

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 497 of 2002

Judgment reserved on 23.07.2018

Judgment delivered on 22.10.2018

1. Vijendra son of Ghasi Ram, aged about 28 years, R/o Ponarpara, near school, Jagdalpur, District Bastar, CG

---- Appellant

Versus

1. State of Chhattisgarh through Police Station, Kotwali, Jagdalpur, District Bastar CG

---- Respondent

For Appellant	-	Shri R.N. Jha, Advocate
For Respondent	-	Ms. K. Tripti Rao, PL

Hon'ble Smt. Justice Vimla Singh Kapoor

CAV Judgment

This appeal is directed against the judgment of conviction and order of sentence dated 28.03.2002 passed by Special Judge (NDPS) Bastar at Jagdalpur in Special Case No. 53/2001 convicting the accused/appellant under Section 20 (b) (i) of the Narcotic Drugs and Psychotropic Substances Act (for short the "NDPS Act") and sentencing him to undergo rigorous imprisonment for two years with fine of Rs. 3000/-, plus default stipulation.

2. Facts of the case in brief are that on 23.09.2001 at 1:05 AM a secrete information was received by Sub Inspector Narayan Oti (PW-2) to the effect that passing by some old bridge one man was carrying Ganja towards Jagdalpur for sale. Thereafter, PW-2 reduced the said information to writing vide Ex. P-2 and forwarded

the same to CSP Jagdalpur vide Ex. P-4. Subsequently, PW-2 along with staff people, reached the spot, gave notice Ex. P-7 as per the requirement of Section 50 of the NDPS Act to the accused who was already present there, apprised him of his statutory rights of being searched by the Gazetted officer or the Magistrate or by him i.e. PW-2. On consent being given by the accused, PW-2 and his staff gave their own search under Ex. P-8, found 4.5 Kg of contraband (Ganja) in possession of the accused under Ex. P-9 which was kept in a white colour bag and then seized the same under Ex. P-16. After carrying out the weighment proceedings of the contraband two samples of 25 grams each were drawn and sealed vide Ex. P-13, contraband and the samples were sealed. Contraband and the samples were kept in safe custody in the Maalkhana of police station Jagdalpur after entering the same into the register prescribed for that. One sample marked as article "A" was sent for chemical examination to Forensic Science Laboratory, Raipur on 28.09.2001 vide memo Ex. P-23. On chemical examination being done, the sample so sent was confirmed to be that of *Ganja* vide Ex. P-23 – the report of the FSL. After completion of investigation, charge sheet was filed by the police for the said offence followed by framing of charge accordingly.

3. So as to hold the accused/appellant guilty, prosecution has examined 04 witnesses in support of its case. Statement of the accused/appellant was also recorded under Section 313 of the Code of Criminal Procedure in which he denied the charge levelled against him and pleaded his innocence and false implication in the

case. This apart, one witness namely Anti alias Acti (DW-1) has also been examined by the defence in support of its case.

4. After hearing the parties, the trial Court has convicted and sentenced the accused/appellant as mentioned above in paragraph No.1 of this judgment.

5. Counsel for the appellant submits as under:

(i) That the prosecution has utterly failed to establish its case beyond reasonable doubt by adducing any reliable or cogent evidence.

(ii) That the independent witness namely Mohan Singh (PW-4) has not corroborated the testimony of Narayan Oti (PW-2).

(iii) That the Court below has ignored the fact that the prosecution has not complied with the mandatory provisions of Sections 41, 42, 50, 52, 55 and 57 of the NDPS Act.

(iv) Summing up thus, it is argued by the counsel for the accused/appellant that the judgment impugned convicting and sentencing the accused/appellant as described above is liable to be set aside.

6. On the other hand, counsel for the respondent/State supports the judgment impugned and submits that the findings recorded by the Court below convicting the accused/appellant under Section 20 (b) (i) of the NDPS Act are strictly in accordance with law and there is no illegality or infirmity in the same.

