

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 626 of 2013

1. Rajkumar, S/o. Shri Gulab Singh Yadav, Aged About 20 Years, R/o. Village Dihiya, P.S.Manda, Police & Revenue District Allahabad, Uttar Pradesh
2. Rajkumar, S/o. Shri Ramprasad @ Ramdas, Aged About 19 Years, R/o. Village Lalganj, P.S. Lalganj, Police & Revenue District Mirzapur, Uttar Pradesh.

---- Appellants

Versus

State Of Chhattisgarh, Through P.S. Bagbahar, Police & Revenue District Jashpur, Chhattisgarh

---- Respondent

&

Criminal Appeal No. 55 of 2016

Vijay Kumar Pal, S/o. Harishanker Pal, Aged About 20 Years, S/o. Village Dhedhra, Police Station Manda, District Allahabad, Uttar Pradesh.

---- Appellant

Versus

State Of Chhattisgarh, Through Station House Officer, Police Station Bagbahar, District Jashpur, Chhattisgarh.

---- Respondent

For Appellants	:	Mr. R.K.Bhagat & Mr. Ajeet Kumar Yadav, Advocates
For State	:	Ms. Astha Shukla, Panel Lawyer

Hon'ble Shri Justice Goutam Bhaduri

C.A.V. JUDGMENT

(Reserved On : 16.05.2018)

(Delivered On : 18.05.2018)

1. Both the appeals are being heard together and decided by this common order as they are arising out of the same judgment of conviction and sentence dated 06.05.2013 passed by the learned Special Judge (N.D.P.S. Act), District Jashpur, in Special Case No.04/2012 whereby the appellants have been convicted under Section 20(b)(ii)(C) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "*the NDPS Act*")

and have been sentenced to undergo R.I. for 10 years with fine of Rs.1,00,000/- each and in absence of payment of fine amount, further R.I. for 2 years have been imposed.

2. As per the prosecution case, on 12.09.2012 the S.H.O. of Bagbahar along-with other staffs were checking the vehicles, at that time, on 8:15 O'clock one Eicher Truck bearing No.U.P. 70 S 9706 was intercepted, which was driven by Rajkumar Yadav (A-1). He was served with a notice in presence of the witness Devendra Kumar Mishra & Arjun Bhatt and were also served with a notice under Section 50 of the N.D.P.S. Act. The police officers and staffs were also subjected to search and thereafter Eicher vehicle was searched and the inspection panchnama was prepared by Ex.P-18. On inspection of the vehicle, 65 Kg of Cannabis were found, which were on initial inspection were found to be Cannabis. Thereafter, the notice was served for weighment of the goods and after weighment, weighment panchnama Ex.P-22 was prepared. On initial inspection by rubbing, by burning and by smelling, it was found to be Cannabis, thereafter, out of the total Cannabis so recovered, 300 grams samples were taken and were placed in the three packets and sealed and the seizure was made by Ex.P-26. The statement of the witnesses were recorded and FIR was registered by Ex.P-41 and the copy of the report was sent to the Special Court Jashpur. After the Cannabis were sent to be kept in the Malkhana and was handed over to the Incharge of Malkhana, an acknowledgment was received by Ex.P-13. The arrest thereafter were made and the intimation of arrest was sent to the family members of the appellants. After seizure of the Cannabis, notice was sent to the S.D.O.P. Patthalgaon by Ex.P-31. The Cannabis so seized were sent for FSL to Forensic Laboratory at Raipur and the report was received by Ex.P-12 wherein it was found to be Cannabis. During investigation, the police also seized an agreement Ex.P-1 which purports that the owner of the

offending vehicle was Smt. Priya and it was given on rent to Vijay Kumar Pal for Rs.20,000/- per month and after investigation, the charge sheet was filed before the Court.

