

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 353 of 2014**

Baidabag S/o Shri Jamani Bag, aged about 40 years, R/o. Baddehi, thana Rajkhariyar, Civil & Revenue District Nawapara, (Orissa).

---- Appellant (in jail)

Versus

State of Chhattisgarh through the District Magistrate, Durg, District Durg, Chhattisgarh.

---- Respondent

For the Appellant	:	Shri Sumit Shrivastava, Advocate.
For the Respondent/ State:		Shri Neeraj Sharma, Deputy G.A.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Judgment on Board

10.01.2017

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 30.1.2014, passed by the Learned Special Judge (NDPS Act), Durg, District Durg, Chhattisgarh, in Special Criminal Case No.05 of 2013, whereby and whereunder the learned Special Judge has convicted the appellant/ accused under Section 20(b)(ii)(B) of the NDPS Act, 1985 (for short 'the NDPS Act') and sentenced him to undergo RI for 7 years and to pay fine of Rs.50,000/-, in default of payment of fine, to further undergo RI for one year.

2. The case of the prosecution, in brief, is that on 24.02.2013 Sub-Inspector Shivanand Tiwari (PW-8), posted in police station Dhamdha, received an information, that two persons travelling in Maturi Car bearing

registration No.O.R./09-A/1661 from Raipur towards Bemetara, are carrying illegal narcotic substance, Ganja for the purpose of sale. He immediately recorded the information in the Station House Diary vide Ex. P/30 and dispatched the memorandum vide Ex. P/1 to the Superior Officer, CSP, Durg. After summoning the witnesses, a panchanama was recorded vide Ex. P/4 at about 6:50 am on the same day. After receiving instructions from the Superintendent of Police, he proceeded towards Gandai Chowk and the said area was sieged. At about 7:15 am one car was intercepted on the spot, in which the appellant and two others were travelling. He informed them about the information received from the informer and a consent for search was obtained from the appellant and the co-accused vide Ex. P/5.

3. The appellant and two others were afforded opportunity to search the members of the raiding party vide Ex. P/6. On searching the car, which was in possession of the appellant and others, a plastic bag containing 12 bags of ganja was found. It was seized vide panchanama Ex. P/7. The recovery panchanama Ex. P/8 was separately recorded. The recovered articles were suspected to be the narcotic substance and by smell and by burning procedures it was identified as narcotic substance, ganja vide. Ex. P/9. The contents of all the bags were mixed to make a homogenous mixture and panchanama Ex. P/10 was recorded about this procedure. The balance was verified. The recovered narcotic substance was weighed and it was found to be 11 Kg 300 gms. From the material, two packets of 100 gms each were weighed and which were separately packed and sealed vide Ex. P/12. The panchanama of weighing procedure was recorded. Out of the material recovered, samples were prepared and the panchanama Ex. P/13 was recorded. All the articles i.e. the bulk recovery of ganja, the samples and the

car which was used for transport were seized vide Ex. P/14. Panchanma of sample of seal used for all the preserved articles was prepared Ex. P/15. The spot map Ex. P/16 was prepared. One spot map Ex. P/2 has been separately prepared by the Patwari. One unnumbered First Information Report Ex. P/37 was recorded on the spot. After registering offence against the appellant and others, a report of complete procedure conducted was sent to Superintendent of Police, Durg vide Ex. P/39. The appellant and others were formally arrested. Numbered FIR Ex. P/40 was recorded in police station Dhamdha. During investigation, the statement of the witnesses were recorded. The samples of ganja which was seized were sent for FSL examination. The FSL report Ex. P/43 has confirmed that the contents of the samples examined was ganja, a narcotic substance. On completion of the investigation, the appellant and others were charge-sheeted.

4. The appellant and others were charged under Section 20(b)(II)(B) of NDPS Act, 1985. The appellant and the others denied the charges, pleaded innocence and demanded trial. The prosecution examined as many as 7 witnesses and the defence examined 1 witness. On being examined under Section 313 of the Cr.P.C., denying all the incriminating evidence against them, the appellant and the others pleaded innocence and false implication. 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 appellant and others as mentioned above. No appeal has been preferred by the co-accused – Parsuram Manjhi.

5. The grounds in this appeal are that the impugned judgment is

erroneous, illegal and contrary to law, facts and circumstances of the case. The mandatory provisions of Section 42, 50 and 51 of the NDPS Act have not been complied with. The independent witnesses in this case have turned hostile and they have not supported the prosecution case. Other witnesses who have supported the prosecution are pocket witnesses and not worth believable. The timings of all the procedures as mentioned in various memorandums clearly show that the prosecution case is doubtful. On these grounds, it is prayed that the impugned judgment may be set aside.

