

(2002) 03 BOM CK 0001

**Bombay High Court (Aurangabad Bench)****Case No:** Criminal Appeal No. 400 of 1999

Chand Khan Gani Khan

APPELLANT

Vs

State of Maharashtra

RESPONDENT

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**Date of Decision:** March 2, 2002**Acts Referred:**

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 18, 42

**Citation:** (2002) 104 BOMLR 110**Hon'ble Judges:** V.K. Barde, J**Bench:** Single Bench**Final Decision:** Allowed

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**Judgement**

V.K. Barde, J.

The Appellant is convicted by the learned Special Judge, Nanded, in N.D.P.S. Case No. 3 of 1990 of offence punishable u/s 18 of the N.D.P.S. Act and sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1 lakh in default of payment of fine to suffer further R.I. for 2 years. Being aggrieved by this order of conviction and sentence, the present appeal is filed.

2. The case of the prosecution is as follows :

P.S.I. Shaikh attached to Vazirabad Police Station, Nanded, was on patrolling duty on night between 21 and 22nd December, 1989. He received information that in Apsara lodge in Room No. 29, one lodger with his family was halting and he was having opium without licence. So, he reached the lodge in the company of two panchas and other constables at about 3.30 a.m. In the room, nothing was found, but in the attached bathroom of the room, in a cloth bag, there was opium. Sample of the opium was taken. Panchnama was prepared. The opium found was 3 kgs. 150 g. That opium was in five polythene bags. Both the accused and his wife were taken to the police station and there the P.S.I. lodged the F.I.R. only against the present Appellant. The seized material was handed over to the Police Station Officer. The

P.S.I. himself carried out further investigation. Sample was sent to C.A. and the C.A. reported that the sample contained opium. So, the chargesheet was submitted in the Special Court at Nanded. The learned Special Judge framed charge against the accused for offence u/s 18 of the N.D.P.S. Act. The accused pleaded not guilty. His defence was that he was not in the room.

3. The learned Special Judge on recording the evidence of the prosecution witnesses, and after recording the statement of the accused, came to the conclusion that the prosecution has proved the offence u/s 18 of the N.D.P.S. Act against the accused and, therefore, he convicted and sentenced him as stated above.

4. The learned Counsel Shri Damle appointed for the accused has argued that no independent witness has supported the prosecution case. Only Head Constable, who was member of the raiding party, is examined to make out the case against the accused. The Investigating Officer himself had expired and, therefore, his evidence could not be recorded. In such circumstances, the prosecution evidence is not reliable. He also argued that the provisions of Section 42 of the N.D.P.S. were not complied with by the Investigating Officer and therefore, the search becomes doubtful.

5. The learned A.P.P. has argued that there may be procedural defects while carrying out the search, but that will not vitiate the trial. The evidence of H. C. Mangrulkar is sufficient to hold that the prosecution has proved its case. The report of the C. A. clearly indicates that the material recovered from the bathroom of Room No. 29 was opium. So, the appeal be dismissed.

6. P.W. 1 is Mohd. Habib and he has stated that 10 years back, he was working as Manager in Apsara Lodge. He was called in Room No. 29 by the police. The accused and his wife were sitting in the room. The Police Officers were there. He has stated that the police had come to the lodge at 3 a.m. and they said that they wanted to take search of Room No. 29. However, he states that nothing was seized in his presence. He signed the panchnama at the instance of the police. Thus, he is not supporting the prosecution case.

7. P.W. 3 is H. C. Elkewar and he has stated that at about 1 a.m. in the night between 21st and 22nd December, 1989, he was with Police Constable Sirse, Police Constable Gite and P.S.I. Shaikh on patrolling duty. They were going by a jeep. P.S.I. Shaikh informed them that raid was to be effected at Apsara Lodge because information was received that one person who possessed opium was in Room No. 29 in that lodge. He has stated that two panchas were taken and they went to Apsara Lodge. Room No. 29 was raided at about 3.30 a.m. Chand Khan and his wife were in the room. He has further stated that a cloth bag was noticed in the bathroom of the room, on taking search of the bag, one iron balance and measures were found. There were small polythene bags containing opium. The total weight of the opium was 3 kgs. 150 g. The accused could not give any explanation about the opium. He

has further stated that the opium bags along with the measures and balance were seized under panchnama. Out of the seized opium, sample of 100 grams was taken and kept in paper envelope. That was also closed and sealed and the accused were taken to the Police Station, Vazirabad. The F.I.R. was lodged by the P.S.I. The same is at Exhibit 38. He has stated that the contents of the panchnama Exhibit 29 are true and correct.

