

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 616 of 2011

- Mushtaq Ahmed Khan, S/o Maqbool Hussain Khan, aged about 52 years, Occupation Cloth Merchant, R/o Nurani Chowk, Raja Talab, Raipur (CG)

---- Appellant

In jail

Versus

- State Of Chhattisgarh through Police Station Chuikhadan, Distt. Rajnandgaon (CG)

---- Respondent

For Appellant : : Shri Vimlesh Bajpai, Advocate.

For Respondent/State : Shri Rahul Tamaskar, PL.

And

CRA No. 567 Of 2011

- Shailendra Kumar Dhurve S/o Lt. Jagannath Rao, aged about 45 years, R/o Dhurve Travels, Fool Chowk, Jorapara, Distt.-Raipur, C.G.

---- Appellant

in jail

Vs

- State Of Chhattisgarh through District Magistrate Rajnandgaon, Distt. Rajnandgaon (CG)

---- Respondent

For Appellant : Shri Mirza Hafiz Baig, Advocate.

For Respondent/State : Shri Rahul Tamaskar, PL.

Hon'ble Shri Justice Pritinker Diwaker

Judgment On Board

22/09/2016

As these two appeals arise out of a common judgment of conviction and order of sentence dated 17.6.2011 passed by the Special Judge (N.D.P.S. Act), Rajnandgaon, in Special Case No.4/2009, they are being disposed of by this common judgment.

02. By the judgment impugned, the trial Judge has convicted each of the appellants under Section 20(b)(ii)C of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the Act”) and convicted them to undergo RI for 10 years and to pay a fine of Rs.1 lac with default stipulation.

03. Facts in brief are that on 14.3.2009 a secret information was received by GC Pati, Station House Office, P.S. Chhuikhadan, that two persons are having Ganja with them in a white coloured Tata Indica Car bearing registration No.CG 04 H 3948. The said secret information was reduced in writing vide Ex.P/9, the same was entered in Rojnamchasanha No.59 vide Ex.P/1, panchanama Ex.P/10 which is in relation to not obtaining warrant due to paucity of time was prepared in compliance of Section 42(2) of the Act, two independent witnesses were called, they were informed about the secret information, the information was sent vide Ex.P/11 to SDOP after making entry of the same in Rojnamchasanha. When the police party and the witnesses reached the place of incident, they found one Tata Indica Car bearing registration No. CG 04 H 3948 standing there, on the driver seat accused Shailendra was sitting whereas on the back seat other

accused Mustaq Ahmed was found sitting. The accused persons were given notice under Section 91 of Cr.P.C. vide Ex.P/28. In reply they submitted that they do not possess any document in respect of said contraband. Notice under Section 50 of the Act was given vide Ex.P/27 to the accused persons and after their consent, they were searched vide Ex.P/26, however, nothing incriminating was found on their personal search and accordingly, panchanama Ex.P/17 was prepared. In the car, in two gunny bags kept on the back seat Ganaj was found and recovery panchanama Ex.P/29 was prepared. Identification panchanama Ex.P/30 was prepared and it was noticed that in those bags Ganja was kept. For weighment of the seized article, one Nasir Khan was called vide Ex.P/14, in presence of investigating officer GC Pati (PW 13), weighment was done. Physical verification of the weight and the balance was done vide Ex.P/15. Upon weighment, 50 kg Ganaj was found, out of which four samples each weighing 50 gms were made in plastic box, weighing panchanama and sample panchanama was prepared vide Ex.P/16. Seal showing P.S. CK RJN CGP was prepared and affixed, the same was verified vide panchanama Ex.P/32; registration and insurance documents of the vehicle were seized vide Ex.P/39; spot map Ex.P/35 was prepared; the accused persons were arrested vide Ex.P/33 and P/34; information of their arrest was sent to their family members vide Ex.P/40 and P/41. At the spot itself Dehati Nalishi Ex.P/43 was recorded and after reaching police station, FIR (Ex.P/44) was registered under Crime No.61/09; and the seized contraband was handed over to Malkhana Muharrir. Entries were made in Sanha vide Ex.P/51 showing return of the police party in the police station. After completing the entire formalities,

detailed information was sent to SDOP as per requirement of Section 57 of the Act vide Ex.P/12. The samples were sent to FSL vide Ex.P/23 which were duly received in FSL vide Ex.P/24 whereas report sent by FSL is Ex.P/45 confirming the contraband seized and sent to be Ganja. The investigating officer recorded statements of the witnesses, prepared spot map and subsequently, filed challan before the competent Court against the accused/appellants. The trial Court framed charge under Section 20(b)(ii)C of the NDPS Act against them.