6. Learned counsel for the appellant submits that the evidence adduced by the prosecution was not itself sufficient to establish its case beyond reasonable doubt. Statements of the Investigating Officer and the members of the raiding party cannot be believed as they are all interested eyewitness. No independent witness has supported the prosecution case and the mandatory provisions of Sections 42, 50 and 55 of the NDPS Act have not been complied with and as such, the appellant is entitled for acquittal. On these grounds, the appellant/ accused is entitled for benefit of doubt.

7. On the other hand, learned State counsel has argued that the prosecution has proved its case beyond reasonable doubt and there is no scope for interference with the impugned judgment.

8. Shivanand Tiwari (PW-8), is the Sub-Inspector posted in police station Dhamdha. He stated that he received an information that the two persons travelling in Maturi Car bearing registration No. O.R./09-A/1661 from Raipur towards Bemetari, are carrying illegal narcotic substance, Ganja for the

purpose of sale. He immediately recorded the information in the Station House Diary vide Ex. P/30 and dispatched the memorandum vide Ex. P/1 to the Superior Officer, CSP, Durg. After summoning the witnesses, a panchanama was recorded Ex. P/4 at about 6:50 am on the same day. After receiving instructions from the Superintendent of Police, he proceeded towards Gandai Chowk to verify and intercept the car as per the information received and the said area was sieged. One car was intercepted and stopped on the spot and in which the appellant and two others were travelling. A consent for search was obtained from the appellant and the co-accused vide Ex. P/5. The appellant and two others were afforded opportunity to search the members of the raiding party vide Ex. P/6. The car in possession of the appellant and others was searched and a plastic bag containing 12 bags of narcotic substance ganja was found and a panchanama Ex. P/7 was recorded. The recovery panchanama Ex. P/8 was separately recorded. The recovered articles suspected to be narcotic substance were identified by smell and by burning procedures as narcotic substance, ganja vide. Ex. P/9. The contents of all the bags were mixed to make a homogeneous mixture and panchanama Ex. P/10 was recorded about this procedure. The balance was verified. The recovered narcotic substance was weighed and it was found to be 11 kg 300 gms. From the same material, two packets of 100 gms each were weighed and which were separately packed and seized vide Ex. P/12. The panchanama of weighing procedure was recorded. Out of the material recovered, samples were prepared and the panchanama Ex. P/13 was recorded. All the articles i.e. bulk of recovered ganja, the samples and the car which was used for transport were seized vide Ex. P/14. Panchanama of sample of seals used for all the preserved packets was prepared Ex. P/15. The spot map Ex. P/16

was prepared. One spot map Ex. P/2 has been separately prepared by the Patwari. One unnumbered First Information Report Ex. P/37 was recovered on the spot. After registering offence against the appellant and others, a report of complete procedure conducted was sent to Superintendent of Police, Durg vide Ex. P/39. The appellant and others were finally arrested.

9. In cross-examination, his statement has remained unrebutted. He denied that the independent witnesses of all the proceedings are pocket witnesses. Further, he denied all the adverse suggestions. The statement regarding all the proceedings has remained unrebutted. The ground of the defence that the appellant and others were falsely implicated was specifically denied.

10. Arjun Sen (PW-3) was examined as witness of search, seizure etc. He has not supported the prosecution case and declared hostile. Similarly, another independent witness Shabuddin (PW-4) has also not supported the prosecution case and declared hostile. Pappu Tamrakar (PW-6) is also a hostile witness. Head-Constable, Bhikham Singh Sahu (PW-7) stated that on the date of incident Shivanand Tiwari (PW-8) gave him charge of the seized articles containing ganja weighing 11 kg 100 gm which was packed and sealed condition. Two sample packets of 100 gm each were also packed and sealed which were kept in safe custody. The sample articles B and C were sent for FSL examination report of which was received later on. In cross-examination, this statement has remained unrebutted. There is no such statement in his cross-examination to hold that the statement of this witness in examination-in-chief is unbelievable. Danasingh (PW-1) stated that the information Ex. P/1 sent by Shivanand Tiwari (PW-8) was received

in the office of City Superintendent of police.

11. After going through the statement of all the witnesses of the prosecution and on close scrutiny, it appears that though the independent witnesses produced by the prosecution have not supported the prosecution case, but the statement of IO, Shivanand Tiwari (PW-8) by itself is complete and un rebutted. No question has been put to him in cross-examination regarding enmity with the appellant or having any adverse interest for falsely implicating the appellant and others in this case. It is not a rule of law that the police officer as a witness should always be disbelieved, but it is only a rule of caution, for the reason that the Investigating Officer has an interest to see the success of prosecution, some corroboration is always needed. In this case, statements of Shivanand Tiwari (PW-8) and Bhikham Singh Sahu (PW-7) corroborate each other. In principle, it is not a requirement that there should be corroboration on each and every particular of the incident and to the extent the corroboration received is sufficient to make the link complete.

