENCH : Hon'ble Shri Justice Alok Verma
and Hon'ble Shri Justice Ved Prakash Sharma
Criminal Appeal No.1426/2013

Mohammad Nayan Choudhary

Vs.

State of M.P.

-X-X-X-X-X-X-X-X-X-X-X-

Shri Santosh Khoware, learned counsel for the appellent.
Shri Milind Phadke, learned Govt. Advocate for the
respondent-State.

-X-X-X-X-X-X-X-X-X-X-X-

ORDER

(Judgment delivered on 6th day of February, 2017)

Per : Ved Prakash Sharma, J.

This appeal preferred through Superintendent Jail, Indore is directed against judgment and order dated 18.03.2011 rendered by Special Judge (Narcotics), Indore in Special Case No.15/07, whereby appellent Mohd. Nayan Choudhary has been found guilty under Section 8/20(C) of Narcotic Drugs and Psychotropic substances Act, 1985 (for short 'the Act') and sentenced to undergo 15 years R.I. and to pay a fine of Rs.1,50,000/- and to undergo 3 years R.I., in default of payment of fine.

02. The prosecution story, in a nutshell, is that on 24.09.2007 Sub-Inspector R.K. Mishra (P.W.12), Police Station Sanyogitaganj, Indore, received a secret information that a person wearing a grey/cream coloured T-shirt and grey

pant having long hairs is coming to sell cannabis ('*Ganja*') to some person. The information was recorded in daily diary at serial No.2127 at 2.50 p.m. (copy Ex.P/25-C). As the concerned C.S.P. could not be contacted on wireless, therefore, due to paucity of time memo Ex.P/3 under Section 42 of 'the Act' was prepared recording reasons for non-procurement of search warrant; a copy of the same was forwarded through Constable Shantilal (P.W.5) to C.S.P. Thereafter, R.K. Mishra (P.W.12) along with police force and two panch witnesses namely, Nikki (P.W.7) and Pushkar Raj Verma (P.W.10) arranged a trap near Navlakha Busstand. After around 15-20 minutes a person of the given features having a sack and bag with him alighted from bus coming from Mhow Rao. On interrogation, he revealed his name as Mohd. Nayan Choudhary S/o Rahim Choudhary. After giving him a notice under Section 50 of 'the Act', apprising him that he can opt for being searched before Magistrate or gazetted officer, on his consent as per memo Ex.P/8, a search was carried out of the gunny bag and other bag held by him. Green leaves, buds and flowers like material was found inside the bag, which on physical examination, vide memo Ex.P/11 was identified as cannabis. On weighment respectively, 14 kilogram and 10 kilogram of cannabis was found in the gunny bag and the other bag. After mixing the same, two samples of 250 gram each (A/1, A/2) were drawn. The appellant was arrested. FIR (Ex.P/37) was recorded at Police Station Sanyogitaganj in this regard. The samples and the remaining material were separately sealed in presence of panch

witnesses. A report with regard to arrest and seizure under Section 57 of 'the Act' was sent to the then C.S.P. Sample article A/1 was sent for chemical examination to FSL, Rao, Indore. Dr. Vishnu Kolhe (P.W.13), vide report Ex.P/23, confirmed that the same is cannabis. After usual investigation, a charge-sheet was laid before the competent Court.

03. On being charged for offence under Section 8/20(C) of 'the Act' the appellant abjured guilt and claimed to be tried. The appellant pleaded that on 22.09.2007 around 1.45 a.m., two unknown persons had taken him to Police Station Sanyogitaganj, Indore to hold a magic show as he was earlier holding such shows in '*Nakhrali Dhani*', a restaurant. It was further submitted on behalf of the appellant that a sum of Rs.6 lacs was due against the owners of '*Nakhrali Dhani*' regarding which she has lodged a report with the Labour Court and that due to non-payment of the amount due he left '*Nakhrali Dhani*' and started holding his shows at 'Hotel Sayaji' regarding which Manager - Ramanand Yogi of '*Nakhrali Dhani*' had told him that if he refuses to organise magic show at '*Nakhrali Dhani*' he would not be allowed to hold magic shows at any other place, . Thereafter, on 22.09.2007 around 1.45 p.m., two persons had taken him to Police Station Sanyogitaganj, Indore, and he was put in confinement regarding which a news was also published in the newspaper Sanja (Ex.D/1) and Lokswami (Ex.D/2) that he was apprehended by the officials of the Crime Branch and was handed over to Police Station – Sanyogitaganj, Indore.

04. The learned trial Court on appreciation of

evidence, adduced before it, found the charge levelled against him proved beyond reasonable doubt, accordingly, he was convicted and sentenced as stated herein above.

