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HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on : 03.04.2019

Judgment Delivered on : 26/06/2019

CR.A. No. 646 of 2017

- Sanjay Kumar, S/o. Shashi Bhushan Yadav, Aged About 23 Years, Caste -Gadariya, R/o. Village- Bankat, Police Station- Barauli, District- Gopalganj, Bihar.

---- Appellant

Versus

- State Of Chhattisgarh, Through : Station House Officer, Police Station, Tapkara, District- Jashpur, Chhattisgarh.

-----Respondent

AND

Cr.A. No. 865 of 2017

- Amit Singh, S/o. Late Harinder Singh, Aged About 23 Years, Caste- Rajput, R/o Village Parsauni, Police Station- Sindhwaliya, District- Gopalganj, Bihar.

---- Appellant

Versus

- State Of Chhattisgarh, Through : The Station House Officer of Police Station- Tapkara, District- Jashpur, Chhattisgarh.

-----Respondent

For Appellant (in Cr.A. No.646/2017)	: Ms. Hamida Siddiqui, Advocate with Mr. Sumit Singh Rathore & Ms. Rashmi Sen, Advocates
For Appellant (in Cr.A. No.865/2017)	: Mr. Roop Naik, Advocate
For Respondent/State	: Mr. I. Lakra, Dy.G.A.& Mr. Adil Minhaj, P.L.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

C A V JUDGMENT

26/06/2019

1. Both the appeals are heard and decided together by this common judgment as they are arising out of the same sessions trial.
2. These appeals have been preferred against the judgment of conviction and order of sentence, passed by the learned Special Judge (N.D.P.S. Act), Jashpur, District – Jashpur (C.G.) in Special Criminal Case No.5/2016 on 16.02.2017, convicting the appellants for the offence under Section 20 (B) (ii) (C) of the Narcotic Drugs Psychotropic Substance Act, and sentencing them to undergo R.I. for 10 years and fine of Rs.1,00,000/- with default stipulations.
3. Case of the prosecution in brief is this that on 29.11.2015, Sub-Inspector Ajay Sahu (P.W.-12) received one information from an informant, that some persons are transporting huge quantity of contraband Ganja in a car coming towards – Tapkara. Ajay Sahu (P.W.-12) prepared one information Panchnama (Ex.P-27) and another panchanama showing inability to obtain search warrant vide Ex.P-28. Information was immediately dispatched to the office of SDO(P) at Kunkuri and then he proceeded to the spot along with a team of other police officials. The independent witnesses were summoned on the spot. One unnumbered Toyota Itios car coming from the road towards Balisankara was stopped,

which was found occupied by one driver and one another passenger, who introduced themselves as Sanjay Kumar and Amit Singh. Notice under Section 50 of N.D.P.S. Act was served upon the accused persons vide Ex.P-5 and Ex. P-6. Thereafter, the accused persons gave written consent vide Ex.P-39 and Ex.P-40 to be searched by Ajay Sahu (P.W.-12). Initially search of the raiding party and the witnesses were given to the accused persons, which was found without any result. Thereafter, the dickey of the Car in possession of the accused persons was searched, which was found containing numerous packets of Ganja of weight half k.g. and one k.g. Recovery memo Ex.P-10 and Ex.P-11 from both the appellants were prepared. The contents of the packets were tested by smelling, tasting, rubbing and burning and the material was found to be Ganja vide Ex.P-12 and Ex.P-13. Thereafter, the contents of both the packets were taken out and homogeneous mixture were prepared from the material recovered from both the accused persons, vide Ex.P-14 and Ex.P-15. For the weightment procedure, the balance was firstly verified vide Ex.P-16 and then the contraband was weighed. The weight of the material recovered from the Sanjay Kumar was 37.470 Kg. and from the appellant- Amit Singh was 57 Kg. Two samples of 500 grams from each recovery were prepared. The weighing certificate is Ex.P-19. The samples and the remaining material were packed and sealed. Seal Panchnama, Ex.P-20 was also prepared. All the material