12. Constable – Satish Goutam (DW-1) has been examined in defence and he stated that on dictation of Shivanand Tiwari (PW-8) he has written some of the memos like Exs. P/2, P/5 and P/6. He does not know whether other memos were written on the spot or were written in the police station. Memos of search, recovery, homogeneous panchanama, verification of balance, weighing, procedure panchanama, sample panchanama, seizure memo panchanama of sample of the seal, information to the CSP, Durg and the First Information Report etc. are in this record. In cross-examination, he admitted that there is some defect in mentioning the time of the procedure. He further admits that as per the station house diary entry Ex. P/38 he came

back to the police station alongwith his officer. The statement of this witness does not in any way make any ground to disbelieve the statement of the Investigation Officer. Writing on a paper with a pen is not by itself a ground to falsify the whole procedure. The application of mind to record a document or to get recorded a document is the main role in making of a document. It is very clear from evidence on record that Shivanand Tiwari (PW-8) played the main role by applying his mind in preparing the various memos in which Satish Gautam (DW-1) has helped just in a clerical manner. Hence, this ground of defence does not in any manner affects the prosecution evidence. Some discrepancy in recording the time by itself does not falsify the whole story of the prosecution. For these reasons, the grounds raised in this appeal are found without substance and merits. Hence, the conviction recorded by the trial court against the appellant cannot be interfered with.

13. In the alternative, it is prayed that the appellant is in jail since the date of arrest i.e. 24.2.2013, thereby he has undergone in custody for 3 years 10 months and 17 days and as such the sentence awarded by the trial court may be modified. The conviction of the appellant is under Section 20(b)(ii) (B) of the NDPS Act, in which the contraband found is lesser than the commercial quantity but greater than smaller quantity, and the punishment provided is RI for a term which may extend to 10 years and with fine which may extend to Rs.1,00,000/-.

14. In the facts and circumstances of the case, the conviction of the appellant is upheld. However, looking to the fact that the appellant has undergone more than half of the sentence of RI awarded to him, it is a fit case where the sentence of RI may be reduced. Therefore, the sentence

awarded by the trial court is hereby set aside and instead thereof, the appellant is sentenced under Section 20(b)(ii)(B) of the NDPS Act to undergo RI of 4 years and fine of Rs.10,000/-. On non-payment of fine, the appellant shall further undergo RI for a period of three months.

15. The appeal is partly allowed to the extent indicated above.

16. This is not the conclusion and the fact remains that the co-accused – Parsuram Manjhi has not preferred any appeal before this court. After the judgment passed in this appeal, benefiting the appellant by modification and reduction of sentence passed by the trial court, it seems unreasonable that the co-accused should be languishing in jail for the whole term of sentence awarded by the trial court. This situation of anomaly has to be dealt with accordingly by applying the principles of parity in the criminal case.

17. In **Ajmer Singh V. State of Haryana** reported in 2010 (2) SCC(Cri) 475, 2010 (Supp) AIR(SC) 582, 2010 AIR(SCW) 1494, 2010 (3) SCC 746, 2010 CrLR 357, the Apex Court held as follows:

'The principle of parity in criminal case is that, where the case of the accused is similar in all respects as that of the co-accused then the benefit extended to one accused should be extended to the co-accused.'

With regard to this principle, it is important to mention the observation of this court in the case of **Harbans Singh v. State of Uttar Pradesh and Ors.**, reported in **[(1982) 2 SCC 101]**. In that case it was held, that, in view of commutation of death sentence of one of the accused, who was similarly placed as that of appellant, award of death sentence to appellant was unjustified and, hence, the death sentence of the appellant was stayed till the decision of the President on

commutation of sentence. An important observation of this Court on the point need to be noticed at this stage: "it will be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted to one of life imprisonment and the life of the co-accused is shared."

High Court is not helpless in dealing with such situation and the Madhya Pradesh High Court in the case of **Ratan Singh Vs. State of Madhya Pradesh** reported in **1977 Cri. L.J. 1951 Page 673**, held as follows in paragraphs 6, 9 as under:-

'6. However, so far as the question of taking the matter for consideration in suo motu exercise of revisional powers of this Court is concerned, we feel that it is a fit case where we must exercise our powers under Section 401 of the Code of Criminal Procedure (1974) in view of the particular facts and circumstances of this case for the reasons stated hereinafter.

9. If the undisputed illegality of conviction has been brought to our notice, we cannot refuse on our part to interfere merely because the accused concerned did not challenge the same by preferring an appeal. However willing an accused may be to submit to the sentence and however negligent or reluctant he might have been in moving this Court by preferring an appeal, this Court will have no hesitation in setting aside his conviction if it was satisfied that the same was illegal.'

