

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No. 58 of 2016

From the judgment and order dated 01.07.2016/04.07.2016
passed by the Addl. Sessions Judge -cum- Special Judge,
Jeypore in Criminal Trial No.47 of 2013.

Lal Khan Appellant

-Versus-

State of Orissa Respondent

CRLA No.693 of 2016

Amir Khan Appellant

-Versus-

State of Orissa Respondent

For Appellant: Mr. P.K. Nanda
(in JCRLA 58 of 2016)

For Appellant: Mr. M.R. Padhy
(in CRLA 693 of 2016)

For Respondent: - Mr. Arupananda Das
Addl. Govt. Advocate

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing & Judgment: 23.06.2022

S. K. SAHOO, J. The appellant Lal Khan in JCRLA No. 58 of 2016 and appellant Amir Khan in CRLA No.693 of 2016 faced trial in the Court of learned Addl. Sessions Judge -cum- Special Judge, Jeypore in Criminal Trial No.47 of 2013 for offence punishable under section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 30.01.2013 at about 6.30 a.m. near Chakde india Hotel Chowk on N.H.26 (Jeypore-Borigumma Road), they possessed 119 Kgs. 800 grams of Ganja in a Mini Truck bearing Regd. No.MP-42-G-0524 without any authority.

Both the appellants were found guilty of the offence charged by the learned trial Court and sentenced to undergo rigorous imprisonment for a period of ten years each and to pay a fine of Rs.1,00,000/- (rupees one lakh) each, in default, to undergo further rigorous imprisonment for a period of six months vide impugned judgment and order dated 01.07.2016/ 04.07.2016.

Since both the appeals arise out of one common judgment and order of conviction, with the consent of learned counsel for the respective parties, those were heard analogously and disposed of by this common judgment.

2. The prosecution case, in short, is that Amal Sardar (P.W.7), Sub-Inspector of Police, Jeypore Sadar Police Station received a credible information on 30.01.2013 at 5.00 a.m. about transportation of ganja in a Mini Truck bearing registration No.MP-42-G/0524 running from Baipariguda side to Raipur side. Entering the said fact in the station diary, P.W.7 proceeded to detect the case with other staffs, namely, Purusottam Jani (P.W.1), Laxman Barik, Sarat Chandra Bisoi and Chudamani Biswal, Head Constable and at about 5.45 a.m. near Chakde India Hotel Chowk, Jeypore, he intercepted the Mini Truck coming from Baipariguda side with two occupants (the appellants). After ascertaining the identity of the occupants/appellants, at their option, he requisitioned the Executive Magistrate (P.W.5) to the spot and arranged one weighing man (P.W.6) and two independent witnesses, namely, P.W.3 and P.W.4 and then, he searched the appellants and the involved Mini Truck in their presence. Besides the articles as per exhibits, Ext.4/2 contained the properties recovered on personal search of the appellants. He also recovered twenty four numbers of packets wrapped with polythene from the vehicle as per the seizure list Ext.3/2 and the articles in the packets were suspected to be Ganja. From a homogeneous mixture sample in

two packets, each containing 25 grams were collected from each recovered packets. The samples were duly kept in sealed packets marked as A to X. The appellants and the seized properties were produced before the Inspector in-charge of Jeypore Sadar police station.

P.W.7, the informant presented the written report before P.W.8 Rakesh Kumar Tripathy, who was acting as Inspector in-charge on temporary basis in absence of the regular Inspector in-charge of Jeypore Sadar police station and accordingly, P.W.8 registered Jeypore Sadar P.S. Case No.15 dated 30.01.2013 under section 20(b)(i) of N.D.P.S. Act against both the appellants. P.W.7 also produced the seized contraband articles along with the Mini Truck as per the seizure list. The contraband articles were kept in the police station malkhana in a sealed condition. P.W.8 took up investigation of the case, visited the spot, examined the witnesses and on 31.01.2013 he forwarded both the appellants along with the seized contraband articles including the sample packets before the learned Special Judge, Jeypore and as per the direction of the learned Special Judge, Jeypore, P.W.8 produced the sample packets before the learned S.D.J.M., Jeypore on the next day, which was then forwarded to R.F.S.L., Berhampur through C/625 H.H.Naik for