3. During the course of trial, the appellants/accused abjured their guilt and claimed to be tried. The prosecution on their behalf had examined as many as 12 witnesses. The prosecution primarily relied on the statement of I.O. K.P. Chouhan (PW-12) and Rajesh Kumar Pal one of the Inspector (PW-11). The independent witness i.e. Arjun Bhatt (PW-5) and Devendra Kumar Mishra (PW-6) have not supported the case of the prosecution, however, they admitted their signatures on the documents. The learned trial Court after evaluating the facts and entire evidence on record convicted the accused/ appellants as aforesaid, hence this appeal.
4. Learned counsel for the appellants would submit that the prosecution was not able to prove that the appellants were in conscious possession of the Cannabis. He further submits that there has been non-compliance of Section 50 of the N.D.P.S.Act and he relies on **(2002) 7 SCC 419** in between ***Avtar Singh & Others v. State of Punjab*** and submits in the course of examination under Section 313 of Cr.P.C. not even a question was asked that how the appellants were in possession of the contraband.
5. Per contra, learned State counsel opposes the argument advanced by the learned counsel for the appellants and would submit that the judgment passed by the learned trial Court is well merited, which do not require any interference.
6. Perused the entire record of the Court below, statement of the witnesses and the documents, which are exhibited.
7. The record would show that the independent witnesses were Arjun Bhatt (PW-5) and Devendra Kumar Mishra (PW-6). Both the witnesses have deposed that they do not know anything about the incident as only their

signatures were obtained in various documents i.e. Ex.P-13 & P-14 Nazri-naksha of the place & Panchnama, Ex.P-16 Notice given under Section 50 of N.D.P.S.Act, Ex.P-17 Panchnama-talasi of the police team. Ex.P-18 Talasi-panchnama of the offending vehicle, Ex.P-19 Seizure panchanama of the goods i.e. Cannabis, Ex.P-20 Identification panchnama, Ex.P-21 Panchnama of physical verification of the weighment scale, Ex.P-22 Taul-panchnama, Ex.P-23 Primary inspection panchnama of the Cannabis, Ex.P-24 Sample panchnama and Ex.P-25 Weighment panchnama, Ex.P-26 Property seizure memo and Ex.P-27, P-28 & P-29 Arrest memo. All these documents though contains their signature but the statement would reveal that they have not supported the case of prosecution. They were declared hostile. The witnesses have deposed that the police officer had obtained certain signatures on the papers; thereby the signatures in the documents were admitted. The I.O. PW-12 has on the other hand completely supported the case of the prosecution.

8. It is a settled proposition in absence of support of any independent witness in case of NDPS, the prosecution can rely on the statement of I.O. and other police officer provided their statement as trustworthy. The proposition that the statement of police officer can be relied on by the prosecution has been held by the Supreme Court in case of **Sumit Tomar v. State of Punjab**¹, which has been laid down as under :

“....., we hold that though it is desirable to examine an independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statements cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the NDPS Act, Accordingly, we reject both the contentions.”

¹(2013) 1 SCC 395

Therefore, in this case, though the independent witnesses have not supported the case of prosecution, the statement of the Investigating Officer cannot be sidelined or shelved. The principle set out in the aforesaid case squarely covers and takes cares of the situation like this, as is existing in the case.

9. Now reverting to the statement of K.P. Chouhan (PW-12), he has deposed that on 12.09.2012 while he was posted as Sub Inspector in the Police Station Bagbahar, he alongwith the Head Constable Dilip Kumar Minj and another staff Jivnath Minj, Sharad Chandra Behra, Rajesh Pal, Ravi Kumar & Fateshwar Paikra had gone for checking of the vehicle at Pandripani Farsabahar Road in front of Reliance Tower, which was recorded in the Rojnamchasanha Ex.P-34. Copy of the Rojnamchasanha Ex.P-34(c) is on record. The same is also proved by Dilip Kumar Minj (PW-9) who has proved such Rojnamchasanha by comparing it with the original. Thereafter, PW-12 had stated that one vehicle which was coming from Orissa was Eicher bearing No.U.P. 70 S 9706 was stopped and checked. When primary enquiry was made from the inmates of the vehicle they could not get the satisfactory answer. Thereafter, two independent witnesses Arjun Bhatt (PW-5) and Devendra Kumar Mishra (PW-6) were called and in their presence the vehicle was checked. Checking in between the Chassis and back body of the Truck one Chamber was found and in such Chamber 65 packets were found. The packets on weighment was found to be 65 Kg. These proceedings were recorded in the Rojnamchasanha Ex.P-35. This Rojnamchasanha is further proved by PW-9 i.e. Moharrir of the concerned Thana by comparing it with the original.
10. The statement of the witnesses would further show the witness deposed that on primary inspection all the bags were found to be Cannabis (Ganja). Initially, the notice was given under Section 50 of the N.D.P.S. Act

to check the vehicle, when Rajkumar Yadav one of the inmate of vehicle agreed for checking, an endorsement was made. Perusal of Ex.P-16 would show that notice was given for checking of the vehicle bearing No. U.P. 70 S 9706 and Rajkumar Yadav agreed for checking of the vehicle by the police officer. Thereafter, the police officer also got themselves checked and nothing was found. The same document i.e. panchnama is marked as Ex.P-17, which bears the signature of Rajkumar Yadav from C to C.

