

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR**Criminal Appeal No. 359 of 2011**

Girdhar Kumar Sahu, S/o. Bhagwandas Sahu, Aged about 23 years,
Occupation- Driver, R/o. Charoda, Basti Thakurdev Para, Bhilai 3, District Durg
(C.G.).

---- Appellant

Versus

State Of Chhattisgarh, Through Police Station- Kondagaon, District Bastar
(C.G.).

---- Respondent

For Appellants : Smt. Renu Kochar, Advocate
For State/Respondent : Shri Sangharsh Pandey, Dy. Govt. Advocate

Hon'ble Shri Justice Goutam Bhaduri**JUDGMENT****12.10.2017**

1. This appeal is against the judgment dated 18.03.2011 passed by the learned Special Judge (N.D.P.S. Act) Jagdalpur (C.G.) in Special Case No.18/2009 whereby the appellant has been convicted under Section 20(B) 2(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/-, in default of payment of fine, further R.I. for 1 year has been ordered for.
2. As per the prosecution case, on 11.06.2009 one R.P.Mishra who was working as A.S.I. at Police Station Kondagaon received a secret information that a Silver colour Bolero bearing No.O.R.10 D 7741 and one more vehicle i.e. Red colour Tavera bearing No.C.G. 07 6172 were coming from Jagdalpur towards Raipur and are transporting Cannabis. The same was immediately recorded in Rojnamchasanha and thereafter the individual witnesses were summoned and electronic weighing scale was also called for. The respective Panchnama was prepared and initially the information was sent to SDOP Kondagaon, the higher official.

Subsequently, before proceeding, it was felt that, in order to get warrant of search, the accused alongwith Cannabis may fled away, the reasons not to obtain the warrant was recorded in writing and subsequently the information was sent to SDOP Office Kondagaon. Thereafter, the ASI alongwith staff and witnesses with the necessary papers, cloths, packets and electronic weighing scale etc. went to the spot. It was the case of the prosecution that before going for such raid, the police officers enquired about the higher official i.e. SDOP Kondagaon and it was found that he was on leave. Consequently, the proceeding was recorded in the Rojnamchasanha and the police team started to proceed for raid. After reaching to the spot, different vehicles were being checked and two vehicles i.e. vehicle bearing No.O.R.10 D 7741 and another vehicle bearing No.C.G.07 6172 were seen coming and the police officers tried to stop the vehicle. When the police tried to stop the vehicle, the Driver of the Tavera vehicle did not stop and tried to fled away and the police followed them in their vehicle while other was stopped. When the accused found that they are being followed by the police, they tried to fled away towards Bheergaon & Chargaon forest. In such process, the vehicle came down from the road and the Driver fled away leaving the Car in an abandoned condition. When the police team reached towards the vehicle, it was found that the vehicle Tavera was locked and out of the police team few of other officers were completing the necessary requirement for search and seizure of the another vehicle bearing No. O.R.10 D 7741. The other police team, which followed on search of the vehicle, 13 packets of Cannabis were found in Tavera vehicle. Thereafter, the vehicle and Cannabis were seized. On primary inspection, the goods so seized were found to be Cannabis, out of it, the samples were taken out and after weighment of the entire Cannabis alongwith samples, it was found to be total 124.400 Kg. Apart from it, from the vehicle i.e. bearing No.C.G.07

6172 the Registration book was seized and the vehicle without the Key. Thereafter, from each bags, two sample packets of 50 grams each were prepared and the bags were sealed. The statement of the witnesses were recorded and the vehicle and goods alongwith samples were deposited in the Malkhana. The FIR was registered and the entire proceeding was informed to the SDOP Kondagaon. The sample packets were subsequently taken out and sent for FSL, Raipur and subsequently the sample report confirms it to be Cannabis. Thereafter, on 02.07.2009, the accused Girdhar Kumar Sahu himself appeared in the Police Station Kondagaon and from him the Key of the Car was seized alongwith other documents and the statement of owner of the vehicle Manohar Lal Lohiya was recorded. It revealed that the accused Girdhar Kumar Sahu was his Driver and on 10.06.2009, he obtained the vehicle by saying that he has to take his ailing maternal grand-father from Bhilai to Raipur, but subsequently it revealed that the vehicle was used in transportation of Cannabis. The owner further states that when he enquired into the matter and tried to find out the whereabouts of the Driver after coming to know of the fact that the vehicle was involved in transportation of Cannabis, the Driver and his entire family had fled away from their residence. After such entire investigation, the charge sheet was filed before the trial Court by the prosecution.

