

IN THE HIGH COURT OF ORISSA, CUTTACK

CRLA No. 606 of 2018

From the judgment and order dated 26.02.2018 passed by the learned 2nd Additional Sessions Judge, Balasore in Special Case No. 02/26 of 2016.

1. Sk. Najbul
2. Sk. Khalil Appellants

-Versus-

State of Odisha Respondent

JCRLA No. 39 of 2019

A. Shimadri Rao Appellant

-Versus-

State of Odisha Respondent

For Appellants: M/s. Sk. Zafarulla, Advocate

For Respondent: Mrs. Susamarani Sahoo
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 13.10.2022

S.K. SAHOO, J. The appellants Sk. Najbul and Sk. Khalil in CRLA No. 606 of 2018 and appellant A. Shimadri Rao in JCRLA No.39 of 2019 faced trial in the Court of learned 2nd Additional Sessions

Judge, Balasore in Special Case No. 02/26 of 2016 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 24.01.2016 at about 8.10 a.m., in front of Banadurga Travels office at Sahadevkhunta bus stand, they were found in possession and transporting the contraband articles i.e., Ganja weighing about 36.4 Kgs for sale without any authority or licence for the same.

The learned trial Court vide impugned judgment and order dated 26.02.2018 found the appellants guilty of the offence charged and sentenced each of them to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh) each, in default, to undergo further rigorous imprisonment for a further period of one year.

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

2. The prosecution case, in short, is that on 24.01.2016 at about 7.35 a.m. while Ajaya Kumar Behera (P.W.5), S.I. of Excise, Sadar Charge, Balasore along with his staff were performing patrolling duty on the road from Fakir Mohan Golei to Kuruda, on the way at I.T.I. Chhak, P.W.5 received an

information from reliable source regarding illegal possession and transportation of excisable articles at Sahadevkhunta bus stand. Accordingly, he wrote down the information under section 42(1) of the N.D.P.S. Act and sent the same to his immediate higher authority through a constable who delivered the letter to Inspector of Excise. P.W.5 along with his staff rushed to the spot and detained three persons holding suspected articles in jari bag. P.W.5 gave his identity and on being asked, the appellants disclosed their names and addresses. The personal search and belongings were conducted on the consent of the appellants after giving his own personal identity by P.W.5. During such search, cash of Rs.300/- was seized from appellant Sk. Khalil, Rs.300/- seized from appellant Sk. Najbul and Rs.410/- from the appellant A. Shimadri Rao. When the search of the jari bag was conducted, incriminating contraband articles i.e. ganja was recovered from the same. P.W.5 conducted some tests and from its colour and texture, he came to know that recovered substance was nothing but ganja. On the demand of P.W.5, the appellants failed to produce any authority in support of possession and transportation of such ganja. The weighment of ganja was taken and it was found to be 36 Kgs. and 400 grams. The seizure list was prepared and the contraband ganja was sealed by using of personal seal of P.W.5, after taking signatures of the appellants

so also the witnesses at the spot. The copy of the seizure list was handed over to each of the appellants and in token of receipt, the appellant A. Shimadri Rao put his signature and other two appellants put their L.T.Is. on the seizure list. P.W.5 prepared the spot map, memo of arrest and other document at the spot in presence of the appellants and recorded the statements of the appellants and the witnesses. The appellants were arrested and brought to the Excise Office and then forwarded them to Court on the same day along with the seized articles. P.W.5 made a prayer to the Court for drawal of sample from the seized ganja for sending the same to the Asst. Chemical Examiner, Government of Odisha, Excise Central Divisional Laboratory, Central Division, Cuttack for chemical examination. After obtaining the order of learned Special Judge, Balasore, the learned S.D.J.M., Balasore drew the sample and sent it for chemical examination. The chemical examiner opined as per the report Ext.23 that the sample is ganja as defined under section 2(iii)(b) of the N.D.P.S. Act. As per the direction of the Court, the bulk quantity of ganja was kept in Court Malkhana. P.W.5 prepared a detailed report of the case and sent it to the Superintendent of Excise on 25.01.2016 through Inspector of Excise, Balasore. The money that was seized from each of the appellants was also deposited in the Special Court

and on completion of investigation, final P.R. was submitted against the appellants.

