

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No. 450 of 2018

&

CRLA No. 907 of 2019

(Appeals under Section 374 of the Code of Criminal Procedure challenging the Judgment dated 09/11.01.2018 passed by the learned Sessions Judge-cum-Special Judge, Nuapada in Special Case No. 10 of 2013.)

CRLA No. 450 of 2018

AFR Ram Rahish Tripathy & Another Appellants

-Versus-

State of Odisha Respondent

CRLA No. 907 of 2019

Duryodhan Gouda Appellant

-Versus-

State of Odisha Respondent

Advocate(s) appeared in both the cases:-

For Appellants : M/s. J.R. Dash and
Mr. K.L. Dash, Advocate.

For Respondent : Mr. P. Tripathy,
Additional Standing Counsel
for the State.

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT
6th December, 2022

SASHIKANTA MISHRA, J.

This common judgment shall dispose of the aforementioned Criminal Appeals filed by the appellants challenging the judgment passed on 9/11.01.2018 by the learned Sessions Judge-cum-Special Judge, Nuapada in Special Act Case No. 10 of 2013. As per the said judgment, the appellants were convicted of the offence under Section 20(b)(ii)(c) of the NDPS Act, 1985 and sentenced to undergo rigorous imprisonment for ten years each and to pay a fine of Rs.1,00,000/- (Rupees one Lakh only) each, in default, to undergo further rigorous imprisonment for two years each.

2. Briefly stated, the prosecution case is, on 21.10.2013 at about 5.00 A.M. the S.I and staff of Komna Police Station in the district of Nuapada found two vehicles namely, TATA Indigo LS vehicle bearing Registration No. MP 20 CA 4684 and Maruti Suzuki Alto 800 bearing Registration No. MP 51 CA 0624 coming from Khariar side towards Komna. The vehicles were intercepted for verification. On search of the vehicle 33 packets were found from both the vehicles and on further search the packets were found to contain contraband Ganja. The total quantity of Ganja was found to be Q.1.90Kgs 50 Grams. The

occupants of the vehicles were detained and the formalities of search and seizure were carried out. The samples were taken for chemical analysis and the remaining Ganja was repacked in different bags. The accused persons were arrested and forwarded to the Special Court. Upon completion of investigation, charge sheet was submitted under Section 20(b)(ii)(c) of the NDPS Act and the accused persons were put to trial.

3. The accused persons took the plea of denial.

4. In order to prove its case, prosecution examined 14 witnesses and exhibited 13 documents. The defence did not adduce any evidence, either oral or documentary.

5. Learned Special Judge examined the oral evidence on record in detail. It was urged by the defence that there was non-compliance of the mandatory provisions of Sections-50, 55 and 57 of the NDPS Act. Learned Special Judge after going through the oral and documentary evidence on record held that there was no violation of the provisions of Section- 50 and 55 of the NDPS Act. Learned Special Judge also held that in view of the evidence of the I.O, there was no violation of Section- 57 of the Act. As such, it was held that the evidence of the witnesses was trustworthy and that the contraband Ganja had been properly seized and also kept in proper custody after being sealed and therefore, there was no infirmity in the procedure adopted. On such findings, learned Special Judge convicted the appellants and sentenced them as aforesaid.

6. Heard Mr. J.R. Dash, learned counsel for the appellants and Mr. Priyabrata Tripathy, learned Additional Standing Counsel for the State.

7. Assailing the impugned order of conviction, Mr. Dash contends that the mandatory provision relating to search, seizure and custody of the contraband were not complied with at all. According to him, the I.O. P.W.-14 has admitted such violation during his cross-examination. Since, the mandatory provisions have been violated the impugned judgment of conviction and sentence cannot be sustained in the eye of law.

8. Per contra, Mr. P. Tripathy argues that the informant could not adduce evidence as he had expired but the other witnesses who were present at the spot during search and seizure of the contraband have clearly and cogently proved that the same was done strictly in compliance of the statutory provisions. He further argues that the learned Special Judge has taken pain to meticulously scan the evidence of the witnesses to be satisfied as regards compliance of the provisions. Therefore, according to Mr. Tripathy, no case for interference is warranted.

9. The first objection raised by Mr. Dash is non-compliance of Section-50 of the Act. Section-50 reads as follows;

“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.”

It is evident that before conducting a search of the person of an accused option has to be given by the Searching Officer to the accused of being searched in the presence of a Gazetted Officer or the Magistrate. This has been held to be a mandatory provision, non-compliance of which vitiates the search. It is well settled that compliance of Section-50 is required only then the person of the accused is to be searched but not so when any vehicle, place, thing etc., is required to be searched. Reference may be had in this regard to the decision of the Apex Court in the case of *State of Rajasthan Vrs. Paramanda & another* reported in (2014) 57 OCR (SC)- 1087

10. Coming to the evidence, it is seen that none of the witnesses have stated anything regarding search of the accused persons. While P.Ws. 1, 2, 3, 4, 11 and 12 being independent witnesses, have turned hostile, the official witnesses have also not stated anything regarding search of the person of the accused persons. P.W.7 and P.W.8 who were witnesses to the seizure do not say anything regarding search of the accused persons but both of them have stated about search of the vehicles whereby 20 packets of Ganja was found from the dickey of the TATA Indigo vehicle and 13 packets of Ganja from the dickey of the Maruti Alto vehicle. Thus there is no evidence of any search being carried out of the accused persons. Such being the case, compliance of Section-50 is not necessary. The contentions of Mr. Dash in this regard is therefore not acceptable.

