

IN THE HIGH COURT OF ORISSA, CUTTACK

CRLA No.690 of 2016

From the judgment and order dated 21.10.2016 passed by the Special Judge, Gajapati, Parlakhemundi in G.R. Case No.26 of 2015 (T.R. No.16 of 2016).

1. Bhajanama Pradhan @ Bhajaram Pradhan	
2. Baya Sahu	
3. Saheba Sahu	
4. Babula Sahoo	Appellants

-Versus-	
State of Odisha	Respondent
For Appellants:	Mr. J.K. Panda
For Respondent:	Mr. Debasis Biswal Addl.Standing Counsel

CRLA No.641 of 2016

1. Rabindra Gouda	
2. Chakra Sahu	
3. Ramesh Dash	Appellants

-Versus-	
State of Odisha	Respondent
For Appellants Nos.1 & 3: -	Mr. Lambodar Achari Amicus Curiae
For Appellant No.2: -	Mr. J.K. Chhotaray
For Respondent: -	Mr. Debasis Biswal Addl.Standing Counsel

P R E S E N T:

THE HON'BLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 25.08.2022

S.K. SAHOO, J. The appellants Bhajanama Pradhan @ Bhajaram Pradhan, Baya Sahu, Saheba Sahu and Babula Sahoo in CRLA No.690 of 2016 and the appellants Rabindra Gouda, Chakra Sahu and Ramesh Dash in CRLA No.641 of 2016 faced trial in the Court of learned Special Judge, Gajapati, Parlakhemundi in G.R. Case No.26 of 2015 (T.R. No.16 of 2016) for offences punishable under sections 20(b)(ii)(C)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 01.06.2015 at about 4.00 p.m. near village Akili Farm under Mohana police station, they were detected in possession of 179 kgs. 400 grams of contraband ganja in eight gunny bags without having any licence or authority and they committed an offence of abetting with criminal conspiracy in transportation of the contraband ganja.

The learned trial Court vide impugned judgment and order dated 21.10.2016 though acquitted the appellants of the charge under section 29 of the N.D.P.S. Act, but found them guilty under section 20(b)(ii)(C) of the N.D.P.S. Act and sentenced each of 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 undergo further rigorous imprisonment for a period of one year.

Since both the criminal appeals arise out of same judgment, 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 on 01.06.2015, Sri P. Shyam Sundara Rao (P.W.9), the S.I. of Police of Mohana police station being in-charge of the Inspector in-charge of Police of the said police station intended to go out of the police station with staff for execution of warrants and excise raid in and around Chandiput area and accordingly, P.W.9 entered such fact in Station Diary vide entry no.14 and then went out of the police station with staff by availing the police jeep. While proceeding towards Chandiput area near village Akili, P.W.9 found eight persons were descending from a road side hillock, each carrying a bag on their heads and out of suspicion, P.W.9 along with other police staff by the side of the road made an ambush and when those persons came nearer the police party, they were surrounded by the police party, but one person could manage to escape by throwing his bag and the remaining

seven persons were apprehended with eight bags and from those bags, smell of ganja was coming out. As it was a case of chance detection of ganja, so at the spot, P.W.9 intimated his immediate superior authority i.e. S.D.P.O., R.Udayagiri over mobile phone and enquired from the appellants about their names and addresses and also searched the contents of each bag in their presence and in presence of independent witnesses and other police staff. After some time, on requisition, a weighman along with some other police staff reached at the spot and then each bag of ganja was weighed and all total, the appellants were found possessing 179 kgs. 500 grams of ganja without any authority and at the spot, P.W.9 not only seized all the aforesaid eight bags of ganja but also collected two packets of sample ganja from each bulk ganja bag and then sealed each bulk bag of ganja as well as sample packets and then P.W.9 returned back to the police station with the appellants as well as the seized articles and samples.

P.W.9 drew up a plain paper F.I.R. and being the in-charge of I.I.C. of Mohana police station, he also registered Mohana P.S. Case No.52 dated 01.06.2015 under sections 20(b)(ii)(C)/29 of the N.D.P.S. Act against the appellants so also one Kampu Sahu basing upon his own report and requested his

colleague Sri Purna Chandra Behera (P.W.11), S.I. of Police to take up investigation.