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

P.W.1 Dulaba Sahu and P.W.2 Bhuban Patra are the independent witnesses to the search and seizure, but they did not support the prosecution case, for which they were declared hostile by the prosecution.

P.W.3 Santosh Kumar Behera was the Constable attached to Sadar Balasore and he accompanied P.W.5 to the spot. He stated about the recovery of contraband ganja from the possession of the appellants. He is also a witness to the seizure of contraband ganja packets.

P.W.4 Chandra Mohan Sethi was the A.S.I. of Excise, Sadar Balasore, who was one of the members of the patrolling party and he stated about the seizure of contraband ganja from the possession of the appellant.

P.W.5 Ajaya Kumar Behera was the S.I. of Excise, Sadar Charge, Balasore, who not only received information from reliable source regarding illegal possession and transportation of excisable articles, wrote down such information under section 42(1) of the N.D.P.S. Act and sent it to his immediate superior authority but also searched the appellants in presence of

available witnesses and recovered contraband ganja from their possession and seized. He is also the investigating officer who on completion of investigation submitted final P.R.

The prosecution exhibited twenty seven documents. Ext.1/2 is the seizure list, Ext.2 is the signature of P.W.1 on his statement, Ext.3/2 is the spot map, Ext.4/2 is the notice to the appellants, Ext.5/2 is the statement of P.W.2, Ext.6 is the statement of P.W.4, Ext.7 & 7/1 are the signatures of P.W.4 on paper slips, Ext.8 is the command certificate, Ext.9 is the letter under section 42(1) of the N.D.P.S. Act, Ext.10 is the xerox copy of notice, Ext.11 is the statement of appellant A. Shimadri Rao, Ext.12 is the statement of appellant Sk. Khalil, Ext.13 is the statement of appellant Sk. Najbul, Ext.14 is the statement of K. Barik, Ext.15 is the statement of S. Behera, Ext.16 is the prayer made before Court for sending samples for chemical examination, Ext.17 is the extract of order of Special Judge, Ext.18 is the order of S.D.J.M., Balasore, Ext.19 is the forwarding letter of S.D.J.M., Balasore, Ext.20 is the xerox command certificate, Ext.21 is the Mal Challan, Ext.22 is the receipt of Asst. Chemical Examiner, Ext.23 Chemical examination report, Ext.24 is the office copy of detailed report, Ext.25 is the letter of prayer, Ext.26 is the challan for Rs.1,010/-, Ext.27 is the zimanama.

The prosecution also proved one white jerry bag containing seized ganja as M.O. I.

4. The defence plea of the appellant was one of denial.

5. The learned trial Court after analysing the evidence on record came to hold that since independent witnesses examined in the case as P.Ws.1, 2 and 6 have not supported the factum of seizure, the entire prosecution case is based on the evidence of official witnesses i.e., P.Ws.3, 4 and 5. The learned trial Court further held that the evidence of the official witnesses i.e. P.Ws.3, 4 and 5 are consistent in nature with regard to search and seizure and nothing has been elicited from their mouth during the cross-examination to discard their evidence. Learned trial Court further held that even though P.W.5 was a member of raiding party, conducted search and recovered contraband ganja from the possession of the appellants in presence of witnesses, seized the same and registered case and investigated into the case and submitted final prosecution report but the appellants have not brought any material to show that they were prejudiced on account of such investigation by P.W.5. Learned trial Court further held that the provision under section 42 of the N.D.P.S. Act has been duly complied by the prosecution so also sections 50 and 57 of the N.D.P.S. Act. The learned trial Court further held that seal of the seized sample

packet (A/1) had remained intact till its examination in laboratory. It was further held that since the seal of the seized packet had remained intact, it cannot be said that there was any tampering during the time of sealing and non-production of brass seal is not a ground to disbelieve or discard the prosecution case with regard to search and seizure. The learned trial Court concluded that the appellants were in exclusive possession of 36.4 Kgs. of ganja which was seized by P.W.5 from their possession. Learned trial Court further held that there are no materials to show that the Excise officials had any previous enmity with the appellants and as such it is not possible to accept the plea of the appellant that they are being falsely implicated in this case. Learned trial Court further held that the evidence of three official witnesses i.e., P.Ws.3, 4 and 5 is clear, cogent, reliable and trustworthy and their evidence has remained unshaken and in the cross-examination, nothing has been brought out to discard their evidence and accordingly, the appellants were found guilty for the offence under section 20(b)(ii)(C) of the N.D.P.S. Act.

