

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 1015 of 2016

Vishal Das, S/o. Balakdas, Aged About 35 Years, R/o. Maharani Ward Jagdalpur, District- Bastar, Chhattisgarh.

---- Appellant

Versus

State Of Chhattisgarh, Through Police Station Kotwali, Out-Post Bastar, District Bastar, Chhattisgarh.

---- Respondent

For Appellants : Mr. Suresh Tandan, Advocate
For State/Respondent : Mr. S.R.J.Jaiswal, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order on Board

24.01.2018

1. This appeal is against the judgment dated 18.10.2013 passed by the learned Special Judge (N.D.P.S. Act) Jagdalpur (C.G.) in Special Case No.01/2011 whereby the appellant has been convicted under Section 20(b)(2-C) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "*the NDPS Act*") and sentenced to undergo R.I. for 10 years and fine of Rs.1,00,000/-, in default of payment of fine, further R.I. for 1 year has been awarded.
2. As per the prosecution case, on 01.11.2010 an information was received by the police of Police Station Bastar that a person is carrying Cannabis in two bags; thereafter, it was registered in the Rojnamchasanha and Panchnama was prepared. Subsequently, two of the witnesses were called by the Constable Heeralal Mandavi and reasons were also recorded for not obtaining the warrant. Thereafter, two witness Shivnath Sethiya and Rajesh Kumar Baghel were called and the police proceeded to the spot wherein the information was received that the person was in possession was transporting the Cannabis. Having gone to the place of incident, the appellant was confronted with the questions and information

that he is in possession of Cannabis and subsequently he was served with a notice that he is free to get himself examined by any gazetted officer. Thereafter, having consented to the fact that accused is ready and willing to get himself examined by the police and other officers, he was examined but no Cannabis were found in person but subsequently the bag which he was carrying was searched wherein Ganja like substance were found. On preliminary inspection, the goods were found to be Cannabis and thereafter in its entirety the weighment was made and total 23 Kg of Cannabis were found in the bags. Thereafter 50 grams of each 4 samples were taken out which was sealed and Panchnama was prepared and seizure memo was prepared. Thereafter, the FIR was registered and the sealed packets and Cannabis alongwith other entire Cannabis were deposited in Malkhana. Subsequently, the sealed packet was sent for FSL and according to the FSL, it was found to be Cannabis and lastly the charge sheet was filed.

3. During the course of trial, the appellant/accused abjured the guilt and claimed to be tried. The trial Court after evaluating the statement of the seven prosecution witnesses and five defence witnesses came to a conclusion that the prosecution was able to prove the charges that the appellant was in possession of Cannabis and convicted him as aforesaid. Hence this appeal.
4. Learned counsel for the appellant would submit that the appellant has been falsely implicated in this case. The appellant was having some enmity with the I.O., as such, the appellant was picked up from his home and was subsequently inculpated in the false case. He further submits there is no prove of fact that the samples which were deposited were taken out and sent for FSL. Consequently, the goods which were seized has not been proved that the same samples were taken out and, as such, it cannot be stated that the goods which were seized was Cannabis.

Therefore, the appeal is liable to be allowed and the appellant deserves acquittal.

5. Per contra, learned State counsel opposes the argument advanced by the learned counsel for the appellant and would submit that the order of conviction is well merited which do not call for any interference.
6. I have heard learned counsel appearing for the parties and perused the records.
7. The record would show that the individual seizure witness namely Shival Sethiya (PW-1) and Rajesh Kumar (PW-2) have not supported the case of the prosecution. They were declared hostile. The witness have however contended that the police official obtained certain signatures on the papers, thereby the signature in the documents were admitted. 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 in 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.”

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

¹(2013) 1 SCC 395

principle set out in the aforesaid case squarely covers and takes cares of the situation like this, as is existing in the case.

