

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 232 of 2011

1. Gautam Banjare, S/o. Mohan Banjare, Aged about 33 years, R/o. Village Bhatgaon, Station Mana Camp, District Raipur (C.G.).
2. Kisan Jagat, S/o. Mahesh Jagat, Aged about 21 years, R/o. Village Kumhari, Station Kumhari, Distt.-Durg (C.G.)
3. Pradip Shah, S/o. Satyanarayan Shah, Aged about 42 years, R/o. Umarkot, Station Umarkot, Distt.-Naurangpur (Orissa)

---- Appellants

Versus

State Of Chhattisgarh, Through Station In-charge, Center Bodla, District Kabirdham (C.G.).

---- Respondent

For Appellant No.1 : Ms. Nirupama Bajpai, Advocate
For Appellant No.2 : Mr. Malay Shrivastava, Advocate
For Appellant No.3 : Mr. A.K.Bhakta, Advocate
For State/Respondent : Mr. Sameer Behar, Panel Lawyer

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

25.04.2017

1. This appeal is against the judgment of conviction and sentence dated 05.03.2011 passed by the learned Special Judge, Kabirdham, in Special Case No.147/2010 whereby the appellants have been convicted under Section 20(b)(ii)(c) of the Narcotic Drugs & 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/- each, in default of payment of fine amount, additional R.I. for 2 years each.
2. (i) The brief facts of the prosecution is that on 16.07.2010, the Sub-Inspector, Police Station Bodla, District Kabirdham, received an information that in Tata Indica Car bearing No. C.G.17 C 0917 and Santro Zinc Car bearing No. C.G.04 HA 5750 are being used for transporting the Cannabis and parked near the Pump-house of one Rajaram Yadav.

Consequently, two witnesses Santosh Satnami & Shyamkartik Satnami was served with a notice, the information recorded and Mukhbeer Panchnama was prepared and after sending the information to the Additional Superintendent of Police, it was recorded in the Rojnamchasanha. Thereafter, since there was an apprehension that the accused may flee away, in case the search warrant procedure is followed, information was sent to the Additional Superintendent of Police and thereafter the raid was performed.

(ii) During such raid, initially a notice under Section 50 of the NDPS Act was served to the accused and having received the consent both the Cars were searched. On having searched, from Santro Car, bearing No.C.G.04 HA 5750 under it's seat seven bags of Cannabis were recovered. Likewise, in a vehicle which was driven by Pradip Shah i.e. Tata Indica Car bearing No.C.G.17 C 0917, from the back seat, three jute bags were recovered which were filled with Cannabis and were seized. Along-with such Cannabis, mobile and documents of the vehicle were also seized. The Cannabis, having recovered, the seizure memo was prepared and initially on physical inspection by smell of burning, it was found to be Cannabis. Thereafter, the weighment was made and from the accused Gautam Banjare 22 kg 500 grams, from Kishan Jagat 38 kg 500 grams which were in a Santro Car and from Pradip Shah 35 kg Cannabis were recovered. Subsequently, from each bag, 100 gram samples were taken out and ten packets were prepared and the rest of the Cannabis remained to be kept in the jute bags. Thereafter, both the samples and jute bags were sealed. The jute bags and samples were deposited in the Malkhana and the crime was registered under Section 20(b) of the NDPS Act bearing Crime No.189/2010. Subsequently, the seized samples were sent to FSL and the FSL report further was proved to be positive that of Cannabis. Thereafter, the charge sheet was filed.