6. Mr. Sk. Zafarulla, learned counsel appearing for the appellants in criminal appeal as well as JCRLA mainly challenged the order of conviction of the appellants on the basis of non-compliance of mandatory provision under section 42 of the

N.D.P.S. Act. Learned counsel for the appellants submitted that P.W.5 who stated about the compliance of such mandatory provision was with P.W.4 while they were performing patrolling duty but the evidence of P.W.4 is totally silent about the compliance of section 42 of the N.D.P.S. Act. He further submitted that though P.W.5 has stated that the relevant letter relating to compliance of section 42(1) of the N.D.P.S Act was sent to the office of the Inspector of Excise through one constable namely, Bijay Singh but neither the said constable was examined nor the Inspector of Excise. The original of Ext.9 was not seized during course of investigation as admitted by P.W.5 and no specific questions with reference to Ext.9 have been put to any of the appellants in the accused statement. Therefore, the learned trial Court erroneously held that there is compliance of section 42 of the N.D.P.S. Act in this case and as such benefit of doubt should be extended in favour of the appellants. Learned counsel also highlighted regarding non-compliance of provision under section 50 of the N.D.P.S. Act so also independent witnesses not supporting the prosecution case. He further highlighted about P.W.5 being the officer conducting search and seizure also investigated the case and submitted the final P.R.

Mrs. Susamarani Sahoo, learned Addl. Standing Counsel appearing for the State, on the other hand, supported

the impugned judgment and submitted that not only from the oral evidence of P.W.5, but also from the document vide Ext.9, it is apparent that there has been compliance of section 42 of the N.D.P.S. Act. She submitted that the signature of the Inspector of Excise is appearing on Ext.9 which has been duly proved by P.W.5 as Ext.9/2 and therefore, the learned trial Court is quite justified in holding that there has been compliance of section 42 of the N.D.P.S. Act. Learned counsel for the State further submitted that in question no.1 to each of the appellants, it has been put that P.W.5 got reliable information regarding illegal possession and transportation of incriminating articles at Sahadevkhunta bus stand and what have they got to say to this and all the appellants have stated that 'it is false' and therefore, it cannot be said that no question has been put regarding compliance of section 42 of the N.D.P.S. Act. According to her, in a case of this nature, there is no requirement to comply section 50 of the N.D.P.S. Act and no illegality has been committed by the learned trial Court in acting upon the evidence of the official witnesses and there is nothing to show that the I.O. was biased or the appellants were prejudiced on account of investigation conducted by P.W.5 and therefore, there is no perversity in the impugned judgment and the appeal should be dismissed.

7. Adverting to the contentions raised by the learned counsel for the respective parties and before discussing the submission relating to challenging the impugned judgment and order of conviction on account of non-compliance of section 42 of the N.D.P.S. Act, if the evidence of the prosecution witnesses is taken into account, it would appear that the independent witnesses P.Ws.1, 2 and 6 have not supported the prosecution case for which they have been declared hostile by the Special Public Prosecutor and leading questions have been put to each of them under section 154 of the Evidence Act. Therefore, the prosecution case rests on the evidence of three official witnesses i.e. P.Ws.3, 4 and 5.

In a case of **Hersha @ Hiresa Majhi & Anr. -Vrs. State of Odisha reported in (2019)76 Orissa Criminal Reports 728**, it has been held that:-

"9. It is true that the independent witnesses like P.Ws.5, 6 and 7 have not supported the prosecution case for which they have been declared hostile by the prosecution and allowed to be cross-examined by the learned Special Public Prosecutor under section 154 of the Indian Evidence Act, 1872. Merely because the independent witnesses have turned hostile, the evidence of the police witnesses cannot be disbelieved. 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. 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, then it would be an impossible task for the prosecution to succeed in a single case in establishing the guilt of the accused. Therefore, the Court has got an onerous duty to appreciate the relevant evidence of the official witnesses and determine whether the evidence of such witnesses is believable after taking due care and caution in evaluating their evidence.