3. During the course of trial, the appellant/accused abjured his guilt and claimed to be tried. The evidence of as many as 11 witnesses were recorded by the prosecution before the Court and the documents were proved. The learned Court below after evaluating the entire evidence on record convicted the accused as aforesaid. Hence, this appeal.
4. Smt. Renu Kochar, learned counsel for the appellant, would submit that the case suffers from non-compliance of Section 42 of the NDPS Act. It is submitted that the information which was recorded by the police while they

received the said information, there is a serious inconsistency exists in respect of as what information was received as against the information sent to the higher officials. It is therefore submitted that the case of the prosecution is dependent on the falsity. It is further submitted that at the relevant time, the appellant/accused was not arrested on the spot and he was arrested on 02.07.2009 much after the date of incident of 11.06.2009. It is further submitted that the documents of vehicle were with the owner of the vehicle and it was quite irrational for the owner to sit idle after coming to know the alleged offence was committed by the accused being his Driver on next day of incident through papers. It is stated that only on 02.07.2009 the accused had surrendered. It is submitted that the statement of the owner of the vehicle PW-9 would show that the entire documents of the insurance paper were handed over by brother of owner of Car and no plausible explanation has been given as to how that documents came into possession of accused so as to inculcate him. It is further submitted that the alleged Cannabis though were deposited in the Malkhana, the seal was not deposited and in absence of any seal, it cannot be said that the samples were sealed properly, which raises doubt. It is further submitted that there is non-compliance of Section 57 of the NDPS Act, as no information was given after the arrest to the higher officials by the I.O. Further, reliance was placed in case of ***State of Rajasthan v. Jagraj Singh***¹ and submits that when there is inconsistency in between recording of information and sending the same to the higher officials, it will fall in to breach of condition of Section 42 of the NDPS Act. Therefore, the appellant who is lodged in jail since 02.07.2009 may be acquitted.

5. Per contra, learned State counsel opposes the argument advanced by the learned counsel for the appellant. He went though the statement of I.O.

¹ (2016) 11 SCC 687

PW-3 and the Constable who initially recorded the statement and sent the Mukhbirpanchnama and submits that as per reading the statement together, it would show that there is sufficient compliance of Section 42(1) & (2) of NDPS Act. Reference was made to a case of **Mohan Lal v. State of Rajasthan**² and submits that in any case, it cannot be stated that there is breach of compliance of Section 42 of NDPS Act. He further submits that the seizure has been duly proved and after surrender of the accused with the Key would show that the appellant/ accused was driving the vehicle on the relevant date, which is supported by the statement of PW-9, the owner of the vehicle. It is further stated that the goods were seized were confirmed to be Cannabis as would be evident from the report of the FSL, therefore, the order of the trial Court is well merited which do not call for any interference.

6. I have heard learned counsel appearing for the parties and perused the records.
7. The individual witness of the seizure namely Naresh Yadav, PW-1 and Parvej Khan, PW-4 have not supported the case of the prosecution; however, they have admitted their signature in various documents of search & seizure. It is a settled proposition that in absence of support of the individual witness in case of NDPS, the prosecution can rely on the statement of I.O. and the other police officers provided their statement as trustworthy.
8. Though, the independent witnesses, in this case, have not supported the case of prosecution. The Hon'ble Supreme Court in case of **Sumit Tomar v. State of Punjab**³, has laid down the following principle :

“....., we hold that though it is desirable to examine an independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when

²AIR 2015 SC 2098

³(2013) 1 SCC 395

there in no animosity established against them by the accused, conviction based on their statements cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the NDPS Act, Accordingly, we reject both the contentions.”