04. So as to hold the accused/appellants guilty, the prosecution examined 13 witnesses in all. Statements of the accused were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication.

05. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellants as mentioned above. Hence these appeals.

06. During pendency of these appeals, this Court had directed for linking Cr.A.No.272/2010 with the present appeals, however, counsel for the appellants submit that the present appeals have no connection with Cr.A.No.272/2010 and therefore, the instant appeals may be decided independently, to which State counsel also has no objection.

07. Ordered accordingly.

08. Learned counsel for the appellants submit as under:

- that there is total non-compliance of Section 42 of the Act whereas compliance of the same is mandatory. There is material discrepancy while showing paper compliance of Section 42 of the Act. In some places, it has been mentioned that the information was passed on to superior officer through one Damru Ram whereas at some places, name of Hemant Sahu is there. According to the appellants, this discrepancy occurred because all the formalities have been completed after reaching police station and not at the spot.
- that provisions of Section 52A(2) of the Act have also not been complied with by the prosecution and the entries have not been made properly in the Malkhana register. Likewise, while making weighment of the contraband, bags and other articles have not been weighed separately which vitiated the entire proceedings.
- that the provisions of Section 55 of the Act have also not been complied with and even the seal prepared by the I.O. has not been deposited in the Malkhana intact.
- as regards compliance of Section 57, it has been argued that independent witnesses PW-10 and PW-11 have not supported the prosecution case and even PW-4 witness to weighment has not supported the prosecution case.
- as per prosecution case after drawing samples they were kept in small plastic boxes whereas when the same were received in FSL it were in packets.

09. On the other hand, supporting the impugned judgment it has been argued by the State counsel as under:

- that there is substantial compliance of Section 42 of the Act and this has been duly proved not only by the IO (PW 13) but also by PW-2 who at the relevant time was Head Constable/Reader in the office of SDOP.
- though the prosecution was not under obligation to comply with Section 50 as it was not required in the present case but yet the provisions of Section 50 have also been complied with.
- in relation to Section 52A(2) it has been argued that compliance of the said section is not mandatory, however, even assuming that two bags were not weighed separately, it will not make much difference in the case because quantity of the contraband seized is about 50 kg and even if the contraband was weighed separately, it would have been more than 49 kg i.e. beyond the commercial quantity.
- that at the spot itself seal bearing impression P.S. CK RJN CGP was prepared and the same was affixed on the samples and bags in which the remaining contraband was kept and the articles were also sent to Malkhana in sealed condition, from where within two days the same sent to FSL. When the articles were produced before the trial Court, sealing was found proper. Even otherwise, it was not the case of the defence before the trial Court that seal was tampered in any manner or that some other articles were sent to FSL.

- even if the independent witnesses have not supported the prosecution case, the accused/appellants can very well be convicted solely on the basis of statement of I.O. which in the present case remains unrebutted and consistent, thereby inspiring confidence of the Court.

10. Heard counsel for the respective parties and perused the material on record.

11. PW-1 Dhaneshwar Dhru was, at the relevant time, Malkhana Muharrir. He has proved the entries made in Sanha vide Ex.P/1 in respect of secret information, Ex.P/2 to P/4 in respect of police party proceeding for place of occurrence, Ex.P/5 and P/6 in relation to return of police party. He has also proved Rojnamchasanha Ex.P/7 and Ex.P/8 relating to seizure of contraband including that of documents of the vehicle. This witness was put to lengthy cross-examination, however, nothing could be elicited from him by the defence which could render his evidence untrustworthy or doubtful.

