

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 160 of 2012

Subhash Kumar Thakur @ Shibu, S/o. Dhannu Thakur, Aged about 18 years, Occupation- Welder, R/o. Ganjpara Nadi Road Beldarpara, Near Ekta Public School Durg, Thana Kotwali, Durg, District Durg (C.G.).

---- Appellant

Versus

The State Of Chhattisgarh, Through Police Thana Arjuni, District Dhamtari (C.G.).

---- Respondent

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Criminal Appeal No. 161 of 2012

Balram Pradhan, S/o. Joginath Pradhan @ Jogendra Pradhan, Aged about 30 years, Occupation- Motor Cycle Machanic, R/o. Boriguma Kodpadroad, Thana Booriguma, District Koraput (Odisha).

---- Appellant

Versus

The State Of Chhattisgarh, Through Police Thana Arjuni, District Dhamtari (C.G.).

---- Respondent

For Appellants : Mr. S.C.Verma & Mr. Arvind Dubey,
Advocates
For State : Mr. Anupam Dubey, Dy. Govt. Advocate

Hon'ble Shri Justice Goutam Bhaduri

C.A.V. Order

29.08.2017

1. This appeal is against the judgment of conviction and sentence dated 31.01.2012 passed by the learned Special Judge, N.D.P.S., Dhamtari, in Special Case No.04/2011, whereby the appellants have been convicted under Section 20(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "*the NDPS Act*") and have been sentenced to undergo

R.I. for 10 years and fine of Rs.1,00,000/-, in absence of payment of fine amount, 3 years additional R.I. has been ordered for.

2. As per the prosecution case, an information was received on 27.11.2010 that certain persons were traveling by Indica Car bearing No.C.G.04 3742 were coming towards Dhamtari with Cannabis. Therefore, the information was recorded in the Panchnama by Ex.P-19 and the police alongwith staff in order to seize the contraband waited near village Banrout, near a place of Kumhadain temple. At about 1:30 (p.m.) O'clock, a Tata Indica Car bearing No.C.G. 04 3742 was coming wherein three persons were found to be traveling and on having asked the name, they disclosed their name as Balram Pradhan, Hiranya Das & Subhash Kumar. It was further confronted that information was received by the police that they are carrying Cannabis in their vehicle, it was denied by the accused. Subsequently, one Balram Pradhan was given notice under Section 50 of NDPS Act and after obtaining the consent, the Car was searched. On search of the Car, 21 polythene bags were found, which on physical verification found to be containing Cannabis. Therefore, Panchnama was prepared by Ex. P-11. Before such search was made, the police team were also searched by the accused Balram Pradhan itself but nothing was found; however, when Balram Pradhan was searched, from his possession, a mobile and Rs.5000/- was found and from Hiranya Das a mobile and Rs.2500/- was found and from Subhash Kumar a mobile and Rs.70/ was found. Having *prima facie* found that the seized articles were Cannabis, the same was taken for weighment to village Banrout and the weighment was carried out and after physical verification of the weighing scale and on having weight, the goods were found to be of 175.700 Kg, thereafter, the Panchnama was prepared as Ex.P-13. Thereafter, the seizure memo was prepared that the Cannabis were seized in Car by Ex.P-15 so the appellants were arrested. Thereafter, the Cannabis were deposited in the Malkhana and before it from each packet, 50 grams of

sample were taken out and were separately sealed. Subsequently, the samples were sent through the Superintendent of Police, Dhamtari to FSL Raipur. The FSL by its report Ex.P-36 found it to be Cannabis. One of the accused Hiranya Das was found to be minor and, as such, the case was filed before the Juvenile Justice Board whereas against the present applicant, charge sheet was filed after entire investigation on 20.05.2011. The charges were framed under Section 20(ii)c) of NDPS Act as prima facie the Cannabis were found to be of commercial quantity.

