

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.724 of 2010

Judgment Reserved on : 23.1.2020

Judgment Delivered on : 20.5.2020

Avinash Ashtikar, son of Late Anant Ashtikar, aged about 39 years, occupation Shopkeeper, resident of Kasaridih, Durg, District Durg, Chhattisgarh, at present residing at C.S.E.B. Colony, Gudiyari, Police Station Gudiyari, Raipur, Chhattisgarh

--- Appellant

versus

State of Chhattisgarh through Police Station Chhawani, District Durg, Chhattisgarh

--- Respondent

For Appellant	:	Shri R.K. Jain, Advocate
For Respondent	:	Shri Sushil Sahu, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. The instant appeal has been preferred against the judgment dated 20.9.2010 passed by the Special Judge under the Narcotic Drugs and Psychotropic Substances Act, 1985 (henceforth 'the Act'), Durg in N.D.P.S. Special Case No.15 of 2008, whereby the Appellant has been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 20(b)(ii)(C) of the Act	Rigorous Imprisonment for 10 years and fine of Rs.1,00,000/- with default stipulation

2. Prosecution case, in brief, is that on 11.10.2008, T.C. Malakar (PW7), Sub-Inspector of Police Station Chhawani received a secret information that a person, namely, Avinash Ashtikar (the Appellant

herein) is illegally transporting Ganja in his Indica Car bearing registration No.CG 13 C 0227 from Raipur to Supela, Bhilai. After recording the said information, two witnesses, namely, Salim Khan and Mohd. Nisar were informed about the secret information and Mukhbir Suchna Panchnama (Ex.P1) was prepared. In compliance of the provision contained in Section 42(2) of the Act, a written communication (Ex.P17) was sent to the higher officer, i.e., the City Superintendent of Police, Chhawani, Bhilai about the secret information. Ex.P17 was received by Abdul Afzal Khan (PW4), Reader of the office of C.S.P., Chhawani. Thereafter, Sub-Inspector T.C. Malakar (PW7) along with staff and witnesses went to the spot. It was seen that Indica Car bearing registration No.CG 13 C 0227 was coming from towards Raipur and the car was being driven by the Appellant. The car was stopped and after informing the Appellant about the Mukhbir Suchna, in compliance of the provision of Section 50 of the Act, he was given a notice (Ex.P2) for search. The Appellant gave his consent in writing in Ex.P2 itself for his search by Sub-Inspector T.C. Malakar (PW7). During search, 2 filled plastic manure bags and 1 electronic weighing machine were found kept in rear seat of the car. Search Panchnama (Ex.P4) was prepared. Both the bags and the weighing machine were seized vide Ex.P5. Identification of the seized substance was done which was found to be Ganja. Identification memo (Ex.P6) was prepared. Physical verification of the seized electronic weighing machine was done and its panchnama (Ex.P7) was prepared. On weighing of the Ganja recovered from the two bags, it was found to be total 26 Kgs. Samples of 50 Gms. each were taken out from said bags, i.e., total 2 samples were taken out and kept in 2 containers. Weighing

Panchnama (Ex.P8) was prepared. The car, Ganja and samples were seized vide Ex.P9. The Appellant was arrested on the spot vide arrest memo (Ex.P11). After return to the police station, First Information Report (Ex.P20) was registered. All the seized articles including the 2 containers in which samples were kept were deposited in the Malkhana. Entry of the deposit in the Malkhana Register is Ex.P15. Acknowledgment (Ex.P16) of the deposit was obtained. The 2 samples of Ganja were sent to the Forensic Science Laboratory for examination vide Ex.P21. Acknowledgment given by the FSL is Ex.P22. FSL report is Ex.P25, which is positive. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure. On completion of the investigation, a charge-sheet was filed against the Appellant. Charge was framed against him.

3. In support of its case, the prosecution examined as many as 7 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the Appellant denied the guilt and pleaded innocence. One witness Rani Ashtikar, wife of the Appellant has been examined in defence.
4. On completion of the trial, vide the impugned judgment, the Trial Court convicted and sentenced the Appellant as mentioned in first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant submitted that without there being sufficient evidence on record against the Appellant, the Trial Court has wrongly convicted him. The provisions of Sections 55 and 57 of the Act have not been duly complied with. It was further submitted that according to the