Therefore, I am of the humble view that the non-supporting of the prosecution case by the three independent witnesses i.e. P.Ws.1, 2 and 6 cannot be the sole ground to discard the evidence of the three official witnesses P.Ws 3, 4 and

5, if the same is found to be clear, cogent, reliable, trustworthy and above reproach.

8. It is of course correct that P.W.5, S.I. of Excise, Sadar Balasore, who conducted search and seizure, himself conducted investigation and submitted the final prosecution report but without any material that the appellants were seriously prejudiced because of such investigation and that the I.O. was biased to implicate the appellants in a false case, the evidence of P.W.5 cannot be discarded so also the prosecution case.

In the case of **Mukesh Singh -Vrs.- State (Narcotic Branch of Delhi) reported in (2020) 79 Orissa Criminal Reports (SC) 924** wherein it is held as follows :

"12. From the above discussion and for the reasons stated above, we conclude and answer the reference as under:

I. That the observations of this Court in **Bhagwan Singh v. State of Rajasthan (1976) 1 SCC 15; Megha Singh v. State of Haryana (1996) 11 SCC 709; and State by Inspector of Police, NIB, Tamil Nadu v. Rajangam (2010) 15 SCC 369** and the acquittal of the accused by this Court on the ground that as the informant and the investigator was the same, it has vitiated the trial and the accused is entitled to acquittal are to be treated to be confined to their own facts. It

cannot be said that in the aforesaid decisions, this Court laid down any general proposition of law that in each and every case where the informant is the investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled to acquittal;

II. In a case where the informant himself is the investigator, by that itself 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 informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. A contrary decision of this Court in the case of **Mohan Lal v. State of Punjab (2018) 17 SCC 627** and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled."

9. Learned counsel for the appellants submitted that there has been non-compliance of section 50 of the N.D.P.S. Act during course of such search and seizure.

I find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance of section 50 of the N.D.P.S. Act is relevant only where search of a person is involved and the said section is not applicable or attracted where no search of a person is involved. Search and recovery from a bag, brief case, container, etc., does not come within the ambit of section 50 of the N.D.P.S. Act as section 50 expressly speaks of search of person only. This issue in my considered opinion is no more res integra in view of the observations made by the Hon'ble Supreme Court in the case of **Madan Lal -Vrs.- State of Himachal Pradesh reported in (2003) 7 Supreme Court Cases 465**, wherein it was observed as follows:-

"16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises. See **Kalema Tumba v. State of Maharashtra and Anr.: JT 1999 (8) SC 293; State of Punjab v. Baldev Singh: JT 1994 (4) SC 595; Gurbax Singh v. State of Haryana: 2001 (3) SCC 28.**

The language of section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles, or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra). Above being the position, the

contention regarding non-compliance with section 50 of the Act is also without any substance."

In the case of **State of Himachal Pradesh -Vrs.- Pawan Kumar reported in (2005) 4 Supreme Court Cases 350**, the Hon'ble Supreme Court has held:

"11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

After discussion on the interpretation of the word 'person', the Court concluded that the provisions of section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which (the accused) may be carrying. The Court further observed that in view of the discussion made, Section 50 of the Act can have no application on the facts and circumstances of the case as opium was allegedly recovered from the bag, which was being carried by the accused.

Therefore, I am of the humble view that there is no necessity for compliance of section 50 of the N.D.P.S. Act in this case.

10. So far as the contention relating to non-compliance of the provision under section 42 of the N.D.P.S. Act is concerned, in the case of **Ramakrushna Sahu -Vrs- State of Orissa, reported in (2018) 70 Orissa Criminal Reports 340,** this Court 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".

