

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 10 of 2013

- Budhiyarin Bai W/o Dhanaji Pardhi Aged About 61 Years R/o Village Chikhali, PS Dondilohara, Ps Dondi, Distt. Balod C.G. Pin 491771 , Chhattisgarh

---- Appellant

Versus

- State Of Chhattisgarh Through Aarkashi Kendra Dondi Distt. Balod C.G. Pin 491771. , Chhattisgarh

---- Respondent

For Appellant	:	Shri Vipin Tiwari, Advocate
For Respondent	:	Shri Ravindra Agrawal, Govt. Advocate.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Sanjay Agrawal

Judgment On Board

Per P. Diwaker, J

26/02/2018

1. This appeal arises out of the judgment of conviction and order of sentence dated 8.11.2012 passed by the learned Special Judge (NDPS), Durg in Special Criminal Case No.9/2011 thereby convicting the appellant under Section 20 (b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing her to undergo RI for 15 years and fine of Rs.1,00,000/-, in default of payment of fine to undergo additional RI for 3 years.
2. Brief facts of the case are that on 15.1.2011 Inspector M.R. Nayak (PW-9) received telephonic information from Chandrika (PW-3) that accused/ appellant is keeping *ganja* in her house for the purpose of sale. After

recording such information in the roznamcha sanha vide Ex.P-19, PW-9 forwarded this information telephonically to the police station having jurisdiction over the area wherein the house of accused/appellant was situated and the same was reduced in writing by Sub-Inspector Vinay Singh Baghel (PW-7) vide Ex.P-21. The said information was forwarded by PW-7 to the City Superintendent of Police vide Ex.P-18. Thereafter by making entry of their departure in the roznamcha sanha vide Ex.P-23C, PW-7 along with staff rushed to the house of accused/appellant. On reaching the house of accused/appellant, she was informed with respect of the above-mentioned information that she is having the possession of Ganja in her house. She was also informed about her right to search in presence of gazetted officer or the Magistrate, on which she opted to carry out the search of her house from the said police officials. On such consent, after giving search of the police officials and the witnesses to the accused/appellant, the search of her house was carried out in which 20 jute-bags containing ganja like substance were recovered. The contraband was examined by smelling and burning the same and was found to be ganja vide Ex.P-8. Thereafter, homogenization of the contraband contained in 20 different jute-bags was done vide Ex.P-11. One Devlal Sinha was summoned for weighing the contraband and he came to the spot along with weighing scales. Physical verification of the weighing scales was done vide Ex.P-9. Weighment of contraband being done, it was found to be 5 quintal & 21.5 kilogram respectively in such bags. Out of such quantify, sample of 50 gm from each bag to get examined from the forensic laboratory were taken out vide Ex.P-10. The ganga recovered from the house of accused/appellant was seized in presence of witnesses vide Ex.P-13. Spot map was also prepared vide Ex.P-14. Thereafter the appellant and the seized ganja were brought to

the police station and after making entry of their arrival in the roznamcha sanha of Ex.P-27C, FIR (Ex.P-28) was registered against the accused persons under Section 20(b) of the NDPS Act. Accused/appellant was arrested vide Ex.P-16 and information regarding her arrest was given to her husband Dhanaji Pardhi vide Ex.P-29. The contraband seized from the spot was handed over to Maalkhana Moharrir and receipt (Ex.P-35) thereof had been obtained. On 18.1.2011 samples of the contraband were sent to FSL, Raipur from where report of Ex.P-38 was received confirming the contraband to be ganja. Statements of witnesses were recorded under Section 161 CrPC.

3. On completion of investigation, charge sheet under Section 20(b) & 27A of the NDPS Act and Section 299 of the IPC was filed against as many as five accused persons including present accused/appellant. The trial Court framed the charge under Section 20 (b) (ii) (C) of NDPS Act against present appellant and two other accused persons. Remaining two accused persons have been charged with the offence punishable under Section 27A of the NDPS Act.
4. So as to hold the accused persons guilty, the prosecution examined 09 witnesses in all. Statements of accused persons were also recorded under Section 313 Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication.
5. The trial Court after hearing the counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as mentioned in the opening paragraph of this judgment. However, learned trial Judge acquitted five co-accused persons of the charges.

