

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No. 70 Of 2016

From the judgment and order dated 04.11.2016 passed by the 3rd Addl. Sessions Judge -cum- Special Judge, Berhampur, Ganjam in 2(a) C.C. Case No. 20/2012(N)/T.R. No. 22 of 2015.

Pradeep Panda

.....

Appellant

-Versus-

State of Orissa

.....

Respondent

JCRLA No. 71 Of 2016

Raghunath Sahu

.....

Appellant

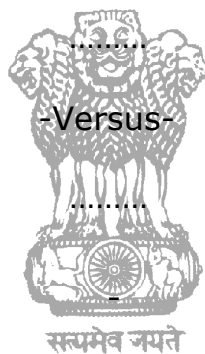
-Versus-

State of Orissa

.....

Respondent

For Appellants:



Ms. Kiran Rout

For Respondent:

Mr. Debasis Biswal
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing : 14.09.2022 Date of Judgment: 23.09.2022

S.K. SAHOO, J. The appellant Pradeep Panda and Raghunath Sahu faced trial for the offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985

(hereafter 'N.D.P.S. Act') along with co-accused Kiran Kumar Pati who was separately charged for the offence under section 20(b)(ii)(C) read with section 25 of the N.D.P.S. Act in the Court of the learned 3rd Addl. Sessions Judge -cum- Special Judge, Berhampur, Ganjam in 2(a) C.C. Case No. 20/2012(N)/T.R. No. 22 of 2015 on the accusation that on 04.06.2012 at about 5.30 a.m., both the appellants were found in conscious possession of 220 kilograms of ganja (cannabis) and transporting the same in a Tata Indica car bearing registration No.OR-02W-5419 without having any authority or licence to possess the same and the co-accused Kiran Kumar Pati being the owner of the said car knowingly permitted the appellants to use the car for commission of transporting ganja in contravention of the provisions of the N.D.P.S. Act.

The learned trial Court vide impugned judgment and order dated 04.11.2016 while acquitting the co-accused Kiran Kumar Pati of all the charges, found the appellant guilty of the offence charged and sentenced them 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 pay the fine, to undergo rigorous imprisonment for one year each.

2. The prosecution case, in short, is that P.W.7 Sarat Chandra Bhanja, S.I. of Excise, E.I. & E.B.(S.D.), Berhampur received reliable information regarding illegal transportation of ganja at Dengaosta to Seragada side on 04.06.2012 at about 3.00 a.m.. He reduced the information into writing and gave written intimation (Ext.11) to his higher authority i.e. Siba Prasad Gantayat (P.W.6), who was working as Inspector in-charge of Excise, E.I. & E.B. Unit-II, Berhampur. Then P.W.7 along with other excise officials proceeded to Narasinghagada Chhak under Patapur police station to work out the information. They reached at the spot by 5.20 a.m. and while performing patrolling duty at about 5.30 a.m., they detected one Indica car bearing registration No. OR-02W-5419 coming from the side of Dengaosta and going towards Palaspur and found two persons inside the car, one person was driving the car and another person were sitting adjacent to him in the car. After detaining the car, P.W.7 disclosed his identity to those two persons and also ascertained their identification and the appellant Raghunath Sahu was found to be driver of the vehicle and the appellant Pradeep Panda was found sitting in the front seat. Since smell of ganja was coming from inside the car, P.W.7 called P.W.1 Kali Charan Barala, who was passing by that way and requested him

to remain present as a witness. P.W.7 gave written option to the appellants about their right to be searched before a Gazetted Officer or an Executive Magistrate, but both the appellants expressed their willingness in writing to be searched by P.W.7. P.W.7 gave his personal search before P.W.1 and then the car was searched and six jerry bags containing ganja were recovered, out of which three were kept at the backside seat and three were kept in the dickey of the car. P.W.7 put the Sl. Nos.1 to 6 on six jerry bags. He opened each of the bags one after another and tested a handful of ganja from each bag by rubbing the same in his palm so also by burning the same and from its smoke, colour, text and from the departmental experience of thirty three years, he came to the conclusion that the recovered articles were nothing but cannabis. He prepared drug testing chart and on weighment of each jerry bags by means of spring balance, the total quantity of ganja came to be 220 kilograms. Since the appellants did not disclose the source from which they collected such ganja and admitted their guilt, P.W.7 sealed the jerry bags and put the impression of brass seal on each of the jerry bags so also affixed the paper slip which contains his signature, the signatures of the appellants and the witnesses. He handed over the brass seal in zima of P.W.3 Biswajit Das by

