

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 867 of 2012

1. Soumitree Naik S/o Chaitanya Naik Aged About 26 Years R/o Sahadevpur, PS Vonpuri, Distt. Pondh Orissa
2. Umesh Kumar Vaghar S/o Kishor Vaghar Aged About 35 Years R/o Kokomaji PS - Kantamal, Distt. - Boudha Orissa.

---- Appellants

Versus

- State Of Chhattisgarh Through PS City Kotwali, Distt. Mahasamund C.G.

---- Respondent

For Appellants	:	Shri BK Chakraborty, Advocate.
For Respondent/State	:	Shri Avinash K. Mishra, P.L.

Hon'ble Shri Justice Pritinker Diwaker

Hon'ble Shri Justice Sanjay Agrawal

Judgment on Board by Justice Pritinker Diwaker

12/04/2018:

This appeal arises out of the judgment of conviction and order of sentence dated 4.1.2012 passed by the Special Judge (NDPS Act, 1985), Mahasamund in Special Criminal Case No.3/2011, convicting the accused/appellants under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act (in short "the Act"), 468 & 471 of IPC and sentencing each of them to undergo RI for 15 years, pay a fine of Rs.1.50 lacs; RI for 5 years, fine of Rs.25,000/- and RI for 5 years, fine of Rs.25,000/- with default stipulations respectively.

02. Facts of the case in brief are that on 16.12.2010 at 10.20 am

information was received by ASI GS Chandel (PW 6) from constable Kamlesh Shrivastava that he has apprehended vehicle Bolero bearing No.CG 13C/5625 duly possessed by the appellants and during search contraband has been found in the said vehicle. The said vehicle was being driven by appellant No.1 and appellant No.2 was sitting in it. This information was reduced into writing in Rojnamchasanha No.838 vide Ex.P/7C. The information was also forwarded to superior officer vide Ex.P/7C1. The police party reached near Ghorari Chowk where the vehicle was apprehended and the accused persons were detained. Independent witnesses PW-9 Rajesh Singh and PW-10 Amalhari Singh were summoned. Notice under Section 50 of the Act was given to them, on which they consented for search by the police. First, the accused persons were allowed to make search of the police personnel and the witnesses, however, on such search being made, nothing objectionable was found from their possession. When search of the vehicle in question was made, in 13 bags, 3 bags of blue color and 10 bags of black color, contraband was found. On the spot itself the contraband was got examined by the witnesses by way of smelling, tasting and burning, and on the basis of their experience, they found it to be ganja vide Ex.P/13. After giving notice for weighment vide Ex.P/14 and physical verification of the weighment vide Ex.P/15, the contraband was weighed which came to be 306.480 kg vide Ex.P/16. From each of the bags, two samples, each weighing 50 gms, were drawn and as such, total 26 samples were drawn and the samples and the remaining ganja were duly sealed. Sample panchanama of the seal was prepared vide Ex.P/17. Thereafter, the contraband, vehicle and its documents etc. were seized vide Ex.P/18 and Dehati Nalishi of the

entire proceedings was recorded vide Ex.P/19; spot map was prepared vide Ex.P/20 and after return to police station, entry was made in Rojnamchasanha vide Ex.P/201C. Thereafter, FIR (Ex.P/22) was registered against the appellants under Section 20(b) of the Act. From the pockets of the accused/appellant No.1 seizure of cash of Rs.5900, one route map and cell phone was made vide Ex.P/23. Formal arrest of the accused persons was made vide Ex.P/24 & P/25. Ex.P/21C also reflects that contraband and the seized articles were duly deposited in Malkhana vide Ex.P/26C. Samples were sent to FSL vide Ex.P/27. Acknowledgment of sample seal is Ex.P/29. Ex.P/5C shows that the seized articles were duly deposited in the Malkhana. As per FSL report Ex.P/36, the contraband was confirmed to be ganja. After completion of usual investigation, charge sheet was filed and the trial Judge framed charges under Sections 20(b)(ii)(C) and 468 & 471 of IPC against the appellants.

03. So as to hold the accused persons, the prosecution examined 10 witnesses in all. Statements of the accused were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication.

04. 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 accused/appellants as mentioned in para-1 of this judgment.

05. Learned counsel for the appellants submits as under:

- (i) that there is non-compliance of Sections 42 and 50 of the NDPS Act,
- (ii) that conscious possession of the contraband has not been proved by the prosecution;
- (iii) that the seized contraband was not properly kept in the Malkhana and there is no conclusive evidence to this effect.
- (iv) that weighment of the contraband has not been done properly.
- (v) that the samples were with the police for about four days and therefore, possibility of tampering with the same cannot be ruled out.
- (vi) in 313 CrPC statement of the accused, no question was put to them regarding knowledge of the contraband in their vehicle or in respect of exclusive possession of the contraband.
- (vii) that considering the statements of the seizure witnesses, they do not appear to be reliable witnesses.
- (viii) lastly it has been argued that if this Court finally upholds the conviction of the appellants, then at least considering the fact that they are not habitual offender and belong to very poor family, the jail sentence as well as the fine sentence imposed on them may suitably be reduced.

