

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.293 of 2004

Judgment Reserved on : 8.8.2018

Judgment Delivered on : 31.10.2018

- 1. Paras Kumar Razak, S/o Chottkuram Razak, aged about 22 years, Caste Dhobi, R/o Village Ganaya, Tahsil Marwahi, P.S. Marwahi, District Bilaspur, Chhattisgarh
- 2. Umakant Singh, S/o Jaysingh, aged about 26 years, R/o Village Pador, P.S. Bhalumada, District Anuppur

---- Appellants

versus

State of Chhattisgarh

--- Respondent

For Appellants	:	Shri H.S. Ahluwalia, Advocate
For Respondent/State	:	Shri Arvind Shukla, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

- 1. This appeal is directed against the judgment dated 16.3.2004 passed by the Special Judge under the Narcotic Drugs and Psychotropic Substances Act, 1985 (henceforth 'the Act of 1985'), Bastar at Jagdalpur in Special Case No.57 of 2003 convicting and sentencing each of the Appellants as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 20(b)(ii)(B) of the Act of 1985	Rigorous Imprisonment for 3 years and fine of Rs.8,000/- with default stipulation

- 2. Facts of the case, in brief, are that on 22.11.2003, Assistant Sub-

Inspector Vikaschandra Rai (PW5) was posted at Police Station Farasgaon. He received information from an informant that 2 persons, carrying contraband article Ganja, were going towards Raipur on an LML vehicle. This information was recorded in Rojnamcha Sanha (Ex.P23). A panchnama (Ex.P3) was also prepared in this regard. He forwarded this intimation to his senior officer S.D.O. (P), Kondagaon and proceeded towards the spot along with staff (police party) and panch witnesses. On National Highway No.43, in front of police station, both the Appellants were stopped. The vehicle was being driven by Appellant No.1, Paras and Appellant No.2, Umakant was sitting behind Paras on the vehicle. Notices under Section 50 of the Act of 1985 (Ex.P5 and Ex.P6) were given to the Appellants. Vide Ex.P28 and P29, both the Appellants consented for their search by Assistant Sub-Inspector Vikaschandra Rai (PW5) himself. Appellant Paras was having a *jhola* (bag) and Appellant Umakant was having an airbag. On being searched, Ganja like substance was found in both the bags. Search panchnama was prepared vide Ex.P8 and P9. Identification of the substance was done. Thereafter, on weighing the substance of one bag, the substance was found to be 4 kgs. and on weighing the substance of the other bag, it was also found to be 4 kgs. 2-2 packets each of 50 grams of Ganja were prepared as sample packets from each of the two bags recovered from the Appellants. From Appellant Paras, 4 kgs. Ganja, an LML motorcycle and cash of Rs.200/- and from Appellant Umakant, 4 kgs. Ganja and cash of Rs.300/- were seized. Specimen seal panchnama was also prepared vide Ex.P16 and P17. Both the Appellants were arrested on the spot vide arrest memo Ex.P18 and P19. Thereafter, Assistant Sub-Inspector Vikaschandra Rai (PW5)

brought the seized sample packets, Ganja, motorcycle and the Appellants to the police station. A crime was registered against the Appellants vide First Information Report (Ex.P31). The seized articles along with the sample packets were deposited in the Malkhana. A complete information about the proceedings done was forwarded to the S.D.O. (P), Kondagaon vide Ex.P34. 2 sample packets were sent to the Forensic Science Laboratory, Raipur vide Ex.P35 for chemical examination. Acknowledgment of the FSL is Ex.P36. FSL report is Ex.P37. The report is positive. On completion of the investigation, a charge-sheet was filed against the Appellants for offence punishable under Section 20(b) of the Act of 1985. Charge was framed against them under Section 20(b)(ii)(B) of the Act of 1985.