recovered and the car with driving license of Sanjay were seized vide Ex.P-21 from the appellant Sanjay Kumar. Rest of the contraband and samples were seized vide Ex.P-22 from the appellant Amit Singh. The appellant/ accused were arrested on the spot and Dehati Nalishi (Ex.P-43) was recorded immediately. S.I., Ajay Sahu (P.W.-12) then recorded statement of the witnesses on the spot and then came back to the police station along with the appellants/accused. All the proceedings taken up were entered in the station house diary. Numbered FIR, Ex.P-45 was lodged. The seized articles were handed over to the Malkhana Moharrir for keeping in safe custody. Rest of the investigation procedure were carried out. Samples were sent for FSL examination regarding which, report vide Ex.P-50 was received according to which contents of samples were Ganja, a narcotics substance. On completion of investigation, charge-sheet was filed against the appellants before the concerned Court.

4. The trial Court charged the appellants with offence under Section 20 (B) (ii) (C) of the Narcotic Drugs Psychotropic Substance Act. The appellants denied the charges and prayed for trial. The prosecution examined as many as 13 witnesses on its behalf. On examining the appellants under Section 313, they denied all the incriminating evidence against them and pleaded innocence and false implication. No witness was examined in defence. On completion of trial, judgment has been delivered, in which the

appellants stand convicted and sentenced as mentioned hereinabove.

5. It is submitted by the learned counsel for appellants in both the cases that the appellants have been erroneously convicted for the offence as aforesaid without there being evidence of prosecution beyond reasonable doubt. Firstly it is objected that a compliance of Section 50 N.D.P.S. Act was not made by the official conducting the raid, none of the appellants was informed that they have right to be searched in presence of gazetted officer or a Executive Magistrate. The appellants were made to sign by force and under the pressure in consent papers. Therefore, the raid procedure itself has vitiated. Timing shown in various memos do not co-relate with the proceedings taken up, which shows that case is concocted. Ex.P-22 is the seizure prepared on the spot, but it shows crime number, which was registered as offence on later point of time shows that the documents have been manipulated in this case. The witnesses of search and seizure (P.W.-2) and (P.W.-3) have not supported the prosecution case. Similarly the witness of weighment procedure (P.W.-4) has also turned hostile. Further Ajay Sahu (P.W.-12) has admitted in his cross-examination that memos have been prepared on proforma, which was previously printed, which shows non-application of mind by raiding officer. On behalf of the appellant Sanjay Kumar, it is submitted that he was not the owner of the vehicle. One modification was found in the car to conceal

the material inside the compartment, which can not be done by a driver, therefore, involving him in the commission of offence is erroneous.

6. Counsel for the appellants relied on the judgment of Supreme Court in case of ***Mohan Lal Vs. State of Punjab***, reported in ***AIR (SC) 2018-0-3853***, in case of ***State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu Vs. Rajangam***, reported in ***(2010) 15 SCC 369***, in case of ***Nirmal Singh Pehlwan Vs. Inspector, Customs, Customs House, Punjab***, reported in ***(2011) 12 SCC 298*** and the order passed by the Division Bench of this Court in ***Cr.A. No.123 of 2011, passed on 07.06.2017*** in case of ***Bholaram & Ors. Vs. State of C.G.*** it is prayed that the appellants be acquitted of the charges.
7. Counsel for the State opposes the grounds raised in both the appeals and the submissions made in this respect. It is submitted that the prosecution has proved its case beyond all reasonable doubts. The evidence of police official can not be believed only for the reason that they are the members of police department. Hence there is no room for interference in the impugned judgment.
8. I have heard the learned counsel for the parties and perused the record of the Court below.
9. The point in issue in these appeals are whether the prosecution has proved the charges against the appellants on the basis of the evidence beyond reasonable doubt.

