

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on : 02.05.2019

Judgment Delivered on : 17/05/2019

CRA No. 714 of 2015

- Suraj Sharma S/o Vinod Sharma, Aged About 24 Years, R/o Luchkipara Durg, Police Station Durg, District- Durg Chhattisgarh, Chhattisgarh

---- Appellant

Versus

- State Of Chhattisgarh Through Aarakshi Kendra (the Station House Officer), Police Station Durg, District-Durg Chhattisgarh, Chhattisgarh

-----Respondent

For Appellant	: Shri Praveen Dhurandhar, Advocate
For Respondent/State	: Shri I. Lakra, Deputy Govt. Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

C A V JUDGMENT

17/05/2019

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 20-02-2015 passed by the Special Judge [under Narcotic Dugs and Psychotropic Substances Act, 1985 (in short 'the NDPS Act)], Durg (C.G.), in NDPS Case No. 15/2014 convicting the appellant for the offence under Section 21(B) of the NDPS Act and sentencing him to undergo R.I. 08 years along with fine Rs.25,000/- with default stipulation.
2. The case of prosecution in brief is this that on 27.07.2014, Sub-

Inspector- B.R. Bisan (PW-5) received one information that the appellant/accused is in possession of brown sugar and trying to sell it. One information panchnama was recorded in Station House Diary vide Ex.-P/18. The intimation regarding the same was sent to the City Superintendent of Police vide Ex.-P/4, regarding which entry was made in the Station House Diary vide Ex.-P/19. Two witnesses were summoned regarding which entry was made in the Station House Diary vide Ex.-P/20. As he had no time to obtain search warrant therefore, he proceeded to the spot along with team of raiding party, regarding which entry Ex.-P/24 was made in the Station House Diary. The appellant was found on the spot who was caught and served with a notice Ex.-P/6 under Section 50 of the NDPS Act. The appellant then gave consent to be searched by S.I. B.R. Bisan (PW-5). Firstly the members of the raiding party and the witnesses were searched by the appellant vide panchnama Ex.-P/7, which was without any result. Thereafter, the person of the appellant was searched and he was found in possession of one polythene bag kept in the right pocket of his jeans pant, containing 34 small packets which contained brown sugar powder. The search memo was prepared vide Ex.-P/8. The S.I. B.R. Bisan (PW-5) then tested the powder inside the packets by smelling and burning and identified it as brown sugar vide Ex.-P/9. The recovery panchnama Ex.-P/10 was recorded on the spot. The contents of all the packets were then taken out and a homogeneous mixture was prepared vide Ex.-P/11. The weightment procedure was carried out, firstly, the balance was verified vide Ex.-P/2. Mohit Jain (PW-1) conducted the weightment procedure and it was found that all the 34 packets containing the powder weighted 36.53 grams. After taking out

the brown sugar from all the packets, it was found to be of weight 17.25 grams along with the weight of the paper on which the brown sugar was kept. Subsequent to that, it was found that excluding the weight of the paper the weight of the contraband was 15.19 grams, vide Ex.-P/3. All the articles were seized vide Ex.-P/12. A seal panchnama of the seal which was used in packing and sealing of the articles was prepared vide Ex.-P/13. The spot map was prepared vide Ex.-P/34. Thereafter, an unnumbered FIR (Ex.-P/7) was lodged on the spot. After returning to the police station the seized brown sugar was handed over to Shankar Prajapati (PW-3) for keeping the same in safe custody. The numbered FIR (Ex.-P/29) was separately recorded. The statement of the witnesses were recorded and on completion of the investigation, charge-sheet was filed against the appellant.

3. The appellant was charged with offence under Section 21 (B) of NDPS Act, to which he denied and prayed for trial. On completion of prosecution evidence the appellant was examined under Section 313 of Cr.P.C., in which he denied all the incriminating evidence against him and pleaded innocence and false implication. No witness was examined in defence.
4. On completion of the trial, the appellant has been convicted and sentenced as aforementioned.
5. It is submitted by the learned counsel appearing for the appellant, that the procedure under Section 50 of the NDPS Act was not complied with by the police officer making the search. The so called seizure of the brown sugar was belatedly sent for FSL

examination and there is no explanation given for the delay. The independent witnesses of search and seizure have turned hostile. Therefore, on this basis, the appellant was entitled for acquittal. Hence, it is prayed that the appeal may be allowed and the appellant may be acquitted from the charge. In the alternative, it is prayed that if this Court is not convinced to acquit the appellant, then his sentence of imprisonment may be reduced to the period already undergone by him in jail.

6. Learned counsel for the State/respondent opposes the grounds raised in this appeal and the submissions made in this respect. It is submitted that the prosecution has proved its case beyond reasonable doubts. Hence, the appeal may be dismissed.
7. I have heard the learned counsel for the parties and perused the record of the Court below.
8. According to S.I. B.R. Bisan (PW-5), the appellant was served with notice under Section 50 of the NDPS Act vide Ex.-P/6. In cross-examination he has denied adverse suggestion. On perusal of the said notice Ex.-P/6, the details mention that the appellant was informed that he is required to be searched and he has entitlement to be searched in presence of a Gazzeted Officer or Magistrate or by the police official serving the notice and on the same notice the appellant has recorded his consent, that he wants to be searched by S.I. B.R. Bisan (PW-5) himself and he has signed below the same note. There is no specific denial on

the part of the appellant regarding his signature on Ex.-P/6.