chemical analysis. P.W.8 submitted a detailed report before the Superintendent of Police, Koraput, which was later on seized as per seizure list Ext.21. The relevant station diary entry in which the fact of information about transportation of ganja has been noted down by P.W.7 has been marked as Ext.25. P.W.8 also seized the malkhana register of the police station. The chemical analysis report was also received, which indicates that the exhibits were found to be containing fruiting and flowering tops of cannabis plant known as ganja. On completion of investigation, P.W.8 submitted charge sheet against both the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act.

3. The appellants were charged under section 20(b)(i) of the N.D.P.S. Act for unlawful possession of 119 Kgs. 800 grams of contraband ganja. The appellants refuted the charge, pleaded not guilty and claimed to be tried.

4. During course of trial, in order to prove its case, the prosecution examined eight witnesses.

P.W.1 Purusottam Jani, who was the A.S.I. of Police attached to Jeypore Sadar police station was one of the members of the raiding party and he stated about the detention of the vehicle, presence of the appellants in the vehicle and seizure of contraband ganja from the vehicle. He also stated that

P.W.7 sent requisition to the Sub-Collector, Jeypore through one Laxman Barik, A.S.I. of Police for deputation of an Executive Magistrate and P.W.7 also called the weighman (P.W.6) to the spot.

P.W.2 Bhagaban Sahu was the Constable attached to Jeypore Sadar police station and he stated about the seizure of malkhana register of Jeypore Sadar police station, extract of station diary entry and two command certificates by the investigating officer (P.W.8) under seizure list Ext.1.

P.W.3 Abhay Kumar Swain and P.W.4 Prem Chand Pattanaik are the independent witnesses and also witnesses to the weighing chart and seizure, did not support the prosecution case, rather they stated that on being asked by some police officials, they put their signatures on blank papers and proved Exts.2/3, 3/2, 4/2, 5/2, 6/2 and 7/2 as their signatures.

P.W.5 Achyutananda Palit was the Tahasildar -cum- Executive Magistrate, Jeypore who remained present at the time of search of the vehicles and seizure of contraband ganja by the police. He took zima of the brass seal.

P.W.6 Balmiki Mohapatra was the weighman, did not support the prosecution case.

P.W.7 Amal Sardar was the S.I. of Police attached to Jeypore Sadar police station and he is the informant in the case and he stated about the detention of the vehicle, presence of the appellants in the vehicle and seizure of contraband ganja from the vehicle.

P.W.8 Rakesh Kumar Tripathy was the S.I. of Police attached to Jeypore Sadar police station and also acting as I.I.C. in-charge and he is the Investigating Officer who on completion of investigation, submitted charge sheet.

The prosecution exhibited twenty six documents. Ext.1, 3/2, 4/2, 5/2, 21 and 23 are the seizure lists, Ext.2/3 is the weighment chart, Ext.6/2 is the specimen seal paper, Ext.7/2, 14 and 15 are the paper slips, Ext.8, 9/1 and 17 are the zimanamas, Exts.10 and 11 are the option offer letters, Ext.12 is the spot map, Ext.13 is the F.I.R., Ext.16 is the chemical examination report, Exts.18 and 19 are the command certificates, Ext.20 is the forwarding letter sending of exhibit to R.F.S.L., Berhampur, Ext.22 is the detailed report, Ext.24 is the copy of letter, Ext.25 is the station diary entry, Ext.25/1 is the station diary entry no.493 dated 29/30.01.2013, Ext.25/2 is the S.D. entry no.494, Ext.25/3 is the S.D. entry no.507, Ext.25/4 is the S.D. entry no.509, Ext.25/5 is the S.D. entry no.510,

Ext.25/6 is the S.D. entry no.527, Ext.26 is the malkhana register vide Vol. No.XLII and Ext.26/1 is the malkhana entry vide Sl. No.204 dated 30.01.2013.

