

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No. 367 of 2015

(An Appeal challenging the Judgment dated 29.04.2015 passed by the learned A.D.J.-cum-Special Judge, Boudh in Spl. Case No. 06 of 2014.)

AFR **Ashok Suna** **Appellant**

-Versus-

State of Odisha **Respondent**

Advocate(s) appeared in this case:-

For Appellant : M/s. P.C. Mishra, S.K. Samal and
B.P. Mishra, Advocate.

For Respondent : Mr. S.K. Mishra,
Additional Standing Counsel
for the State.

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

16th December, 2022

SASHIKANTA MISHRA, J.

The judgment passed by the learned Additional Sessions Judge-cum-Special Judge, Boudh on 29.04.2015 in Special Case No.6 of 2014 (T) is under challenge in the present appeal whereby the appellant was convicted for the offence under Section-20(b)(ii)(c) of the

N.D.P.S. Act and sentenced to undergo R.I. for ten (10) years and to pay fine of Rs.1,00,000/-(Rupees One Lakh), in default, to undergo further R.I. for two (2) years.

2. Prosecution case, briefly stated is as follows;

One Alakarani Panda, Inspector of Police, Special Task Force (STF), Odisha, Bhubaneswar along with her staff had come to Boudh to collect criminal intelligence and for detection of NDPS cases. While they were moving in Boudh Police Station area, they received reliable information regarding storage of huge quantity of contraband Ganja in the house of one Panchanan Ghantal of Dhadalapada. The information was conveyed to the Superintendent of Police, S.T.F., Bhubaneswar over phone, who made Station Diary entry and directed to take appropriate action. Accordingly, the services of one Executive Magistrate and two official witnesses were requisitioned. While moving towards Gochhapada and Dhadalapada road, they found an auto rickshaw bearing Registration No.OR- 27-3047 standing on the road in a suspicious manner. Ms. Panda intimated the matter to the D.S.P. who directed her to proceed to the auto-rickshaw for verification. When the STF staff went towards the auto-rickshaw, its driver suddenly started running away

towards the bushy jungle but he was apprehended after a chase. On interrogation, he disclosed his name as Ashok Suna (appellant). Six gunny bags containing contraband Ganja were found to have been kept in the auto-rickshaw. Necessary formalities of search and seizure were followed, the accused was arrested and the case was registered being STF P.S. Case No. 03 of 2014 and investigation commenced. On completion of investigation, charge-sheet was submitted against the accused.

3. The accused took the plea of denial.

4. To prove its case, prosecution examined eleven witnesses and exhibited thirty two documents. The prosecution also proved thirteen material objects. Defence, on the other hand, examined two witnesses including the accused as D.W.1. The learned Trial Court examined the evidence on record both oral and documentary and held that the accused was in unlawful exclusive and conscious possession of six gunny bags containing 239 Kg. 300 grams of contraband Ganja in the auto-rickshaw occupied by him without any licence or permit in violation of Section-8 of the N.D.P.S. Act. It was further held that his running away from the spot reflects his subsequent conduct which is relevant

under Section-8 of the Indian Evidence Act. Learned Court below further held that the mandatory provisions of the Act namely, Sections-42, 50, 52, 55 and 57 were fully complied with. As regards the defence evidence, learned Court below disbelieved the same on the ground that the same does not in way nullify the positive evidence adduced by the prosecution. On such findings, the accused was convicted and sentenced as aforesaid by judgment which is impugned in the present appeal.

5. Heard Mr. P.C. Mishra, learned counsel for the appellant and Mr. S.K. Mishra, learned Additional Standing Counsel for the State.

6. Assailing the impugned order, Mr. P.C. Mishra, apart from pointing out certain discrepancies in the F.I.R. mainly contends that the mandatory provisions of the statute as contained in Sections-50, 52, 52-A, 55 and 57 of the N.D.P.S. Act were not complied with for which, the prosecution case cannot be treated as valid. Mr. Mishra further contends that the discrepancies in the evidence of P.W.1 relating to the number of gunny bags allegedly seized from the auto-rickshaw at the spot raise reasonable doubts regarding the veracity of the prosecution case. According to

Mr. Mishra, the Trial Court overlooked these vital aspects for which the impugned judgment of conviction cannot be sustained in the eye of law.