8. Similar is the deposition of H. C. Sirse, P.W. No. 4.

9. Both Head Constables Elkewar and Sirse state that two panchas were called and they were taken to Apsara Lodge along with the police. Head Constable Sirse has stated that both panchas were rickshaw drivers. However, deposition of the panch witnesses and panchanama indicate that one was the manager of the lodge and other was rickshaw driver. So, how is it that the police took two panchas along with them to effect the raid when one of the panchas was present in the lodge itself working as Manager.

10. It is in the deposition of Police Head Constable Sirse that there was a balance and measures in the cloth bag. However, H. C. Sirse states that he was not remembering from where the weights were called for measuring the quantity of opium. Similarly, H. C. Elkewar states that the weights were brought from outside, but he did not remember wherefrom. It is thus seen that these two witnesses are not able to state exactly from where the weights were taken and how the opium was weighted.

11. Both these police witnesses state that the bags were sealed. However, it is not made clear how the bags were sealed. The F.I.R. or the panchnama does not indicate that the P.S.I. had taken the seal of the police station with him for sealing the bags of contraband. Then which seal was used for sealing the bags of contraband and sample of the contraband. It is most important to show that the bags and sample were sealed properly at the place of panchnama itself. The evidence in this respect even from the two Police Constables is not satisfactory. So, on material points, the evidence of the prosecution is vague or contradictory.

12. H. C. Elkewar states that on reaching at the lodge, they went to Room No. 29. While H. C. Sirse states that on reaching at the lodge, the register of the lodge was checked and it disclosed that one person by name Chandkhan was in Room No. 29. There is this discrepancy in the evidence of these two witnesses. The register was not produced before the Court to show that the accused was occupying Room No. 29 as a lodger. It is also not known on what date and at what time he had hired that room. The evidence of the Manager of the lodge does not give all those details. The learned Advocate for the accused has argued that if the accused had entered in the room just before the police effected the raid, then how it can be said that the accused was aware that the contraband was there in the bathroom. The prosecution cannot prove that the accused was having conscious possession of contraband. The

bag containing packets of opium was not found in the luggage of the accused. It was not found in the room in which the accused was, but in the attached bathroom. So, the prosecution case is not definite about the conscious possession of the contraband with the accused. I find substance in this argument. The register of the lodge ought to have been seized to show that the accused was the lodger in the room.

13. The learned Counsel for the accused has further pointed out that the P.S.I. received information, but exactly when he received information is not mentioned in the F.I.R. There is nothing to show that the P.S.I. recorded that information in writing and communicated it to the Senior Police Officer. There is also no evidence indicating that the P.S.I. had recorded his reasons to effect the raid at night time. Thus, the provisions of Section 42 of the Act were not duly complied with. If other evidence is taken into consideration, then this procedural lacuna definitely prejudiced the accused.

14. When it is noticed that Section 42 of the Act is not complied with and no independent witness is supporting the prosecution case, then the evidence of Police Officers and evidence regarding search and seizure has to be scrutinised very cautiously. Here, unfortunately, the P.S.I. could not be examined, but then the Police Constables who were with the P.S.I. at the time of effecting the raid and who were also with him on patrolling duty could have stated about the recording of information in writing, communicating the information to the Senior Police Officer and recording of reasons for effecting raid between the Sunset and Sunrise. They are silent on these points and that is only because these requirements were not complied with. The F.I.R. itself does not mention that these requirements were complied with.

15. So, looking to all these circumstances, it has to be held that the prosecution has failed to make out the case against the accused. Hence, the appeal is allowed. The order of conviction and sentence recorded by the learned Special Judge, Nanded, on 4.1.1999 in N.D.P.S. Case No. 3 of 1990 for offence u/s 18 of the N.D.P.S. Act is set aside. The Appellant accused is acquitted of the said offence. He be released forthwith from jail, if not required in any other case. Fine, if paid, be refunded to him.