3. During the course of trial, the appellants/accused abjured their guilt and claimed to be tried. The prosecution has examined Kartik Ram Yadav, the seizure witness as PW-1; Ishwar Thakur, Constable who carried the Cannabis to the FSL from the Police Station as PW-2; Sudama Prasad, Head Constable, as PW-3; Arakh Ram Sahu, who weight the goods, as PW-4; Mal Moharrir of Police Station Arjuni, Dinu Markande as PW-5; I.O. Suresh Kumar as PW-7; Owner of the Indica Car Shivshankar Mahapatra as PW-8; Reader of Dy. Superintendent of Police, Kumbhkaran Netam as PW-9 and Sub-Inspector G. Sinha as PW-10. The learned trial Court after evaluating the facts and evidence on record convicted the accused/appellants, therefore, the instant appeal.
4. Learned counsel for the appellants would submit that in this case no compliance of Section 50 of NDPS Act was made, as no opportunity was given to the accused to get themselves examined before the Magistrate and the facts are also not supported by any evidence. It is further submitted that in this case the compliance of Section 42 of NDPS Act was also not done, which would be evident from the statement of PW-10, I.O. It is stated that in the Mukhbeer-panchnama also Ex.P-9, nothing was recorded and information was not given to the higher officials. With respect to compliance of Section 42 of NDPS Act, it was further stated that the permission to conduct the raid was not informed to the higher officials.

He relies on **AIR 2013 SC 953** (*Sukhdev Singh v. State of Haryana*) and would submit that the requirement of Section 42 with respect to search and seizure has not been proved, which needs strict compliance and consequently the conviction cannot be sustained. The counsel further referred to **AIR 2011 SC 2699** (*State of Delhi v. Ram Avtar*) and stated that search of a person in compliance of Section 50 of NDPS Act, actual substantial compliance should have been made and if there is a contravention of Section 50, the recovery so made cannot be admissible on the basis of oral evidence and the accused cannot be convicted on the basis of such possession. Further reference was made **AIR 2011 SC 1939** (*Narcotics Central Bureau v. Sukh Dev Raj Sodhi*) and submits that the trust worthiness of the witnesses cannot be assumed if there is a non-compliance of Section 50.

5. Learned counsel further referred to **(2008) 5 SCC 161** (*E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau*) and submits that out of the total Cannabis held whether it was a mixture or it was separate Cannabis has not been affirmed by the prosecution and therefore the percentage of Cannabis should have been established and it cannot be assumed that the entire goods, which were seized were Cannabis. It is stated that under the circumstances since the appellant is already in jail and the commercial quantity cannot be assumed, he is required to be punished for lesser punishment. Further, it is submitted that the narcotic goods were not produced during the trial, therefore, that would also vitiate the trial. Therefore, under the circumstances, it is submitted that the appellants deserve acquittal.
6. Per contra, learned State counsel opposes the argument advanced by the learned counsel for the appellants.
7. Perused the record of the Court below, evidence and statement of the witnesses and the documents, which are exhibited.

8. The activities started with the evidence of I.O. PW-10, Smt. G. Sinha, of Police Station Arjuni. As per her statement, on 27.11.2010, she received an information from informant that in white colour Indica Car bearing No.C.G. 04 3742 few of the persons are carrying the Cannabis which was reduced into writing in the Panchnama Ex.P-19. Ex.P-19 would show that such information has been reduced in writing, which is also signed by Suresh Nand & Sudama Sahu. Sudama Sahu is PW-3, he also corroborates the existence and execution of Ex.P-19. The information of such fact is stated to be sent by Ex.P-23. Ex.P-23 is supported by the statement of PW-6 Ashman Kumar. He stated that on 27.11.2010 he had carried the information and had delivered such information in the office of the Additional Superintendent of Police to his Reader. Therefore, Ex.P-19 & P-23 if are read together with the statement of PW-10, I.O. and PW-3 Sudama Prasad and PW-6 Ashwant Kumar nothing has come out to disbelieve the same. The receipt of such fact is further corroborated by the statement of PW-9 Kumbhakaran Netam wherein he states that on 27.11.2010 through Ashwant a Constable who is examined as PW-6, he received the said information about illegal transportation of the Cannabis and the said information was given by Ex.P-24, which bears his signature. Therefore, the evidence would suggest there is sufficient compliance of first part of Section 42 of NDPS Act.
9. Subsequent statement of I.O. (PW-10) would show that thereafter the witness Jugal Kishore Sahu and Kartik Ram Yadav came to Police Station who are the witness who are informed about Mukhbeer-panchnama under Section 160 of Cr.P.C. and were requested to extend support in the case. The notice is marked as Ex.P-25. Thereafter, this fact was reduced in writing by Ex.P-2 that in case the I.O. is required to obtain a search warrant, the accused may fee away with Cannabis, therefore, they cannot wait for permission of search from any gazetted officer. Ex.P-2 is of 27.11.2010 and was at 12:15 A.M. As such, without obtaining search