7. Per contra, Mr. S.K. Mishra contends that the so called discrepancies in the evidence are minor and cannot be treated as fatal in nature. As regards the mandatory requirements of the statute, Mr. Mishra argues that the same were duly followed and the Trial Court has taken pains to examine each of such mandatory provision vis-à-vis the evidence on record to record his subjective satisfaction in such regard. According to Mr. Mishra, the impugned judgment does not warrant any interference.

8. A case under Section-20(b)(ii)(c) of the N.D.P.S. Act can succeed only upon clear evidence being adduced regarding exclusive and conscious possession by the accused of the contraband Ganja.

9. Now, whether such possession was unlawful would depend entirely on the circumstances under which the search and seizure was made. Thus, the primary question that arises for consideration is, whether the mandatory requirements of the statute were followed. According to Mr. Mishra, learned counsel for the appellant,

the provision under Section-50 of the Act was not complied with as admittedly the accused was not searched in the presence of a Gazetted Officer or Magistrate and no option was given to him.

Mr. S.K. Mishra, learned Additional Standing Counsel seeks to counter such argument by submitting that the S.T.F. team was proceeding to a different place and the accused along with auto-rickshaw was found on the way which is nothing but a chance discovery. Therefore, there was no time to comply with the requirement of Section-50. In any case, Section-50 applies only to personal search but not search of vehicle.

10. To appreciate the rival contentions, it would be apposite to refer to the provision under Section-50 of the Act, which is quoted hereunder;

“50. Conditions under which search of persons shall be conducted.—(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith

discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

11. There is no dispute that the contraband Ganja was found in auto-rickshaw and was seized upon its search. It is also in the evidence of all the prosecution witnesses that the accused was also searched. Almost all the prosecution witnesses have admitted in cross-examination that neither any Magistrate or Gazetted Officer was present during search of the accused. In fact, the I.O. himself admits in cross-examination that he had not made any requisition for deputation of Executive Magistrate and had also not separately recorded the consent and willingness of the accused for search. It is common ground that no

contraband was found from the person of the accused on his personal search and only a mobile phone was found.

12. It is argued by learned State Counsel that the Provision under Section-50 is not applicable in respect of search of premises, vehicles, bags, articles or any other articles and since no contraband was recovered from the personal search of the accused, he cannot be said to have been prejudiced. The evidence on record shows that no contraband was recovered from the person of the accused. Law is no longer res- integra that non-compliance of Section-50 is fatal to the prosecution case and vitiates the trial. When search is made of a thing or place and also of the accused, compliance of Section-50 is mandatory. In the case of **State of Rajasthan Vrs. Paramanda & Another** reported in **(2014) 57 OCR (SC)- 1087** the Apex Court after discussing several decisions including the one rendered in the case of State of **Punjab Vrs. Balbir Singh** reported in **(1994) 3 SCC 299** held as follows;

“Para-10. In Dilip & Anr. V. State of Madhya Pradesh (2007) 1 SCC 450, on the basis of information, search of the person of the accused was conducted. Nothing was found on their person. But on search of the scooter they were riding, opium contained in plastic bag was recovered. This Court held that provisions of Section 50 might not have been required to be complied with so far as the search of the scooter is concerned, but keeping in view the fact that the person of the

accused was also searched, it was obligatory on the part of the officers to comply with the said provisions, which was not done. This Court confirmed the acquittal of the accused.

11. In **Union of India v. Shah Alam** (2009) 16 SCC 644, heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following *Dilip*, it was held that since the provisions of Section 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.

12. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

13. Mr. P.C. Mishra, Learned counsel for the Appellant next argues that the Provisions under Section 52, 52-A (2) and 55, which are also a mandatory Provisions were violated. The provisions are quoted herein below for immediate reference:

"52. Disposal of persons arrested and articles seized.—(1) Any officer arresting a person under Section 41, Section 42, Section 43 or Section 44 shall, as soon as may be, inform him of the grounds for such arrest.
(2) Every person arrested and article seized under warrant issued under sub-section (1) of Section 41

shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to—

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under Section 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article.