06. Opposing the submission of counsel for the appellant, it has been vehemently argued by learned counsel for the State as under:

- that there is full compliance of Section 42 of the Act as on the same day after receiving information about illegal possession of

the contraband by the accused/appellants, within 10 minutes the same was forwarded to the superior officer vide Ex.P/7C1 and the messenger returned at 10.55 am and entry was made vide Ex.P/7C2. Further, proviso to Section 42(1) is not applicable in the present case as the entire exercise was being done between sunrise and sunset and the proviso is only applicable in case of proceedings taking place after sunset and before sunrise.

- that applicability of Section 50 in the present case does not arise because present is a case where the contraband has been found in the vehicle possessed by the appellants at the relevant time and therefore, the question of personal search does not arise.

Reliance has been placed on the judgment in the matter of ***Makhan Singh Vs. State of Haryana, (2015) 12 SCC 247*** and ***Mohan Lal Vs. State of Rajasthan, (2015) 6 SCC 222***.

- admittedly, the contraband was seized from the vehicle in question which was being driven by accused/appellant No.1 and accused/appellant No.2 was sitting in it and the quantity of the contraband was 306.480 kg and therefore, it cannot be said that they were not aware of such a huge quantity of contraband kept in the vehicle and further, no evidence has been adduced on behalf of the defence to substantiate this plea that they were not having any knowledge about the contraband so seized.
- so far as weighment of the contraband is concerned, the witnesses including the investigation officer have duly proved the same by oral as well as documentary evidence.

- Conviction of the appellants under Sections 468 & 471 is also in accordance with law as from the evidence it stands established that the appellants were using the vehicle in question for transportation of contraband by illegally changing its number plate.
- as regards the sentence part, the trial Court taking into consideration the huge quantity of contraband, the gravity of the offence and its adverse impact on the society, has rightly sentenced the appellants and as such, no leniency is required to be shown to them.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-1 Pawan Kumar Chandrakar is a formal witness who helped in investigation. PW-2 Ugrasen Patel, Head Constable, who at the relevant time was working as Reader to SDOP, Mahasamund received secret information Ex.P/3 and gave its acknowledgement Ex.P/4. PW-3 Dhanesh Tandekar, Head Constable and Malkhana Muharrir states that the seized articles were duly deposited in the Malkhana in sealed condition and entry was made in the register at page No.77 to 79 vide Ex.P/5C. PW-4 Rajkumar Sahu, Patwari, prepared the spot map Ex.P/7. PW-5 Arjun Patel apprehended the vehicle in question on 16.12.2010 when he was on his duty with Kamlesh Shrivastava. He states that the accused persons made an attempt to flee away but were detained and interrogated. He further states that during search they noticed contraband in the said vehicle and upon admission of the accused persons they took the accused persons to TI and information

was passed on by Kamlesh Shrivastava to the police station.

09. PW-6 GS Chandel, investigating officer, while supporting the prosecution case has stated in detail as to how after receipt of information from Constable Kamlesh Shrivastava, further necessary proceedings were conducted, the witnesses were summoned, search was made, weighment was done, samples were drawn and sealed; seized articles were deposited in Malkhana, entire proceedings were reduced in writing, a report thereof was forwarded to the superior officer, the samples were sent to FSL and report was obtained therefrom etc. and finally, charge sheet was filed against the accused persons. PW-7 Chandrashekhar Singh, Constable, took 26 samples to FSL and received its acknowledgement vide Ex.P/28. PW-8 Onkar Madhuri did weighment of the contraband vide Ex.P/16 & P/17. PW-9 Rajesh Singh & PW-10 Amal Dhari Singh Yadav, panch witnesses have also supported the prosecution case.

10. Close scrutiny of the evidence makes it clear that on 16.12.2010 at 10.20 am after receiving information from Constable Kamlesh Shrivastava that he has apprehended vehicle Bolero bearing No.CG 13C/5625, which was being driven by appellant No.1 and in which appellant No.2 was sitting, ASI GS Chandel (PW 6) reduced the said information into writing in Rojnamchasanha No.838 vide Ex.P/7C and forwarded the same to superior officer vide Ex.P/7C1. The police party reached the spot and after summoning independent witnesses PW-9 Rajesh Singh and PW-10 Amal Dhari Singh, they were made aware of the said information. After giving notice under Section 50 of the Act and obtaining consent of the accused persons for search by the police,

when search of the vehicle in question was made, 13 bags containing contraband like ganja were found, which was got examined by the witnesses by way of smelling, tasting and burning, and on the basis of their experience, they found it to be ganja. On weighment being done, it came to be 306.480 kg vide Ex.P/16. From each of the bags, two samples, each weighing 50 gms, were drawn and as such, total 26 samples were drawn, the samples and the remaining ganja were duly sealed and sample panchanama of the seal was prepared vide Ex.P/17. Thereafter, the contraband, vehicle and its documents etc. were seized vide Ex.P/18 and the entire proceedings were recorded in the Dehati Nalishi vide Ex.P/19 and entry was made in Rojnamchasanha vide Ex.P/201C. The document of Ex.P/21C shows that contraband and the seized articles were duly deposited in Malkhana vide Ex.P/26C. Samples were sent to FSL vide Ex.P/27; acknowledgment of sample seal is Ex.P/29 and document of Ex.P/5C also shows that the seized articles were duly deposited in the Malkhana in sealed condition. As per FSL report Ex.P/36, the contraband was confirmed to be ganja.

