

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 655 of 2011**

Judgment Reserved On : 20/07/2018

Judgment Delivered On : 06/12/2018

1. Amarnath Soni, S/o Shambhunath Soni, aged about 23 years, R/o Khursipar, Bhilai.
2. Himanshu Swayi, S/o Rashanand Swayi, aged about 32 years, R/o Potagi, Orissa.
3. Ravi Swayi, S/o Rashanand Swayi, aged about 32 years, R/o Potagi, Orissa.
4. Abhimanyu Nayak, S/o Madan Nayak, aged about 30 years, R/o Barnipur, District Koraput, Orissa.
5. Mohan, S/o Satyanarayan, aged about 21 years, R/o Paur Patlam, Andhra Pradesh
6. Saccha Kumar, S/o Nageshwar Rao, aged about 27 years, R/o Raur Patlam, Andhra Pradesh.
7. Ramkumar, S/o Ramprasad Yadav, aged about 22 years, R/o Khursipaar, Bhilai
8. Dhanpati Nayak, S/o Bhagwan Nayak, aged about 20 years, R/o Jaipur, District Koraput, Orissa.
9. Santosh Baag, S/o Suresh Baag, aged about 23 years, R/o Jaipur, Orissa.

---- Appellants**Versus**

- The State Of Chhattisgarh through Station House Officer, P.S. Kota, District Bilaspur (CG)

---- Respondent

For Appellants : Shri Shailendra Dubey with Miss Shivali Dubey, Adv.
For Respondent/State : Shri Anil Pillai, Deputy AG.

**Hon'ble Shri Prashant Kumar Mishra &
Hon'ble Smt. Vimla Singh Kapoor, JJ**

C A V JUDGMENT

The following judgment of the Court was delivered by **Prashant Kumar Mishra, J.**

1. All the appellants have been convicted for committing offence under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') and sentenced to undergo RI for 20 years and fine of Rs.2 lakhs each, in default of payment of fine to undergo additional RI for 2 years. Appellants Amarnath, Himanshu and Ravi were allegedly found in possession of 35 kg of contraband Ganja kept in Hyundai Verna Car bearing Registration No.CG-18 T/0187, whereas appellants Mohan, Saccha Kumar and Ram Kumar were found in possession of 38 kg of Ganja in Indica Car bearing registration No.OR-10E/5717. Similarly, appellants Dhanpati and Santosh were found to possess illicit Ganja weighing 24.51 quintals kept in 76 bags in a truck bearing registration No.MP-07W/2259.
2. Prosecution story is that on 17.9.2009, SHO, PS Kota, District Bilaspur, Shri DS Diwan received a communication from Constable Karan Jaiswal vide Ex.-P/48 to the effect that he has received a secret information that few persons travelling in truck

No. MP-07W/2259, Verna Car No. CG-18 T/0187 and Indica Car No. OR-10E/5717 are transporting illicit Ganja from Bilaspur to Pendra through Achanak Mar. Secret information was recorded in Panchnama (Ex.-P/49) by Constable Karan Jaiswal. The said Constable was sent to summon witnesses and arrange weighing instrument, which was recorded in Rojnamcha Sanha No.678 (Ex.-P/50). Constable Karan Jaiswal brought witnesses Vijay Sahu and Aslam Khan and weigh-woman Anju along with weighing instrument to PS Kota, which was recorded in Rojnamcha Sanha (Ex.-P/51). After reaching the place of occurrence, accused Dhanpati, Abhimanyu and Amarnath were served notice under Section 50 of the Act vide Ex.-P/7, P/8 & P/9 as to whether they wanted to be searched by a police officer or in the presence of any Magistrate or gazetted officer. The said accused consented to be searched by the police officer in Ex.-P/9 itself. Similarly, other accused persons were served notice vide Ex.-P/11 & P/12 for search of their respective Hyundai Verna and Indica Car. Prior to the seizure operation, the police staff and witnesses were also searched by the accused Amarnath vide Ex.-P/13 & P/14.

3. From Indica Car, one mobile set and one bag of Ganja was recovered vide Ex.-P/15. Similarly, from Verna car, one mobile set and one bag containing Ganja was recovered vide Ex.-P/16. From

truck also one mobile set and 76 bags of Ganja was recovered. 76 bags containing Ganja was kept concealed beneath 40 bags of cattle-feed and 15 bags of Yam (Jimikand). Seizure memo of articles recovered from the truck is Ex.-P/17 & P/18. Primary test of contraband Ganja recovered from all the vehicles was conducted vide Ex.-P/21, P/22 & P/23. Weighing Panchnama, primary test Panchnama etc was prepared on the spot along with recovery memo of all the mobile sets.