executing zimanama vide Ext.5/2. He prepared the seizure list in which the signatures of the appellants so also the witnesses were taken and copy of the seizure list was given to each of the appellants. P.W.7 also prepared spot map vide Ext.6/2 and then he recorded the statements of the appellants as well as the witnesses, explained the grounds of arrest of the appellants. P.W.7 brought the appellants along with the seized articles and produced them before the learned Sessions Judge -cum- Special Judge, Berhampur and prayed for drawal of samples of the seized articles. As per the order of the learned Special Judge, he produced the seized articles before the learned S.D.J.M., Berhampur, who verified the seal and seized articles were opened for drawal of samples and accordingly, 50 grams of samples from each of the jerry bags in duplicate were collected. The sample packets Ext.A to F were handed over to P.W.5 Braja Bihari Nayak, Constable of Excise to hand over the same to the Asst. Chemical Examiner, D.E.C.T.L., Berhampur under the authorization letter issued by the learned S.D.J.M., Berhampur. The broken seals of jerry bags were kept in a separate envelope and sealed before the learned S.D.J.M., Berhampur so also the seized jerry bags Sl. Nos.1 to 6 containing cannabis were stitched and resealed by the learned S.D.J.M., Berhampur.

Thereafter, the jerry bags Sl. Nos.1 to 6 with seized articles and envelope containing broken seal so also duplicate sample packets A1 to F1 were deposited in Court Malkhana vide C.M.R. No. 26 dated 04.06.2012 as per the orders of the Court. On 05.06.2012 P.W.7 submitted preliminary report and also wrote a letter to the R.T.O., Bhubaneswar to find out the ownership of the offending vehicle. On 11.06.2012 he received the report from the R.T.O., Bhubaneswar that the owner of the vehicle was the accused Kiran Kumar Pati (who faced trial and acquitted). The Chemical Examiner indicated in his report that the sample marked as Exts. A to F were found to be cannabis (Ganja) as defined under section 2(iii)(b) of the N.D.P.S. Act. Since in spite of all attempts made by P.W.7 to serve the notice on the owner of the vehicle, it could not be possible, on completion of investigation, final prosecution report was submitted against the two appellants so also accused Kiran Kumar Pati, showing latter as an absconder.

3. The appellants pleaded not guilty to the charge framed against them and claimed to be tried.

4. The defence plea of the appellant Pradeep Panda is that on 03.06.2012 he was coming from Arakhapur from Berhampur in Kaleswari bus and at about 7.00 p.m. he reached

at Berhampur bus stand and went to his friend's house through Goilundi Chhak and at that place, he was called by one person Bhanja Babu, who took him to Excise office and he was detained in the night and on the next day, his signatures were taken on some papers and thereafter, he was forwarded to Court.

The defence plea of the appellant Raghunath Sahu is that on 03.06.2012 he was going in a bus from Puri to Berhampur to his brother-in-law's house situated at Digapahandi and he was coming with a bag having sweets inside it, but he was caught by excise people who took him to Goilundi office and he was detained there on that day and thereafter, on the next day, his signatures were taken on some papers and the excise people took away his driving licence and thereafter he was produced in the Court along with the appellant Pradeep Panda.

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

P.W.1 Kali Charan Barada, who is an independent witness, did not support the prosecution case. He stated that on one occasion, while he was going to Lunilathi from his village in a cycle, on the way near Palaspur police officials asked him to sign on some blank papers and no written option was given to the accused Raghunath Sahu in his presence and he also proved his

signature on Ext.1. He also stated that no written option was given to the accused Pradeep Panda in his presence but he proved his signature on Ext.3. He also proved his signatures on Exts. 4, 5, 6, 7 and 8.