11. PW-1 Pawan Kumar Chandarkar, Home Guard, has proved receipt of information regarding transportation of contraband and his evidence remains unchallenged. PW-2 Ugrasen Patel, Reader to SDOP has proved receipt of information in the office of SDOP on 16.12.2010 itself vide Ex.P/3. Further, as per PW-6 GS Chandel, IO, on the same day after receiving information about illegal possession of the contraband by the accused/appellants, within 10 minutes the same was forwarded to the superior officer vide Ex.P/7C1 and the

messenger returned at 10.55 am and entry was made vide Ex.P/7C2. Thus, in view of the above oral and documentary evidence, it is clear that there is full compliance of Section 42 of the Act. Since the entire proceedings were conducted between sunrise and sunset and the proviso to Section 42(1) is only applicable in case of proceedings taking place after sunset and before sunrise, the same is not applicable in the present case.

12. So far as conscious possession of the contraband is concerned, we find substance in the argument of counsel for the State that in view of the admitted position that a huge quantity of contraband weighing about 306.480 kg was seized from the vehicle in question driven by accused/appellant No.1 and in which appellant No. 2 was sitting and particularly, the fact that when they were intercepted, they made an attempt to run away, it can safely be presumed that they were fully aware of the contraband kept in their vehicle.

13. As regards weighment of the contraband, seizure of the articles and deposit of the same in Malkhana, PW-3 Dhanesh Tandekar, Head Constable and Malkhana Muharrir states that the seized articles were duly deposited in the Malkhana in sealed condition and entry was made in the register at page No.77 to 79 vide Ex.P/5C. PW-8 Onkar Madhuri who did weighment of the contraband has proved the same. PW-9 Rajesh Singh & PW-10 Amal Dhari Singh Yadav, panch witnesses and PW-6 GS Chandel, investigating officer, have fully supported the prosecution case on this point and the defence could not elicit anything from them to make their evidence untrustworthy or doubtful. Thus, there is nothing on record to suggest that weighment of the contraband

was faulty or seizure was made in contravention of the provisions of the Act or there was any lapse in keeping the seized article in safe custody or depositing the same in Malkhana which could probablize tampering with the samples.

14. So far as conviction of the appellants under Section 468 & 471 of IPC is concerned, from the oral as well as documentary evidence it is apparent that the appellants with a premeditated mind and with intention to cheat were using the vehicle in question having original registration No. OR-15-N-8084, for illegal transportation of contraband by fraudulently changing its number plate displaying the registration No.CG-13C/5625. As such, their conviction under the aforesaid sections is also strictly in accordance with law.

15. Thus, regard being had to the overall evidence on record, oral and documentary, complicity of the accused/appellants in crime in question stands proved beyond all reasonable doubt. Being so, the findings recorded by the trial Court holding them guilty under Section 20(b)(ii)(C) of the Act and Sections 468 & 471 of IPC cannot be faulted with and the same are hereby affirmed.

16. So far as sentence part under Section 20(b)(ii)(C) of the Act is concerned, admittedly, quantity of contraband i.e. 306.480 kg in the present case is much more than the commercial quantity and being so, substantive jail sentence cannot be less than 10 years and likewise, fine amount can also not be less than Rs.1 lac as per the statutory requirement. Considering the overall facts and circumstances of the case, the manner in which such a huge quantity of the contraband was being carried, the adverse effect of the contraband on the society at

large, we are of the opinion that the substantive jail sentence of 15 years' RI awarded by the trial Court is just and proper and as such, requires no interference. However, keeping in view the principles of law laid down in *Shahejad Khan Mahebub Khan Pathan Vs. State of Gujarat*, (2013) 1 SCC 570 in relation to quantum of sentence, considering the poor financial condition of the appellants and the object of imposition of fine amount, we are of the opinion that ends of justice would be served if the fine amount is reduced from Rs.1.50 lacs to Rs.1 lac and likewise, the default sentence is reduced from 02 years to 06 months' RI.

17. In the result, the appeal is allowed in part. Conviction and sentence of the appellants under Sections 468 & 471 of IPC are hereby maintained. Further, while maintaining their conviction under Section 20(b)(ii)(C) of the Act as also the substantive jail sentence of 15 years' RI, the fine amount of Rs.1.50 lacs each imposed under this section is reduced to Rs.1 lac each and likewise, the default sentence is also reduced from 02 years to 06 months' RI. The appellants are reported to be in jail, therefore, no further order regarding their arrest/surrender etc. is required to be passed.

Sd/

(Pritinker Diwaker)
Judge

Sd/

(Sanjay Agrawal)
Judge