4. The Head Constable kept seized illicit contraband in the police station by entering the same in Thana register No.8, seizure memo of which is Ex.-P/3. The constable sent information to the SP, which was entered in the Rojnamcha Sanha (Ex.-P/29) along with memo itself (Ex.-P/60). The seized illicit contraband was sent for chemical examination on 22.9.2009 vide Ex.-P/61 for which a positive report was submitted by the FSL vide Ex.-P/62.
5. The appellants abjured the guilt and contested the allegations. The prosecution has examined 10 witnesses to bring home the charges. The accused did not examine any defence witness. After conclusion of trial and on the basis of material available on record, the trial Court has convicted all the accused persons as stated above.

6. Shri Shailendra Dubey and Ms. Shivali Dubey, learned counsel for the appellants would submit that 3 vehicles were separately found to possess illicit contraband, however, only one joint trial has been conducted without invoking the provisions of Section 29 of the Act, therefore, the trial is vitiated. It is argued that the charge is not framed properly inasmuch as there is no charge of transportation of Ganja, which has prejudiced the accused. Arguments have been raised highlighting non-compliance of Sections 42 and 52(2) of the Act. It is also argued that the prosecution has not proved by cogent and reliable evidence as to which accused was travelling in which vehicle. According to learned counsel, the IO is not a reliable witness. AS Dhruv (PW-10), the then Additional SP, Bilaspur, wrongly took over the investigation. It is also highlighted that seal Panchnama has not been prepared and there is no proof as to which seal was put at the time of preparing seizure of articles or at the time of deposit of illicit contraband in the Malkhana and sending it to the FSL.
7. Per contra, Shri Anil Pillai, learned Deputy AG would submit that Section 52 of the Act is only an enabling section which does not speak about production of articles in the Court being mandatory. He would submit that even if seal Panchnama was not prepared or is not on record, the sample sent to the FSL having been found

sealed, there is no lacuane in the prosecution case on this count. He would further submit that Section 42 of the Act has been duly complied with. Secret information has been taken down in writing by the concerned police staff.

8. Yadunath Prasad Dadsena (PW-1) is the Forest Range Officer posted in the Achanak Mar Forest Range on the date of offence. On receipt of memo from the Additional SP (Rural), he prepared the site map (Ex.-P/1). He has also submitted to the police the *Toposheet* of Achanak Mar Tiger Reserve vide Ex.-P/2. Although this witness admits that he was not present on the spot at the time of the incident but has indicated the place where vehicles were seized on information by the police.
9. Pardesi Ram Dhruw (PW-2) was posted as Head Constable at PS Kota on 17.9.2009. This witness was handed over the seized contrabands by the SHO Shri Diwan which was entered in the Japti Mal Register at Sr. No.112. He has given details of the contraband and the mobile sets recovered from the accused persons which were entered in the Register at S. No.112 and Register No.8. He would admit that the Register is signed by the officer or employee who deposits the seized articles as well as the officer or employee who receives the articles. However, in this case, Mal Khana

register does not contain signatures of both the depositor and the recipient. He also admits that copy of Mal Khana register has not been produced with the charge sheet. Copy of the register was brought by this witness with him at the time of evidence vide Ex.-P/3, copy whereof was retained vide Ex.-P/3C. He also admits that the register does not carry any entry mentioning deposit of samples of contraband separately. He also admits that there was no endorsement/signatures over the seized articles which were deposited in the Mal Khana vide Ex.-P/3. He also admits that there being no mark over samples of Ganja, the same has not been mentioned in Ex.-P/3C. He further admits that bags or sample packets were not sealed, therefore, he has not mentioned this fact in Ex.-P/3C. According to this witness, sample packets were sent for FSL examination on 17.9.2009 itself but he is not in a position to state as to the time and the person to whom samples were handed over.

10. Vijay Sahu (PW-3) is the seizure witness but has not supported the prosecution case, therefore, he has been declared hostile. However, this witness would admit his signatures over documents (Ex.-P/5 to Ex.-P/45). He would state that a group of persons had gone for seeking donation for “*Navratri*” festival where they were instructed by the police to put signatures over the documents. Similarly,

Aslam Ali (PW-4) is also a witness to all the Panchnama and seizure proceedings but has not supported the prosecution, though he admits his signatures over all the documents (Ex.-P/6 to Ex.-P/45).

11. Rajesh Kumar Singh (PW-5) is the owner of Hyundai Verna Car.

He has stated that the appellant Amarnath had hired the car in connection with marriage of his sister.