10. There appears to be no dispute that 37.470 Kg. and 57 Kg. Ganja have been recovered and seized on the date of incident. The recovery was from the appellants is a question, which shall be determined in the discussions ahead. There also appears to be no dispute that the samples that were prepared were sent for F.S.L. examination and have been confirmed in the F.S.L. report vide Ex.P-50 that the contents of the samples were Ganja, which is a narcotic substance.
11. Firstly, the objection made by the appellants regarding the legality of process of search and seizure needs consideration. Again, the appellants have not denied their presence on the spot. Therefore, it is also not under any dispute. The service of notice under Section 50 of N.D.P.S. Act vide Ex. P-5 and P-6 were served upon the appellants is also not specifically disputed and signing of written consent vide Ex.P-39 and Ex.P-40 by the appellants is again not disputed. It has been argued that the procedure under Section 50 of N.D.P.S. Act was not complied with and the appellants were not informed of their right to be searched in presence of the gazetted officer or an Executive Magistrate.
12. It is very clearly not a case of search and recovery from the person of the appellants. It has been held in the case of ***State of Himachal Pradesh Vs. Pawan Kumar*** reported in ***AIR 2005 SCW 2154*** that according to the definition in words and phrases, the word 'person' means human being with proper covering of clothes and footwear. It has been further observed that bag,

briefcase or container carried by the person can not fall within the ambit of person. Therefore, it is held that Section 50 of N.D.P.S. Act does not apply to search of bag, briefcase, article or the container carried by person to be searched. This view of the three Judge Bench of the Court has been reiterated in numerous cases. Therefore, now it is well-settled that search of bag and baggage or container shall not fall within the ambit of Section 50 of N.D.P.S. Act. Therefore, such compliance is not at all necessary. The service of notice upon the appellants under Section 50 of the N.D.P.S. Act and the consent given by the appellants are immaterial. Therefore, the objection raised on this point have no force of law.

13. Another objection raised that the timing shown in various memos do not correlate with the proceedings taken up and one of the memos namely Ex.P-22, Crime Number is mentioned on it. Further, the memos have been prepared in proforma, on this ground, it is argued that the case is concocted.
14. S.I., Ajay Sahu (P.W.-12) has stated that on receiving information, he prepared a Panchnama vide Ex.P-27. Another Panchanama was also prepared regarding not having received the objection to search warrant vide Ex.P-28 and sent information vide Ex.P-29 to the Superior Authority, regarding which entries were also made in the Station House Diary. He has stated that he sent notice to sub-Divisional Officer to present himself on the spot. He has further stated that on the spot, the car which was occupied by the

appellants was stopped. After all the appellants were served with notices of search, he has further stated that on searching the car, he found packets of Ganja in possession of appellant Sanjay Kumar vide Ex.P-10 and similarly, he found packets of Ganja in possession of another appellant Amit Singh vide Ex.P-11. Thereafter, the contents of the packets were tested and identified as Ganja vide Ex.P-12 from the recovery of appellant Sanjay Singh and vide Ex.P-13 from the recovery of appellant Amit Singh. He has further stated that all the packets were opened and the contents were mixed to make a homogenous mixture vide Ex.P-14, the recovery from Sanjay Kumar and vide Ex.P-15, the recovery from Amit Singh. Subsequent to that, weighment procedure was carried out, which was firstly verified vide Ex.P-16. On weighing, the total weight of Ganja recovered from appellant Sanjay Kumar, was found to be 37.470 Kg, in the Panchanama vide Ex.P-17. Similarly, on weighing Ganja recovered from appellant Amit Singh, vide Ex.P-18, the total weight was found to be 57 Kg and this weighment procedure was certified by the witness of the weighment vide Ex.P-19. The seizure of car and 37.470 Kg. Ganja was made from appellant Sanjay Kumar vide Ex.P-21 and similarly 57 Kg. Ganja was seized from the appellant Amit Singh and the samples of packets was made vide Ex.P-22. A seal panchanama for the seal used for packing and sealing was separately prepared vide Ex.P-20 and a numbered F.I.R. was recorded on the spot vide Ex.P-45. On the

basis of this, numbered F.I.R. was registered later on in the Police Station. He has further stated that all the seized articles were handed over to Malkhana-in-charge vide Ex.P-48 for keeping in safe custody. Subsequent to that, the samples were sent for F.S.L. examination and the report was received vide Ex.P-50.

