

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 03-10-2018

Judgment delivered on 28-11-2018

CRA No. 78 of 2011

- Prashant Kumar s/o. Umashankar Sahu, aged 19 years r/o. New Shantinagar, Police Station Mova, Raipur, District Raipur (CG).

---- Appellant

Versus

- State of Chhattisgarh Through Police Station Saraipali, District Mahasamund Chhattisgarh.

---- Respondent

&

CRA No. 19 of 2011

1. Neeraj Rai s/o. Raju Rai, aged abot 16 years, 3 months and 7 day, r/o. Near Pandari Talab, Raipur, Police Station Mova (Raipur), District Raipur (CG).
2. Sanju Marathi s/o. Narayan Bhav, aged about 20 years, r/o. Devendra Nagar, Raipur, Police Station Mova (Raipur), District Raipur (CG).

---- Appellants

Versus

- State of Chhattisgarh through Police Station Saraipali, District Mahasamund Chhattisgarh.

For Appellant in : Mr. Ajit Singh, Advocate

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For Appellant in : Mr Ajay Chandra, Advocate.

CRA No. 19/2011

For respondent/State : Mr. Vinod Tekam, P.L.

Hon'ble Shri Justice Ram Prasanna Sharma
CAV Judgment

1. Since both the appeals arise out of same judgment dated 23-11-2010 in Special Criminal Case No. 04 of 2010 which are common in nature, they are heard analogously and are being disposed of this common judgment.

2. So far as appellant No.1 Neeraj Raj in Criminal Appeal No.19 of 2011 is concerned, this court has already disposed of the case vide judgment dated 22-10-2013 on the ground that he is a juvenile.

3. Both these appeals are preferred against the judgment of conviction and order of sentence dated 23-11-2010 passed by the Special Judge (Narcotic Drugs and Psychotropic Substance Act, 1985) (for short, "the Act, 1985") Mahasamund in Special Criminal Case No.04 of 2010, wherein the said Court has convicted the appellants for commission of offence under Section 20 (b)(ii) (c) of the Act, 1985 and sentenced them to undergo rigorous imprisonment for ten years and to pay fine of Rs.1,00,000/- each with default stipulations.

4. As per prosecution case, on 9-6-2010 Sub Inspector Subhash Pawar (PW/8) received information in Police Station Saraipali that three persons were transporting cannabis

(Ganja) illegally by one Maruti Van bearing registration No. CG-04/HB/0248. On the said information he prepared panchnama regarding information and another panchnama regarding non-receiving of warrant in time before the witnesses namely Ganesh Bhoi and Dabbu Sen and sent the panchnama to Sub Divisional Officer (Police) Saraipali by Constable Mahesh Dahariya No.141. Thereafter, he along with staff Head Constable, constables and independent witnesses went to Chuipali main road by Government vehicle. Vehicle Maruti Van bearing registration No. CG/04/HB/0248 was seen going towards them which was stopped. In the said van all the three appellants were sitting. On being asked by Sub Inspector Subhash Pawar (PW/8), they have disclosed their names and on checking of the said van some illegal article was found in three plastic bags. The said Sub Inspector disclosed about conducting search of them and their articles and they have informed about their right under Section 50 of the Act, 1985 to be searched by any Magistrate or Gazetted Officer. All the appellants gave option to be searched by the said Police Officer. Before searching the appellants, Police staff and their witnesses have given option about their search and no objectionable article was found in their possession. After searching three bags containing illegal contraband article was found lying in

the Maruti Van and on weighing of three plastic bags 15.100 kgs, 19.100 kgs and 16.100 kgs of Ganja was found and other medicines were also found. The total weightment of Ganja was 50.300 kgs. From each of the packets two samples of 50 grams of Ganja were taken for chemical examination. In all six samples were taken and entire illegal contraband article was seized from the appellants. Articles were sealed and same was brought to Police Station Saraipali and handed over to Incharge of Malkhana for safe custody. Samples were sent to FSL, Raipur for chemical examination. Detailed memorandum of the proceeding was sent to Sub Divisional Officer (P) Saraipali. Upon investigation, the appellant was charge-sheeted. After completion of trial, the trial Court convicted and sentenced the appellants as mentioned above.