6. Learned counsel for the appellant submits that a bare reading of Section 42, 50 & 55 of the NDPS Act would show that they are mandatory in nature and non-compliance of the same by the investigating officer vitiates the entire investigation and trial. The said provisions being mandatory have to be strictly considered, particularly in view of the minimum sentence of imprisonment and fine prescribed under the NDPS Act without any discretionary power to Court to impose a lesser sentence of imprisonment or fine irrespective of the quantum of recovery. From perusal of the material on record it is apparent that in the present case technical provisions of Sections 42, 50 & 55 of the NDPS Act have not been complied with in accordance with their spirit while holding the investigation by the investigating officer, therefore, the search, seizure and arrest of the appellant were illegal and as such the appellant is entitled to be acquitted of the charge.
7. On the other hand, learned counsel for the State/respondent by justifying the impugned judgment said that the same is based on proper appreciation of evidence and also in accordance with law. There is compliance of the each and every mandatory provisions of the NDPS Act applicable in the present case. Therefore, the impugned judgment does not require any interference at this stage and prayed for dismissal of this appeal.
8. Heard learned counsel for the respective parties and perused the material on record.
9. Laxmi Narayan (PW-1) is the driver of the vehicle in which the ganja was brought to the police station. He has duly supported the prosecution case.
10. Manish Kumar Rajput (PW-2) is the police person who took the sealed

packets of samples to the Forensic Science Laboratory, Raipur. According to this witness, on 19.1.2011 the Station House Incharge of Police Station Dondi handed over him the sample parcels for depositing the same in the FSL, but due to some defect, sample parcels were not accepted by the laboratory and were returned back. Thereafter on 20.1.2011 the samples were again handed over to him and he deposited the same in FSL, Raipur and the receipt of depositing the samples in FSL is Ex.P-1.

11. Chandrika Bai (PW-3) was the President of Women Group of village Chikhli at the relevant point of time. She has stated that they have searched the house of accused/appellant and found ganja kept in 20 different bags. She has further stated that having found ganja kept at the house of accused/appellant, they informed the police on telephone whereupon the police came there and carried-out the proceedings. She is also witness of Ex.P-3, P-5, P-6, P-8 to P-16.
12. Bhushanlal Chorka (P-4) is the Patwari who prepared the spot map (Ex.P-15).
13. Gyanesh (PW-5) is the police person who was examined to prove the compliance of Section 42 of the NDPS Act. This witness has stated about the receipt of information regarding ganja and that a copy thereof was given to him by PW-7 for submitting the same in the office of City Superintendent of Police. He has further stated that the said information was received by the Reader in the office of City Superintendent of Police and acknowledgement was given by the Reader of the CSP on the document Ex.P-18.
14. Nemichand Joshi (PW-7) is the police constable who brought original roznamcha sanha (Ex.P-19) in which information regarding ganja was

recorded by PW-7. Vinay Singh Baghel (PW-7) is the investigating officer who has duly supported the prosecution case.

15. Nandkumar (PW-8) was posted as Maalkhana Moharrir at the relevant point of time. According to this witness, the in-charge of Police Station Dondi deposited 20 bags containing ganja weighing 5 quintal & 21.5 kilogram and 40 packets of 50 gm each for keeping it in safe custody and an entry to this effect was made by him in the register at Sr. No.4/11. He has issued the receipt of deposit of seized property in the maalkhana of police station vide Ex.P-35. According to him, on 20.1.2011 he sent the samples with Constable No.514 to the FSL for examination and entry in this regard was mentioned in the register vide Ex.P-39. He has further stated that on account of malkhana of police station Dondi being dilapidated and tiled roof, there is seepage. That apart, the maalkhana being replete of rats the properties kept therein are nibbled out leading to its destruction and damage.
16. M.R. Naik (PW-9) is the police inspector who received the information regarding ganja from Chandrika (PW-3). According to this witness, on receipt of the information that accused/appellant is keeping ganja in her house for the purpose of sale, he recorded the same in roznamcha sanha No.40 (Ex.P-19C) and thereafter transferred it to the police station having jurisdiction over the place where house of accused/appellant was situated.
17. Ahilyabai (DW-1) has stated that on the fateful day the police infact wanted to take the husband of accused/appellant with them for the purpose of interrogation, however, on being disclosed by accused/appellant that her husband used to remain sick, the police took her with them.