7. Heard counsel for the parties and perused the evidence on record.

8. Narayan Otti (PW-2) has testified that he had recorded the secrete information Ex. P-2 in the presence of independent witness Mohan Singh (PW-4) and one Tulse (not examined). It is thus apparent that PW-4 and said Tulse were present with PW-2 right from the time when secrete information was received till the seizure of the contraband from the possession of the accused/appellant and drawing and sealing of the samples. However, PW-4 does not support the case of the prosecution and has chosen to turn hostile. He has rather stated that the police had taken his signatures on Ex. P-2 to Ex. P-17 at the police station. Nothing could be elicited from this witness even in the cross-examination after his being declared hostile. What is important to mention here is that another witness namely Tulse who could have stated something substantial in the matter, has not been examined by the prosecution and even no explanation has been put forth by it for the non-examination of Tulse. It is a settled legal position that when an independent witness though cited by the prosecution and is very much available with it, his non-examination leads to an inference against the prosecution.

9. Secondly, Ex. P-2 – the *Panchnama* of the secrete information received by PW-2 at 0.15 AM at police station Kotwali, Jagdalpur shows the presence of both the witnesses i.e. PW-4 and one Tulse at the police station yet PW-4 Mohan Singh does not support the case of the prosecution and another one namely Tulse has not even been examined by the prosecution, which also leads to an adverse inference against its case. Furthermore, sample *Panchnama* Ex. P-14 shows that the police drew two samples of 25

grams of contraband each by marking as articles "A-1 and A-2" and they were sent to chemical examination under the signature of Superintendent of Police, Jagdalpur (Bastar) and the FSL report (Ex. P-24) shows that the sample contained Ganja. However, it is noteworthy that though two samples marked as "A-1 and A-2" were taken out, why only one sample marked as "A" was sent for chemical examination and report was obtained accordingly. Since this lacuna too remains un-explained by the prosecution, benefit of the same has to go to the accused.

10. Further, the memo of Superintendent of Police dated 28.09.2001 (Ex. P-23) shows that the sealed contraband marked as article "A" was sent through constable Balwant Singh of police station Jagdalpur but the FSL report Ex. P-24 shows that the sample was received at FSL Raipur on 03.10.2001. The seizure memo Ex. P-16 and *Malkhana* register Ex. P-1/C do not disclose any identification mark on the sample. The memo of Superintendent of Police (Ex.P-23) shows that the sample packets were sent through constable for chemical examination on 28.09.2001 but the *Malkhana* register Ex. P-1/C does not mention any such entry about samples being drawn on 28.09.2001 and sent for chemical examination to the Forensic Science Laboratory through the said constable. That constable has not even been examined by the prosecution who could have stated as to in what condition the sample was kept during these five days from 28.09.2001 to 03.10.2001. This lacuna on the part of the prosecution also stands in favour of the accused and does not rule out the possibility of the samples being tampered with while being sent to the Forensic

Science Laboratory for chemical examination. Even PW-1 namely R.K. Sinha has admitted that there is no mention in the Malkhana register regarding the samples being sent to Forensic Science Laboratory for chemical examination.

11. Thus the overall factual discussion made above goes to show the utter failure of the prosecution in proving its case beyond all reasonable doubt on the basis of which the complicity of the accused in the crime in question could be established in accordance with law. No need to say that its benefit has to go to the accused only. Being all this, the finding recorded by the Court below holding the accused/appellant guilty of the offence under section 20 (b) (I) of the NDPS Act are not based on proper appreciation of the evidence of the witnesses and accordingly the same is liable to be set aside.

12. Appeal is thus allowed, judgment impugned is set aside and the accused/appellant is acquitted of the charge levelled against him. Since he is already on bail, no order setting him free etc is required to be passed. Bail bonds so furnished stand discharged. Fine amount, if deposited, is directed to be refunded to the accused.

Sd/-

(Vimla Singh Kapoor)

Judge