P.W.2 Saroj Kumar Bag, who was working as Constable of Excise, E.I. & E.B.(SD), Berhampur was issued with command certificate for service of notice on the accused Kiran Kumar Pati. He proved his signature on the command certificate in Ext.9.

P.W.3 Biswajit Dash who was working as Constable of Excise, E.I. & E.B.(SD), Berhampur was one of the members of the patrolling party with P.W.7 and stated about recovery of contraband ganja from the vehicle in question. He is a witness to the zimanama (Ext.5), spot map (Ext.6) and seizure list (Ext.7).

P.W.4 Ladu Kishore Panigrahy, who was working as A.S.I. of Excise, E.I. & E.B.(SD), Berhampur, was one of the members of the patrolling party with P.W.7 and stated about recovery of contraband ganja from the vehicle in question.

P.W.5 Braja Bihari Nayak, who was working as Constable of Excise, E.I. & E.B.(SD) Unit-II, Berhampur was one of the members of the patrolling party with P.W.7 and stated about search and seizure of contraband ganja from the

possession of the appellants in the offending car. He is a witness to the written option given to the appellants as per Exts.1/1 and 2/1. He is also a witness to the drug testing chart conducted at the spot as per Ext.8/1 and also the zimanama of brass seal of the I.O. as per Ext.5/2. He is also a witness to the seizure list prepared at the spot as per Ext.7/2 as well as the spot map as per Ext.6/2.

P.W.6 Siba Prasad Gantayat, who was working as Inspector in-charge of E.I. & E.B., Unit-II, is the immediate official superior of P.W.7. He is also a witness to the written options marked as Exts.1/1, 3/2, 4/2, 5/2 as well as the spot map Ext.6/2 and seizure list Ext.7/2.

P.W.7 Sarat Chandra Bhanja, who was the Sub-Inspector of Excise, E.I. & E.B. (S.D.), Berhampur is the investigating officer of the case.

The defence has examined four witnesses in support of the defence plea.

D.W.1 is the appellant Pradeep Panda, who stated that on the date of occurrence i.e. on 03.06.2012 he was coming from Arakhapur to Berhampur in Kaleswari bus and at about 7.00 p.m. he reached at Berhampur bus stand and after getting down from the bus, he had been to his friend's house through

Goilundi Chhak and at that place, he was called by P.W.7 and thereafter, he took him to Excise office, kept him in their office and on the next day, he took his signatures on some papers and thereafter, he was produced in Court. He denied to have any knowledge about search and seizure and stated that the excise officers have falsely implicated in the case.

D.W.2 is the appellant Raghunath Sahu, who stated that on the date of occurrence i.e. on 03.06.2012 he came in a bus from Puri to Berhampur to his brother-in-law's house situated at Digapahandi and while he was coming with a bag having sweets inside it, the excise officials caught him and took him to Goilundi office and remained there on the same day and on the next day, they took his signatures on some papers and took away his driving licence and thereafter produced him in the Court. He further stated that the car in which he was brought to Court was brought from the office itself and he did not know anything what was kept inside the car.

D.W.3 Kiran Kumar Pati, who was one of the co-accused in the case, was the owner of the offending vehicle, which was purchased from H.D.F.C. Finance in the year 2004 and he stated that the said vehicle was sold to one Ranjit Kumar Behera of Khandagiri, Bhubaneswar on 11.12.2007. He further

stated that since Ranjit Kumar Behera had not paid the full and final settled amount of the car for which he could not repay the balance amount to the Bank and the Bank issued a notice, which has been marked as Ext.B. D.W.4 Ashok Kumar Das, who was having a tea stall in front of the excise office situated at Srinagar stated that he was supplying cups of tea to the employees of the excise office. He stated about bringing of the appellants to the excise office and on the next day putting both the appellants in front of an Ambassador car and taking photographs. He also stated that he heard that the excise people have falsely implicated the appellants in this case.