[52-A Disposal of seized narcotic drugs and psychotropic substances.— [(1) xxx xxx xxx
xxx]

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

55. Police to take charge of articles seized and delivered.—An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.”

14. In this regard, it is the contention of Mr. Mishra, that the seized articles and the accused were taken to Bhubaneswar but not to the local Police Station which is at a distance of only 40 Kms. (forty kilometers). The object of Section-52 is safe custody of the seized articles. It is to be noted in this regard that the search and seizure was made by the S.T.F. which has jurisdiction over the entire State. But in all fairness and in compliance of Section 52 and 52-A(2), the seized articles as well as the accused should have been taken to the nearest Police Station, yet the same not having been done, naturally creates a doubt as the accused and the seized articles were taken all the way to Bhubaneswar which is more than 300 Kms. away from the spot that too during the night, whereas the local police station situates at a distance of 40 kms only.

15. It has been further argued that as per Section 55, the seized article is to be taken charge of by the O.I.C. of a Police Station, who shall keep it in safe custody. In the instant case, one Sub-Inspector (P.W.7), who took charge of the six gunny bags filled with Ganja admitted in cross-examination that the seized Ganja had not been weighed before her and that she does not remember the weight of the gunny bags. She also admitted to have not verified the gunny bags. She further admits not to have collected and seized any exclusive sample and that no sealing of the seized articles had been made during receipt. It goes without saying that when the statute has laid such emphasis on proper sealing and custody of the seized articles, it is incumbent upon the investigating agency to scrupulously adhere to the same. Highlighting the importance of the mandatory provisions of the statute/ the Rajasthan High Court in a similar case in the case of **Ved Singh and Others vrs. State of Rajasthan**, reported in **2002 (CrILJ) 1463** held as follows;

“Para-7 There is no evidence to suggest that the compliance of Section 55 of the Act was ever made. The practice and procedure in such cases is that at the time of the recovery the material has to be sealed by the personal seal of the officer making the recovery: Thereafter, the sealed packets are taken to the ‘Maal Khana’ of the Police Station or to

the office of Narcotics Department, where the packets are to be resealed so that there are no chances of subsequent tampering. In this case there is no evidence to suggest that the packets were resealed when they were deposited in the office. The prosecution has to prove by a positive evidence that the packets were intact after the recovery till they were deposited in the 'Maal Khaana.' It has to be further proved by positive evidence that during the course of their stay in the 'Maal Khana' the packets remained intact. It is further to be proved by positive evidence that after taking from the Maal Khana till they were deposited with the Public Analyst they remained intact. But a testimony to that effect is also not on record. At the office of Public Analyst the material received is to be weighed, so that it is clear that there was no major change in the weight of the material. This is a safeguard provided in the interest of the accused persons and there have been number of cases in which the accused persons have been acquitted simply on the ground that the difference between the weight of the sample at the time of the recovery and the same at the time of their deposit with the public analyst was far in excess. In the instant case a precaution has been taken to not to mention the weight of the sample at the time of receipt in the office of public analyst. This is an infirmity, the benefit of which must go to the accused persons."

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16. Thus the possibility that what was presented to P.W.7 at Bhubaneswar after travelling a distance of 300 kilometers may also have been tampered with during the journey cannot be lost sight of. Thus, the requirement of Section 55 was also not complied with.

17. Reading of the impugned judgment reveals that the learned Special Court has held that as the raid was conducted on the basis of a chance recovery the applicability of the mandatory provision for Section-42 of the

Act is not required to be complied with. As regards compliance of Section-50, the learned Court below has held that there had not been any personal search of the accused but only of the vehicles. This is contrary to the evidence on record as discussed earlier. As regards the Sections-52, 52(A) and 55 of the Act, learned Court below did not find any infirmity in the evidence but in view of the discussion made herein before in relation to the evidence on record and the position of law, it is evident that the findings of the learned Special Judge as above cannot be sustained. Thus from an analysis of the evidence on record in the backdrop of the contentions advanced on behalf of the accused-appellant, this Court finds that the order of conviction passed by the learned Court below warrants interference.

18. In the result, the Appeal is allowed. The impugned judgment is set aside. The appellant being on bail his bail bonds be discharged.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 16th December, 2022/ Balaram Behera, Sr. Steno