P.W. 5 has stated that on 24.01.2016 at an early morning at 7.35 a.m., he along with his staff while performing patrolling duty on the road from Fakir Mohan Golei to Kuruda and on the way at ITI chhak, he received an information from reliable source regarding illegal possession and transportation of excisable articles at Sahadevkhunta bus stand and accordingly, he wrote down the said information under section 42(1) of the N.D.P.S. Act and sent it to his immediate authority under section 42(2) of the N.D.P.S. Act through a constable, namely, Bijay

Singh to deliver the said letter to the Inspector of Excise. The command certificate issued to constable Bijay Singh has been marked as Ext.8 and the letter Ext.9 has been proved by P.W.9 towards the compliance of section 42(1) of the N.D.P.S. Act. The signature of Inspector of Excise has also been proved as Ext.9/2.

P.W.4 was with the P.W.5 at the relevant point of time and he stated that P.W.5 got the reliable information that three persons were in possession of incriminating excise articles near Balasore Bus stand and thereafter they proceeded to Balasore bus stand and found three persons were sitting in front of Banadurga ticket counter by holding a white jerry bag. The evidence of P.W.4 is totally silent that the reliable information which was received by P.W.5 was reduced into writing and it was sent through one constable Bijay Singh to the Inspector of Excise.

P.W.3 was also present along with P.Ws. 4 and 5 at the relevant point of time and he stated that P.W.5 got the reliable information that three persons were in possession of incriminating excise article near Balasore bus stand and after giving command certificate to constable Bijay Singh who went to Inspector of Excise to inform about possession of contraband articles, they proceeded to Balasore Bus Stand. Therefore, P.W.3 is also silent that P.W.5 wrote down the information into writing

and that writing was sent with the constable to be given to the Inspector of Excise.

P.W.5 in his cross-examination has stated that Ext.9 was received by the Inspector on 29.01.2016 vide Ext.9/2 and he has not seized Ext.9 in original. He stated that on the receipt of Ext.9, the Inspector immediately returned the same. Therefore, it is clear that the evidence of P.W.5 relating to the reliable information being reduced to writing vide Ext.9 and sending the same through constable Bijay Singh is not corroborated by the other two official witnesses. Most importantly, the constable Bijay Singh has not been examined to say that he was sent by P.W.5 to deliver such letter to the Inspector of Excise, nor the Inspector of Excise has been examined during trial to say that he received Ext.9 from P.W.5. Therefore, it is very difficult to hold that the prosecution has satisfactorily proved about the compliance of section 42 of the N.D.P.S. Act.

Ext.9 is a very important document which shows about the compliance of mandatory provision under section 42 of the N.D.P.S. Act, but most peculiarly, no question on this particular document has been asked to any of the appellants in their statements recorded under section 313 of Cr.P.C. The examination of the accused under section 313 of Cr.P.C. is not a

mere formality. The questions put and the answers given have great use. The accused must be given opportunity to explain each and every circumstance appearing in evidence against him. Section 313 of the Code prescribes a procedural safeguard for an accused facing the trial to be granted an opportunity to explain the facts and circumstances appearing against him in the prosecution's evidence, that opportunity is a valuable one and cannot be ignored. Under section 313 (1)(b) of the Code, it is mandatory for the trial judge to put to the accused, facing trial every such piece of evidence, which appears incriminating against the accused and reply of the accused shall be sought thereto. The accused may or may not avail the opportunity for offering the explanation. Where the circumstances appearing in the evidence against the accused are not put to him in examination under section 313 of Cr.P.C., the same cannot be used against him. Since it is the prosecution case that the reliable information was reduced into writing vide Ext.9 and it is a very important document to substantiate the compliance of section 42 of the N.D.P.S. Act, it was nonetheless necessary for the learned trial Court to draw the attention of this particular document in the accused statement to each of the appellants. The same having not been done, Ext.9 cannot be used against the appellants and therefore, I am of the humble view that the

learned trial Court was not justified in holding that there has been compliance of section 42 of the N.D.P.S. Act in the case in hand.

11. In view of the foregoing discussions and in absence of any clinching evidence regarding compliance of mandatory provision under section 42 of the N.D.P.S. Act, the impugned judgment and order of conviction of the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act and the sentence passed thereunder is not sustainable in the eye of law.

Accordingly, both the Criminal Appeals are allowed. The appellants are acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. The appellants, who are now in jail custody, be set at liberty forthwith, if their detention is not otherwise required in any other case.

Trial Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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S.K. Sahoo, J.

Orissa High Court, Cuttack

The 13th October 2022/Pravakar