05. The conviction and sentence has been challenged in this appeal on the ground that the appellant has been falsely implicated in this case because of his dispute with owners of '*Nakhrali Dhani*' regarding non-payment of dues. It is further contended on behalf of the appellant that mandatory provisions of Section 42, 50, 52 & 57 of 'the Act' were not complied with in letter and spirit, therefore, the impugned judgment deserves to be set aside.

06. Per contra, learned counsel for the respondent/State has submitted that plea with regard to false implication is not based on any plausible material and that 24 kilogram of cannabis lying in two bags held by the appellant, was recovered by the police after complying with relevant provisions of 'the Act', therefore, the conviction and sentence does not call for any interference.

07. Heard the learned counsel for the parties and perused the record.

08. In view of the submission made by respective counsel for the parties, it is required to be seen whether the conviction recorded against the appellant is in accordance with the law and evidence available on record and further whether the sentence is as per law?

09. The plea with regard to false implication because of some dispute over non-payment of money by owner or Manager of '*Nakhrali Dhani*', ex facie appears to be an after-

thought because the appellant in his examination u/s. 313 of 'the Code' has not taken any such specific stand, rather in response to question No.45, he has simply stated that he has been falsely implicated because of some quarrel ("Kaha Suni") with police officers in connection with holding of 'programme'. So also, no specific suggestion in this regard has been given to R.K. Mishra (PW-12) who had laid trap and allegedly conducted seizure of cannabis from possession of the appellant.

10. As regards publication of news item in newspaper dated 24.9.2007 (Ex.D/1 and Ex.D/2), the same carries no evidentiary value in absence of testimony of reporter, news-correspondent or editor of the newspaper. (See the decisions of apex Court in the case of *Quamarul Islam V/s. S.K. Kanta : AIR 1994 SC 1733*; and *Samant N. Balkrishna V/s. George Fernandez : AIR 1969 SC 1201*).

11. In *Quamarul Islam (supra)*, Hon'ble the apex Court dealing with the issue of proof and evidential value of newspaper report has held as under:-

"Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved and the manner of proving a newspaper report is well settled. Since, in this case, neither the reporter who heard the speech and sent the report was examined nor even his reports produced, the production of the newspaper by the Editor and publisher, PW4 by itself cannot amount to proving the contents of the newspaper reports. Newspaper, is at the best secondary evidence of its contents and is not

admissible in evidence without proper proof of the contents under the Indian Evidence Act."

12. In *Samant N. Balkrishna (supra)*, Hon'ble the apex Court has observed thus:

".....A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible..."

13. Though it has been contended on behalf of the appellant that Section 42 of 'the Act' was not complied with while effecting search and seizure, however, we can take note of the fact that in the instant case the search/seizure was made at a public place (Bus stand), therefore, the provisions of Section 42 of 'the Act' were not attracted because Section 43 of 'the Act' pertaining to search at a public place will apply in such situation. In this regard, we can usefully refer to the pronouncement of the apex Court in *Ganga Bahadur Thapa vs. State of Goa, 2000(10)SCC 312* and *Narayanswami Ravishankar vs. Asst. Directorate of Revenue Intelligence, 2002(8) SCC Page-7*. Even otherwise, from the record, we find that not only the secret information was recorded by RK Mishra (P.W.12) but copy of the relevant memo (Ex.P/3) was

also sent by him to CSP which is corroborated by Shri Ashok Kumar Singh (P.W.4), who at the relevant time was posted as Reader to C.S.P.

14. As regards compliance of section 50 of 'the Act', the same is applicable in case of 'search of a person' and not where the search is made of some bag or purse held by the accused. In this connection, the law laid down by the apex Court in the case of *Kalema Tunba vs. State of Maharashtra, (1999) 8 SCC 257*, can usefully be referred wherein the apex Court has categorically laid down that if a person is carrying a bag or some other article with him and contraband article is found in the bag, it cannot be said that the contraband was found from the person of the accused. This view was reiterated by the apex Court in a number of subsequent decisions including in *Kamla vs. State of M.P., (2000) 10 SCC 380*. The pronouncement of apex Court in *Madanlal vs. State of Himachal Pradesh, (2003) 7 SCC 465*, can also be usefully referred in this connection, wherein it has been ordained that Section 50 of 'the Act' does not extent to search of a vehicle or a container or a bag or premises.

15. In the case at hand, the cannabis is said to be recovered from gunny bag and other bag, allegedly, held by the appellant. No personal search was, as a matter of fact, conducted, therefore, question of compliance of Section 50 of 'the Act' did not arise. Hence, it cannot be complained that there was non-compliance of Section 50 of 'the Act'.