The prosecution also proved seventy four material objects. M.O.I is the brass seal, M.Os.II to XXV are the ganja packets, M.Os.XXVI to XL are the sample packets and M.Os.LI to LXXIV are the sample packets.

5. The defence plea of both the appellants was one of denial and the appellant Amir Khan (in CRLA No. 693 of 2016) pleaded that a false case has been foisted against him whereas in the accused statement recorded under section 313 Cr.P.C., the appellant Lal Khan (in JCRLA No.58 of 2016) stated that he was taking food in a 'dhaba' and their vehicle was out of order and at that point of time, the police arrived at that place and coming to know that both of them belonged to the State of Madhya Pradesh, foisted the case against them.

6. The learned trial Court after assessing the oral as well as documentary evidence on record came to hold that when search and recovery were made in an open place, i.e. a public road, there is no necessity of compliance of section 42 of the N.D.P.S. Act and section 43 of the said Act is applicable here. Reliance was placed in the case of **Karnail Singh -Vrs.- State**

of Haryana reported in (2009) 8 Supreme Court Cases

539. Learned trial Court further held that even though the independent witnesses have not supported the prosecution case as usual, but in view of the evidence of the official witnesses, the prosecution case has been proved. It was further held that a cumulative effect of the oral and documentary evidence established that there was seizure of contraband article (ganja) of commercial quantity from the conscious possession of the appellants and that they were transporting the same in a Mini Truck unauthorisedly and accordingly, both the appellants were found guilty under section 20(b)(i) of the N.D.P.S. Act.

7. The first and foremost question is whether framing of charge under section 20(b)(i) of the N.D.P.S. Act and conviction of the appellants for such offence is legally sustainable.

The charge sheet was submitted under section 20(b)(ii)(C) of the N.D.P.S. Act.

Charge has been framed under section 20(b)(i) of the N.D.P.S. Act on the accusation that on or about 30.01.2013 at about 6.30 a.m. near Chakde India Hotel Chouk on N.H.36 (Jeypore-Borigumma Road), the appellants were unauthorisedly found possessing 119 Kgs. 800 gms. of Ganja in a Mini Truck bearing Regd. No.MP-42-G-0524.

Section 20(b)(i) of the N.D.P.S. Act states that whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder produces, manufactures, possesses, sells, purchases, transports, imports inter-state, exports inter-state or uses cannabis, shall be punishable (i) where such contravention relates to Clause (a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees. Clause (a) relates to cultivation of cannabis plant. In the case in hand, since the contravention does not relate to cultivation of cannabis plant rather illegal possession of commercial quantity of ganja, the proper charge should have been section 20(b)(ii)(C) of the N.D.P.S. Act. The finding of the learned trial Court is that the seizure was of commercial quantity of ganja from the conscious possession of the appellants which they were transporting in a Mini Truck unauthorisedly. In my humble view, the learned trial Court in the factual scenario has erroneously framed charge under section 20(b)(i) instead of 20(b)(ii)(C) of the N.D.P.S. Act. Framing of charge is not an empty formality. The object behind framing of charge is to make the accused aware of the nature and extent of the accusation against him. The learned trial Court should have been careful

enough to mention the charge correctly and conviction order should also have been under proper offence. The nature of punishment under section 20(b)(i) and 20(b)(ii)(C) of the N.D.P.S. Act is quite distinguishable. The maximum substantive sentence for section 20(b)(i) is for ten years which is the minimum one for 20(b)(ii)(C) of the N.D.P.S. Act. However, in view of the language of framing of charge and section 464 of the Cr.P.C., it cannot be said that any prejudice has been caused to the appellants on account of framing of charge under section 20(b)(i) instead of 20(b)(ii)(C) of the N.D.P.S. Act or any failure of justice has occasioned thereby inasmuch as the appellants were made aware of the nature and extent of the accusation against them.