The prosecution exhibited seventeen documents. Ext.1/1 is the written option of appellant Raghunath Sahu, Ext.2/1 is the written consent of appellant Raghunath Sahu, Ext.3/2 is the written option given to appellant Pradeep Panda, Ext.4/2 is the written consent to appellant Pradeep Panda, Ext.5/2 is the zimanama, Ext.6/2 is the spot map, Ext.7/2 is the seizure list, Ext.8/1 is the drug testing report, Ext.9 is the signature of P.W.2 on the command certificate, Ext.10 is the authorization letter of S.D.J.M., Berhampur, Ext.11 is the written intimation, Ext.12 is the disclosure of the grounds of arrest of appellant Pradeep Panda, Ext.13 is the disclosure of the grounds

of arrest of appellant Raghunath Sahu, Ext.14 is the letter for drawal of the sample, Ext.15 is the letter to R.T.O., Bhubaneswar, Ext.16 is the report of the R.T.O. and Ext.17 is the chemical examination report

The prosecution also proved fifteen nos. of material object i.e. M.O.I is the brass seal, M.O.II is the envelop containing broken seal, M.Os.III to VIII are the duplicate sample packets deposited in the Sessions Malkhana, M.O.IX is the remnants of samples received from D.E.C.T.L, Berhampur, M.O.X is the jerry bag Sl.No.1 containing 52 kgs., M.O.XI is the jerry bag Sl.No.2 containing 46 kgs., M.O.XII is the jerry bag Sl.No.3 containing 39 kgs., M.O.XIII is the jerry bag Sl.No.4 containing 38 kgs., M.O.XIV is the jerry bag Sl.No.5 containing 23 kgs. and M.O.XV is the jerry bag Sl.No.6 containing 22 kgs.

The defence exhibited two nos. of documents. Ext.A is the cheque signed by Ranjit Behera and Ext.B is the notice issued by H.D.F.C. Bank in favour of the co-accused Kiran Kumar Pati.

6. The learned trial Court after assessing the oral as well as documentary evidence on record, has been pleased to hold that P.Ws.2, 3, 4, 5, 6 and 7 are departmental witnesses and their statements are found to be consistent on the point of

factum of recovery and seizure of six nos. of jerry bags having 220 kilograms of ganja in total along with an Indica car used in transporting the said ganja from the exclusive and conscious possession of the appellants. It was further held that the evidence of the P.Ws. is found to be convincing, credible, trustworthy, firm and concrete to fasten the guilt of illegal possession and transportation of huge quantity of ganja. The learned trial Court further held that the appellants have not rebutted the presumption available under sections 35 and 54 of the N.D.P.S. Act for their illegal possession and transportation of ganja materials in the seized vehicle. However, it was held that the evidence on record does not indicate that the co-accused Kiran Kumar Pati had any knowledge for use of the vehicle in the commission of the offence and hence, the presumption available under section 35 of the N.D.P.S. Act cannot be drawn to hold that he had such culpable mental state in committing the offence by allowing the vehicle for use of commission of offence under the N.D.P.S. Act. Accordingly, the learned trial Court held the co-accused Kiran Kumar Pati not guilty of the offences charged, however found the appellants guilty under section 20(b)(ii)(C) of the N.D.P.S. Act.

7. Ms. Kiran Rout, learned counsel appearing for the appellants contended that the independent witness P.W.1 has not supported the prosecution case for which he was declared hostile and he has stated that he was asked to sign on some blank papers, but the other witnesses on whose statements the learned trial Court has placed implicit reliance are all departmental witnesses and conviction has been based on the evidence of such witnesses, which was not justified. It is further submitted that P.W.7 is the officer who not only received reliable information but also conducted search and seizure and he is the investigating officer of the case and therefore, he is a highly interested witness and the appellants have been seriously prejudiced on account of the investigation being conducted by such an officer. It is further submitted that the defence has examined four witnesses including the two appellants as D.W.1 and D.W.2 and D.W.4, who is having a tea stall in front of the excise office has supported the defence plea and the learned trial Court has not placed any reliance on the defence plea without any justifiable reason. It is further submitted that no malkhana register was proved in this case and therefore, the safe custody of the seized article is doubtful. It is further submitted that there is non-compliance of the provisions under sections 42, 50 and 57