12. SS Paikara (PW-6) was the SDOP, Pendra Road on the date of the incident. At 11 am on the date of the incident, he received information from the SHO, Kota that some people are carrying contraband Ganja in a truck. Thereafter this witness went towards Achanak Mar, cordoned off the area but when he reached near Achanak Mar, staff of PS Kota had already seized the truck containing Ganja.

13. Ajay Kumar (PW-7) is a witness to weighing Panchnama (Ex.-P/26). He admits his signatures over the documents but denies that any weighing was done in his presence. This witness has been declared hostile. He has admitted his signatures over other documents (Ex.-P/24, P/25 & P/27). He has denied to have given any statement to the police vide Ex.-P/47. He would admit that the police had obtained his signatures over the blank papers after

summoning him, as he is engaged in selling vegetables near the Police Station. Prithwi Raj Pradhan (PW-8) is the owner of Indica car. Appellant Abhimanyu is his driver. According to this witness, the driver had taken the car in connection with marriage of his relative.

14. NR Arya, SDOP, Kota has been examined as PW-9. He would state that on 17.9.2009 SHO, PS Kota, Shri DS Diwan had sent written information to him through Constable Karan Jaiswal that as per secret information, all the three vehicles i.e. truck, Verna car and Indica car are involved in illicit transportation of Ganja from Bilaspur to Pendra through Kota, Achanak Mar. Information received by this witness through T.I. Kota is Ex.-P/48 which was recorded in Rojnamcha Sanha vide Ex.-P/49. According to this witness, Mukhbir Soochna Panchnama is Ex.-P/6. He has also proved all the documents concerning search, seizure, weighment etc. He would admit that he received information (Ex.-P/48) in the office of SDOP, Kota at 11.25 pm on 17.9.2009, but the receipt of this document signed by him, as appearing in Ex.-D/1, was not produced with the charge sheet. He further admits that secret information was first received by Inspector Shri DS Diwan but the same is not part of charge sheet or record. He again admits that preparation of Mukhbir Panchnama (Ex.-P/6) has not been entered

in the Rojnamcha Sanha. He would further admit that Shri KS Dhruw, Additional SP (Rural) was his superior police officer having control over Kota Police Station but the copy of Mukhbir Soochna Panchnama was not sent to him. Report submitted to the superior police officer is not on record but entry concerning submission of such report is mentioned in Rojnamcha Sanha No.692 (Ex.-P/59C).

15. Shri Arya (PW-9) has also admitted that there is no mention either in the FIR or in any other documents as to which accused was travelling in which vehicle. He has also admitted that there is no material in the entire documents filed by the police as to what quantity of Ganja was taken out from a particular bag for sampling. He has also not mentioned as to what quantity of Ganja was taken out for testing on the spot nor the ashes of the burnt Ganja were kept separate and seized. He also admits that there is no mention in Ex.-P/28 that the bag was sealed nor there is mention in the seizure memo (Ex.-P/30), regarding 24 quintals 51kg of Ganja recovered from the truck, that all the bags were sealed. This witness would further admit that samples of the seal put on seizure memos (Ex.-P/27 to P/30) has not been prepared nor the sample seal was deposited separately in the Mal Khana. According to him, all the bags containing seized contraband were sealed before

depositing in the Mal Khana and similarly, all the sample packets were sealed. But the trial Court has observed in para-35 of deposition of this witness that Ex.-P/4 does not mention that the packets were sealed.

16. In para-42 of deposition, which is part of cross-examination, PW-9 would clearly admit that the seized contraband has not been produced in the Court. He also admits that at the time of receiving report of FSL, the seal was not received back nor the same has been produced in the Court for examination. Significantly, this witness would clearly state that the seal affixed by him over the packets including sample packets was of “**SDOP, Kota**” but FSL report (Ex.-P/62) indicates that the packets were containing seal of “**Police Station, Kota, Bilaspur**”. Thus the seal which the witness states to have put is different than the seal found on the sealed packets sent to the FSL. This witness further admits that the samples were sent for FSL examination on 18.9.2009 but the same were received by the FSL, Raipur on 22.9.2009. Constable No.1065 Gangadhar Kanwar had taken the samples to the FSL but the said Constable has not been examined by the prosecution. There is absolutely no material on record as to why this delay occurred nor as to the place where the samples were kept from 18.9.2009 to 21.9.2009.