11. Mr. Dash, next urged that the seizure of the contraband Ganja was made by clubbing two vehicles and preparing one seizure list but without showing the link between the said two vehicles. The I.O. P.W.14 has admitted in his cross-examination that there is no material to indicate the interconnection between the two vehicles. He further argues that one seizure list was prepared even though different quantities of Ganja were allegedly recovered from two different vehicles. While this Court finds the above to be somewhat irregular but is unable to accept the contentions that only for such reason the trial was vitiated. Moreover, the

accused persons have not shown as to how they were prejudiced by preparation of a common seizure list.

12. Mr. Dash then urged that there was serious violation of Section-55 and Section-57 of the Evidence Act. Amplifying his contention, Mr. Dash has argued that there is no proof that the contraband was sealed at the spot and re-sealed so as to ensure its safe custody. The Maalkhana Register was also not produced and proved. In order to appreciate the contentions of Mr. Dash, this Court has perused the evidence of P.W.7 who, being an S.I. of Police had accompanied the informant and other staff to the spot. He says, the Ganja bags were brought out and the contents were kept in a polythene and mixed up. One Chandulal Jain weighed the total Ganja which came to around 1 Qtl. 90 Kg & 50 Grams. He further says, S.I. D.K. Sahu (informant) drew two samples from the bulk Ganja with each sample weighing 25 Grams and were kept in separate packets and those packets were sealed. He further says that the remaining bulk Ganja was kept in 13 packets which were also sealed and the polythene packets which were containing Ganja were also kept in separate packets and sealed. In cross-examination, it was suggested he had not stated before the I.O. regarding sealing of the sample Ganja packets and the remaining bulk Ganja packets. The I.O. in his cross-examination clearly admitted that P.W.7 had not stated before him that the seized Ganja (both sample and bulk) were sealed. This is a major contradiction, which in the context of Section-55 assumes great

significance. That apart, the above statement of P.W.7 is not supported by P.Ws. 8 and 10. Both of them have not stated anything at all regarding sealing of the packets at the spot. An independent witness (P.W.11) stated that when he had been to the Police Station, he saw the bulk Ganja lying on the floor of the Police Station, which were weighed and came to 1 Qtl. 90 Kg & some odd. Thereafter he left. Subsequently he was called to the Police Station where he saw the sealed packets and police instructed him to be a witness to the seizure of Ganja. In the absence of any positive evidence regarding sealing of the seized contraband at the spot, the testimony of P.W.11, notwithstanding the fact that he was declared hostile by the prosecution, presents a plausible alternative which raises a reasonable doubt as regards the sanctity of the procedure followed by the I.O. regarding safe custody of the Ganja. Thus, there is no evidence to show that the Ganja was sealed at the spot along with the sample.

13. Another discrepancy pointed out by Mr. Dash and also noticed by this Court is with regard to weight of the samples drawn from the seized Ganja. According to P.W.7-S.I. D.K. Sahu (informant) drew two samples from the bulk Ganja, each sample weighing 25 Grams. P.W.8 also says so and so does P.W.10. P.W.14 says that he had examined the informant and perused the seizure list regarding the bulk Ganja and two samples of Ganja in two packets containing 25 Grams. The Chemical Examination Report marked as Exhibit-14 however shows

that one of the sample packets marked as Ext.A sent to RFSL, Berhampur was found to contain 50 grams of Ganja.

The above discrepancy on weight of the sample sent to chemical analysis and the one prepared at the spot creates serious doubts as regards the safe custody of the Ganja after its so called seizure. It goes without saying that the Provisions of Section-55 is meant to ensure that the seized contraband is kept in proper custody from the point of its seizure till its production before the Court, so as to rule out the possibility of tampering in between. This safeguard is built in to the statute keeping in view the stringent penal provisions it prescribes for the offender. Therefore, the prosecution must come above board with its case by adhering evidence showing guilt of the offender beyond reasonable doubts.

14. Thus this Court finds that prosecution was not successful in establishing that the seized contraband was properly sealed at the spot, re-sealed at the Maalkhana and kept in safe custody till its production before the Special Court. Whether it was taken to the Maalkhana at all is also beset with doubts in view of non-production of the Maalkhana Register.

15. This Court, in the case of ***Jadaba Dehury @ Dehery Versus State of Orissa***, reported in ***2009 (II) OLR-466*** held as follows;

“5. The aforesaid provision clearly enjoins a duty upon the Officer-in-Charge of the Police Station to receive and keep in safe custody, the articles seized

and delivered to him. It is mandatory to affix a seal to such articles and to take samples of the articles from them and all samples so taken are required also to be sealed to the seal of the Officer-in-charge of the Police Station and non-compliance of the same is clearly an infraction of stipulation contained in Section 55 of the N.D.P.S. Act.”

16. A reading of the impugned judgment shows that the learned Special Judge has not considered these vital aspects at all rather, the evidence of the prosecution has been accepted as it is without making deep scrutiny to ascertain as to if the mandatory requirements of the statute were complied with or not. The impugned judgment therefore, becomes susceptible to interference.

17. For the foregoing reasons therefore, this court holds that the impugned order of conviction and sentence passed by the learned Special Judge cannot be sustained in the eye of law which is therefore, set aside. The accused persons are acquitted from the charge under Section - 20(b)(ii)(c) of the NDPS Act. They be set at liberty forthwith, if not required to be detained in connection with any other case.

.....
Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 6th of December, 2022/ Balaram Behera, Sr. Steno