P.W.11 re-seized the bags containing bulk quantity of ganja marked as Exts.A, B, C, D, E, F, G & H, all the sample packets, two sealed envelopes containing the brass seal and specimen seal impression slip and also seized one envelope containing two paper slips vide T-1 and T-2 and prepared a seizure list (Ext.10), visited the spot, prepared the spot map (Ext.16), examined other witnesses, examined the appellants and recorded their confessional statements and arrested the appellants. P.W.11 sent VHF message to I.I.C., Dharakote police station about arrest of the appellants and also requested to supply the antecedents of the appellants and sent the appellants to C.H.C., Mohana for their medical examination through escort party and also made a prayer to the learned Special Judge for sending the sample exhibits to R.F.S.L., Berhampur after producing the appellants and exhibits and on the same day, on the direction of the learned Special Judge, P.W.11 produced the seized sample packets of contraband ganja before the learned S.D.J.M., Parlakhemundi for sending the same to R.F.S.L., Berhampur for chemical examination and later on as per the direction of the learned S.D.J.M., P.W.11 sent the sample

packets Exts.A1, B1, C1, D1, E1, F1, G1 and H1 to R.F.S.L., Berhampur through one constable C/179 S. Sabar for chemical examination and report. As per the order of the Court, P.W.11 produced the sample ganja packets marked as Exts.A2 to H2 and paper envelop marked as T-2 containing brass seal impression of P.W.9 before Court Malkhana in-charge and bulk ganja marked as Exts.A to H were produced before P.S. Malkhana in-charge. On 03.06.2015, P.W.9 sent a detailed report (Ext.18) to the Superintendent of Police, Gajapati and P.W.11 seized such detailed report from the S.P. Office Head Moharir Sri Krushna Ch. Jamadar and he conducted raid against the absconding accused Sibaram Swain and Kampa Sahu in their village Badagada under Dharakote police station in the district of Ganjam. On 06.07.2015, P.W.11 seized the command certificates of the home guard and OAPF jawans issued by P.W.9 and on 30.08.2015, he received the chemical examination report (Ext.20) from the R.F.S.L., Berhampur through C/436 Rama Rao Gumdani (P.W.1). The exhibits marked as A1 to H1 were found to contain fruiting and flowering tops of cannabis plant i.e. Ganja. The seal of the exhibits A1 to H1 tallied with the specimen seal impression and brass seal marked as exhibit T1. On completion of investigation, P.W.11 submitted charge sheet

on 09.12.2015 against the appellants under sections 20(b)(ii)(C)/29 of the N.D.P.S. Act.

3. The appellants were charged under sections 20(b)(ii)(C)/29 of the N.D.P.S. Act for illegal possession of 179 kgs. 400 grams of contraband ganja without any licence and also carrying one gunny bag each containing contraband ganja and were party to criminal conspiracy, which they refuted, pleaded not guilty and claimed to be tried.

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

P.W.1 Rama Rao Gumudani and P.W.2 Anil Kumar Sabar, who were the constables attached to Chandragiri Outpost are the witnesses to the seizure of command certificate, station diary entry and malkhana register as per seizure list Ext.1.

P.W.3 Bisra Karji, who was the OAPF Constable attached to Mohana police station, was one of the members of the patrolling party to village Chandiput and he stated about apprehension of the appellants with the contraband ganja weighing about 179 kgs.

P.W.4 Madhav Naik was the Home Guard attached to Mohana police station, who was one of the members of the patrolling party to village Chandiput and he stated about

apprehension of the appellants with the contraband ganja weighing about 179 kgs. He is also a witness to the seizure of one bag containing contraband ganja each from the appellants Bhajanama Pradhan, Baya Sahu, Babula Sahoo, Chakara Sahu, Ramesh Dash and Saheba Sahu as per seizure lists Exts.2, 3, 4, 5, 6 and 8 respectively. He also stated about the seizure of contraband ganja at the spot as per seizure list Ext.7. He is also a witness to the seizure of weighing machine on production by weighman (P.W.5) as per seizure list Ext.9.

P.W.5 Subash Chandra Mallick, who was the weighman, is a witness to the seizure of his weighing machine as per seizure list Ext.9.

P.W.6 Sekhar Prasad Naik was the Home Guard of Mohana police station, who was one of the members of the patrolling party towards Chandragiri area and he stated about apprehension of the appellants with the contraband ganja weighing about 179 kgs.

P.W.7 Abhimanyu Palai, who was the A.S.I. of police at Chandragiri police outpost is a witness of seizure of 8 nos. sealed packets of ganja as well as 16 nos. of sealed sample packets of ganja as per seizure list Ext.10 at Mohana police station. He is also a witness to the seizure of detailed report from Head Moharir of the S.P. Office as per seizure list Ext.11.

P.W.8 Kartik Mallik is an independent witness who did not support the prosecution case and he has been declared hostile.

P.W.9 P.Shyam Sundar Rao, who was the S.I. of police of Mohana police station, was leading the patrolling party towards Chandiput area and he stated about the search and seizure of bags containing contraband ganja from each of the appellants, its weighment, sample collection, sealing by using his personal brass seal and arrest of the appellants. He is also the informant in the case.