18. The question for consideration is whether compliance of mandatory provisions of the NDPS Act i.e. Sections 42, 50 & 55 has been made by the prosecution in this case or not.
19. Before proceeding further, it would be apposite to state here the object and purpose behind enacting the NDPS Act. This Act was enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. At the same time, to avoid harm to innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly.

The provisions of Section 42 make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for belief while carrying out arrest of search. Likewise, Section 42 (2) requires that where an officer takes down an information in writing under sub-section (1), he shall send a copy thereof to his immediate senior officer.

Similarly, Section 50 of the NDPS Act provides an extremely valuable right to the suspect to get his person searched in presence of a gazetted officer or a Magistrate. The compliance with the procedural safeguards contained in Section 50 of the NDPS Act is intended to protect a person against false accusation and frivolous charges, as also to lend creditability to the search and seizure conducted by the empowered officer. In other words, this section casts a duty on the empowered officer to inform the suspect of the existence of his right to have his search conducted before a gazetted officer or by a Magistrate, so as to enable him to avail of that right.

Section 55 of the NDPS Act requires that the officer in-charge of the

police station concerned shall take charge of all the articles seized under this Act and also affix his seal and the articles be kept in safe custody. This Section has also been introduced to safeguard the accused persons against any false implication and that is why the officer in-charge of the concerned police station has been authorized to take the custody of articles seized under this Act immediately and keep in safe custody.

The above provisions have been made in order to protect the interests of the citizens from irregular and illegal invasion on their liberty by the authorities as well as in the interest of the State to secure the evidence bearing upon the commission of crime and necessary to enable the justice to be done shall not be withheld from the course of law on merely formal or technical grounds.

20. Keeping in mind the object and purpose of enactment of the NDPS Act, the facts and evidence of the present case are being examined to see whether the compliance of Section 42, 50 & 55 of the NDPS Act has been made in this case or not .
21. From perusal of the testimony of Investigating Officer Vinay Singh Baghel (PW-7) it is clear that after receiving information that the appellant has kept ganja in her house for the purpose of sale, he made an entry regarding the information in the roznmancha sanha (Ex.P-21C) and before proceeding towards the house of accused/appellant, he sent information (Ex.P-18) about the same to his immediate official superior i.e. City Superintendent of Police, Rajhara through Constable No.1480 Gyanesh Chandel (PW-5). He has also requested the City Superintendent of Police to immediately reach the spot for taking action. Gyanesh Chandel (PW-5), in his cross-examination, has admitted the fact that he went to the office of City Superintendent of Police with the information prepared by the Station House Officer Vinay Singh Baghel (PW-7) and handed over to the same to

the Reader of the City Superintendent of Police. He has further stated that said information (Ex.P-18) contains acknowledgement of the Reader. A bare perusal of information (Ex.P-18) reveals that it was prepared on 15.1.2011 by PW-7 and addressed to the City Superintendent of Police, Rajhara. Thus, from the statement of the investigating officer, it is apparent that in the present case compliance of Section 42 of NDPS Act has been made.

True it is that neither the City Superintendent of Police nor the Reader of the City Superintendent of Police has been examined by the prosecution, but the defence has not been able to demonstrate that any material prejudice has been caused to the defence due to non-examination of superior officer etc. Therefore, in the given facts and circumstances of the case, the failure of the prosecution to examine the aforesaid witness does not adversely affect the prosecution case.