15. In cross-examination, S.I. Ajay Sahu (P.W.-12) has admitted that he himself is the lodger of F.I.R. and investigator. He has denied all the adverse suggestions given to him by the defence. He has also specifically denied the suggestions that the seizure memo vide Ex.P-21 and Ex.P-22 were later on prepared in the Police Station. He has admitted that for completing the procedure, he had carried with him the printed proformas but had made it clear that all the proformas were blank, which were written on the spot during the procedure. No specific question has been put to this witness regarding the variations of timing in the Panchnamas. Therefore, the question raised in this appeal regarding the variations and improbabilities of timing was not put to this witness to explain the anomaly pointed out.
16. The timings mentioned in the various Panchanamas are perused and I do not find any serious discrepancies in the same. It is true that the Panchanamas have been written on the proforma prepared but in the proforma, only headings are printed and rest all the contents are hand written. Therefore, it cannot be said that the Panchanama so written are totally irrelevant and were not

prepared on the spot. Proforma with heading is acceptable. It is only in such case, when the proforma has printed in it with findings, which may be considered as objectionable. Therefore, the discrepancies that have been pointed out in the arguments by the counsel are immaterial and further no opportunity was given to the I.O. to explain the same. Therefore, this objection cannot be entertained.

17. Another reliance of the appellant is the hostility of the independent witness. What has been stated by Ajay Sahu has not been supported by the independent witnesses Chaitanya Singh (P.W.2) and Mukesh Sahu (P.W.-3). Although both of them have admitted their signatures in all the memos of proceeding showing them present. Therefore, the presence of signatures of these applicants by itself is a corroborating piece of evidence that such procedure with memos were prepared for the same procedure on which these witnesses signed. Similarly, the witness of weighing- Umesh Kumar Shah (P.W.-4) has also not supported the prosecution case even though he has admitted the signatures on the memos of weightment procedure, which shows that the memos of weightment procedure were prepared, in which he has put his signatures, which lends partial support to the statement made by I.O.
18. A.S.I., Jagdish Malhotra (P.W.-8) was a member of the team. He has fully supported the procedure taken up by Ajay Sahu (P.W.-12) in his statement and his statement has remained unrebutted

in cross-examination.

19. No such question has been put to these witnesses and Sub Inspector Ajay Sahu (P.W.-12) and A.S.I., Jagdish Malhotra (P.W.-8) that they had any previous enmity with the appellants or they have any specific reason or personal interest to falsely implicate the appellants. It has been clearly held in **Baldev Singh Vs. State of Haryana** reported in **2016 Cr.L.J. 154** and in **Tahir Vs. State of Delhi** reported in **(1996) 3 SCC 338** that there is no such view that the evidence of the police officials has to be disbelieved. There is of course a rule of caution and if after close scrutiny, the evidence of police witnesses inspires confidence, it can be held as trustworthy and reliable and it can form the basis of conviction in the occasion of hostility of independent witnesses. Therefore, on this basis, I am of this opinion that the evidence given by Ajay Sahu (P.W.-12) and A.S.I., Jagdish Malhotra (P.W.-8) are totally reliable and trustworthy.
20. The ratio laid down by the Supreme Court in **Mohal Lal Vs. State of Punjab** (Supra) would not be applicable to this case because it has been modified by the Hon'ble Supreme Court itself in subsequent judgment passed in **Varinder Kumar Vs. State of Himachal Pradesh**, reported in **SCALE-2019-3-50**, that the ratio and direction given in the judgment of **Mohal Lal Vs. State of Punjab** (Supra) shall not be applicable to the cases prior to the date of passing of judgment in Mohan Lal. The date of incident in this case is 29.11.2015, which is definitely prior to the date of

judgment in ***Mohan Lal Vs. State of Punjab*** (Supra), therefore, the case is to be decided on its own merits and substance and principle of law prevailing at the time, when the incident has taken place. Hence, the appellants do not get any benefit from the judgment of Supreme Court in ***Mohan Lal vs. State of Punjab*** (Supra).

21. After considering all the facts and circumstances of this case minutely at length, I am of this opinion that the findings of conviction recorded by the Court below and the sentence passed against them does not need interference and the appeals filed by the appellants have no substance. Hence, the appeals are dismissed.

Sd/-
(Rajendra Chandra Singh Samant)
Judge