8. Learned counsel for the appellants drew the attention of the Court to the F.I.R. (Ext.13) lodged by P.W.7 wherein it is mentioned as follows :

"On 30.01.2013 at 5 a.m. I received credible information that, Mini Truck bearing Regd. No.MP-42-G/0524 carrying contraband ganja coming from Baipariguda side to Raipur side. So, I entered the fact in P.S. S.D.E. No.493 dt.30.01.2013 and intimated to my immediate superior S.D.P.O., Jeypore as well as sent extract of the Station Diary Entry vide letter No.141 dated 30.01.2013 (T) C/823 B. Das, issued C.C. No. 387309 dtd. 30.01.2013. As I have presumed to belief that, the delay would be caused to obtain search warrant

which may facilitate the accd. persons to escape and as such I considered to conduct the ground of belief in the station diary.”

Learned counsel for the appellants further placed the evidence of P.W.7, who has stated that on 30.01.2013 at 5 a.m. he received telephonic message about illegal transportation of contraband ganja in a Mahindra Van bearing registration no. MP-42-G-0524 running from Baipariguda side to Raipur side and he made station diary entry of the message and then copies of the entries were sent to the Superintendent of Police, Koraput and S.D.P.O., Jeypore. He argued that though the relevant station diary entry has been marked as Ext.25/1, but neither the letter No.141 dated 30.01.2013 has been proved nor C/823 B. Das who carried the extract of the station diary entry along with the said letter to the office of the S.D.P.O., Jeypore has been examined. It is further argued that neither the Superintendent of Police, Koraput nor the S.D.P.O., Jeypore has been examined in the case nor any responsible officer from such offices has been examined to substantiate that such a letter was sent by P.W.7 in compliance with the provision under section 42(2) of the N.D.P.S. Act and it was received by him in his office. The evidence of the I.O. (P.W.8) is totally silent about seizure of any such letter as mentioned in the F.I.R. According to the learned

counsel for the appellants, in the factual scenario, the provision under sub-section (2) of section 42 of the N.D.P.S. Act needs mandatory compliance and here when the officer who has taken down the information in writing has stated that he had sent copies thereof to his immediate official superior in terms of sub-section (2) of section 42 of the N.D.P.S. Act, it was nonetheless the duty of the prosecution to bring on record the oral as well as documentary evidence to show that in fact such mandatory provision has been complied with in letter and spirit. It is further submitted that the learned trial Court was not justified in observing that in the case in hand, there is no necessity of compliance of the provisions under section 42(2) of the N.D.P.S. Act relying on the decision in the case of **Karnail Singh** (supra). Learned counsel further submitted that since non-compliance of the mandatory provisions in a case of this nature goes to the root of the matter, the conviction of the appellants cannot be sustained in the eye of law and as such, benefit of doubt should be extended in favour of the appellants.

Mr. Arupananda Das, learned Additional Government Advocate for the State of Odisha, on the other hand, supported the impugned judgment. He placed the evidence of the official witnesses, namely, P.W.7 and P.W.8 and submitted that after

getting reliable information, the same was reduced into writing in the station diary and since the station diary book has been seized in which the relevant entry (Ext.25/1) exists, there has been compliance of the provisions under section 42(1) of the N.D.P.S. Act. Learned counsel further submitted that it is true that even though oral evidence is there that the extract of the information taken down in writing were sent to the office of the Superintendent of Police, Koraput and S.D.P.O., Jeypore and no documentary evidence has been proved in that respect and no one from the office of the Superintendent of Police, Koraput or S.D.P.O., Jeypore have also been examined, but for the laches of the I.O. in not seizing the material documents and not examining the material witnesses, the entire prosecution case cannot be disbelieved particularly when huge quantity of ganja has been seized in this case. He also placed reliance to the provisions under section 43 of the N.D.P.S. Act and submitted that since seizure and arrest has been made in a public place, the provisions under section 43 of the N.D.P.S. Act would be applicable and not section 42 of the N.D.P.S. Act and therefore, the appeals should be dismissed.