3. To rope in the Appellants, the prosecution examined as many as 5 witnesses. Statement of the Appellants were also recorded under Section 313 of the Code of Criminal Procedure in which they denied the guilt, pleaded innocence and false implication. No witness has been examined in their defence.
4. After Trial, the Trial Court convicted and sentenced the Appellants as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellants submitted that the panch witness and the witness of weight have not supported the case of the prosecution and they have been declared hostile. He further submitted that the case of the prosecution is based on the

statement of Investigating Officer Assistant Sub-Inspector Vikaschandra Rai (PW5) only. He further submitted that as per the prosecution case, the First Information Report (Ex.P31) was recorded on 22.11.2003 at 17:20 hours. But, the crime number is mentioned in search panchnama (Ex.P8 and P9), weight panchnama (Ex.P10 and P11), identification panchnama (Ex.P12 and P13), seizure memo (Ex.P14 and P15), specimen panchnama (Ex.P16 and P17) and in arrest memo (Ex.P18 and P19). As per the prosecution itself, all these documents were prepared at the spot before registration of the crime, i.e., FIR (Ex.P31), but from perusal of all these documents it is clear that these documents were prepared at a time after registration of the FIR (Ex.P31) in the police station. Therefore, the entire prosecution story is doubtful. It was further submitted that allegedly, the contraband article was seized on 22.11.2003 and according to Section 57 of the Act of 1985, information was forwarded to the S.D.O. (P), Kondagaon on 12.12.2003 vide Ex.P34. Thus, it is clear that within 48 hours of the seizure of the contraband article, intimation thereof was not forwarded to the S.D.O. (P) and thus, compliance of the provision of Section 57 of the Act of 1985 has not been done in this case. It was further submitted that as per the statement of Malkhana Moharrir Head Constable Jaidev Bhoi (PW1), 2 sample packets were sent for chemical examination through Constable Shiv Kumar, but Constable Shiv Kumar has not been examined by the prosecution. As per entries of the Malkhana Register (Ex.P2), the sample packets were given to Constable Shiv Kumar on 27.11.2003, but according to the memo (Ex.P35), the sample packets were sent to the FSL on 25.11.2003 and as per the acknowledgement (Ex.P36) of the FSL, the sample packets were

received in the FSL along with the memo dated 25.11.2003. Since the sample packets were handed over to Constable Shiv Kumar on 27.11.2003, it is not possible that the said sample packets had already been sent to the FSL on 25.11.2003. Either the entries of the Malkhana Register (Ex.P2) are incorrect or the covering memo (Ex.P35) and acknowledgement (Ex.P36) which contain entries of 25.11.2003 are incorrect. In these circumstances, the statement of Constable Shiv Kumar is essential in this case. Thus, the entire case of the prosecution is doubtful and, therefore, no offence is proved against the Appellants beyond reasonable doubt. Hence, they are entitled to get acquittal.

6. On the contrary, Learned Counsel appearing for the State opposed the contentions raised on behalf of the Appellants and supported the impugned judgment of conviction and sentence.
7. I have heard Learned Counsel appearing for the parties and perused the record with utmost circumspection.
8. Since seizure witnesses Sulendra Singh (PW2), Sonau (PW3) and weight witness Pawan (PW4) have not supported the case of the prosecution in any manner and have been declared hostile, the case of the prosecution is based only on the statements of Investigating Officer Assistant Sub-Inspector Vikaschandra Rai (PW5) and Malkhana Moharrir Head Constable Jaidev Bhoi (PW1).
9. Investigating Officer Vikaschandra Rai (PW5) has deposed that on 22.11.2003, he received information from an informant that 2