Therefore, in this case, though the independent witnesses have not supported the case of prosecution, the statement of the Investigating Officer cannot be sidelined or shelved. The principle set out in the aforesaid case squarely covers and takes cares of the situation like this, as is existing in the case.

9. Now coming to the evidence which is on record, which would show that PW-2, R.N.Mandavi and PW-3, R.P. Mishra, the police officer, stated that on 11.06.2009 they received an information that one silver colour Bolero vehicle bearing No.O.R.10 7741 and red colour Tavera vehicle bearing No.C.G.07 6172 are coming from Jagdalpur to Raipur and is loaded with the Cannabis. The same was recorded in writing by Ex.P-11(c). Perusal of Ex.P-11(c) would show that it is a copy of Rojnamchasanha on 11.06.2009, which shows information was recorded that two vehicles bearing the particular numbers were coming from Jagdalpur to Raipur for which the information was recorded. Thereafter, the statement of PW-3, R.P. Mishra, would show the Police Constable No.413, Uday Ram Bhaskar, was sent to bring the weighing balance machine and witnesses, the same was also recorded in Rojnamchasanha Ex.P-12(c). The PW-8, Uday Ram Bhaskar, also corroborates the same thing. Thereafter, as per the statement of PW-3, Constable Uday Ram Bhaskar came with the weighing balance machine and witnesses namely Narendra Yadav, Parvej Khan and one Kamal Singh Kurre and the witnesses were also informed about such secret mukhbeer information and in respect of transportation of the Cannabis, a panchnama was prepared. The said information was further recorded in writing by Ex.P-15 and the information was sent to

SDOP Office Kondagaon, who is the higher official. Perusal of Ex.P-15 would show that it bears the seal of the SDOP Office Kondagaon on the same date at the bottom and the signature of the Reader is also appended that of the SDOP. The PW-8, Uday Ram Bhaskar, who was carrier of such information has also stated that he went to the office of SDOP and had given such information. The PW-5 who was the Reader in the SDOP Office Kondagaon, at the relevant time, has stated that he has received such information and had given the acknowledgment of the same. The Reader of the SDOP Office has further proved it by Ex.P-27(c), which is the mail-register of the SDOP Office, which shows that two separate crime were registered in respect of different vehicles i.e. Crime No.146/2009 was registered in respect of the Bolero vehicle bearing No.O.R. 10 D 7741 and Crime No.147/2009 was registered in respect of the Tavera vehicle bearing No.C.G.07 6172.

10. Subsequently, the statement of PW-3 would reveal that a memo in writing was prepared with reasoning for not obtaining the search warrant and for that a panchnama was prepared by Ex.P-17. Reading of Ex.P-17 would show that the reasons were recorded that in case the procedure to obtain the search warrant is followed then it may take time, meaning thereby the accused may fled away, as such, considering the same, the police staff and other officers went for the raid. The same was also recorded in Rojnamchasanha Ex.P-18(c). Ex.P-18(c) copy of Rojnamchasanha also shows the reasons to prepare the panchnama was recorded in writing that the preparation of search warrant may take time. Thereafter, the copy of Rojnamchasanha Ex.P-19 which is proved by the PW-3 shows that I.O. had tried to inform the SDOP Kondagaon over a telephone, but since the SDOP was on leave and permission would have entailed some time, as such, the police team went in two vehicles to Raipur road to intercept the accused. The PW-3 has also corroborated this fact in his statement that at

the relevant time he tried to inform the reason to conduct the raid without the search warrant as the SDOP was on leave and obtaining permission would have entailed time; consequently, he followed to conduct the raid.