of the N.D.P.S. Act and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. Debasis Biswal, learned Additional Standing Counsel for the State of Odisha, on the other hand, supported the impugned judgment and submitted that in the case of this nature, the version of the departmental official witnesses can be relied upon to convict the accused if their evidence is consistent and reliable. It is further submitted that merely because the independent witness (P.W.1) has not supported the prosecution case, the same cannot be a ground to doubt the veracity of the prosecution case. It is further submitted that in the accused statement, no plea has been taken by the appellants and the plea taken by examining the defence witnesses is not acceptable and rightly, the learned trial Court has not placed any reliance on the same. It is further submitted that section 42 of the N.D.P.S. Act has been complied with, which will be clear from the evidence of P.Ws.6 and 7 and in a case of this nature, there is no requirement to comply with section 50 of the N.D.P.S. Act and further the documents and the oral account of P.W.7 and other witnesses indicate about compliance of such provisions. Learned counsel further submitted that section 57 of the N.D.P.S. Act is not mandatory and since the seized articles were produced in the

Court from the spot immediately after its seizure and it was not taken to any police station or excise office, thus, there is no necessity of proving any malakhana register in the case and therefore, the appeal should be dismissed.

8. (A) **Independent witness not supported the prosecution case:**

Coming to the first submission of the learned counsel for the appellants regarding non-supporting of the case by the independent witness, this Court in the case of **Herasha Majhi and others -Vrs.- State of Odisha reported in 2020 (I) Orissa Law Reviews 39**, held as follows:

"9.....Conviction can be based solely on the testimony of official witnesses; condition precedent is that the evidence of such witnesses must be reliable, trustworthy and must inspire confidence. There is absolute no command of law that the testimony of the police officials should always be treated with suspicion. Of course while scrutinizing the evidence, if the Court finds the evidence of the police officials as unreliable and untrustworthy, the Court may disbelieve them but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is based on the principle that

quality of the evidence weighs over the quantity of evidence. The rule of prudence requires a more careful scrutiny of the evidence of the police officials, since they can be said to be interested in the result of the case projected by them. Absence of any corroboration from the independent witnesses does not in any way affect the creditworthiness of the prosecution case. Non-supporting of the prosecution case by independent witnesses in N.D.P.S. Act cases is a usual feature but the same cannot be a ground to discard the entire prosecution case. If the evidence of the official witnesses which is otherwise clear, cogent, trustworthy and above reproach is discarded in such cases just because the independent witnesses did not support the prosecution case, I am afraid that it would be an impossible task for the prosecution to succeed in a single case in establishing the guilt of the accused."

Therefore, I am of the humble view that merely because P.W.1, the independent witness has not supported the prosecution case, the evidence of other witnesses and the prosecution case cannot be disbelieved.

(B) **Officer conducting search and seizure is the investigating officer:**

Law is well settled that merely because the officer who conducted search and seizure, is also the investigating officer of the case, the accused persons are not entitled to be acquitted on that score.

In **Mukesh Singh -Vrs.- State (Narcotic Branch of Delhi)** reported in (2020) 10 Supreme Court Cases 120, the Five Judge Bench of the Hon'ble Supreme Court has held as follows :

"13.2(ii) In a case where the informant himself is the investigator, by that itself it cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore, on the sole ground that the informant is the investigator, the accused is not entitled to acquittal."

Therefore, though the contention of the learned counsel for the appellants that since P.W.7 conducted search and seizure, in the fairness of things, he should not have investigated into the case and submitted the prosecution report has considerable force, but all the same, in absence of any

unfairness or bias on the part of P.W.7 to implicate the appellants falsely, the prosecution case cannot be discarded on that score.