persons, carrying contraband article Ganja, were going towards Raipur on a motorcycle. He recorded this information in Rojnamcha Sanha (Ex.P23) and also prepared a panchnama thereof (Ex.P3) in this regard. He forwarded this information to higher officer vide Constable Dhaneliya and prepared a panchnama (Ex.P4). Thereafter, he went to the spot along with staff (police party) and witnesses. He has further deposed that when he reached at the police station which was situated at National Highway No.43, both the Appellants were going on a motorcycle. Appellant Paras was driving the motorcycle. He was having a *jholi* (bag) and Appellant Umakant was having a black bag with him. He informed the Appellants about the information he had received from the informant and vide Ex.P5 and P6, he gave them a notice under Section 50 of the Act of 1985 for their personal search. Vide Ex.P28 and P29, both the Appellants consented to be searched by him. Therefore, he and his staff gave their search to the Appellants vide Ex.P7. Thereafter, bag of Appellant Paras was searched vide Ex.P8 and bag of Appellant Umakant was searched vide Ex.P9. Ganja like substance was found from both the bags. After identification of the substance found from the bags, identification memo (Ex.P12 and P13) was prepared. The Ganja recovered from the Appellants was weighed vide Ex.P10 and P11 in which it was found that each of the two bags had contained 4 kgs. of Ganja, i.e., total 8 kgs. Thereafter, 2-2 sample packets each containing 50 grams of the seized Ganja were prepared and sealed. Specimen seal panchnama (Ex.P16 and P17) were prepared. Both the Appellants were arrested vide arrest memo Ex.P18 and P19. This witness has further deposed that he returned to the police station along with the seized articles and the

Appellants. After the return, Crime No.154 of 2003 was registered in the police station vide Ex.P31 and the seized articles were handed over to Malkhana Moharrir Jaidev Bhoi (PW1) and an acknowledgement (Ex.P1) was obtained from him. Thereafter, he informed to the S.D.O. (P) vide Ex.P34 in compliance of the provision contained in Section 57 of the Act of 1985. He has further deposed that the seized packets were sent to the FSL vide memo dated 25.11.2003 (Ex.P35) for chemical examination. Acknowledgement of the FSL is Ex.P36. FSL report is Ex.P37. The report is positive. In his cross-examination, he has stated that he reached the spot at 5:35 p.m. He has admitted the fact that in the spot-map (Ex.P39) at column No.8, he mentioned the time about his arrival on the spot as 17:00 hours. He explained about this that the time of 17:00 hours mentioned in the spot-map is of preparation of the said spot-map. He has admitted the fact that in the spot-map (Ex.P39) there is over-writing on the date mentioned therein because it appeared to him that there was a mistake in writing the month in Ex.P39. He has also admitted the fact that in Ex.P38 also, some over-writing is present. He has also admitted the fact that in all the documents, he has not mentioned the exact place of the incident. He has also admitted the fact that in compliance of the provision contained in Section 57 of the Act of 1985, he informed about the incident to his higher officer after about 22 days from the date of incident. He has admitted the fact that on 27.11.2003, the sample packets were sent to the FSL for chemical examination through Constable Shiv Kumar.

10. Malkhana Moharrir Jaidev Bhoi (PW1) has deposed that on 22.11.2003, he deposited the seized Ganja, sample packets and

other seized articles in the Malkhana and gave acknowledgement thereof vide Ex.P1 and made relevant entries in the Malkhana Register (Ex.P2) at Sl.No.136. He has further deposed that 2 sample packets were sent to the FSL for chemical examination through Constable Shiv Kumar.

