

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 12 of 2015

1. Vijay alias Vikki, S/o Shri Arun Kumar, aged about 32 years, Profession Cab Driver, R/o S.E.C.L. S.B.S. Colony Korba, District Korba (C.G.)
2. Chunnu Upadhyay, S/o Shri Bhupat Upadhyay, aged about 34 years, Profession Labourer, R/o Bhikhampura, P.S. Sariya, District Raigarh (C.G.)

---- Appellants

Versus

- The State of Chhattisgarh, Through Station House Officer P.S. Sariya, Raigarh, District Raigarh (C.G.)

---- Respondent

For Appellant :	Shri Shailendra Dubey , Advocate
For Respondent/State :	Shri R.K. Jaiswal, Panel Lawyer

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Judgment on Board

09/01/2017

1. This appeal has been preferred against the judgment passed by First Additional Sessions Judge (Special Court), Raigarh (C.G.), in Special Case No. 11/2011 passed on 22/11/2014, whereby both the appellants were convicted under Section 20 (b)(ii)(C) of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, '*NDPS Act*') and have been sentenced with RI of 10 years along with fine of Rs. 1 Lakh each with default stipulation.

2. The case of the prosecution is this, that Sub Inspector Manjeet

Singh Kaushal (PW-8) was posted as SHO in Police Station, Sariya. On 24/07/2011 he received one information, that illegal narcotics substance ganja is being transported in a Maruti Car via Chandrapur. He immediately summoned the witness vide Ex.P/1 and Ex.P/28 and in their presence panchnama Ex.P/2 was prepared. He dispatched one information to Sub Divisional Officer (Police) Sarangarh vide Ex.P/25 and proceeded to the spot village Panchdhar, Chandrapur. One car bearing Registration No. C.G.15 ZD 0990 was stopped, which was occupied by the appellants. One notice under Section 50 of NDPS Act was served vide Ex.P/3 to both the appellants, informing them about their right to be searched in presence of a Gazetted Officer or a Magistrate. The appellants gave consent to be searched by the officer present, which was recorded on Ex.P/3 and signed by both the appellants. Appellants were given an opportunity to search the members of the raiding party and the search conducted vide Ex.P/4 was without any result.

3. On search of Car No. CG 15 ZD 0990, four gunny bags containing narcotics substances were recovered. Search memo was recorded vide Ex.P/5, the contents of the gunny bags were identified as ganja vide Ex.P/6. For weighing procedure balance and weight were procured and panchnama about the correctness of balance and weight was recorded vide Ex.P/7. With the help of this balance and weight the recovered article in four gunny bags containing ganja were weighed accordingly and found that each of them to be having 10 kg. of ganja, which were marked as A1, A2 and B1, B2. From each of the gunny bags 100 grams of ganja was taken out for sampling and rest of the

contents of the bags were sealed. A panchnama was recorded vide Ex.P/8. Two sample packets of ganja were prepared, sealed and were seized from the possession of appellant No. 2. Similarly two sample packets of ganja were prepared and seized from the possession of appellant No. 1 vide Ex.P/10. Panchnama of seal used for sealing was separately prepared vide Ex.P/11. Entries were recorded in the station house diary vide Ex.P/20C to Ex.P/24C. FIR Ex.P/34 was recorded and seized articles bags and samples of ganja were deposited in malkhana vide Ex.P/18C and Ex.P/19C. Sample packets of ganja were sent for FSL examination. The FSL report Ex.P/36 confirmed that the contents of the sample packets was narcotics substances ganja. After completion of investigation, both the appellants were charge-sheeted.

4. Appellants were charged under Section 20 (b)(ii)(C) of NDPS Act. Both the appellants denied the charges and demanded trial. Prosecution examined eight witnesses. On examination under Section 313 of CrPC, appellants denied all the circumstances in prosecution evidence against them, pleaded innocence and false implication. In defence two witnesses were examined. After completion of trial impugned judgment was passed convicting and sentencing the appellants as mentioned above.