warrant, police proceeded for search and seizure. This document was signed by PW-1 Kartik Ram. The statement of Kartik Ram, PW-1, also supports the same. Kartik Ram is also a seizure witness. The witness PW-10 has further stated that in respect of the illegal transportation of Cannabis, the information sent through one Yashwant Buware, who is examined as PW-6. Sending of such information corroborated by PW-6. The document Ex.P-24 is the receipt of illegal transportation of Cannabis as it bears the endorsement of receipt. No cross-examination has been made to the witness PW-10 as to whether such information was given or not. Consequently, it cannot be presumed that the information was not given by the police in compliance of Section 42(2) of the NDPS Act. Prima facie, it shows that the information Ex.P-2 with respect to the search and seizure as required under Section 42 of NDPS Act was reduced in writing and was sent forthwith to the superior officers. Therefore, considering the evidence argument advance by the appellant that information and the requirement of Section 42 of NDPS Act was not made cannot be sustained.

10. Perusal of the statement of witnesses would further show that on the date of 27.11.2010 at about 1:35 a Tata Indica Car bearing No.C.G.04 3742 was coming from Nagri and near a place known as Kumhadain Mata Mandir, the said Car was intercepted. In the said Car, both the appellants were traveling namely Balram Pradhan & Subhash Kumar alongwith them another person Hiranya Das who was minor was also traveling. Thereafter, when the name of the occupant of Car was asked and after disclosure of the name, a notice under Section 50 of the NDPS Act was given to Balram Pradhan. It is further stated that the notice was given by Ex.P-3 giving him option to get himself examined through any Gazetted officer or any Magistrate. The perusal of Ex.P-3 would show the notice was given to search the Car also. Ex.P-3 also bears the signature of Kartik Ram Yadav, who is examined as PW-1.

11. No plausible explanation has been given by accused under Section 313 of Cr.P.C. with respect to such notice of search. It is stated that thereafter in person Balram was also searched and Talasi-panchnama was recorded as Ex.P-4 and from him, a mobile and Rs.500/- was recovered.
12. Likewise, from the possession of Subhash Kumar Thakur, a Nokia mobile phone of Model 6600 and Rs.70/- cash was recovered. The panchnama-talasi was scribed as Ex.P-6 wherein the I.O. had signed from B to B and Kartik Ram Yadav had signed from A to A. The I.O. has proved the same and Kartik Ram Yadav (PW-1) has also proved the document Ex.P-4 & P-6 and admitted his signature. Kartik Ram Yadav (PW-1) further proved the document Ex.P-7 wherein the appellants agreed to get their Car searched. This document is also proved by PW-10 and is marked as Ex. P-7. The police personnel were also searched who were seven in numbers, which is proved by Kartik Ram Yadav (PW-1) and the document is marked as Ex.P-8. Subsequently, the accused were searched in person but nothing was found, which was recorded in Panchnama Ex.P-9. This document is also proved by the witness Kartik Ram (PW-1). The I.O. has also proved Ex. P-8 & P-9, thereby the signature is being corroborated by the individual witness apart from the I.O.
13. The document and the statement of I.O. (PW-10) and the individual witness PW-1 would show that the Car bearing No.C.G. 04 3742 was further searched. The consent of which was given by Ex.P-7 by all the three accused and on search of such Car, 21 polythene packets in different colours were found. The said Talasi-panchnama was marked as Ex.P-10 and proved by the I.O. and independent witness. The record shows each packets were opened and the goods inside was taken out and was examined by rubbing, smelling and by burning it. *Prima facie*, it was found to be Cannabis. Therefore, a panchnama was prepared by Ex.P-11, which is also proved by PW-10 and signature is marked from B

to B. With respect to the specific question and suggestion that the witness has not complied the provisions of Section 50 of NDPS Act was denied.

14. The submission made by learned counsel for the appellants that while examining the Car, there was a non-compliance of Section 50 of the N.D.P.S. Act cannot be appreciated in lieu of law laid down in case of ***State of H.P. v. Pawan Kumar*** reported in ***(2005) 4 SCC 350*** wherein the Supreme Court has interpreted the words “search any person” occurring in sub-section (1) of Section 50 of the Act. It was held that the word “person” has not been defined in the Act. A bag, briefcase or any such article or container, etc. under no circumstances, can be treated as body of human being. They are given a separate name and are identifiable as such. It was further held they cannot even remotely be treated to be part of the body of a human being. An incriminating article can be kept concealed in the body or clothings or coverings in different manner. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the words “search of person”. One of the tests, which can be applied is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person.
15. In this case, the facts would suggest that search of Car when was made, the Cannabis were recovered from it, therefore, search of a Car cannot be put at par with the word “search of person” which finds place in Section 50 of the Act. The Car at any case cannot be treated as human body or to search a Car it will require touching of human body, as such, the person conducting the search cannot be said that in remotely it would be search of a person. Therefore, the submission of the appellants that there was non compliance of Section 50 while making search in person cannot be appreciated.