11. Therefore, as per the statement of PW-3, the initial information was recorded in writing by Ex.P-11(c) about commission of offence and the said information was reduced in writing further and was sent to SDOP the higher officials by Ex.P-15(c). Followed by the statement of PW-3 wherein he has stated that before obtaining the permission for the search, the same could not be obtained for paucity of time and he had called up the SDOP but could not connect him on phone since he was on leave. Thereafter, in compliance to Section 42(2) of NDPS Act, the reasons for not obtaining the search warrant was recorded in writing by Ex.P-17 and information was sent to SDOP, the higher official, which was recorded in Rojnamchasanha Ex.P-18.
12. At this stage, if the facts are looked into in terms of principles laid down in case of ***Mohal Lal v. State of Rajasthan*** (supra), it was held that in such circumstances involving emergent situations, the recording of information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency. The Court while examining the decision rendered in *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* [AIR 2000 SC 821] and *Sajan Abraham v. State of Kerala* [AIR 2001 SC 3190] reiterated the view taken by the Constitution Bench explaining the position opined that *Abdul Rashid* (supra) did not require about literal compliance with the requirements of Section 42(1) and 42(2) nor did *Sajan Abraham* (supra) hold that requirement of Section 42(1) and 42(2) need not be fulfilled at all. The larger Bench summarized the effect of two decisions, which are reproduced herein below :

“(a) The officer on receiving the information of the nature referred to in sub-section (1) of Section 42 from any person has to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1),

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer

does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

13. Therefore, Ex.P-15 & Ex.P-17 read with Ex.P-18 would show that there has been a sufficient compliance of Section 42(1) and Section 42(2) of NDPS Act. The decision relied on by the learned appellant's counsel do not come to help as both the information to the higher official in compliance of Section 42(1) & 42(2) for reasonable belief that a search warrant or authorisation cannot be obtained without the affording the opportunity for escape of the offender was recorded and in the facts of this case, the same was sent to the higher officials accordingly.
14. Now further coming to the statement of PW-3, I.O., would show that on 11.06.2009, he went alongwith the team to the spot to intercept the vehicle, which was coming from Jagdalpur to Raipur with Cannabis. Subsequently, it is stated that the vehicle was seen coming at about 14:05. The vehicle bearing No.C.G.07 6172, which is relevant here was seen coming but one of the vehicle bearing No.O.R. 10 D 7741 was stopped. In the meanwhile, Tavera vehicle fled away which was followed. Subsequently, when it was followed, the vehicle fled towards the forest and after some time, the vehicle came down from the road and the Driver fled away. The vehicle was spotted in 500 meters inside the dense forest, but no one was found. The door of the vehicle was closed since one of the senior officer was involved in preparation of seizure of Cannabis from the other vehicle i.e. O.R.10 D 7741, as such, PW-3 started further proceeding and after search of the vehicle, 13 bags were found and the panchnama was prepared by Ex.P-2. Initially the goods which were found in the vehicle were tested by rubbing, smelling and after burning it was

primarily found to be Cannabis and for which the Panchnama Ex.P-4 was prepared. The witness has also confirmed the signature on the Panchnama. Subsequently, the Cannabis were weighed and in such 13 bags, total 124.400 Kg of Cannabis were found.

15. The weighing panchnama was prepared by Ex.P-6 and in the vehicle R.C.Book was also found but the vehicle was without any Key. Subsequently, from each 13 bags, sample of 50-50 grams of two packets each were taken out and were sealed which was prepared in the seizure memo Ex.P-7. The sealed packets were marked from A-1, A-2 and bags were marked from M1, M2 and the sample panchnama Ex.P-9 was prepared. Thereafter, the entire goods found in the bags were sealed and samples were also sealed and the panchnama was prepared by Ex.P-10.
16. The PW-7, Tarun Kumar Maitri, who is the Head Constable at Kondagaon as Mulkhana Moharrir stated that R.P. Mishra, PW-3, had brought the vehicle C.G.07 6172 and 13 bags of Cannabis alongwith sample of 26 numbers of 50-50 grams having given the same, it was recorded in the Malkhana register. The copy of Malkhana register is marked as Ex.P-32(c) and endorsement was made in the seizure memo. Perusal of seizure memo Ex.P-7 also shows that the endorsement of receipt of Car and bags of Cannabis alongwith sample packets were made by the Malkhan Moharrir. It is further stated that the vehicle which was deposited was without any Key and in the R.C. Book & Registration Book the owner was shown as Lohiya Marketing Company. The deposit of Cannabis according to its weight tallies with the weighment of Taul-panchnama Ex.P-6. Ex.P-32(c) copy of Malkhana register also confirmed the fact that sealed bags of Cannabis were deposited alongwith samples packets. In the cross examination of this witness, nothing has come out to destroy the same.