17. KL Dhruw (PW-10) has also recorded statements of some of the witnesses. This witness received case diary after 20-25 days of the incident. He admits that after few days of the incident, a complaint was made against the SDOP, Kota that he is likely to release some of the seized vehicles, therefore, investigation was handed over to him.
18. It is also to be noticed that the prosecution has not examined Shri D.S. Diwan, SHO, PS, Kota, who had sent information to Shri NR Arya (PW-9).
19. On the basis of above discussed evidence available on record, it appears, the prosecution has not conducted investigation properly inasmuch as there is no proof that while depositing the articles in the Mal Khana, those were properly sealed nor there is any proof that samples deposited in the Mal Khana were sealed properly. It is for this reason, difference in the seal over packets as mentioned in Ex.-P/62 than the description of seal mentioned by PW-9 in his deposition assumes great significance and raises serious doubt over the prosecution case that it was the same samples drawn from the seized articles which was sent for FSL examination. The fact that there is no evidence that the seized contrabands were sealed properly, is a serious lacuane in the prosecution case for which the

accused persons are entitled for acquittal as held by the Supreme Court in the matter of **Union of India Vs. Bal Mukund & Others** {2009 Cr.L.R. (SC) 590} in para-40 thus:-

“40. There is another infirmity in the prosecution case. Section 55 of the Act reads as under:

“55. Police to take charge of articles seized and delivered. - An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police Station.”

PW-7 did not testify as to which of the bags seized had been sent for analysis. No statement had been made by him that the bags produced were the bags in question which were seized or the contraband was found in them.”

20. Similarly, in the matter of **Noor Aga Vs. State of Punjab & Another** {2008 Cr. L.R. (SC) 655}, recovery of 1.400 kgs heroine was made from card board cartoon and the card board cartoon was not produced in the Court. No convincing explanation was given, which reduces the evidentiary value of the statements made by the witnesses referring the fact of recovery of contraband. Bulk quantity of contraband allegedly recovered was not produced in the Court. The respondents contended that it was destroyed but on what authority it was done, not clear. Physical evidence of three

samples taken from the bulk amount of contraband were also not produced. There was material discrepancy in weight of samples. Third sample of 5 gms was found 8.7 grams in FSL. The samples were not deposited in the Malkhana for three days and kept at airport. It was obligatory to keep the samples in safe custody. Independent witnesses did not sign the sample and signature of accused also not found though he signed it. Material discrepancies like change in colour, weight of the sample and absence of signature of accused cannot be ignored totally. Malkhana report was also not produced. There was material contradiction in time of seizure of contraband. In such circumstances, conviction was held to be not justified.

21. In the case at hand, there is clear admission on the part of the IO that the seized articles were never produced before the Court.
22. In a recent judgment in the matter of **Mohinder Singh Vs. State of Punjab** {2018 (3) Crimes 227 (SC)}, the Supreme Court has held in paras- 12 & 13 thus:-

12. For proving the offence under the NDPS Act, it is necessary for the prosecution to establish that the quantity of the contraband goods allegedly seized from the possession of the Accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the document showing destruction of the contraband.

13. In **Vijay Jain v. State of Madhya Pradesh** (2013) 14 SCC 527, this Court reiterated the necessity of production of contraband substances seized from the Accused before the trial court to establish that the contraband substances seized from the Accused tallied with the samples sent to the FSL. It was held that mere oral evidence to establish seizure of contraband substances from the Accused is not sufficient. It was held as under:

“10. On the other hand, on a reading of this Court's judgment in **Jitendra v. State of M.P. (2004) 10 SCC 562**, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the Accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the Accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in **Ashok v. State of M.P. (2011) 5 SCC 123**, this Court found that the alleged narcotic powder seized from the possession of the Accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the Appellant.”

23. We may also notice that the IO has found contrabands in 3 separate vehicles, however, at the time of drawing samples, there is no mention in the documents as to which sample was drawn from the packets kept in which particular vehicle. It is also not mentioned in any of the papers presented before the Court as to which accused was travelling in which vehicle. The manner in which

investigation has been carried out in such serious offence involving huge quantity of contraband is not only deprecable but when the same is read along with admission by PW-10 that there was complaint against the IO that he is likely to absolve some vehicles involved in the case, it goes without saying that superior police officer like the SP of the concerned area must look into and supervise investigation in such serious offences.

24. In view of the serious lacuane in the investigation from the stage of recording of Mukhbir Panchnama till the FSL examination, the prosecution has failed to establish the charge against the appellants.
25. For the foregoing, the Appeal is allowed. Conviction and sentence imposed on the appellants under Section 20 (b)(ii)(C) of the Act are set aside and they are acquitted of the said charge. The appellants be set at liberty forthwith unless required to be detained in any other case.

Sd/-
Judge
(Prashant Kumar Mishra)

Sd/-
Judge
(Vimla Singh Kapoor)