16. Again, as regards compliance of Section 57 of 'the Act', which requires that information with regard to search,

seizure and arrest should forthwith be sent to superior officer, the testimony of R.K. Mishra (PW-12) reveals that a detailed report with regard to search, seizure and arrest vide memo (Exh. P/38) was sent to CSP, Sanyogitaganj, Indore (Para 7 of his statement). His testimony on this point finds corroboration from Ashok Kumar Singh (PW-4), who in Para 2 has deposed that report (Ex. P/38) was received by him on 24.9.2007 itself, which was delivered to him by a Constable. His testimony on this point further stands corroborated by Shantilal (PW-5), who has deposed in para 2 that he delivered copy of the report to the Reader of CSP. Nothing could be brought out by the defence during cross-examination of these witnesses that they are concealing true facts or putting distorted facts before the Court regarding compliance of Section 57 of 'the Act'. Therefore, it cannot be said that Section 57 of 'the Act' was not complied with in letter and spirit.

17. Though it has been contended before this Court that the contraband was recovered from 4 bags and that only one sample was sent for forensic examination, however, from the testimony of R.K. Mishra (PW-12), who conducted the search and seizure as also from perusal of search memo (Ex. P/10), it transpires that the appellant was found in possession of two bags in which leaves, buds, flowers, etc. Suspected to be of cannabis were lying. He has further deposed that after seizure, the contents of two bags were mixed and thereafter two samples of 250 gms. each were drawn from the same and duly sealed along with remaining material at the spot. Despite detailed and searching cross-examination, nothing could be

elicited to discredit this witness on the aforesaid point.

18. The testimony of Dr. Vishnu Kolhe (PW-13) is clear and specific on the point that next day i.e. on 27.9.2007, sealed bag (Ex. P/1) along with draft (Ex. P/36) concerning Crime 930/2007, Police Station Sanyogitaganj, Indore was received in the forensic laboratory which was duly sealed and that, the contents of the packet on examination as per Ex. P/23, were found to be cannabis. Being an expert, his testimony on this point carries weight and in absence of any material anomaly deserves to be accepted. Therefore, the finding recorded by learned trial Court that the substance recovered from possession of appellant was cannabis is unassailable.

19. Lastly, it has been contended that the independent witnesses viz. Nikki (PW-7) and Pushkarraj (PW-10) have not supported the prosecution version. In this connection, it is noteworthy that they have been discredited by the prosecution by contradicting with their statements (respectively Exh. P/18 and P/20) recorded u/s. 161 of 'the Code'. Apart this, the law is well settled that the testimony of a police officer cannot be thrown overboard only on the ground that he is a police officer. If the testimony of a police officer, on due appreciation, is found to be trustworthy and free from material contradictions and anomalies, nothing prevents in law in recording conviction on the basis of such evidence. In ***P.P. Beeran v. State of Kerala, AIR 2001 SC 2420***, a case under the NDPS Act, the apex Court has held as under:

“Indeed all the 5 prosecution witnesses who have been examined in support of search and seizure were members of the raiding party. They are all police officials. There is, however, no rule of law that the evidence of police officials has to be discarded or that it suffers from some inherent infirmity. Prudence, however, requires that the evidence of the police officials, who are interested in the outcome of the result of the case, needs to be carefully scrutinized and independently appreciated. The police officials do not suffer from any disability to give evidence and the mere fact that they are police officials does not by itself give rise to any doubt about their credit worthiness.” placed reliance on the uncorroborated testimony of the Police Inspector in the case of possession of drug of small quantity. "

20. In view of the aforesaid, on careful examination of evidence available on record and thoughtful consideration of the submissions made by learned counsel for rival parties, this Court does not find any reason to disagree with the finding of conviction recorded by learned trial Court.

21. Considering the quantity of contraband recovered from possession of appellant, the sentence of 15 years RI appears to be disproportionate and on higher side. In our considered opinion, a sentence of 10 years' RI and a fine of Rs.1,00,000/- (One Lakh) will be just and proper in the facts and circumstances of the case.

22. Resultantly, the appeal is partly allowed and the conviction as recorded by the trial Court is maintained, however, the sentenced imposed against the appellant is

reduced from 15 years' RI to 10 years' RI and the fine is reduced from Rs.1.5 Lakhs to Rs. 1 Lakh. The appellant, in default of payment of fine, will suffer further six months' RI.

(Alok Verma)
Judge

(Ved Prakash Sharma)
Judge

soumya