5. Learned counsel for the appellants would submit as under:

- i) Main witnesses of the prosecution are eight in number and most of the witnesses are Police personnel and their statement is contradictory in nature and looking to the omissions and improvements in their version, commission of offence is not established against the appellants.

- ii PW/1 Mahesh Daheriya has stated in his evidence that he has taken the mail at about 11 .00 am but it was contradicted by evidence of Head Constable Agni Pradhan (PW/5) which shows non-compliance of Section 42 (2) of the Act, 1985.
- lii) Proceeding under Section 42 (2) and 50 of the Act, 1985 were not carbon copy and original copy was not brought before the court below and the same is not admissible in evidence.
- iv) Mandatory provisions of Section 50 of the Act, 1985 requires written consent of the appellants, but no such documents were produced by the prosecution with charge-sheet.
- v) Mandatory provision of Section 55 of the Act, 1985 was not complied with by the prosecution, therefore, investigation being vitiated in non-compliance of the said provision.
- vi) Independent witnesses have not supported the prosecution witnesses regarding search and seizure, therefore, statement of Police Officer should not have been relied upon.
- vi) Section 42(2) of the Act, 1985 requires a rank of Sub Inspector to investigate the

case, but in the present case, investigation was conducted by the officer who is lesser than the rank of Sub Inspector.

- vii) As the prosecution could not prove its case beyond reasonable doubt, the finding arrived at by the trial Court is liable to be reversed.

6. On the other hand, learned counsel for the State submits that judgment of the trial Court is strictly in accordance with law and the same is not liable to be interfered while invoking the jurisdiction of the appeal.

7. I have heard learned counsel for the parties and perused record of the court below in which impugned judgment is passed.

8. To substantiate the charge, prosecution examined as many as eight witnesses. To nullify the charge, defence side examined two witnesses namely Raj Kumar Agrawal (DW/1) and Anil Purohit (DW/2). Sub inspector Subhash Pawar (PW/8) deposed before the trial Court that upon information regarding transport of contraband article Ganja by a Maruti Van, he called two independent witnesses namely Ganesh Bhoi and Dabbu Sen and information was recorded in a form of Panchnama as per Ex.P/2. He further recorded the information regarding search without warrant and same was

sent to Sub Divisional Officer (P), Saraipali as per Ex.P/17 through Constable Mahesh Daheriya No.141. As per version of this witness, thereafter he rushed to the spot along with police personnel and independent witnesses and stopped Maruti Van in which all the three appellants were sitting. Notices were served to them under Section 50 of the Act, 1985 regarding their right to be searched by the said Police Officer or any Magistrate, but they opted to be searched by the said Police Officer and thereafter these three appellants have searched the police personnel and independent witnesses where no objectionable article was found and on search of vehicle, three bags containing article like Ganja and other articles were seized and he identified the article as Ganja (cannabis). Seized articles were weighed by the electronic balance and after weighing it was found to be 15.00 kgs, 19.100 and 16.100 kgs , in all 50.300 kgs. Two samples of 50 grams each were separated from each packet and in all six samples were prepared and one other packet of burnt ash of Ganja was also prepared. All the articles were sealed and specific seal was also affixed on the said articles. As per version of this witness, seized articles were handed over to (PW/6) Head Constable Neelambar Singh Netam who was Incharge of Malkhana and acknowledgement receipt was received as per Ex.P/22.

He further deposed that entire proceedings were recorded in a form of report and same was sent to Sub Divisional Officer (P) Saraipali as per Ex.P/31. Version of this witness is supported by the version of Neelambar Singh Netam who was Incharge of Malkhana (PW/6). As per version of this witness, he received articles seized in the case and kept it in safe custody of Malkhana of Police Station in a sealed condition and it was mentioned in the register of Malkahana a per Ex.,P/23. As per version of this witness, seized packets were handed over to Constable No.92 to submit the same before FSL, Raipur and as per acknowledgement Ex.P/34, Constable Heeralal N.92 has submitted the article for examination in FSL and as per report (Ex.P/35), test of Ganja was found to be positive. Version of weighment of contraband article is supported by version of PW/4 Vijendra Pradhan. PW/5 Agni Pradhan is a person who received information in the office of Sub Divisional Officer (P) Saraipali under Section 42(2) of the Act, 1985 as per Ex.P/2. All the witnesses have been subjected to searching cross examination, but nothing could be elicited in favour of defence and material facts are established by the evidence of all these witnesses. Javed Ali (PW/7) is a person from whose traveling agency, the said vehicle Maruti Van bearing

registration No. CG/04/HD/0248PW/8 was hired by appellant Neeraj Rai which supports the prosecution case.