9. Considering the submissions made by the learned counsel for the respective parties, it is not in dispute that in the

F.I.R. lodged by P.W.7, it is clearly mentioned that there was receipt of credible information on 30.01.2013 at 5.00 a.m. by P.W.7 regarding transportation of contraband ganja in a Mini Truck bearing registration No.MP-42-G-0524. The F.I.R. further reveals that such credible information was entered in the P.S. Station Diary No.493 dated 30.01.2013. The relevant station diary entry, which has been marked as Ext.25/1 reads as follows:

"At this hour, I received an anonymous telephonic call about transportation of contraband Ganja in a Mahindra Van bearing registration No.MP-42-G/0524 from Baipariguda side to Raipur side (T) Jeypore Town. Since I have reason to believe that delay would cause in obtaining search warrant, which shall facilitate the miscreants to escape in order to defeat the culprit without obtaining search warrant, as per the provision laid down in Sec.42 of N.D.P.S. Act, I sent information to my SDPO, Jeypore (immediate superior) with copy to S.P., Koraput along with copy of S.D. entry made in this regard."

Even though in the F.I.R., it is mentioned that the extract of the station diary entry vide letter no. 141 dated 30.01.2013 was sent to the immediate superior of the informant, i.e. S.D.P.O., Jeypore, but such letter has not seen the light of the day as neither P.W.7 has proved it nor the I.O. (P.W.8) has made any endeavour to seize such a vital letter. The evidence of

P.W.7 to the effect that copies of the entries of the station diary were sent to the Superintendent of Police, Koraput as well as S.D.P.O., Jeypore, but neither the Superintendent of Police, Koraput as well as S.D.P.O., Jeypore nor any responsible officer from their office has been examined to say that such a letter as finds place in the F.I.R. has been received in their office.

10. Law is well settled that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and cause prejudice to the accused.

In case of **State of Punjab -Vrs.- Baldev Singh reported in 1999 (II) Orissa Law Reviews (SC) 474**, it is held as follows:-

"10. The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his

belief under the proviso to sub-section (1), shall forthwith send a copy of his belief under the proviso to sub-section (1) to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of section 43 and section 42 is that whereas section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, section 43 does not contain any such provision and as such while acting under section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful. "

The decision rendered in the case of **Baldev Singh** (supra) was further considered by a five-Judge Bench in the case of **Karnail Singh** (supra) wherein it was held in the concluding paragraph as follows:-

"35. In conclusion, what is to be noticed is Abdul Rashid i.e. (2000) 2 SCC 513 did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham i.e. (2001) 6 SCC 692 hold that the requirements of Sections 42(1) and 42(2) need

not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had 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.

(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 of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of 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 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."

In case of **State of Rajasthan -Vrs.- Jag Raj Singh @ Hansa reported in (2016) 64 Orissa Criminal Reports (SC) 827** a Division Bench of the Hon'ble Supreme Court held that without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers. In the present case, it is not the case of the prosecution that the jeep HR-24 4057 had any permit for transporting the passengers. The High Court has looked into the evidence and came to the conclusion that there was no material to indicate that there was any permit for running the jeep as public transport vehicle. The High Court held that personal jeep could not be treated as public transport vehicle. It was further held that since the jeep cannot be said to be a public conveyance within the meaning of Explanation to section 43 of the N.D.P.S. Act, hence, section 43 was clearly not attracted and provisions of section 42(1) proviso were required to be complied with and it was further held that the aforesaid statutory mandatory

provisions having not been complied with, the High Court did not commit any error in setting aside the conviction.