(C) **Non-compliance of section 42 of N.D.P.S. Act :**

In the case of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports (SC) 183**, it is held by a five-Judge Bench of the Hon'ble Supreme Court that the officer on receiving the information (of the nature referred to in sub-section (1) of section 42 of the N.D.P.S. Act) from any person had to record it in writing in the concerned Register 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) of the N.D.P.S. Act. It is further stated therein that the total non-compliance of requirements of sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible but delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42 of the N.D.P.S. Act.

P.W.7 has specifically stated that on 04.06.2012 at about 3.00 a.m. he received reliable information about illegal transportation of ganja at Dengaosta to Seragada side and he gave written intimation to his higher authority i.e. Inspector in-

charge of Excise Sri Siba Prasad Gantayat (P.W.6) and the said intimation letter has been marked as Ext.11. P.W.6 has also stated that on 04.06.2012 while he was working as Inspector in-charge, E.I. & E.B. Unit-II, Berhampur, P.W.7 intimated him in writing regarding illegal transportation of ganja at village Pattapur and he also proved his signature on Ext.11. He further stated that after getting such information, he directed P.W.7 to proceed to the spot.

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 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."

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 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.

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 view of the evidence of P.Ws.6 and 7, it is apparent that reliable information was reduced into writing by P.W.7 and it was sent to the higher authority (P.W.6) and the relevant document has been proved and no cross-examination has been made by the learned defence counsel on that aspect to disbelieve such compliance. Therefore, the contention of the learned counsel for the appellants that there has been non-compliance of the provision under section 42 of the N.D.P.S. Act is not acceptable.

(D) **Non-compliance of section 50 of N.D.P.S. Act :**

With regard to non-compliance of the provision of section 50 of the N.D.P.S. Act, the Hon'ble Supreme Court in the case of **State of H.P. -Vrs.- Pawan Kumar reported in (2005)4 Supreme Court Cases 350** has held that for search of vehicle, this provision did not require mandatory compliance. It was further held that there was hardly any time lag between seizure, production and also chemical examination and

considering the quantity of contraband seized in the case, the possibility of planting looks an impossibility. It was further held that the samples were taken from what were seized and were also having been chemically examined and accordingly, the appellants were found guilty of the offence charged.

In the case in hand, P.W.7 has stated that he gave his identification to the appellants, who were found inside the car and expressed his intention so also to search the car and apprised the appellants about their willingness to be searched before the Gazetted Officer or before the Executive Magistrate in writing and both the appellants expressed their willingness to be searched by P.W.7. The written option given by the appellant Raghunath Sahu has been marked as Ext.1/1 and the written option given by the appellant Pradeep Panda has been marked as Ext.3/2. The written consent given by the appellant Raghunath Sahu has been marked as Ext.2/1 and the written consent given by the appellant Pradeep Panda has been marked as Ext.4/2. Therefore, the contention of the learned counsel for the appellants regarding non-compliance of section 50 of the N.D.P.S. Act which in fact is not necessary, is not acceptable.

(E) **Non-compliance of section 57 of N.D.P.S. Act:**

So far as compliance of section 57 of the N.D.P.S. Act is concerned, it states that that whenever any person makes any arrest or seizure under this Act, he shall, within forty eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.

In the case of **Bahadur Singh -Vrs.- State of Haryana reported in (2010) 4 Supreme Court Cases 445**, it is held that the provision under section 57 of the N.D.P.S. Act is not mandatory and that substantial compliance would not vitiate the prosecution case.

In the case of **Manoj Kumar Panigrahi -Vrs.- State of Odisha reported in 2020 Criminal Law Journal 730**, it is held that even though section 57 of the N.D.P.S. Act is held not to be mandatory but the official conducting search and seizure cannot totally ignore such a provision which is directory in nature as the same has got a salutary purpose and if he ignores such a provision then adverse inference should be drawn against the prosecution.