Further it has been held in the judgment of **FARUK @ GAFFAR V/S STATE OF U P** reported in **2013 (1) AILLJ 266** as follows:

'15. The Karnataka High Court in the case of **M.P.**

Ponnamma and another v. The State of Karnataka reported in **1978 CrLJ 1241** has observed in paragraphs 6 ...
... as under :

6. In the course of the judgment, I have mentioned that A-2 and A-3 have not appealed. But, in the view that I have taken in this judgment, I think, this Court must intervene in exercise of its revisional jurisdiction without any appeal by A-2 and A-3 this Court has power under Section 401. Cr.P.C. in a proper case to deal with the cases of accused persons not appealing against their conviction while deciding the appeals preferred by other accused. Section 401 does not in any way affect the jurisdiction vested in this Court to deal with the cases of non-appealing accused.

16. Reference has been made to the judgment of Hon'ble Supreme Court in **Popular Muthiah v. State** reported in **2006 3 SCC(Cri) 245** represented by Inspector of police specially paragraphs 27, 29 and 30 which read as follows :

27. While exercising its appellate power, the jurisdiction of the High Court although is limited but, in our opinion, there exists a distinction but a significant one being that the High Court can exercise its revisional jurisdiction and/or inherent jurisdiction not only when an application therefore is filed but also suo motu. It is not in dispute that suo motu power can be exercised by the High Court while exercising its revisional jurisdiction. There may not, therefore, be an embargo for the High Court to exercise its extraordinary inherent jurisdiction while exercising other jurisdictions in the matter. Keeping in view the intention of Parliament, while making the new law the emphasis of Parliament being "a case before the Court" in contradistinction from "a person who is arrayed as an accused before it" when the High Court is seized with the entire case although would exercise a limited jurisdiction in terms of Section 386 of the Code of Criminal Procedure, the

same, in our considered view, cannot be held to limit its other powers and in particular that of Section 482 of the Code of Criminal Procedure in relation to the matter which is not before it.

29. The High Court while, thus, exercising its revisional or appellate power, may exercise its inherent powers. Inherent power of the High Court can be exercised, it is trite, both in relation to substantive as also procedural matters.

30. In respect of the incidental or supplemental power, evidently, the High Court can exercise its inherent jurisdiction irrespective of the nature of the proceedings. It is not trammelled by procedural restrictions in that :

(i) Power can be exercised suo motu in the interest of justice. If such a power is not conceded, it may even lead to injustice to an accused.

(ii) Such a power can be exercised concurrently with the appellate or revisional jurisdiction and no formal application is required to be filed therefor.

(iii) It is, however, beyond any doubt that the power under Section 482 of the Code of Criminal Procedure is not unlimited. It can inter alia be exercised where the Code is silent, where the power of the Court is not treated as exhaustive, or there is a specific provision in the Code; or the statute does not fall within the purview of the Code because it involves application of a special law. It acts *ex debito justitiae*. It can, thus, do real and substantial justice for which alone it exists.'

The Apex Court in the case of **Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra** reported in **2003 2 SCC 708** has laid down that the detention

of an accused who is placed in the same situation (if not lesser than the appellant, who has been granted relief) would be per se violative of Article 21 of the Constitution of India and the Court shall not deny the same relief to the non-appealing accused. Relevant paragraph-6 of the judgment of the Apex Court reads as follows :

'6. The above is not enough to dispose of this matter. As the second accused Jabbar was placed in the same situation as the appellant in this case (if not lesser), Article 21 of the Constitution would not permit us to deny the same benefit to the second accused, notwithstanding the fact that the SLP and the review application filed by him have been dismissed by this Court.'

18. Looking to the settled principles in this respect and for the purpose of removing disparity in dealing with co-accused who has not preferred any appeal, this court is competent to exercise jurisdiction of revision under Sections 397 and 401 of the Cr.P.C. suo motu and also the inherent powers under Section 482 of the Cr.P.C. The record of the trial court is already before this court, the State has noticed all the proceedings and is duly represented. It is only the co-accused who is not represented. The matter under consideration is for extending the same benefit to the non-appealing co-accused, which has been extended in favour of the appellant/ accused. Hence, on the basis of the reasons discussed in the aforementioned paragraphs, to modify and reduce the sentence of the co-accused - Parsuram, Manjhi suo motu jurisdiction of revision is exercised. Maintaining the conviction of non-appealing co-accused under Section 20(b)(ii)(B) of the NDPS Act, the sentence awarded by the trial court is set aside and instead non-appealing co-accused is sentenced with RI for 4 years with fine of

Rs.10,000/-. On non-payment of fine he shall be further subjected to RI for three months in default. Thus, this appeal and suo motu revision are disposed of.

Sd/-

(Rajendra Chandra Singh Samant)
Judge

Nimmi