In the case of **Ramakrushna Sahu -Vrs.- State of Odisha reported in (2018) 70 Orissa Criminal Reports 340**, it is held as follows:

"12.....Law is well settled that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and cause prejudice to the accused. Section 42 (2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall send a copy thereof to his immediate official superior within seventy-two hours. Under section 42 (1), if the empowered officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he

need not take down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to believe that obtaining search warrant or authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender. The copy of information taken down in writing under sub-section (1) or the grounds of belief recorded under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act has to be sent to his immediate superior official within seventy-two hours."

In the case of **Biswanath Patra -Vrs.- State of Odisha reported in 2019 (I) Orissa Law Reviews 34**, it is held as follows:

"8. Under section 42(1), if the empowered officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in

writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he need not take down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to belief that obtaining search warrant or authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender. Section 42 (2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall send a copy thereof to his immediate official superior within seventy-two hours."

In view of the settled position of law, now it is to be seen whether the contentions raised by the learned counsel for the appellants that there is non-compliance of mandatory provision under section 42(1) and 42(2) of the N.D.P.S. Act is sustainable or not. The registration certificate of the vehicle has been seized under seizure list Ext.4/2 and it indicates that it stands in the name of the owner Narayan Rao, son of Mr. Maruti

Rao, Village-Mudlay, Gulana, Shajapur (MP) and it does not indicate the vehicle to be a public transport vehicle. The explanation to section 43 shows that private vehicle would not come within the expression 'public place' as explained in section 43 of the N.D.P.S. Act. Explanation to section 43 defines expression 'public place' which includes any public conveyance. The word 'public conveyance' as used in the Act has to be understood as a conveyance which can be used by public in general. The Motor Vehicle Act, 1988 was enacted to regulate the law relating to motor vehicle. The vehicles which can be used for public are public motor vehicles for which necessary permits have to be obtained. The R.C. book of the Mini Truck though not marked as exhibit but the seizure list (Ext.4/2) indicated that the tax was paid up to 30.09.2011. Thus, as on the date of occurrence, neither up-to-date tax was paid nor there is anything to show that on that day the vehicle was permitted to be used as public transport vehicle. In view of the decision of the Hon'ble Supreme Court in the case of **Jag Raj Singh @ Hansa** (supra), I am of the humble view that the relevant provision would not be under section 43 of the N.D.P.S. Act, but the case would come under section 42 of the N.D.P.S. Act.

In the case in hand, from the beginning, not only in the F.I.R. but also in the station diary entry, it seems that on receipt of credible information about transportation of ganja, the prosecution has tried to make out a case that section 42 of the N.D.P.S. Act has been complied with and the documentary evidence, which are stated to have been maintained to substantiate such compliance have been withheld by the prosecution and the competent persons from the office of S.P., Koraput and S.D.P.O., Jeypore, who could have proved that there has been compliance of such provision, have not been examined and no satisfactory explanation has been offered by the prosecution in that respect. P.W.7 has stated that he sent the copy of the station diary entry to S.P., Koraput and S.D.P.O., Jeypore through constable Babita Dash but the lady constable has not been examined. P.W.8 has stated that he had not examined the S.D.P.O., Jeypore in the case. Thus, it cannot be said that the prosecution has successfully proved the mandatory compliance of section 42(2) of the N.D.P.S. Act in the case.

11. In view of the foregoing discussions, I am of the humble view that prosecution has not successfully established its case against the appellants beyond all reasonable doubt and thus, the impugned judgment and order of conviction of the

appellants under section 20(b)(i) of the N.D.P.S. Act cannot be sustained in the eye of law and the same is hereby set aside. Since the appellants are in judicial custody, they be set at liberty forthwith, if their detention is not required in any other case.

Accordingly, both the JCRLA and CRLA stand allowed.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

Orissa High Court, Cuttack

The 23th June 2022 PKSahoo/RKM/Pravakar

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S.K. Sahoo, J.