9. From the entire evidence, it is established that information prior to search and seizure was written and it was conveyed to superior officer as per Section 42(2) of the Act, 1985 which is adequate and substantial compliance of the provisions embodied in the Act, 1985. In the matter of **Karnail Singh vs. State of Haryana (2009) 8 SCC 539** it is held by Hon'ble the apex Court that the non-compliance of the provision of Section 42(2) of the Act, 1985 may not vitiate the trial if it does not cause any prejudice to the accused. In the present case, before proceeding for search and seizure, information was conveyed to superior officer, therefore, in the present case, there is adequate and substantial compliance of Section 42 of the Act, 1985. Therefore, argument advanced on behalf of the appellants is not sustainable that the provision of Section 42(2) of the Act, 1985 is flouted with. Section 42 of the Act, 1985 has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. In the present case, information was sent before proceeding for search and seizure and therefore, it is not a case where the said provision is not followed.

10. In the present case, search was made on Maruti Van vehicle and it is not a case of search of person. Word “person” would mean human being with appropriate covering clothing and footwear. When the search was made in a vehicle, it cannot be treated as body of human being and this would not come within the ambit of person occurring Section 50 of the Act, 1985, therefore, Section 50 of the Act, 1985 would not apply in the present case. As per law laid down by Hon'ble the Apex Court in the matter of **State of H.P. vs. Pawan Kumar (2005) 4 SCC 350**, though Section 50 of the Act, 1985 would not apply in the present case, the authorities have informed the appellant about their right to be searched as per Section 50 of the Act, 1985 and therefore, it is not a case where the provision of Section 50 of the Act, 1985 was bypassed, in other words, Section 50 of the Act, 1985 is not applicable in the present case, therefore, argument advanced on behalf of the appellant regarding non-compliance of Section 50 of the Act, 1985 is without substance.

11. Learned counsel for the appellants would submit that the independent witnesses of seizure have not supported the version of prosecution, therefore, case of the prosecution is not established.

12. In view of this court, if independent witnesses were not present at the time of seizure, they are not real witnesses and if they were present at the time of seizure and suppressing this fact before the trial Court, they are not reliable. No material was brought on record by the defence to discard the evidence of official witnesses. The ultimate question is whether the evidence of official witnesses suffer from any infirmity. In the present case, nothing of that nature could be pointed out. It is not a case where the evidence of official witnesses became vulnerable due to non-support of independent witnesses. Therefore, argument on this count is also not sustainable.

13. Defence witnesses namely Raj Kumar Agrawal (DW/1) and Anil Purohit (DW/2) are related to newspapers. Version of these witnesses is based on spot inspection where some contraband articles were found. Their version is not related to present appellants against whom there is ample evidence adduced by the official witnesses. Version of defence witnesses is not sufficient to discard the evidence of official witnesses, therefore, these witnesses are of no help to defence side.

14. All the appellants have been provided opportunity to explain circumstances which is established by the prosecution evidence while their examination under Section

313 of the Code of Criminal Procedure, but their case is mere denial which is merit-less and when they offered no explanation, the trial Court was right in holding that all the appellants were in conscious possession of contraband article Ganja to the tune of 50.300 kgs

15. Commercial quantity of Ganja is 20 kgs. In the present case, the appellants were in possession of 50 kgs and 300 grams of Ganja, therefore, the case of the appellant falls within offence of Section 20(b)(ii)(c) of the Act, 1985 for which the trial Court has convicted the appellants and this court has no reason to record contrary finding. Conviction of the appellants is hereby affirmed.

16. Heard on the point of sentence.

The trial Court awarded minimum sentence to the appellants for the said offence and less than minimum sentence cannot be awarded. Sentence part including fine amount is also not liable to be interfered with by this court.

17. Accordingly, the appeals are liable to be and are hereby dismissed. As the appellants are reported to be in jail, therefore, no further order for their arrest etc., is required.

Sd/-
(Ram Prasanna Sharma)
Judge