The appellant had placed reliance on the judgment delivered by Hon'ble the Supreme Court in the matter of **Arif Khan Vs. State of Uttarakhand**, 2018 SCC OnLine SC 459, in which it is held that search and seizure from an accused is mandatory to be made in presence of Magistrate or a Gazetted Officer. This fact has to be examined in the context of the evidence of this case.

9. B.R. Bisan (PW-5) has given statement that while serving notice under Section 50 of the NDPS Act the appellant was informed that he has legal entitlement to be searched in presence of Gazetted Officer or Magistrate. The said fact has not been specifically challenged in the cross-examination. In the matter of **Sate of Punjab Vs. Baldev Singh**, (1998) 2 SCC 724, a three judges of Hon'ble the Supreme Court have held that search made without complying with the mandatory requirement of informing to a person of his right under Section 50 of the N.D.P.S. Act makes search void ab-initio.

Relying on the judgment of two judges Bench of Hon'ble the Supreme Court in the matter of **State of Punjab v. Balbir Singh**, 1994 (3) SCC 299, in which it was held that in compliance of Section 50 of the NDPS Act the person who is to be searched, has to be informed that if he so requires he shall be produced before a Gazetted Officer or Magistrate, therefore, it was

obligatory under the part of the official who makes search to inform the person about his entitlement in this respect. Therefore, the judgment of three judges Bench which was passed earlier shall prevail over the judgment of Hon'ble the Supreme Court in *Arif Khan's case* (supra) comprising of two judges. In such a case apprising the appellant/accused of his right has to be held as sufficient compliance. The appellant has not taken any stand in defence, that he had opted for his search to be made in presence of Gazetted Officer or a Magistrate. Therefore, under these circumstances following the dictum of Hon'ble the Supreme Court in **State of Punjab Vs. Baldev Singh** (supra), it can be held that the requisite compliance of Section 50 of the NDPS Act has been made by the officer concerned.

10. S.I. B.R. Bisan (PW-5) has further stated that the person of the appellant was searched he was found in possession of a plastic packet kept in his right pocket of the jeans pant. The plastic packet contained 34 numbers of paper packets, each containing material which look like to be brown sugar. The search was made vide panchnama Ex.-P/8. Thereafter, the contents of the packets were taken out and tested by smelling and burning and it was confirmed that the content was brown sugar, regarding which panchnama Ex.-P/9 was recorded. The recovery panchnama was separately recorded vide Ex.-P/10. Thereafter, he has stated about taking out the contents of the packets to make homogeneous mixture vide Ex.-P/11. He has given statement

about weighment procedure and according to him the exact weight of the brown sugar was 15.19 grams vide Ex.-P/3 and all the articles were seized by him vide Ex.-P/12. Samples were also prepared of the contents of the packets and seal panchnama Ex.-P/13 was separately prepared. He has given statement regarding complying the other procedures of the investigation and stated that the samples were sent for FSL examination and against which report Ex.-P/36 was received confirming that the content of the sample were di-acetyl morphine, which means that the article seized from the possession of the appellant was brown sugar. In cross-examination his statement has remained unrebutted and there is no such suggestion given to him regarding him having any enmity with the appellant or that he had any specific reason or interest to falsely implicate the appellant.

11. Mohit Jain (PW-1) is a witness of weighment. Ramdhanush Chandrakar (PW-4) has been examined as witness of search and seizure. Both these witnesses have not supported the prosecution case.
12. After closely scrutinizing the evidence of all the witnesses of prosecution, it is found that the conviction against the appellant is based only on the evidence of S.I. B.R. Bisan (PW-5). On close scrutinizing of the evidence of S.I. B.R. Bisan (PW-5) no reason can be found as to why he should falsely implicate the appellant in this case. It is also found that S.I. B.R. Bisan (PW-5) has followed all the provisions of the NDPS Act in making search and

seizure of the appellant, which resulted in recovery of 15.19 grams brown sugar from the possession of the appellant. It has been confirmed in the report of the FSL Ex.-P/36 that the article seized from the appellant was brown sugar.

There is no such rule that police witness shall always be disbelieved, only a rule of caution applies in such cases. In view of the judgment delivered by Hon'ble the Supreme Court in the matter of **Baldev Singh Vs. State of Haryana**, 2016 Cr.LJ 154 and in **Tahir Vs. State**, 1996 (3) SCC 338, conviction can be based on the evidence of police official, even when the same is not supported with evidence of independent witnesses. Therefore, after overall consideration on the facts, circumstances and evidence of this case, I come to this conclusion that the trial Court has not committed any error in convicting the appellant for offence in which he has been convicted.

13. Considered on the prayer made by the appellant for reduction in sentence. The appellant is in jail since the date of his arrest, i.e., 27-07-2014, therefore, the appellant has almost undergone the part of sentence of imprisonment of about 4 years and 9 months and there is no allegation made by the prosecution regarding any criminal antecedent of the appellant. Therefore, I feel inclined to allow the prayer for reduction of jail sentence.
14. Consequently, the appeal filed by the appellant is allowed in part. Conviction of the appellant under Section 21(B) of the NDPS Act

in the impugned judgment is upheld. However, the jail sentence awarded to the appellant, i.e. R.I. for 8 years is reduced to the period already undergone by him in jail. The fine sentence imposed upon the appellant by the trial Court is also maintained.

Sd/-

(Rajendra Chandra Singh Samant)
Judge

Aadil