22. As regards the compliance of Section 50 of NDPS Act, a bare reading of this Section shows that it only applies in a case of personal search of a person and it is not applicable nor attracted where no search of a person is involved. Search and recovery from a vehicle, container, bag or premises does not come within the ambit of Section 50 of NDPS Act. However, this Section makes it imperative for the officer concerned to inform the person concerned (suspect) of the existence of his right to get his person or baggage or premises searched in the presence of a gazetted officer or a Magistrate, so that he can avail that right. The Hon'ble Supreme Court while dealing with the question of compliance of Section 50 of the NDPS Act has held in the matter of **State of Haryana v. Mai Ram** reported in **2008 (4) RCR (Criminal) 130** thus;-

“12. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does

not extend to search of a vehicle or a container or a bag, or premises. [([See Kalema Tumba v. State of Maharashtra and Anr. \(JT 1999 \(8\) SC 293\)](#), [State of Punjab v. Baldev Singh \(1999 \(6\) SCC 172\)](#) and [Gurbax Singh v. State of Haryana \(2001 \(3\) SCC 28\)](#)]. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra). A similar question was examined in [Madan Lal and Anr. v. State of Himachal Pradesh \(2003 \(6\) Supreme 382\)](#). 13 Above being the position, the finding regarding non-compliance of Section 50 of the Act is also without any substance.”

23. In the present case, admittedly, the recovery of ganja was effected from the room of accused/appellant and not from her person. Thus, there was no need to serve notice under Section 50 of NDPS Act, yet a notice (Ex.P-4) was given by PW-7 Vinay Singh Baghel to accused/appellant informing her about the information with him and his intention to search her premises. This notice further demonstrates that PW-7 put a question to her whether she wanted to get her house searched before the Magistrate or gazetted officer or by him and upon this, she gave his consent that she wanted to get her house searched by him. According to panch witness Chandrika Bai (PW-3), a notice for obtaining consent of accused/appellant was given to her. Thus, it is clear that compliance of Section 50 of NDPS Act has been made in this case, as before making search, option was given to the accused/appellant whether she wanted to get her house searched before the Magistrate or Gazetted Officer

and only after obtaining her consent, search was conducted.

24. As regards the compliance of Section 55 of NDPS Act, the requirement of this section is that the SHO will affix his seal on the case property and will keep it in safe custody. From the evidence brought on record, it is clear that the contraband after seizure was handed over to Maal Moharrir (PW-8) of Police Station Dondi for keeping it in safe custody and receipt obtained thereof is Ex.P-35. But from the evidence of PW-7 it does not appear that he sealed the bags containing contraband recovered from the house of appellant. However, the recovery of contraband from the house of appellant stands proved from the testimony of panch witness i.e. Chandrika Bai (PW-3), who has categorically stated that after completing the formalities, the house of accused/appellant was searched and 20 bags containing ganja were seized in her presence vide seizure memo Ex.P-13. According to PW-8, the in-charge of Police Station Dondi deposited 20 bags containing ganja weighing 5 quintal & 21.5 kilogram and 40 packets of 50 gm each for keeping it in safe custody and the samples packets handed over to him were in sealed condition and later on, the same were sent by him through Constable No.514 Manish Rajput to the FSL for chemical analysis. Nothing has come out from the cross-examination of the witnesses to show that there could be any motive for the police to falsely implicate the appellant for this offence. No plausible or reasonable explanation has been offered by accused/appellant in her statement recorded under Section 313 CrPC for her false implication. So, there could be hardly any reason to foist such a heavy recovery of ganja (5 quintal 21.5kg) on her falsely.

In the above circumstances, we are of the view that the provision of Section 55 of NDPS Act has been substantially complied and non-sealing of bags containing contraband (ganja) alone is not fatal to the case of

prosecution. Furthermore, Section 55 of NDPS Act is not mandatory, but it is directory and the law is well settled that even if there is no compliance of Section 55 of NDPS Act, this by itself will not entitle accused to acquittal.

25. In view of what has been discussed above, this Court is of the considered opinion that the prosecution has proved its case beyond all reasonable doubt and so the Court below was fully justified in basing its conclusion on the basis of evidence collected by the prosecution. No interference with the findings of the trial Court is called for. Thus, the appeal being meritless is liable to be dismissed and is dismissed as such. Accused/appellant is already in jail, therefore, no further order regarding her arrest or surrender etc. is needed.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Sanjay Agrawal)
Judge

roshan/-