

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 41 of 2014**

Budhu Khemdu s/o Sonu, aged about 29 years, R/o village
Kumhargudha, PS Aoukhil, District Malkangiri (Odissa)

---- Appellant

Versus

State of Chhattisgarh Through The Police Station Nagarnar,
District Bastar (CG)

---- Respondent

For Appellant : Shri Viprasen Agrawal, Advocate

For State/Respondent : Smt. Shobha Kashyap, Dy. GA

HON'BLE SHRI JUSTICE CHANDRA BHUSHAN BAJPAI**JUDGMENT****16/10/2015**

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 28.10.2013 passed by the Special Judge, (Narcotic Drugs and Psychotropic Substances Act, 1985), Jagdalpur in Special Case No.37/2010, whereby and whereunder the learned Special Judge after holding the appellant guilty for illicit possession of 20 kg of psychotropic substance ganja, the cannabis, convicted him under Section 20 (b) (ii) C of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the 'NDPS Act') and sentenced to undergo R.I. for 10 years and fine

of Rs. 1,00,000/-, in default of payment of fine to further undergo R.I. for 1 year.

2. The conviction is impugned on the ground that without there being any iota of evidence, the Court below has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

3. As per case of the prosecution on 10.8.2010, the Investigating Officer, Latesh Kumar Sori (PW6), Sub Inspector received an information from the informer that a suspected aged about 20-21 years keeping air bag and suitcase filled with gainja is present near forest produce barrier, Dhanpunji on national highway 43, waiting for Bus for Jagdalpur. PW6, Latesh Kumar Sori called the Panch witnesses and recorded the information and also sent the information for further proceedings to his superior officials, C.S.P. Jagdalpur through a Constable. Thereafter, looking to the facts and probabilities of concealment of disposal by the suspected of the contraband material, PW6, along with Police party and Panch witnesses reached to the spot. He noticed the appellant, inquired his name and address and thereafter, gave him notice under Section 50 of the NDPS Act and informed regarding his legal rights that he may be searched before the Magistrate/gazetted officer, if he so wish. After receipt of the notice, the appellant consented to be searched by the

Investigating Officer itself. Thereafter, the bag and the suitcase in the possession of the appellant was searched and noticed objectionable substance. On physical examination, it was found as ganja. The weight of the substance was taken. It was 20 kg in total. 4 samples of 25 gm were taken. Remaining ganja and the samples were dully sealed and seized. The appellant was taken into custody. His relatives were informed regarding the arrest and thereafter, F.I.R. was lodged. The ganja and the samples were kept in security in the Malkhana. A detailed report regarding arrest, seizure and other proceedings was sent to the superior officials. The Samples were sent for chemical analysis to the FSL, Raipur. After completion of the investigation, charge-sheet was filed before the concerned Special Judge.

4. The learned Special Judge framed charges under Section 20 b (ii) C of the NDPS Act. The appellant denied the charges and requested for trial. In order to prove the guilt of the appellant, prosecution examined as many as 8 witnesses. Statement of the appellant was recorded under Section 313 Cr.P.C. in which he denied the circumstances appearing against him, pleaded innocence and false implication in the crime in question. After affording opportunity of hearing to the parties, the learned Special Judge convicted and sentenced the appellant as above.

5. Learned Counsel for the appellant submits that he is not contesting the appeal on its merits, but he is contesting the appeal looking to the quantity of the ganja so seized. The conviction would have been under Section 20 b (ii) A because the Investigating Officer seized 20 kg ganja from the possession of the appellant and as per Table under sub-clause vii a and xxiii a of Section 2 of the NDPS Act at item No.55, the matter be taken as less than commercial quantity. As there was over writing on Ex. P/9 document regarding weight taken by the Investigating Officer during investigation shows that the quantity so seized was not proved as the quantity 20 kg without any shadow of doubt and for this, questions were asked to the Investigating Officer regarding over writing in the weight mentioned in Ex. P/9. Therefore, there is reasonable doubt regarding the weight of the contraband article so seized as 20 kg. Learned counsel further submits that the conviction should have been under Section 20 b (ii) B of the NDPS Act and not under Section 20 b (ii) C. Learned counsel submits that the appellant is a first offender with no criminal history. He is aged about 29 years at the time of arrest, he is labour by profession, earning his livelihood anyhow. He is in jail since 11.8.2010 and thereby he had served R.I. for 5 years, 2 months and 6 days. He will not commit any offence in future and as directed and as per appreciation, on the entire evidence he is not assailing the conviction part. He is assailing the Criminal

Appeal for the quantum of sentence and also quantum of fine sentence. Learned counsel submits that looking to the age, no criminal history, the appellant is engaged in the labour job for earning his livelihood, the substantive jail sentence and the fine sentence may be considered and the appellant may be sentenced for both counts accordingly.

6. On the other hand, learned counsel for the State opposed the prayer and supported the judgment passed by the Court below. She submits that looking to the quantity of ganja so seized and that the appellant is a resident of district Malkangiri (Odissa), found near Jagdalpur along with 20 kg of ganja, shows that it was either for the consumption or for the illegal sale. Hence, the court below that appropriately sentenced the appellant and the appeal may be dismissed for all counts.

7. In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution before the trial Court.

8. So far as quantity of the ganja seized is concerned, by mere observation in Ex. P/9, the document regarding weight of the ganja, it shows that the weight is written as 10 kg is after over writing on a number for both the entries, it shows that earlier some weight 9 kg 50 was mentioned and thereafter, the same was on over writing shown as 10 kg and 10 kg. It creates

sufficient suspicion for the facts whether 20 kg of the ganja was recovered from the appellant or not. In the considered view of this Court, the arguments advanced in this behalf by the learned counsel is acceptable and appreciated. Learned counsel is not otherwise assailing the appeal on quantum of conviction. Even after perusal of other material and evidence I do not see any illegality or impropriety for judgment of conviction but for the fact that conviction passed by the trial Court is amended and held that the conviction under Section 20 b (ii) C is altered to Section 20 b (ii) B of the NDPS Act.

9. So far as quantum of sentence is concerned, for both the counts there is no minimum sentence prescribed for the offence under Section 20 b (ii) B of the NDPS Act. The appellant has already served the sentence i.e. R.I. for 5 years, 2 months and 6 days. The appellant was aged about 29 years at the time of incident. He is shown as a labour and in the lower minimum income group. In the memo of arrest Ex. P/17, no earlier criminal past for the similar offence or for the other offence was shown in the charge sheet, shows that the appellant is a first offender. Looking to the age, his poor economic condition, it may be assumed that he may be mere a carrier for few hours.

10. On due consideration, the quantum of substantive jail sentence and also the fine sentence requires interference. In the

considered view of this Court, the period already undergone by the appellant and fine sentence of Rs.20,000/- would meet the ends of justice.

11. Consequently, the appeal is partly allowed. The conviction of the appellant under Section 20 (b) (ii) B of the NDPS Act is hereby affirmed. The appellant is sentenced R.I. for the period already undergo by him along with fine sentence of Rs.20,000/-. In default of payment of fine he has to undergo R.I. for 3 months. The authorities are directed to set the appellant at liberty forthwith after realization of the fine of Rs.20,000/- and if fine amount is not paid then the authorities are directed to serve the default sentence to the appellant i.e. R.I. for 3 months subject to the realization of the fine amount.

12. The appeal is partly allowed. Sd/

(Chandra Bhushan Bajpai)
JUDGE