17. Thereafter, Ex.P-31 shows that on 02.07.2009 from the appellant, Key of the Car bearing No.C.G.07 6172 was seized. PW-9, Manohar Chandra Lohiya, who was said to be owner of the Car, had stated that before the incident his Driver Girdhar Kumar Sahu, accused, came to him and stated that his maternal grand-father is not well and was to be brought to Raipur and had taken the Key of the Tavera Car. Subsequently, on the next day, he came to know that his Car was involved in transportation of Cannabis, thereafter, he went to the house of the accused/appellant at Charoda, but it was found locked and whereabouts of family members were not found. The PW-6, Vikas Chandra Rai, has stated that on 02.07.2009 the A.S.I. of Kondagaon had stated that on 02.07.2009 the appellant himself came and surrendered and he was arrested by Ex.P-29. In the cross-examination, it is stated that before arrest the statement of the owner of the vehicle was also verified from the area and it was found that the appellant was driving the vehicle as Driver for last three years. In the cross-examination, PW-6 has stated that only one Key was found from the possession of the appellant, however, the second Key was not found. Therefore, taking into facts together, it would show from the statement of PW-9, owner of the vehicle and PW-7, Tarun Kumar who is Malkhana Moharrir, that only the Car was deposited without any Key. Subsequently, the Key of the vehicle was found from the possession of the appellant and those facts are corroborated by the owner of Car that the appellant was driving the vehicle as Driver of the Company at relevant time. Consequently, the fact that the appellant was driving the Car on the date of incident has substantially been established.
18. With respect to the Malkhana register Ex.P-32, it would show that the entire Cannabis were deposited. Subsequently, the parts of Malkhana register Ex.P-32 would show that the samples were taken by Laxmikant Rawte to examine it for FSL. Malkhana Moharrir, PW-7, has also stated

that Laxmikant Rawte has taken such samples for examination. Laxmikant Rawte, PW-10, has confirmed the fact that he had obtained the samples from Malkhana to further give it to the FSL. Ex.P-24 would show that the samples were deposited with the FSL Raipur on 18.06.2009 and the FSL report is marked as Ex.P-25 wherein the sealed packets which was sent for FSL were found to be Cannabis. According to Laxmikant who was carrier of the packets of samples to FSL has proved the fact that he has obtained the goods to sent it to FSL which is corroborated by the entry in the Malkhana register Ex.P-32(c) and the FSL receipt also corroborated the fact that the samples were received in the sealed condition, which were further found to be Cannabis. Therefore, the evidence would show that the samples which were taken out from the bags were found to be Cannabis.

19. As far as seizure is concerned, the same was seized by Ex.P-7. The Ex.P-7 also contains in the first page the endorsement that the sample packets and 13 packets of Cannabis were received by the Malkhana Moharrir, PW-7. The statement of PW-7, Tarun Kumar Maitri, also confirms the same. The Malkhana register copy Ex.P-32(c) also corroborates the same. In the statement of PW-3 and the deposition sheet, it records that PW-3 has produced all 13 packets of Cannabis before the Court. The note is also appended wherein the Court has inspected that 13 packets were produced which were seized in Crime No.147/2009 under the N.D.P.S. Act alongwith the articles were also produced. The sample packets were also produced by PW-3, which were also verified by the Court, therefore, the seized articles and the packets were also produced before the Court during the course of trial.
20. In the examination of the accused, no plausible explanation has been given except the fact that he has been falsely implicated. Therefore, on the closed scrutiny of evidence, I am of the opinion that the prosecution is

able to prove the case that the appellant was in possession of the Cannabis, which were kept in the Car and he tried to fled away. Considering the same, I am of the opinion that the learned Court below has not committed any illegality in convicting the accused.

21. In view of the above, the conviction made by the learned Court below cannot be faulted with. Accordingly, the same is maintained. In the result, appeal has no merit and is dismissed.

Sd/-
(Goutam Bhaduri)
JUDGE