8. Now coming to the evidence which is on record. The statement of I.O. PW-7 would be material. According to his deposition, he stated that while he was working as Sub-Inspector at Police Chowki Bastar on 01.11.2010, he received an information that a person wearing a check shirt & jeans is transporting Cannabis which was recorded in Rojnamchasanha, which is marked as Ex.P-24. A copy of Rojnamchasanha Ex.P-24(c) at serial No.19 also affirms the same. Thereafter, the witness has deposed that he had sent Hemant Bhuare to send the independent witness, which was also recorded in the Rojnamchasanha Ex.P-25(c) and the statement also corroborates such recording of the facts in Ex.P-25(c). Thereafter, two witnesses came and a mukhbeer-panchnama was prepared by Ex.P-3. Perusal of Ex.P-3 would show that the mukhbeer-panchnama was recorded at 10:35. Thereafter at about 10:45, the reasons were recorded that in case the procedure for warrant is obtained, it may take time and the person may flee away, the same is recorded in Ex.P-2 and was sent to the higher official. The receipt of the higher official Superintendent of Police seal is marked in it. Perusal of Ex.P-2 & Ex.P-3 also records endorsement that the information was sent to the higher official which also bears the seal of the Superintendent of Police has not been rebutted in the cross-examination.
9. At this stage, the statement of PW-6, Rajkumar, would show that he has deposed that he was posted in the C.S.P. Office Jagdalpur in 2008 and on 01.10.2011, he received an information of Ex.P-2 recording reasons for not obtaining the warrant for search. This witness has stated that he has received the same and endorsement was made by putting his seal. Ex.P-2 & Ex.P-3 also fortifies the same. The same was registered in the office of Superintendent of Police as Ex.P-22 and the Ex.P-22 reciprocally

supports such contention. Thereby it shows that compliance of Section 42 was validly made by the prosecution.

10. At this stage, if the facts are looked into in terms of principles laid down in case of ***Mohal Lal v. State of Rajasthan***², it was held that in such circumstances involving emergent situations, the recording of information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency. The Court while examining the decision rendered in *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* [AIR 2000 SC 821] and *Sajan Abraham v. State of Kerala* [AIR 2001 SC 3190] reiterated the view taken by the Constitution Bench explaining the position opined that *Abdul Rashid* (supra) did not require about literal compliance with the requirements of Section 42(1) and 42(2) nor did *Sajan Abraham* (supra) hold that requirement of Section 42(1) and 42(2) need not be fulfilled at all. The larger Bench summarized the effect of two decisions, which are reproduced herein below :

“(a) The officer on receiving the information of the nature referred to in sub-section (1) of Section 42 from any person has to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1),

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

²AIR 2015 SC 2098

(c) *In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.*

(d) *While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”*

Therefore, reading of Ex.P-2 & Ex.P-3 with the statement of PW-6 & PW-7 would show that there has been a sufficient compliance of Section 42(1) and Section 42(2) of NDPS Act.

11. Now further coming to the evidence, the statement of PW-7 would show that at 11:30 he went alongwith the police constable in his official vehicle bearing No.C.G.03/3002 towards the National Highway No.43. The same is also corroborated by Rojnamchasanha Ex.P-27 wherein it is recorded

that the police team started for raid. The Rojnamchasanha also records the description of the accused/person who was holding the Cannabis and the statement of PW-7 further shows that he has deposed that when he reached to the spot, the accused was apprehended and on asking his name, it was disclosed to be Vishal Das Tilak then he was given a notice under Section 50 of NDPS Act that he is free to get himself examined by any gazetted officer/ Magistrate of the State or I.O. and he was explained the meaning of the Magistrate. Subsequent to it, when he gave consent to get himself examined by I.O., it was recorded by Ex.P-4. The I.O. has also proved his signature in the said notice. Further, the witness has deposed that when the appellant was examined in person, nothing was found thereafter the police vehicle was also searched by Ex.P-5 by the appellant and two bags which were being carried by the appellant having search the same, Ganja like substance was found, which was recorded in the Rojnamchasanha Ex.P-6. Thereafter, when the bag was searched from the bag the Cannabis like substance were taken out and on the initial examination by rubbing, smelling and after burning the same, it was primarily found to be Cannabis, which was also reduced into writing by Ex.P-8. Ex.P-8 also affirms the same, which bears the signature of the I.O. too.