11. A minute examination of the above statements of Investigating Officer Vikaschandra Rai (PW5) and Malkhana Moharrir Jaidev Bhoi (PW1) and the exhibited and other documents annexed with the charge-sheet makes it clear that the FIR (Ex.P31) was registered on 22.11.2003 at 17:20 hours. In the FIR (Ex.P31), the place of incident is mentioned as In front of Police Station Farasgaon situated 100 metres in the east on National Highway No.43. Apart from the FIR (Ex.P31), in none of the documents available on record, the actual place of incident is mentioned. In the seizure memo (Ex.P14), place of incident is mentioned as Village Farasgaon. In Ex.P15, only Village Farasgaon, N.H. 43, Main Road is mentioned. In no other document, place of incident is mentioned. Search panchnama (Ex.P7) contains time as 15:45 hours, search panchnama (Ex.P8) contains time as 15:50 hours, search panchnama (Ex.P9) contains time as 15:55 hours, weight panchnama (Ex.P10) contains time as 16:05 hours, weight panchnama (Ex.P11) contains time as 16:15 hours, identification panchnama (Ex.P12) contains time as 16:25 hours, identification panchnama (Ex.P13) contains time as 16:20 hours, seizure memo (Ex.P14) contains time as 16:30 hours, seizure memo (Ex.P15) contains time as 16:35 hours, specimen panchnama (Ex.P16) contains time as 16:45 hours, specimen panchnama (Ex.P17) contains time as 16:40 hours, arrest memo (Ex.P18) contains time

as 16:55 hours and arrest memo (Ex.P19) contains time as 16:50 hours. As per the prosecution story, all these documents were prepared at the place of incident. But, all these documents contain Crime No.154 of 2003. While the FIR (Ex.P31) was registered at 17:20 hours. Thus, it is clear that mentioning of time in the FIR (Ex.P31) is not correct or all the aforesaid documents were prepared at a time after registration of the crime (FIR). While discussing this issue, the Trial Court was of the view that the column of crime number was left blank in all the aforesaid documents and the said column was filled up after registration of the FIR. But, on what ground the Trial Court arrived at this conclusion has not been stated by it. Investigating Officer Vikaschandra Rai (PW5) has also not given any explanation on this issue. Therefore, this finding of the Trial Court is based only on presumptions. Apart from this, the entries of Malkhana Register (Ex.P2) show that sample packets were handed over to Constable Shiv Kumar on 27.11.2003. But, as per memo (Ex.P35), these articles were sent to the FSL on 25.11.2003. As per the acknowledgement of Ex.P36 issued by the FSL, the FSL had received 2 sample packets marked as Article A1 and Article B1 on 28.11.2003 along with memo dated 25.11.2003 (Ex.P35). Memo dated 25.11.2003 contains entry of sending Article A1 and Article B1, but the entries of Malkhana Register are of 27.11.2003 in which only handing over of 2 sample packets to Constable Shiv Kumar is mentioned. But, the Malkhana Register does not contain entry of sample packets marked as Article A1 and Article B1, which were handed over to Constable Shiv Kumar on 27.11.2003. In these circumstances, statement of Constable Shiv Kumar is essential in this case because he was the only person who could state that

which sample packets were received by him and in what condition he had received the sample packets.

- 12.** With regard to compliance of the provision of Section 57 of the Act of 1985, from the evidence on record, it is clear that the alleged incident took place on 22.11.2003, but the intimation thereof (Ex.P34) was not sent to the superior officer, i.e., the S.D.O. (P) within 48 hours of the incident, but it was sent to him on 12.12.2003. Though it is settled law that conviction should be made only on the basis of the statement of the Investigating Officer if his statement is otherwise reliable, in the case in hand, looking to the above evidence, in my considered opinion, the statement of Investigating Officer Vikaschandra Rai (PW5) is doubtful. It seems that the whole proceedings were completed and all the documents were prepared at a time sitting in the police station after registration of the FIR (Ex.P31). Apart from this, which sample packets were sent to the FSL is also doubtful. Statement of Constable Shiv Kumar, who had taken sample packets to the FSL for chemical examination, is essential in the case, but he has not been examined by the prosecution. The provision of Section 57 of the Act of 1985 has also not been complied with in this case. In these circumstances, the offence alleged against the Appellants under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 is not proved beyond reasonable doubt.
- 13.** Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellants are acquitted of the charge framed against them.

- 14.** It is reported that the Appellants are on bail. Their bail bonds shall continue for a further period of six months from today in terms of the provisions contained in Section 437A of the Code of Criminal Procedure.
- 15.** Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-
(Arvind Singh Chandel)
JUDGE