Though P.W.7 stated that he submitted preliminary report on 05.06.2012 (date of seizure is 04.06.2012) but his

evidence is silent regarding submission of full report in terms of section 57 of the N.D.P.S. Act. On this score alone, the appellants are not entitled for acquittal.

(F) **Non-production of Malkhana Register :**

Coming to the non-seizure of malkhana register, it appears that such a question was put by the learned defence counsel to P.W.7, who has stated that he has not reflected in the malkhana register of the excise office as because he brought the seized articles directly to the Court from the seizing spot. When the contraband articles were not kept in any police station or any excise office and no entry has been made in the malkahna register, question of proving the malkhana register does not arise.

9. The presence of the appellants inside the offending car has been deposed to by the official witnesses, who are all excise officials and they have further stated that the appellant Raghunath Sahu was in the driver seat and his driving licence has also been seized, six jerry bags containing ganja were found in the car, three of them were found in the back seat and three were in the dicky of the car. All the formalities of search and seizure were complied with and the seizure list was prepared and

the appellants were also supplied with a copy of such seizure list and their signatures were also taken not only in the paper slips, but also in the seizure list of the articles. The evidence of the official witnesses appears to be cogent, consistent and therefore, the learned trial Court has rightly placed reliance on their evidence.

Section 35 of the N.D.P.S. Act speaks about culpable mental state and section 54 of the N.D.P.S. Act states about presumption to be drawn from the possession of illicit articles. Section 35 of the N.D.P.S. Act requires the defence to prove that the accused had no such mental state with respect to the act charged as an offence by the prosecution. The accused is to prove that he was not in conscious possession of the contraband articles if it is proved by the prosecution that he was in possession thereof. Section 35(2) of the N.D.P.S. Act requires the accused to prove beyond reasonable doubt that he had no culpable mental state which can be discharged only by adducing cogent and reliable evidence which must appear to be believable or showing circumstances which might lead the Court to draw a different inference. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift.

The prosecution has to prove the fundamental facts so as to attract the rigors of section 35 of the N.D.P.S. Act.

In view of section 54 of the N.D.P.S. Act, both the appellants are to account satisfactorily about the possession of the contraband articles. If the prosecution proves the search and seizure of the contraband articles from the accused to have been conducted in strict compliance of all the mandatory provisions and other directions provisions as far as possible, the burden shifts to the accused to account it satisfactory otherwise presumption shall be raised against him that he has committed an offence under the Act.

It has been rightly observed by the learned trial Court that both the appellants have not rebutted such presumption under sections 35 and 54 of the N.D.P.S. Act by bringing into evidence, therefore, presumption is to be drawn against them for their illegal possession and transportation of ganja material in the seized vehicle.

It is no doubt that the appellants examined themselves as witnesses and stated that they were brought to the excise office and detained and some signatures were taken in blank papers and they were forwarded to Court on the next day.

D.W.4 has stated that he had seen the excise people brought both the appellants one after another to the excise office and on the next day, they were forwarded to Court and that the excise people brought gunny bags from their office and put them in an Ambassador car and asked the appellants to stand near the said car and then photographs were taken, but no such plea has been taken by the appellants when they were examined as defence witnesses rather in the accused statements their plea was one of denial. The learned trial Court has discussed the evidence of the four defence witnesses and rightly placed no reliance on them.

10. In view of the foregoing discussions, when the evidence of the official witnesses appears to be clear, cogent, trustworthy and reliable and the appellants were found inside the offending car and there was seizure of commercial quantity of ganja in six jerry bags from the said car and there has been compliance of section 42 of the N.D.P.S. Act and the appellants have failed to rebut presumption under sections 35 and 54 of the N.D.P.S. Act and the defence plea is not acceptable, I am of the humble view that both of them have been rightly found guilty under section 20(b)(ii)(C) of the N.D.P.S. Act. The sentence which has been imposed on the appellants is the minimum

sentence prescribed for the offence. Therefore, no interference is called for with the impugned judgment of the learned trial Court.

Accordingly, both the jail criminal appeals being devoid of merit, stand dismissed.

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

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 23rd September 2022/PKSahoo