P.W.10 Amarnath Sabar was the police constable attached to Mohana police station who was also a member of patrolling party. He stated about the seizure of contraband ganja in bags from the appellants which came to 179 kgs. and drawal of sample, preparation of seizure list and arrest of the appellants.

P.W.11 Purna Chandra Behera was the S.I. of Police attached to Chandragiri Outpost under Mohana police station who is the Investigating Officer of the case. He effected some seizures and took step for dispatching the sample packets from chemical analysis.

Exts.1 to 11 and Ext.12/1 are the seizure lists, Ext.13 is the zimanama, Ext.14 is the command certificate, Ext.15 is the plain paper F.I.R., Ext.16 is the spot map, Ext.17 is the entry in

Malkhana Register, Ext.18 is the Detailed Report, Ext.19 is the Station Diary entry and Ext.20 is the Chemical Examination Report.

The prosecution also proved nine material objects. M.O.I to M.O.IX are the nine nos. of seized sample packets of ganja.

6. The defence plea of the appellants was one of complete denial.

No witness was examined on behalf of the defence.

7. The learned trial Court after assessing the evidence on record has been pleased to hold that the empowered officer conducted the search and seizure by adopting the procedure laid down under the general provisions of law under section 100(4) of Cr.P.C. and the evidence on this aspect is found unassailed. It was further held that the prosecuting agency has complied with the mandatory provisions of the N.D.P.S. Act without any fault. It was further held that there is nothing to dispute regarding exclusive and conscious possession of huge quantity of contraband ganja with the appellants on the relevant date, time and the place of occurrence. It was further held that there is nothing left to dispute that whatever seized from the possession of the appellants was nothing but ganja. Learned trial Court has held that there is lack of evidence on the point of abetment and

criminal conspiracy and therefore, the charge under section 29 of the N.D.P.S. Act is not established. However, basing on the oral and documentary evidence adduced from the side of the prosecution, it was held that the prosecution has established the charge under section 20(b)(ii)(C) of the N.D.P.S. Act against the appellants.

8. Mr. Jugal Kishore Panda, learned counsel appearing for all the appellants in CRLA No.690 of 2016, Mr. Lambodar Achari, learned Amicus Curiae appearing for appellants nos.1 and 3 so also Mr. J.K. Chhotray, learned counsel for the appellant no.2 in CRLA No. 641 of 2016 contended that the independent witness has not supported the prosecution case and there are discrepancies in the evidence of the official witnesses regarding drawal of samples at the spot, sealing of the articles and preparation of seizure list. It is further argued that the prosecution evidence is not consistent as to whether reliable information was received regarding transportation of ganja by the appellants while P.W.9 was in the police station or while performing patrolling duty. It is further submitted that there is non-compliance of the provisions under section 42 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. Debashis Biswal, learned Additional Standing Counsel, on the other hand, submitted that even though the independent witness has not supported the prosecution case, but law is well settled that in a case of this nature, the evidence of the official witnesses cannot be thrown out, if it is otherwise truthful and reliable. He further submitted that almost all the official witnesses have stated that each of the appellants was carrying one gunny bag in which commercial quantity of ganja was found on weighment and since it was a chance detection, the question of compliance of section 42 of the N.D.P.S. Act does not arise and therefore, the appeals should be dismissed.

9. In this case, P.W.8 Kartik Mallick is an independent witness, who has not supported the prosecution case and he has been declared hostile. So far as weighman (P.W.5) is concerned, he was also working as Home Guard at Mohana police station and he has stated that he did not know the accused persons in the dock and though he stated that he weighed ganja with his weighing machine so also stated about preparation of the sample packets, but he has not stated about the presence of the appellants at the spot.

P.W.3, who was the constable attached to Mohana police station though stated about seizure of ganja packets, its weighment and drawal of samples from each of those ganja

bags, but his evidence is silent regarding sealing of sample packets so also sealing of bulk quantity of ganja. The evidence of P.W.6, the home guard, is silent about drawal of samples from the bags so also its sealing.

P.W.9 has stated that on 01.06.2015 at about 2.30 p.m. as a routine patrolling duty, he along with his staff departed from Mohana police station for excise and warrant raid in and around Chandiput area and station diary entry no. 14 was made in that connection. The station diary entry, that has been marked in this case as Ext.19 is the entry which was made after P.W.9 returned to the police station with the accused persons and the ganja bags and registered Mohana P.S. Case No. 52 of 2015. The station diary entry, which was made prior to the departure, has not been proved in this case. In the F.I.R., P.W.9 has stated that on the way, they got reliable information regarding carrying of contraband ganja by eight persons, whereas in the evidence, P.W.9 has stated that at the spot, he got reliable information. He has further stated that he has not informed his immediate superior officer in writing and he has not prepared any separate document regarding any reliable information that he received before detection of the offence. He further stated that he had not followed the statutory provision under sections 41, 42 and 50 of the N.D.P.S. Act, because it was a chance detection of ganja and

there was every possibility of absconding of the accused persons taking opportunity of darkness.