5. The ground in this appeal are these, that the impugned judgment of conviction and sentence is contrary to the evidence available on record. There had been no legally admissible evidence to hold conviction against them. Objection has been raised about the truthfulness of the FSL report. It is submitted that the contraband

recovered from each of the appellants weight 20 Kg., including the bags in which the material was contained. The material on being removed from the bags, the weight would have been less than the commercial quantity, which was not done. For these reasons, the finding of the trial court is erroneous. The trial Court has failed to appreciate that Section 42 and 50 of NDPS Act has not been strongly complied with, which makes a ground to acquit the appellants. Statement of prosecution witnesses are full of material contradiction and omissions, which could not have been formed the basis of conviction. On these grounds, it is prayed to acquit the appellants.

6. It is submitted by counsel for the appellants that the statement of prosecution and witnesses is un-reliable and does not support the case of prosecution, for this reason there is no legally admissible evidence. Secondly, it is submitted that the contraband recovered from the car has been weighed separately as per the recovery from each of the appellants. The procedure and weighing was not conducted to ascertain the exact weight of contraband, it was weighed along with gunny bags. The weight of ganja recovered from each of the appellants is shown to be 20 Kg. and on subtracting weight of the bags from which the quantity of ganja recovered from each of the appellant would have been less than 20 Kg and this would have lead to this finding that the quantity of ganja was less than the commercial quantity. It is also submitted that FSL has not been duly proved by the prosecution and on this ground appellants are entitled for benefit of doubt.

7. Considering all the material on record and the arguments

submitted from the appellants side, the question for determination in this appeal is whether the conviction against the appellants is supported by evidence of prosecution beyond reasonable doubt? The evidence before the trial court is perused and finding is arrived at.

8. Sub Inspector Manjeet Singh Kaushal (PW-8) stated, that on 24/07/2011 he received information from one informer. He immediately summoned witnesses Lalchand Dadsena (PW-1) and Bundram, on their appearance he recorded a panchnama of information vide Ex.P/2. He immediately dispatched a memo about the received information vide Ex.P/24 to Sub Divisional Officer (Police), Sarangarh, through constable R.C. Das Mahant (PW-5). Thereafter he arrived at the spot and intercepted one car bearing registration number C.G.15ZD 0990, which was occupied by appellants. Appellants were a notice under Section 50 of NDPS Act Ex.P/3. Both the appellants gave consent to be searched by this witness, thereafter he served one notice vide Ex.P/29 on appellants to produce legal paper for transporting of ganja, but appellants could not produce any paper. He afforded opportunity to the appellants to make a search of all members of raiding party, which was availed by appellants and search was made vide Ex.P/4. The search was without any result.

9. Sub Inspector Manjeet Singh (PW-8) made a search of the car in possession of the appellants vide Ex.P/5. Thereafter the recovered articles narcotics substance was identified as ganja vide Ex.P/6. Further the balance and weight to be used for weighing the seized contraband were verified, a panchnama about its correctness was prepared vide

Ex.P/7. At the same time and on the spot two plastic bags containing ganja recovered from the appellant No.2 was weighed with the help of Goverdhan Diwan (PW-2). Weight of each bag was found to be 10 Kg and total weight was 20 Kg. Both the bags were marked as A & B. 100 gr. of ganja were taken out from each bag and four packets were prepared by marking them as A1, A2 and B1, B2. All the articles were sealed. Thereafter two bags of ganja was recovered from appellant No. 1, where the weight was 10 kg of each bag. 100 gr. was taken out each of the bags and sample packets were prepared by marking them C1,C2 and D1, D2. All the articles were sealed in presence of witnesses. Panchnama was recorded Ex.P/8. Seizure of bags marked as A & B along with samples packets A1, A2 and B1, B2 was made vide Ex.P/9 from possession of appellant Chunnu Upadhyay. Seizure of bags marked as C & D and sample packets C1 and C2, D1 and D2 was done vide Ex.P/10 from the possession of appellant Vijay. Formal arrest of appellants was done. After returning to the Police Station, the seized articles were deposited in Malkhana and FIR Ex.P/33 was recorded by him. The sample packets A1, A2, B1, B2, C1, C2, D1, D2 were sent for chemical examination and FSL report was obtained, which is on record.