11. Talashipanchnama of the vehicle was marked as Ex.P-18 wherein the witness PW-11 signed from C to C. Perusal of such Talashi-panchnama of the vehicle would show that when the vehicle was checked in between Chassis and Dala i.e. Floor of the vehicle a secret Chamber was found. On inspection in Chamber 65 packets were recovered for which photographs were also taken. One photograph in a case file is attached about such Chamber of the vehicle however that has not been exhibited. The another document Ex.P-19 would show the goods when were recovered, panchnama of the goods were prepared styled as Malbaramadagi panchnama, which purports that in between the Chassis and Floor of the vehicle, 65 packets Cannabis were found. Thereafter the material of the packets were inspected by smelling, by taste and by burning and it was prima facie found to be Cannabis. The same was recorded in the identification panchnama (pahchan panchnama) Ex.P-20. Thereafter, the weightment scale was called for and the weightment scale was also verified in front of the witnesses which was found to be correct and the panchnama to this effect was also prepared by Ex.P-21. Thereafter, the entire weightment was made and the entire goods so found which was found to be of 65 Kg was also recorded in the Taul-panchnama by Ex.P-22. Perusal of Ex.P-22 also purports the same fact wherein the signature of PW-12 from D to D is marked.

12. The witness further has deposed that the entire 65 Kg of Cannabis were taken out from the packets and from the market three meters of plastic was called and entire goods were mixed and out of that 100 gram three samples were prepared and were sealed in different packets. The mixture panchnama is marked as Ex.P-23. Perusal of Ex.P-23 which also contains the signature of PW-12 from C to C would show that it is styled as Samishran panchnama and shows that entire packets were mixed and 100 grams three samples were taken out and were sealed in the packets. After taking out the sample, sample panchnama was prepared by Ex.P-24 which bears the signature of I.O. from C to C. Thereafter, again entire weighment was made and in three packets 900 grams Cannabis were sealed and subsequent thereto the Cannabis were again placed back in 65 packets. It is stated that in three packets 900 grams Cannabis were kept and remaining 62 packets 1 Kg of Cannabis were kept and sealed. The panchnama of the weighment again was recorded in Ex.P-25 which bears the signature of I.O. from D to D, which shows that 65 packets again were prepared and sealed and in 3 packets 900 grams were kept while the rest 1 Kg were seized and sealed.
13. Sharad Chandra Behra (PW-10) one of the Sub Inspector has deposed the fact that after the Cannabis were found, it was mixed and after that again it was repacked in 65 packets and 62 packets were prepared of 1 Kg and rest 3 Kg were prepared of 900 grams. Harkes Agrawal (PW-8) who is a Shopkeeper had stated that he was called by the Bagbahar Police with his weighment scale near barrier. The weighment machine was verified which was recorded in Ex.P-21 and has proved the signature from C to C. Thereafter, 65 packets were weighed and the weighment panchnama was prepared by Ex.P-22. This independent witness has further stated that in his presence all the Cannabis were mixed together which was found to be 65 Kg and it was recorded in Taul-panchnama

Ex.P-25, which bears his signature from C to C. Further PW-8 has deposed that out of the Cannabis so kept 100 grams were taken out in three packets which were kept separate. In the cross examination of this witness, nothing has come out to rebut the evidence of the prosecution instead the statement would show he has weight the Cannabis so found were of 65 Kg.