12. Subsequent to it, weighing scale was called and after weighment from one bag 13 Kg and from another bag 10 Kg Cannabis were found, which was recorded in Ex.P-11. Subsequently, from the seized article 50 grams of two samples each were taken out which were marked as A-1, A-2 and B-1, B-2 and the remaining Cannabis of 9.900 Kg and 12.900 Kg were marked as Article B and Panchnama was prepared by Ex.P-12. Thereafter, the sample packets of the entire Cannabis was placed under seal and over the seal emblem of name of T.S.Thakur S.I. was prepared and the seal was placed over the goods. The seal panchnama was also

prepared by Ex.P-13. Perusal of Ex.P-13 would show that the seal panchnama was prepared and subsequently as per Ex.P-14 all the seizure was made and document by Ex.P-14 was prepared. Thereafter, the witness has further deposed that the arrest memo was prepared by Ex.P-16 and the map of place was also prepared, which is marked as Ex.P-17. Subsequent to it, the FIR was registered at about 14:45 by Dehatinalicy which is marked as Ex.P-28 and the information of the arrest was sent to the higher officials on the same date and the communication of the same is marked as Ex.P-29. The witness further has deposed thereafter coming back, it was recorded in Ex.P-29 in the Rojnamchasanha and the FIR was registered by Ex.P-30. The witness further stated that the said Cannabis were deposited in the Malkhana and as per the statement of the Malkhana Moharrir G.S.Bajpai (PW-5), he stated that 10 Kg Cannabis including 50-50 grams sample packet marked as A-1, A-2 and 13 Kg Cannabis alongwith sample packet of 50-50 grams is marked as B-1, B-2 in the sealed position and was given to him by Pourush Purre (PW-7), which was registered in the Malkhana register by Ex.P-20(c). Perusal of Ex.P-20(c) further reveals that the Cannabis alongwith article were given to deposit in the Malkhana.

13. Subsequent statement of PW-7 would show that the samples were thereafter taken out from the Malkhana and the document Ex.P-33, which is dated 02.11.2010 would show that two samples marked as A-1 & B-1 were sent to FSL Raipur, which is also proved by Umesh Kumar (PW-4). He stated that he received the article A-1 & B-1 and the sample packets carried it to the FSL Raipur and thereafter he obtained a receipt of Ex.P-19. Perusal of Ex.P-19 would show that it is dated 03.11.2010 wherein two articles number A-1 & B-1 has been deposited by Umesh Kumar (PW-4). Further record would show that the report of such article A-1 & B-1 was sent by the FSL to the Superintendent of Police Bastar by

Ex.P-34 and the report of the FSL filed alongwith it, which is marked as Ex.P-35 would show that the article which was sent as A-1 & B-1 were marked with presence of Cannabis.

14. The evidence adduced by the defence of DW-1 Smt. Nirma Das, she stated that her husband, the appellant, was forcefully taken from the other place of incident and was arrested and was inculpated in case of Cannabis for which certain applications were given to the higher official, however, no document has been filed for the same and no plausible explanation by the accused was also given in his statement under Section 313 of Cr.P.C.
15. Therefore, perusal of the entire record would show that there has been a sufficient compliance of Section 42 and also the fact that after seizure of the goods which were deposited in the Malkhana, the samples were sent for FSL and were found to be positive of Cannabis. The weightment of Cannabis were of 23 Kg and the evidence during the examination of evidence of PW-7, it would reveal that the entire goods alongwith packets were produced before the Court. The Court had inspected the same and the goods produced were minutely examined and the Court found it the same was seized in Crime No.492/2010 in an offence under Section 20(b) of the NDPS Act alongwith the name of the appellant. The trial Court also observed that the goods produced before the Court were properly sealed and the signatures were also marked in that, therefore, taking into totality of the fact, in the opinion of this Court, after close scrutiny of the evidence, I am of the opinion that the finding arrived at by the learned Court below that the appellant was found in possession of 23 Kg of Cannabis and the prosecution was able to prove the same without any doubt in it. Consequently, the finding arrived at by the Court below cannot be faulted with, as the appellant has failed to bring out any defence.

16. In view of the above, the conviction made by the learned Court below is maintained. In the result, appeal has no merit and accordingly is dismissed.

Sd/-
(Goutam Bhaduri)
JUDGE

ashok