prosecution and the documents prepared by the Investigating Officer, the 2 samples of 50 Gms. each were kept in 2 containers, but the acknowledgment and the report of the FSL show that the samples which were received by the FSL were kept in 2 packets which were marked as A1 and A2. There is nothing on record which shows that the 2 containers in which the samples of Ganja were kept were ever marked as A1 and A2. It was further submitted that in the Malkhana register also, there is no entry that when were the 2 containers in which samples of Ganja were kept taken from the Malkhana to the FSL and by whom. This creates a serious doubt that the samples which were collected in 2 containers on the spot were themselves sent to the FSL for examination or any other packets were sent for examination. It was further submitted that according to the case of the prosecution, the Appellant was arrested on the spot and after return to the police station, FIR (Ex.P20) was registered at 19:35 hours. But, the arrest memo (Ex.P11) shows that the Appellant was arrested at Power House Chowk, Bhilai at 19:35 hours and Crime No.569 of 2008 is also mentioned in the arrest memo. Likewise, in the seizure memo (Ex.P9) also, Crime No.569 of 2008 is mentioned. Thus, again this creates a serious doubt that all the documents were prepared at a time at the police station at the time of registering the FIR (Ex.P20). Therefore, the entire case of the prosecution is doubtful.

6. Learned Counsel appearing for the State opposed the above submission and supported the impugned judgment of conviction and sentence.

7. I have heard Learned Counsel appearing for the parties and perused the record with due care.
8. With regard to the provision of Section 55 of the Act, there is no doubt that on the relevant date Investigating Officer T.C. Malakar (PW7) was posted as a Sub-Inspector at Police Station Chhawani. He was not the Station House Officer of the said police station. His statement and the entries made in the Malkhana register clearly show that before depositing the seized articles in the Malkhana, this witness (PW7) never handed over the seized articles to the Station House Officer of the police station nor did he obtain any seal of the Station House Officer over any of the seized articles. Therefore, it is clear that the provision contained in Section 55 of the Act has not been duly complied with in this case.
9. So far as the contention regarding non-compliance of the provision of Section 57 of the Act is concerned, I have perused the entire evidence led by the prosecution with utmost care, but I do not find any document on record which could show that after completion of the entire proceeding, as contained in Section 57 of the Act, any information was sent to the higher officer nor Investigating Officer T.C. Malakar (PW7) has deposed anything in this regard. Thus, compliance of Section 57 of the Act has also not been done.
10. According to the case of the prosecution and the seizure memo (Ex.P9), 2 samples of 50 Gms. each were taken out and sealed, but those samples were kept in packets or in containers is not mentioned in the seizure memo (Ex.P9). According to the acknowledgment (Ex.P16) of Malkhana Moharrir, the samples were kept in 2 sealed containers. According to the covering memo

(Ex.P21) of the Superintendent of Police, Durg, the samples which were sent to the FSL were kept in 2 containers. The documents Ex.P16 and Ex.P21 do not contain that the 2 containers in which the samples were kept were ever marked as A1 and A2. According to the acknowledgment (Ex.P22) and the report (Ex.P25) of the FSL, the samples which were received by the FSL were kept in 2 packets and those packets were marked as A1 and A2. Investigating Officer T.C. Malakar (PW7) has admitted the fact that the record does not contain that the samples which were collected in the containers/packets were ever marked as A1 and A2. Therefore, this again creates a serious doubt whether the samples which were collected at the spot were itself sent to the FSL for examination or any other packets were sent to the FSL.

11. According to the case of the prosecution, the FIR (Ex.P20) was registered in Police Station Chhawani at 19:35 hours and according to the arrest memo (Ex.P11) the Appellant was arrested at Power House Chowk, Bhilai at 19:35 hours itself. If the Appellant was arrested at Power House Chowk at 19:35 hours then registering of the FIR (Ex.P20) in the police station at the same time, i.e., 19:35 hours itself is not possible. From perusal of the arrest memo (Ex.P11) and the seizure memo (Ex.P9), it is also established that both the documents contain Crime No.569 of 2008. When the FIR (Ex.P20) itself was not registered by that time, then how the crime number was mentioned in those 2 documents is not explained by the prosecution. It seems that all the documents were collectively prepared at a time at the police station after completion of the entire proceeding.

12. On a minute examination of the entire evidence available on record, it is clear that there is non-compliance of the provisions contained in Sections 55 and 57 of the Act in this case. The samples of Ganja which were examined by the FSL relates to this case itself is also doubtful. From the evidence on record, it is also established that all the documents were collectively prepared at a time at the police station after completion of the entire proceeding. This makes the case of the prosecution doubtful. For the foregoing reasons, I find that the prosecution has failed to prove its case beyond reasonable doubt.
13. Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellant is acquitted of the charge framed against him.
14. Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-

(Arvind Singh Chandel)
Judge