

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 469 of 2007**

1. Pawan Madame S/o Sawan Madame, aged about 28 years, Occupation Mistri, R/o Raja Talab, Near Rani Sati Mandir, Raipur, PS Civil Lines, Raipur, District Raipur, Chhattisgarh.
2. Hafiz Khan S/o Lal Khan, aged about 55 years, Occupation Kabadi, R/o Nahar Ke Neeche, Ravi Nagar, Raja Talab, Raipur, PS Civil Lines, Raipur, District Raipur, Chhattisgarh.

---- Appellants**Versus**

State of Chhattisgarh, Through SHO PS Kurud, District Dhamtari, Chhattisgarh.

---- Respondent

For Appellants	: Shri Deepak Gupta and Shri S.K.Agrawal, Advocates.
For Respondent	: Shri Ravindra Agrawal, Panel Lawyer.

Hon'ble Shri Deepak Gupta, Chief Justice**Judgment on Board****13/01/2017**

1. This appeal by the convicted accused/Appellants is directed against the judgment dated 15.06.2007 delivered by the learned Special Judge (Narcotic Drugs and Psychotropic Substances Act) Dhamtari, in Special Criminal Case No. 27 of 2007 he convicted the accused/Appellants for having committed an offence punishable under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called 'the NDPS Act') and sentenced them to undergo rigorous imprisonment for 10 years with fine of Rs. 1 Lac to each. In default of payment of fine, the Appellants were further directed to undergo simple imprisonment for two years.

2. The prosecution story, briefly stated is that on 16.11.2006, one Maruti Van bearing registration No. CG-04-ZP-4427 was being driven from Jagdalpur to Raipur. There was a barrier set up by the police at Dhamtari. The allegation of the prosecution is that the person driving the van did not stop at the barrier. He in fact crashed the barrier and tried to flee away with the vehicle towards village Viretara. The police chased and managed to stop the vehicle. Both the Appellants were found in the vehicle. Appellant No. 1-Pawan was driving the vehicle while Appellant No. 2-Hafiz Khan was sitting in the vehicle as passenger. When the van was searched, 9 sacks/gunny bags were found and on examination, these were found to contain Ganja and the total weight of which was 139 KG and 800 grams.

3. The prosecution case is that the search and seizure was conducted in the presence of independent witnesses Bhikham Sahu (PW-4) and Hemant Lal Netam (PW-5). From each of the sacks/gunny bags, 50 grams of Ganja was separately taken out. These samples were seized, sealed and thereafter sent for chemical examination to FSL and its report is Exhibit P/19 which indicates that those were the samples of Ganja. On this basis, the accused were prosecuted. After carrying out other investigation, the police filed a report under Section 173 CrPC against the accused-Appellants. They denied the charges and prayed for trial. After the trial, the accused-Appellants have been held guilty and have been convicted and sentenced, as aforesaid. Hence, this appeal.

4. The main ground raised in this appeal is that the two independent witnesses namely Bhikham Sahu (PW-4) and Hemant Lal Netam (PW-5) have turned hostile. It is contended that the independent witnesses have not supported the prosecution story and thus, the version of the police that the recovery was made from the accused/Appellants cannot be believed. It is also submitted that these two witnesses have also clearly stated that no search and seizure operation was conducted in their presence and they had signed on the seizure document merely

on the asking of the police.

5. I have gone through the evidence on record and there is no manner of doubt that the aforesaid two independent witnesses have not supported the prosecution story at all. They have in fact virtually deposed as defence witness supporting the defence version and not supporting the prosecution.

6. The issue is whether the accused should be acquitted merely because the independent witnesses have turned hostile. This Court can take judicial notice of the fact that in most of such cases, independent witness turn hostile. Merely because the independent witness has turned hostile, does not mean that the official witnesses are not to be believed. The police officials are as good witness as an independent witness. However, as a matter of caution, when the statement of a police official is taken into consideration, then if there are contradictions in the same, those contradictions are magnified and the accused has to be given benefit of the same. Merely because the conviction of the accused is based on the testimony of official witnesses is no ground to allow the appeal straightaway.

7. In the present case, R.K.Sahu, Assistant Sub Inspector (PW-3) is the Investigating Officer. He has fully supported the prosecution case. What is even more important is that in this case, recovery is not of a few grams or one or two kilograms of Ganja but the recovery is of more than 139 KGs of Ganja. This is such a huge quantity that it cannot be presumed that it was planted by the police. There is no question put to the police officials which would indicate that they had enmity or they were inimical to the accused. The facts which have been proved on record shows that the accused broke through the barrier. Why would they break through the barrier if they were not doing anything illegal. Secondly, both the accused were found sitting in the van containing 9 gunny bags containing a narcotic substance which on chemical examination was found to be Ganja. Therefore, their constructive possession of the Ganja is even proved by the police

witnesses. Section 35 of the NDPS Act reads as follows:

"35. Presumption of culpable mental state.

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation - In this section culpable mental state includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

8. Therefore, if the prosecution can prove that the accused were in conscious possession of the contraband substances then the burden shifts upon the accused to show that they were not aware of what was being transported in their vehicle. This has not been done in the present case. Therefore, I uphold the conviction of the accused/Appellants.

9. However, coming to the quantum of sentence, the accused/Appellant have already undergone more than 10 years of imprisonment. Obviously, they are not in a position to pay the fine amount. Therefore, the only modification which is made in the order of conviction is that in case the accused do not pay the fine amount, then the punishment in default of payment of fine is reduced from two years to six months.

10. With the aforesaid modification, the appeal is disposed of.

Sd/-

(Deepak Gupta)
CHIEF JUSTICE