3. During the course of trial, the appellants/accused abjured their guilt and claimed to be tried. The prosecution on their behalf examined eight witnesses. Predominantly, the seizure witness Santosh Satnami (PW-1) & Shyamkartik Satnami (PW-2), Uttar Kumar Verma (PW-7) who was I.O., Santosh Sahu (PW-8) who carried out the samples for FSL and Bhuwan Lal Sahu (PW-5) who subsequently conducted the investigation. The Court after examining the evidence on record convicted the accused/appellants, therefore, the instant appeal.
4. Mr. A.N.Bhakta, Ms. Nirupama Bajpai & Mr. Malay Shrivastava, learned counsels for the respective appellants, would submit that there has been a gross illegality committed by the Court below, as it failed to observe that there is a breach of compliance of Section 42(2) of the NDPS Act. It is submitted that admittedly in the statement of the I.O., the compliance of Section 42(2) was not proved, therefore, the benefit should have been given in favour of the accused. It is further been contended that though the seizure was of ten bags, only three bags were deposited in the Malkhana as per Ex.P-40 and only three samples were sent though the samples were taken out 10 in numbers of packets, as such, there is an unexplained fact remained to be answered that the rest of the alleged Cannabis were in whose possession ? It is further submitted that after receiving of the respective samples, it was handled by Santosh Kumar Sahu (PW-8) and from where the sample is received is also not clear and he submits that the seized Cannabis were not deposited in the Malkhana, as there was no Malkhana was available. It is stated that in this case, the ambiguity and infirmity exists, which do not warrant the conviction, therefore, the conviction may be set aside.
5. On the other hand, learned State counsel submits that there has been a necessary compliance of Section 42(2) of the NDPS Act, as the information was sent to the superior officers, therefore, this cannot be

doubted and the judgment of conviction and sentence is well merited, which do not call for any interference.

6. I have heard learned counsel for the parties at length, perused the documents and statements on record.
7. The case of the prosecution starts with Ex.P-2 which records that the information was received by way of Mukhbeer-panchnama that two Cars bearing registration No.C.G.17 C 0917 and C.G.04 HA 5750, which were parked near Pump-house of Rajaram Yadav are loaded with the Cannabis. The said document is dated 16.07.2010. Subsequently, Ex.P-3 records that since Cannabis are being transported and in order to comply that the officer has reason to believe that authorisation cannot be obtained of search and seizure as there are chances to escape that of an offender, the same was reduced in writing.
8. The I.O. in this case is examined as PW-7. The PW-7 in his deposition, at para 37 of the cross-examination, stated that the information of Ex.P-3 was written after reaching the village Sukwapara, which was sent by the Head Constable through the Constable to the Additional Superintendent of Police. He further admits that the acknowledgment of such notice was having sent, the acknowledgement was received from the office of the Additional Superintendent of Police. It is further stated that such acknowledgment was not enclosed alongwith the charge sheet and admits it should have been done.
9. In the present case, Section 42 of NDPS Act is relevant, which is extracted as below :

42. Power of entry, search, seizure and arrest without warrant or authorization - (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered

in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector :

Provided further that, if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

10. Reading of the Section would show that Section 42 is sub-divided into two parts, first part purports that information when received from the informer to be recorded and it was recorded in compliance of sub-section (1) of Section 42 by Ex.P-2. There is nothing on record to show that such information was sent to the higher officials. Therefore, primary breach appears to exist. Further, sub-section (2) of Section 42 mandates that if the search and seizure is required to be carried out immediately to avoid escape of accused, the information should have been communicated to the immediate higher officials. The same is claimed to be served by prosecution by Ex.P-3.
11. Perusal of Ex.P-3 do not show that any seal and acknowledgment were obtained from the higher official and such information was sent. On the contrary, PW-7 submits that the acknowledgment was though obtained could not be produced in the charge sheet, therefore, necessarily the document, which was though was possessed by the police was not produced and was a necessary fact to prove the compliance of Section 42(2) of the NDPS Act. In a consequence, only on the basis of Rojnamchasanha Ex.P-44(A), it cannot be held that the official information, after receipt from the Mukhbeer, was sent to the higher officials and further the action contemplated and or taken for search and seizure were informed by the police.

12. The similar proposition came up for consideration in case of ***State of Rajasthan v. Jagraj Singh***¹ wherein it was held that Section 42 is in two parts. The scheme of Section 42 indicates that authorisation officer shall carry out search between sunrise and sunset without warrant or authorisation. The scheme further indicates that in the event search has to be made in between sunset and sunrise, the warrant would be necessary unless the officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of the offender which grounds of his belief have to be recorded. Further sub-section (2) of Section 42 mandates that the said compliance has to be sent to the higher officials. Here in the instant case, the statement of PW-7 would clearly indicate that the said compliance was not made as the police though claimed that communication was made and acknowledgment was obtained but that document was withheld by the prosecution. Therefore, the benefit of doubt about non-compliance of Section 42(2) of NDPS Act lies in favour of accused.
13. Further, in case of ***State of Rajasthan v. Babu Lal***² the Hon'ble Supreme Court has held that in order to prove the compliance of Section 42(2), the document is required to prove the receipt of communication has to be placed on record. In the instant case, admittedly though the PW-7 stated that the information was sent in compliance of Section 42(2) of NDPS Act, neither it was placed nor it was proved. Therefore, the adverse inference has to be drawn against the prosecution for non-compliance of Section 42(2) of NDPS Act for non-production of important document, though was in their possession.
14. The documents further would go to show that from Gautam Banjare by Ex.P-23, the seizure of Cannabis were made in four jute bags of 22 kg 500 gram and 100 gram samples were taken out from four bags. Likewise,