16. Thereafter, the evidence would show that after the Cannabis were found from the Car, the weighment of the same was made. The weighing balance machine was physically verified, which was found to be correct and it was reduced in writing by Ex.P-12, which is also proved by PW-10 and entire 21 bundles of Cannabis were found to be 1 Quintal 75 Kg 700 Grams. The panchnama-taul was prepared by Ex.P-13 and out of 21 bundles, 50 grams of two samples were taken out from each by Ex.P-14 & P-15 and it was sealed. Subsequent to it, one accused Balram Pradhan was asked to produce the document of the vehicle. The weighment panchanama would show that 1 Quintal 75 Kg 700 Grams of Cannabis were recovered and the said recovery cannot be put to doubt considering the statement of I.O. (PW-10) and the individual witness PW-1 and the document of panchnama Ex.P-14 & P-15.
17. Thereafter, FIR was lodged by Ex.P-30 and the appellants were arrested by Ex.P-31 & P-32. The goods so seized were deposited in the Malkhana and Malkhana Moharir is Deenu Markande, who is examined as PW-5. According to his statement, he had received 21 bundles of Cannabis and 42 sealed 50 grams sample packets alongwith other goods, which was registered at serial No.107 for the register. The Malkhana register was marked as Ex.P-21(c). Subsequently, according to the statement of PW-5 on 01.12.2012 the samples were sent for FSL through Constable Ishwar Thakur. Ishwar Thakur is examined as PW-2. He stated that he had received 42 packets and deposited the same to the FSL, Raipur and the receipt of it was marked as Ex.P-18. The FSL report is Ex.P-36, which shows that all the goods which were sent to FSL in the sealed packets were found to be Cannabis.
18. The arguments advanced by the learned counsel that by seizure of 50 grams, it cannot be stated that entire packets, which were taken out were containing Cannabis. He placed his reliance in case of ***E Micheal Raj v.***

Intelligence Officer, Narcotic Control Bureau reported in **(2008) 5 SCC 161**. In this background, if the notification dated 18.11.2009 which has replaced the part of notification dated 19.10.2001 would be relevant, which reads as under :

Notification dated 18.11.2009 has replaced the part of the Notification dated 19.10.2001 and reads as under :

“In the Table at the end after Note 3, the following Note shall be inserted, namely :

(4) The quantities shown in Column 5 and Column 6 of the Table relating to the respective drugs shown in Column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.”

19. The said proposition came for consideration in case of **Harjit Singh v. State of Punjab** reported in **(2011) 4 SCC 441** wherein their Lordship have held that as per the notification the whole quantity of material recovered even in the form of mixture is to be considered for the purpose of imposition of punishment. In such case, the case cited that of **E Micheal Raj** was also considered. In the instant case no plausible explanation has been given by the appellants/accused in their statement under Section 313 of Cr.P.C. Therefore, applying the principles laid down in **Harjit Singh** (supra), the percentage of Narcotic Drugs & Psychotropic Substances shall be inseparable to calculate the small and commercial quantity limit. Even if it was a mixture, it has to be considered as a whole for the purpose of imposition of punishment.
20. In view of this, taking into the evidence in the totality, it would show that from the possession of the appellants, the narcotic goods were seized, which were of the commercial quantity i.e. 1 Quintal 75 Kg 700 Grams

which was certainly fall within the limit of commercial quantity. There is no reason as to why the statement of I.O. (PW-10) cannot be believed and reading of the statement of I.O. (PW-10) along with independent witness PW-1, it is found to be reliable and trustworthy and the Court can act alone on it. Therefore, in a result, the finding arrived at by the learned Court below appears to be just and reasonable and based on proper appreciation of evidence, which do not require any interference.

21. Consequently, the appeals have no merit and are dismissed. It appears that the appellants are in jail, they shall suffer the remaining jail sentence.

Sd/-
(Goutam Bhaduri)
JUDGE