14. The statement of PW-12 K.P.Chouhan would further show that seizure of the vehicle bearing No.U.P. 70 S 7606, 65 packets of Cannabis alongwith the sample, document of Eicher vehicle, driving licence of Rajkumar Yadav was made by seizure memo Ex.P-26 which bears his signature from C to C. and signature of accused Rajkumar Yadav from D to D. Perusal of Ex.P-26 corroborates the oral testimony which shows that the 65 packets of Cannabis along-with the samples were seized. The licence of Rajkumar Yadav was seized and the registration documents of the vehicle which was in name of Smt. Priya, W/o. Chandrakant resident of Allahabad along-with permit and fitness certificate and one temporary permit, driving licence of Rajkumar Yadav were seized. Ex.P-26 bears the signature of all the accused i.e. Rajkumar Yadav, Vijay Kumar Pal and Rajkumar from D to D. In the statement of the accused under Section 313 of Cr.P.C. no plausible explanation has been given for that how such signature appeared in those document.
15. The statement of PW-12 would further show that Nazri-naksha was prepared by I.O. as per Ex.P-30. Perusal of Ex.P-30 would show that the place of incident was in the National Highway near Reliance Tower. This also bears the signature of PW-12 from B to B. It is further stated that the entire intimation was given to S.D.O.P. Patthalgaon by the witness by Ex.P-31 and Ex.P-31 would show that the intimation was sent to the higher officials in compliance of Section 57 of N.D.P.S. Act in respect of seizure and arrest of the accused which was made by Ex.P-27 of

Rajkumar Yadav, Ex.P-28 of Vijay Kumar Pal and Ex.P-29 of Rajkumar, which also bears the signature of the receiving authority to whom it was addressed.

16. PW-7, Jagannath Ram, who is posted at S.D.O.P. Office Patthalgaon has corroborated the fact that on 13.09.2012 through one Constable Vinod Turkey, the office has received the information that the vehicle Eicher Truck bearing No.U.P. 70 S 9706 was found with the Cannabis and the appellants accused Rajkumar Yadav, Vijay Kumar Pal & Rajkumar have been arrested. After such information was received, the entry was made in the Register of the S.D.O.P. by Ex.P-32 and the copy of the same is proved as Ex.P-32(C), therefore, it would show that there has been sufficient compliance was made in respect of Section 57 of the N.D.P.S. Act. The statement of PW-12 would show that while the checking was made in the main road, during the course of such checking, the offending vehicle was stopped and the inmates of the vehicle could not given the plausible explanation, as such, the vehicle was checked and during such check the Cannabis were found. The Supreme Court in case of ***Hamidbhai Azambhai Malik v. State of Gujarat*** reported in ***AIR 2009 SC 1378*** has laid down the proposition that when the information or intimation or knowledge comes to the notice of the Investigating Officer in course of the regular patrolling or an investigation of some other offence, it is not necessary to follow in all cases the conditions incorporated in Section 42. Obviously in this case while the checking was made of the vehicle in the Highway, the Cannabis were found and it is not expected that the Investigating Officer would have a prior knowledge of the fact that certain vehicle was carrying the Cannabis.
17. In this case, the Cannabis were recovered from the vehicle, therefore, as has been laid down in case of ***State of H.P. v. Pawan Kumar*** reported in ***(2005) 4 SCC 350*** the person has been defined which reads as under :

“7. The word “person” has not been defined in the Act. Section 2(xxix) of the Act says that the words and expressions used herein and not defined but defined in the Code of Criminal Procedure have the meanings respectively assigned to them in that Code. The Code of Criminal Procedure, however, does not define the word “person”. Section 2(y) of the Code says that the words and expressions used therein and not defined but defined in the Indian Penal Code have the meanings respectively assigned to them in that Code. Section 11 of the Indian Penal Code says that the word “person” includes any company or association or body of persons whether incorporated or not. Similar definition of the word “person” has been given in Section 3(42) of the General Clauses Act. Therefore, these definitions render no assistance for resolving the controversy in hand.

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a cartoon etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of the Act.”

Following the principles of the aforesaid law laid down in the instant case, the compliance of Section 50 of N.D.P.S. Act would not be within the ambit of the word “search of a person” as in the process of search of human body, no actual seizure was made.

