

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 289 of 2010**

- Aarif Khan S/o Naim @ Naimuddin Khan aged about 50 years, R/o Near Bada Maszid Tarbahara, Bilasupr Police Station Tarbahar, District Bilaspur (CG).

---- Appellant

Versus

- State of Chhattisgarh through Police Station Baloda, District Janjgir-Champa (CG).

---- Respondent

 For the appellant : Mr. Shivendu Pandya, Advocate.
 For the respondent/State : Mr. K. Tripti Rao, P.L.

Hon'ble Shri Justice Ram Prasanna Sharma**Judgment on Board****5-9-2018.**

1. Shri Shailendra Soni and Shri Narendra Singh Thakur, Advocates have been engaged by the appellant for arguing the case on his behalf. Despite repeated calls they have not appeared when the case is called for final hearing, therefore, Shri Shivendu Pandya, Advocate, who is present in the Court has been appointed as *Amicus Curiae* to argue the case on behalf of the appellant.
2. Challenge in this appeal is to the judgment of conviction and order of sentence dated 17-2-2010 passed by the Special Judge (Narcotic Drugs & Psychotropic Substance Act, 1985 (for short, "the Act, 1985"), Janjgir, District Janjgir-Champa

(CG) in Special Criminal Case No. 11 of 2009 wherein the said Court convicted the appellant for commission of offence under Section 20(B)(1)(ii) (C) of the Act, 1985 for illegal possession of contraband Ganja measuring 20.140 kgs on 7-9-2009 at about 8.15 pm at village Budgahan, Police Station Baloda, District Janjgir-Champa (CG) and sentenced him to undergo RI for ten years and fine of Rs.1,00,000/- with default stipulations.

3. In the present case, Incharge of Police Station Baloda received information that one person is in possession of contraband Ganja and this information was recorded in Panchnama and information was sent to higher authorities. Witnesses were called and directed to remain present during seizure proceeding. Appellant was given notice regarding his right to be searched by any Magistrate or Gazetted Officer as per Ex.P/17, but he gave consent to be searched by the said Police officials. First all members of raid party were searched and no objectionable article was found in their possession and thereafter one bag was seized from the possession of the appellant in which contraband articles were kept in 12 packets. All the packets were weighed in electronic weighing machine and total quantity was found to be 20.140 kgs. Two samples of 50 grams each were separated and sealed on the spot and rest of the articles were also seized and sealed. All the seized

articles were given to Incharge of Malkhana for keeping the same in safe custody. The articles which were kept in safe custody and the samples were given to Constable Vijay Kumar Patel for depositing the same in Forensic Science Laboratory for examination. As per report of FSL, test of Ganja was found to be positive. The matter was investigated and the appellant was charge-sheeted.

4. Learned counsel appearing as Amicus Curiae for the accused/appellant submits as under:

- (i) Mandatory provisions under Sections under Sections 42, 50, 52, 55 and 57 of the Act, 1985 have not been properly complied with which vitiated the prosecution case.
- (ii) PW/5 Naval Kishore Singh admitted that weight of Ganja was done at Kishan shop but no one from that shop is examined, therefore, version of prosecution is not supported by this witness.
- (iii) Entry register was not produced before the trial Court against the mandatory provisions of Section 42 of the Act, 1985 which vitiates the trial.

(iv) The trial Court has not evaluated the evidence in its true perspective and came to a wrong conclusion which is liable to be reversed.

5. *Per contra*, State counsel supporting the impugned judgment has submitted that the finding arrived at by the trial Court is based on proper marshaling of evidence which is not liable to be interfered with by this Court.
6. I have heard counsel for the parties and perused the material on record.
7. From the evidence of PW/6 Rajesh Shrivastava, Sub Inspector, it is established that the appellant was having a bag in which contraband articles were kept. From his evidence and seizure of bag, it appears that it is not a personal search. Personal search is done when contraband article is kept either in wearing of the person concerned or in inner part of the body, but that is not the case here. Contraband article was kept in a bag which is not the part of the body. Though notice under Section 50 of the Act, 1985 was given to the appellant, but the same was not required looking to the evidence adduced by the prosecution. Again, it is not a case of search in confined place, therefore, Section 42 of the Act, 1985 has no application.

8. From the evidence of PW/1 Holiram Bhargav, Head Constable, it is clear that information received by the police authorities on 7-9-2009 was sent to Sub Divisional Officer (Police) Janjgir and same was received by the said office as per Ex. P/1 and P/2. From the evidence of PW/2 Preetamlal Yadav, Head Constable, it is clear that all the information received by the police authorities and all the proceeding of search and seizure were recorded in Rojnamcha Sanha as per Exs. P/6, P/7, P/8 & P/9. The proceedings (Ex.P/9 & P/10) are recorded in Rojnamcha Sanha and same is sent to higher authorities as per these documents. Therefore, it cannot be said that provisions under Section 55 or 57 of the Act, 1985 are flouted.
9. Again from the evidence of PW/5 Naval Kishore Singh and Sub Inspector Rajesh Shrivastava (PW/6), it is established that weight of seized article was 20.140 kgs. From their evidence it is also established that 50 grams of contraband Ganja from each packet was separated as sample and bundle of seized articles was 12 in number. From the evidence of Sub Inspector Rajesh Shrivastava (PW/6) and Head Constable Preetamlal Yadav (PW/2), it is established that seized articles were given to PW/2 Preetamlal Yadav who was Head Constable and Incharge of Malkhana and he recorded regarding delivery of articles in the register of Malkhana as per

Ex.P/3 and P/4 and as per evidence of both witnesses, the articles seized were kept in safe custody of Malkhana.

10. From the evidence of PW/4 Vijay Kumar Patel, it is established that he received 12 packets from Police Station Baloda and deposited the same in FSL as per Ex.P/13. As per the report of said FSL (Ex.P/14), the articles were found to be Ganja. As the test of article is positive, it is established that seized article is contraband Ganja. As per schedule of the Act, 1985, quantity more than 20 kgs of Ganja is commercial quantity and for possession of commercial quantity offence under Section 20(B)(ii)(C) of the Act, 1985 is made out for which the trial Court convicted the present appellant.

11. On overall assessment of the entire evidence and argument advanced on behalf of the appellant, this court is of the view that no mandatory provision was flouted during the course of investigation and argument on behalf of the appellant has no force. Thus in the aforesaid view of the matter this Court is of the considered opinion that the findings recorded by the Court below do not suffer from any legal flaw warranting inference in this appeal. Conviction and sentence of the appellant under Section 20(B)(1)(ii)(C) of the Act, 1985 is hereby affirmed.

12. Heard on the point of sentence.

Minimum sentence for offence under Section 20(B)(1)(ii)(C) of the Act, 1985 is RI for ten years and fine of Rs.1,00,000/-.

The trial Court awarded minimum sentence and less than minimum sentence cannot be awarded.

13. Resultantly, the appeal being without any force is liable to be dismissed and it is dismissed as such with the affirmation of the judgment impugned. As the appellant is already reported to be behind the bars, no further order for arrest etc is necessary.

Sd/-

(Ram Prasanna Sharma)
JUDGE

Raju