P.W.10 Amarnath Sabar, the constable attached to Mohana police station has stated that there was prior information with P.W.9 that some persons were transporting ganja and accordingly, he as well as others left the police station.

The Investigating Officer (P.W.11) has stated that P.W.9 in his statement has stated to have received reliable information regarding transportation of ganja.

From the evidence available on record, it is apparent that prior to detection of the offence, there was reliable information with P.W.9 that eight persons were carrying ganja bags, of course it was not when they departed from Mohana police station, rather while they were performing patrolling duty.

The question that now crops up for consideration is whether in the factual scenario, compliance with the requirements of sections 42(1) and 42(2) of the N.D.P.S. Act is necessary.

In the case of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports (SC) 183**, a five-Judge Bench of the Hon'ble Supreme Court held as follows:-

"11.....The material difference between the provisions of sections 42 and 43 of the N.D.P.S. Act is that 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.

x x x x

17. In conclusion, what is to be noticed is **Abdul Rashid** did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did **Sajan Abraham** hold that the requirements of Section 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 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).

(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."

Keeping in view the ratio laid down in the case of **Karnail Singh** (supra), even if in the case in hand, it is the case of the prosecution that P.W.9 received reliable information while

he was not in the police station, but while he was on patrolling duty and the information called for immediate action and any delay would have been resulted in the goods and the evidence being removed or destroyed and it was not feasible in writing down the reliable information given to him for which, he proceeded to take action as per clause (a) to (d) of section 42(1) of the N.D.P.S. Act, but thereafter as soon as it was practical, he should have recorded the information in writing and forthwith informed the same to the official superior. Even if the case is held to be one under special circumstances involving emergent situations, recording of the information in writing and sending copy thereof to the official superior could have been postponed by reasonable period, i.e. after search and seizure, but since it is a case of total non-compliance of the requirements of sub-section (1) and (2) of section 42, the same is impermissible and it is clear violation of section 42 of the N.D.P.S. Act.

Though a detailed report (Ext.18) under section 57 of the N.D.P.S. Act is stated to have been prepared by P.W.9, the officer who was in-charge of the Inspector in-charge of Mohana police station and it was submitted to the Superintendent of Police, Gajapati and it was seized by P.W.11 as per the seizure list Ext.11 from Head Moharir of S.P. Office namely, Krushna

Chandra Jamadar but the said report is something different than the requirement of recording reliable information in writing and sending the same to the official superior as per section 42 of the N.D.P.S. Act. Neither P.W.9 has stated to have prepared any such report (Ext.18) nor the Head Moharir of S.P. Office was examined.

Law is well settled that the total non-compliance of section 42(2) of the N.D.P.S. Act is impermissible and it vitiates the trial and renders the entire prosecution case suspect and causes prejudice to the accused. **(Ref.: Ramakrushna Sahu - Vrs- State of Odisha reported in (2018) 70 Orissa Criminal Reports 340).**

12. In view of the foregoing discussions, since there is no consistency in the evidence of the official witnesses regarding drawal of samples, sealing of the bulk quantity of contraband articles in bags as well as sample packets and there is total non-compliance of the provision under section 42 of the N.D.P.S. Act and the fact that the learned trial Court has committed error in holding that since it is a case of chance recovery of ganja by police patrol party under the leadership of P.W.9, the provisions under section 42 of the N.D.P.S. Act are not applicable, I am of the humble view that the impugned judgment and the order of

conviction of the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act is not sustainable in the eye of law.

Accordingly, both the Criminal Appeals are allowed. The impugned judgment and order of conviction and sentence passed by the learned trial Court is hereby set aside. The appellants are acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. The appellants who are in jail custody shall be released forthwith if their detention is otherwise not required in any other case.

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

Before parting with the case, I would like to put on record my appreciation to Mr. Lambodar Achari, the learned Amicus Curiae for the appellants nos.1 and 3 in CRLA No. 641 of 2016 for rendering his valuable help and assistance in deciding the appeal. The hearing fees is assessed to Rs.7,500/- (rupees seven thousand five hundred) in toto which would be paid to the learned Amicus Curiae immediately.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 25th August 2022/PKSahoo