10. In cross-examination his statement about conducting the procedure of search and seizure as stated remained un-rebutted. There is admission that Lalchand Dadsena (PW-1) had been engaged as driver by Police Station for some time. This admission alone does not affect veracity of Lalchand Dadsena. After perusing his statement there appears to be no rebuttal of his statement given in examination-in-chief, in support of prosecution. He has supported the statement of Manjeet

Singh Kaushal (PW-8). In cross-examination he admits that he was engaged as Driver by the Police Station, Sariya and he had good relation with the people at Police Station and his association with Police Station by itself does not discredit his statement. Though he has admitted that he is not aware of the contents of seizure documents signed by him, but he has stated about seeing the things done in his presence. Thus his statement in examination-in-chief has remained un-rebutted.

11. Constable Soncharan Sahu (PW-3) was a member of raiding party. He has supported the version of investigating officer Manjeet Singh Kaushal (PW-8) about search and seizure from the appellants on the spot. There is no admission in cross-examination that will affect veracity of statement in examination-in-chief.

12. Constable R.C. Das Mahant (PW-5) stated that he acted as messenger to deliver the memo sent by Manjeet Singh Kaushal to SDO (Police) Sarangarh. He deposited the mail containing information and obtained a receipt. Head Constable Laxman (PW-7) has stated similarly, he was present who has received information Ex.P/24 in the office of SDO (Police) Sarangarh. Head Constable Janak Ram Sahu (PW-4) was a person who received the articles seized and the car No. CG15ZD 0990 used for transport of contraband and kept all things in safe custody, after making entries in the Malkhana register. The entries in register have been proved vide Ex.P/17C. Eight samples packets of the narcotic substance were taken out from malkhana on 27/07/2011 and sent for FSL examination. In cross-examination the question was

put to him contents and quantify of bags and packets, to which he could not answer, as he is not the witness of the spot and neither there is any occasion that he could have known about the contents of the packets kept in his custody. Hence, the answers of these question are of no relevance. Constable Prabhat Yadav (PW-6) is the person who acted as messenger to carry the sealed sample packets to FSL, Raipur and after depositing them in the laboratory he obtained receipt vide Ex.P/26, this statement remains un-rebutted.

13. Himanshu Shekhar (DW-1) has stated in defence of Chunnu Upadhyay, that according to his knowledge, about two years before in the night at about 4 a.m. he heard the call of wife of appellant Chunnu, when he was at his residence. He came to know that Policeman wanted to take Chunnu to Police Station, on asking the policeman they replied that they will release him in the morning. Later on he came to know that appellant Chunnu was not released and he has been charge-sheeted. In cross-examination he stated that he does not know for what reason Chunnu is in jail. He has not made any complaint to the Superintendent of Police for charge-sheeting Chunnu Upadhyay. This witness is not aware of the charges against appellant No. 2 and the statement given by him is vague, which does not co-relate with the case of prosecution, hence the statement of this witness cannot be considered as connected with the case of prosecution. Gagan Bihari (DW-2) has stated similarly. The reason given for rejecting the evidence of Himanshu Shekhar (DW-1) applies to the statement of this witness as well and his statement is not found helpful in defending the appellant No. 2 Chunnu Upadhyay.

14. After going through the evidence of all the witness of prosecution and on scrutinizing the same, it is found proved that on the date of incident both the appellants were occupying the Car bearing CG 15 ZD 0990, in which four bags were transported, on being intercepted, apprehended and searched the contents in these bags were found to be narcotics substance ganja.

15. Considering on the ground in appeal, firstly the ground that the statement and prosecution witness is not reliable, has no substance. On close scrutiny of each of the prosecution witnesses, it has been found that the evidence of all the witnesses who have supported the case of prosecution is worth believable.

16. The objection that provision under Section 42 and 50 of the NDPS Act has not been complied with is also without substance. As per the statement of Investigating Officer Manjeet Singh Kaushal (PW-8) soon after receiving of information, one memo was dispatched to higher authority, SDO (Police) Sarangarh. Proof of dispatch of receipt and information to the higher authority has been brought by the prosecution, which has not been rebutted in any manner. This goes to show that Section 42 of NDPS Act has been complied with. As regards the compliance of Section 50 of the NDPS Act, this was not necessary in this case for the reason that the search was made of belongings of the appellants which was separately kept in possession in the car.