12. PW-2 Sukluram has proved compliance of Section 42 (2) and 57 of the Act. He has duly proved secret information Ex.P/9, panchanama regarding not obtaining search warrant Ex.P/10, information to superior officer Ex.P/11 and detailed report Ex.P/12 to the superior officer. PW-3 Haricharan is a witness of Ex.P/9 and P/10. However, he has turned hostile but admitted his signatures on these documents. PW-4 Nasir Khan is a witness of Ex.P/14, P/15 & P/16 pertaining to formalities of weighment of the seized contraband. He has also turned hostile but admitted his signatures on all the documents. PW-5 DB Uikey, Sub

Inspector, is a witness of Ex.P/17 by which personal search of the staff members, witnesses, vehicle as well as himself was made. PW-6 Bhaulal, Patwari, prepared the spot map Ex.P/19 and panchanamas Ex.P/19 to P/21. PW-7 Rajet Lal Yadu, Police Constable, helped the investigating officer during investigation. PW-8 Amritlal took samples to FSL vide Ex.P/23 and also proved receipt of the same in FSL vide Ex.P/24. PW-9 Gyanendra Sahu, Police Constable, accompanied the investigating officer and proved search panchanama Ex.P/17. PW-10 Mahesh has though been declared hostile but admitted his signatures on the documents Ex.P/25 to P/35. PW-11 Tikam, the independent witness, has also turned hostile. PW-12 Rajendra Prasad Mandavi did some part of investigation.

13. PW-13 GC Pati, investigating officer, has stated that after receiving secret information on 14.3.2009 that two persons are carrying Ganja in a white coloured Indica car, after completing the necessary formalities he reached the place of incident along with staff and witnesses. He states that due to paucity of time and there being apprehension of the accused persons fleeing the spot, he was not in a position to obtain search warrant and therefore, he prepared a panchanama to this effect and forwarded the same to SDOP through Constable Hemant Sahu vide Ex.P/9 and P/10. He states that after reaching the place of occurrence, he gave notices to the accused persons under Section 91 of Cr.P.C. who disclosed their names as Shailendra Kumar and Mustaq Ahmed. He also gave them notices Ex.P/28 to show any document for possession of the contraband, however, they failed to produce any such document. He submits that formalities regarding

compliance of Section 50 of the Act were also completed. Upon search of the vehicle, contraband Ganja kept in two gunny bags were found vide Ex.P/29 which was signed by the accused persons. The contraband was examined by smelling and burning and it was found to be Ganja. He asked the police constable to arrange for weighment of the contraband and one Nasir Khan was called and then weighment of the contraband was done, which came to be 50 kg. Thereafter, samples were drawn and sealed, insurance and other documents relating to the vehicle were seized, the accused persons were arrested and intimation regarding their arrest was sent to their relatives. The seized articles including the contraband were sent for chemical examination to FSL.

In the lengthy cross-examination, this witness remained very firm and reiterated as to the manner in which the investigation was carried out and necessary formalities as per provisions of the Act were completed. Defence has not been able to elicit anything from him to make his evidence shaky or unreliable. He has also clarified that secret information was in fact sent through Hemant Sahu and due to inadvertence name of Damru Ram has been mentioned.

14. From the statement of the investigating officer, it is apparent that substantial compliance of Section 42 of the Act has been done. Likewise, arrest and seizure were made in accordance with law and a detailed report in respect thereof was sent within time to the superior officer and as such, there is also compliance of Section 57 of the Act. So far as argument regarding not depositing the sample seal in Malkhana is concerned, it was not the case of the accused persons

before the trial Court that the seal was in any manner tampered. If they had any doubt in their mind in this regard, they could have made a request to the Court below for examination of the same. Even at the time of recording evidence, samples were produced before the Court and the same were found proper and intact.

15. It is a settled position of law that only in case of total non-compliance of Section 42 of the Act, benefit can be given to the accused. However, in the present case, there appears to be substantial compliance of mandatory provisions of Section 42 and thus, it cannot be said that prosecution against the accused/appellant was bad in law. It is equally well settled that conviction can rest on the sole testimony of the investigating officer provided the evidence of investigating officer inspires confidence of the Court and is free from the suspicion of falsity. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case. In the present case, the investigating officer was cross-examined at length and on material points he remained intact. The defence has utterly failed to prove that there is total and definite non-compliance of Section 42 of the Act.

16. In view of what has been discussed above, this Court is of the considered opinion that the prosecution has proved its case beyond all reasonable doubt and so the Court below was fully justified in basing its conclusion on the evidence collected by the prosecution. No

interference with the findings of the Court below is called for. Thus, the appeals being meritless are liable to be dismissed and are dismissed as such. The accused/appellants are already in jail, therefore, no further order regarding their arrest or surrender etc. is required.

Sd/

(Pritinker Diwaker)

Judge

Khan