¹(2016) 11 SCC 687

²(2009) 14 SCC 215

from Kishan Jagat by Ex.P-24, the seizure of Cannabis were made in three jute bags of 38 kg 500 gram and from three bags, 100 gram samples were taken out. Similarly, from Pradip Shah by Ex.P-25, three jute bags containing 35 kg Cannabis were seized and out of three bags, 100 gram samples were taken out.

15. The seizure witness Santosh Satnami (PW-1) & Shyam Kartik Satnami (PW-2) have not supported the said seizure. According to the prosecution, after the seizure of the said Cannabis, it was sent to the Malkhana. The Malkhana receipt and acknowledgment is proved as Ex.P-40. Reading of Ex.P-40 would show that one Madan Lal Sahu, who was Moharrir, had received three jute bags in sealed condition alongwith three packets of sample of 100 gram. The ambiguity also looms large of the fact though the PW-7 stated that 100 gram samples were taken out, reading the seizure alongwith Ex.P-40, it is not clear as to from which bag, the samples were taken out. It is also not clear that though the total seizure of bags were ten how only three bags were deposited with three samples.
16. One of the page of Malkhana is also proved as Ex.P-46(A), which shows that three jute bags were deposited of 35 Kg and from which 100 gram sample was taken out which was seized from Pradip Shah and the remaining 34 kg 900 gram were deposited. Likewise, another Exhibit is made of 47(A), which shows that from Kishan Jagat, three jute bags were deposited of 38 kg 500 grams and out of which 100 gram sample was taken out and 38 kg 400 grams were separately sealed. Likewise, Ex.48(A) from Gautam Banjare, four jute bags were seized of 22 kg 500 gram, out of which 100 gram sample was taken out and rest 22 kg 400 gram were separately sealed and deposited. Therefore, if Ex.P-46(A), Ex.P-47(A) & Ex.P-48(A) if are read alongwith Ex.P-23, P-24 & P-25, which are the seizure memo, which shows that at the time of seizure, the samples were taken out, it is not clear from which jute bags, the samples

were taken out. The I.O. PW-7 has stated that from jute bag samples were taken out therefore if the Cannabis were in separate jute bags then taking out sample from one jute bag will not point out that all the bags were containing Cannabis.

17. Now coming to the sending of samples which was received by Santosh Kumar Sahu (PW-8) who says that he only received three packets of 100 gram by Ex.P-50. The document shows that on 17.07.2010, three sealed packets were handed over. The receipt of the FSL (Ex.P-42) would show that it was received on 19.07.2010 and after deposited the same, it was recorded in Rojnamchasanha by Ex.P-51(A) on 21.07.2010. Therefore, it is also not clear as to where the samples were kept for the period. This fact is also not clear which are the samples traveled which were sent and whether the samples which were obtains were the same, which were seized from the appellants. In a result, it cannot be certainly arrived at that the prosecution has proved their case beyond all reasonable doubt. Certain unexplained porous structure remained in case of prosecution. Apart from it, this Court is of the opinion that there has been a non-compliance of Section 42(1) & 42(2) of the NDPS Act and the prosecution despite placing the evidence on record that compliance was made has failed to prove the same for which the benefit of doubt has to be given to the appellants/ accused.
18. In view of the aforesaid analysis and conclusion, the judgment of conviction and order of sentence passed by the learned trial Court is set aside. The appeal is accordingly allowed. The appellants are acquitted of the charge leveled against them by the trial Court. The appellants are reported to be in jail, they be set at liberty forthwith, if not required in any other case.

Sd/-
(Goutam Bhaduri)
JUDGE