17. Objection has been raised about the admissibility of FSL report Ex.P/36, because no statement has been made by any of the witnesses, that the FSL report mentioned about the contents of

samples being ganja. Section 293 of CrPC makes it explicit, that report of Chemical Examiner or Assistant Chemical Examiner employed by Government may be directly used as evidence in any enquiry, trial and proceeding. The report in Ex.P/36 was never specifically challenged by the appellants before the trial Court, hence on the basis of provision Section 293 of CrPC, Ex.P/36 was a document to be referred directly as evidence which has been referred accordingly by the trial Court, hence this ground in appeal is without any substance. For these reasons and the findings arrived at in this appeal, it is clearly held that prosecution has successfully proved that appellant had been in possession of contraband which was found to be narcotics substance ganja.

18. Now the only ground of contention is that, that the contraband ganja recovered from each of the appellants weighed 20 Kg., whether this statement of the witnesses can be considered as it is? The argument submitted on behalf of the appellants has substance, because if the contraband is weighed with the container or packet, then there should have been some explanation about the weight of container or packet. Reliance has been placed on the judgment of this Court in **Abdul Hameed v. State of Chhattisgarh, Criminal Appeal No. 1087/2008** passed on 19/06/2014, wherein it was held that the evidence does not clearly shows that the investigating officer weighed the ganja after removing the contents from the bag and also it was not clear that the weight of ganja was excluding the weight of plastic bag. It was held in case it was obligatory on the prosecution and ganja recovered was 20 Kg or more than 20 kg excluding plastic bag or other material. In case the weight of ganja is reduced even by one gram the

the case shall not be under Section 20 (b) (ii)(C) of NDPS Act. Finding this circumstance in that case, the appeal was partly allowed and the conviction of appellant was modified from conviction under Section 20(b)(ii)(C) to Section 20 (b)(ii)(B) of the NDPS Act.

19. It has to be examined that this is similar case or not. Manjeet Singh Kaushal (PW-8) has stated that after recovering the contraband kept in plastic bags, the weight of each bag was 10 Kg. There is no statement of this witness that contents of the bag were taken out and weighed separately without the bag in which it was contained. Other witness Lalchand Dansena (PW-1) has not made any specific statement in this regard, other witnesses Goverdhan turned hostile. Other witnesses examined by the prosecution also do not make any clear statement, that the contents of all the bags were removed for the purpose of weighing the contents. Hence, in these circumstances this is a case similar to the case of *Abdul Hameed v. State of C.G.* decided by this Court.

20. A schedule under NDPS Act clearly specifies about the small quantity and commercial quantity. The only interpretation which could be given in this respect, is that the weights of small quantity and commercial quantity has to be specific as specified in the notification, which is a subject of prosecution and not the weight of container or package.

21. As per the memo wherein Ex.P/8 and the statement of prosecution witnesses it is clear that all have stated that bags containing exactly 20 kg narcotics substance was recovered from the

possession of appellant No.1 and similarly bags containing exactly 20 Kg was recovered from the possession of appellant No.2, no explanation has been given about the package or bag in which narcotics substance was contained. It cannot be assumed that the package had no weight at all. This is quite sensitive matter because the weight of contraband creates difference to hold liable a person for possession of small quantity or more than small quantity but lesser than commercial quantity. The arguments on behalf of appellants prove a point, which cannot be discarded simply. Hence this is a case where the conviction of appellant under 20(b)(ii)(C) is under question and State has no answer for this question. For these reasons, the impugned judgment can be interfered with particularly on the point of conviction, thereafter it would affect the sentence is well.

22. On the basis of aforementioned reasons, this appeal is allowed in part. The conviction of appellants under Section 20(b)(ii)(C) is set-aside and altered into conviction under Section 20(b)(ii)(B) of NDPS Act. As prayed and submitted that appellants are in jail since 24/07/2011 on calculating the custodial period of both the appellants comes to be five years, five months and sixteen days. The sentence provided under Section 20(b)(ii)(B) of NDPS Act, is rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees. Looking to the facts and circumstances of the case, the period of custody already undergone by appellant in this case appears to be sufficient punishment for them. Hence, appellants are sentenced with RI for period of sentence already undergone in custody so far and with a fine of Rs.20,000/- each. On non-payment of fine each of the

appellants shall be subjected to RI of further six months.

Sd/-
(Rajendra Chandra Singh Samant)
JUDGE

Kamde