18. The statement of PW-12 would further show that 62 packets of 1 Kg each and 3 packets of 900 grams seized alongwith 100 grams samples, which were in the sealed condition given to one Dilip Kumar Minj to deposit the same in the Malkhana. PW-9, Dilip Kumar Minj, had stated that he is working as Moharrir of the Thana Bagbahar. In his deposition he has stated that after seizure of the goods, it was received to be deposited in the Malkhana which was recorded in Rojnamchasanha Ex.P-36. The copy of the Rojnamchasanha was proved by original and the copy is marked as Ex.P-36(C). Perusal of Ex.P-36(C) would show that 62 packets of 1 Kg each and 3 packets of 900 grams each and 3 packets of sealed 100 grams each were received through one Dilip Kumar Minj. The copy of the Malkhana register is proved as Ex.P-40(C). Perusal of Ex.P-40(C) which is proved by the original would reveal that at serial No.40, it shows that 65 Kg of Cannabis out of which 3 packets of 100 grams and rest of 900 grams packets were deposited in the Malkhana along with the vehicle. Ex.P-40(C) is preceded with Ex.P-39, which shows that the entire goods after seizure were deposited in the Malkhana on 12.09.2012. PW-12 has further deposed that two of the samples were sent for FSL Raipur through one Constable Tarsius. Tarsius Minj is examined as PW-3, he has deposed that on 13.09.2012 he carried two sealed packets to FSL Raipur along-with the letter of the Superintendent of Police Jashpur. The letter of the Superintendent of Police is proved as Ex.P-10. Perusal of Ex.P-10 would show that it is a letter addressed to the FSL Raipur that two sealed packets as A & B were sent through one Tarsius Minj by Bagbahar Police Station. Ex.P-11 is receipt of samples packets at FSL Raipur on 17.09.2012. In the cross-examination of PW-3, it is stated that he carried only the sealed packets and on 14.09.2012 he started from Jashpur to Raipur and because of the holiday, the deposit in FSL Office Raipur was

made on 17.09.2012. Ex.P-12 is a report of the FSL, which shows that two sealed packets, which were deposited were found to be Cannabis.

19. The record would show that at the time when the vehicle was intercepted all the three appellants were in the vehicle. The statement of PW-12 would show that the vehicle was registered in name of one Smt. Priya, W/o. Chandrakant. Smt. Priya is examined as PW-1, she has stated that she knows Vijay Kumar Pal and stated that the vehicle is in her name bearing No.U.P. 70 S 9706 was given on rent to Vijay Kumar Pal for Rs.20,000/- per month for which an agreement was entered on 12.07.2010, which is proved as Ex.P-1. The seizure of such agreement is made by Ex.P-9, which shows that the offending vehicle by which the Cannabis were taken, Vijay Kumar Pal was in hold and in physical control of the vehicle. The document Ex.P-2 is a temporary permit of Chhattisgarh, which is proved by the witness PW-1, the owner of the vehicle. The registration was proved by Ex.P-3, goods permit is proved by Ex.P-4 and certificate of fitness is proved by Ex.P-5. Three receipts is also placed which was issued by the R.T.O. Checkpost of Dhawar, District Balrampur, which shows that the receipt of the vehicle was issued to Rajkumar which are marked as Ex.P-6, Ex.P-7 & Ex.P-8. Thereby, it shows that the vehicle was in name of one Smt. Priya which was given on rent to one Vijay Kumar Pal and the receipts of the R.T.O. Barrier shows that the other accused were in control of the vehicle and were inmates. There is no explanation in the statement of the witness that how they were in vehicle at the relevant time. It has also not been brought forward by any acceptable evidence that they were completely innocent of the fact that the vehicle was carrying the Cannabis.
20. The facts as would suggest that while the appellants were traveling in the vehicle, the goods were found in the vehicle. As has been laid down in case of ***Madan Lal & Another v. State of H.P.*** reported in **(2003) 7 SCC**

465, once the possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. In the examination of the accused/appellants nowhere it has been stated that despite their special knowledge they were not in know of the fact that the Cannabis are not kept in the vehicle. The statutory presumption was on the appellants to rebut, which has not been done in the instant case. Further, perusal of the examination of the accused under Section 313 of Cr.P.C., the question No.17 & 77 when specifically was asked whether they were inmates of the vehicle and how they were found in possession of the goods i.e. contraband, no plausible explanation has been given.

21. Therefore, perusal of the entire case law and facts & evidence would show that there has been a sufficient compliance that the prosecution was able to prove that all the three appellants while were traveling in the vehicle, when the vehicle was intercepted and was searched, huge quantity of Cannabis i.e. 65 Kg which was kept in the secret Chamber in between the Chassis and Floor of the vehicle were found. In the documents which were proved by I.O. no sufficient cross-examination exists on record so as to rebut the same. Under the circumstances, the Court has no hesitation to held that the prosecution was able to prove their case beyond the reasonable doubt. In the result, both the appeal fails and the conviction and sentence of the appellants are upheld accordingly.

Sd/-
(Goutam Bhaduri)
JUDGE