

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No. 549 of 2015

An appeal under Section 374(2) of Cr.P.C. against the judgment and order of conviction passed by learned Special Judge, Gajapati, Parlakhemundi in G.R. Case No. 19/2013 / T.R. No. 25/2013.

AFR **Suraj Bahadur & another** **.....** **Appellants**

-Versus-

State of Odisha **.....** **Respondent**

Advocate(s) appeared in this case:-

For Appellants : M/s. Gopal Krishna Behera and
D.R. Mishra, Advocate.

For Respondent : Mr. P. Tripathy,
Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

5th December, 2022

SASHIKANTA MISHRA, J. The appellants question the correctness of the judgment passed by learned Special Judge, Gajapati, Parlakhemundi in G.R. Case No. 19 of 2013 on 15.09.2014, whereby they were convicted for the

offence under Sections 20(b)(ii)-C/29 of NDPS Act and sentenced to undergo R.I. for 12 years and to pay fine of Rs.1,00,000/- each and in default, to undergo R.I. for one year each for the offence under Sections 20(b)(ii)-C/29 of NDPS Act.

2. The prosecution case, briefly stated, is that on 11.07.2013 at about 4 a.m. the IIC of Mohana P.S. received information that some unknown persons were transporting contraband ganja in a vehicle from Antaraba to Berhampur, basing on which he made a Station Dairy Entry No.212 dated 10.07.2013 and instructed the S.I., Sri Murnal Kalo and other police staff, who were already on patrolling duty for the car festival, to proceed towards the spot and to intercept the vehicle. On receipt of such information, the S.I., Sri Kalo, who is the authorized officer of the case, left for Atharanala Chhak on the same night at 10 p.m. and found a vehicle coming from Kirting and was proceeding towards Berhampur. When the police party asked the vehicle to stop, it did not, whereupon the police party chased the vehicle and managed to intercept

the same near Atharanala. It was found that the vehicle was occupied by its driver, Narayan Bira and a person was sitting at the rear seat with the other accused persons, namely, Suraj Bahadur and Jyoti Mali @ Sukanta (the present appellants), who belonged to Antaraba area. On being asked, the accused persons are said to have admitted that they were transporting contraband ganja in seven jari bags. The authorized officer thereafter arranged two local witnesses and informed the IIC to depute a Gazetted Officer for search of the accused persons, who exercised their option as such. A weighman was also called to the spot. Thereafter, observing all necessary formalities, the vehicle and the accused persons were searched. Seven jari bags containing contraband ganja to the tune of 105 KGs 635 grams were recovered from the vehicle, which were collected, seized and sealed at the spot after drawing the samples by the authorized officer. The accused persons were thereafter produced before the IIC, arrested and the case was registered. Upon completion of other formalities

and investigation, charge sheet was submitted under Sections 20(b)(ii)-C/29 of NDPS Act and the accused persons were put to trial.

3. The accused persons took the plea of denial and false implication.

4. To prove its case, prosecution examined 9 witnesses and exhibited 11 documents. The prosecution also proved 16 material objects. The defence on the other hand did not adduce any evidence.

5. After analyzing the evidence on record and considering the contentions raised by the defence, learned Special Judge held that the mandatory requirements of the statute as per Section 42 and 50 of the NDPS Act were complied with. It was further held that there was clear evidence to show that the requirement of Sections 55 and 57 of the Act was also duly complied with. Thus, from the evidence, the possession of the contraband ganja being fully established learned Special Judge convicted the accused persons and sentenced them as aforesaid by the impugned judgment.

6. Heard Mr. G.K. Behera, learned counsel appearing for the appellants and Mr. P. Tripathy, learned Additional Standing Counsel for the State.

7. Assailing the impugned judgment of conviction, Mr. Behera has raised the following points.

(i) There was non-compliance of Section 42 of the NDPS Act, inasmuch as there is no evidence as to who received the prior information and on what basis the so called search and seizure was effected by the authorized officer.

(ii) The requirement of Section 55 was also not complied with, inasmuch as the seized articles were not re-sealed by the I.O. at the time of their receipt in the P.S. Malkhana.

(iii) There is also no evidence as to what happened in between the date of seizure and the date on which the sample was sent for chemical analysis.

According to Mr. Behera, the mandatory requirement of the statute not having been complied with, the impugned judgment cannot be sustained in the eye of law.

8. Per contra, Mr. Priyabrata Tripathy submits that the appellants have raised grounds which only suggest minor discrepancies and therefore, such objection is only hyper-technical and hypothetical in nature. It is further contended that all necessary formalities of search, seizure and custody of the contraband were fully complied with and therefore, the impugned judgment does not warrant any interference whatsoever.

9. In view of the specific grounds on which the impugned judgment is sought to be challenged it would be apposite at the outset to refer to the relevant statutory provisions. Section 42 of the NDPS Act reads as follows:

42. Power of entry, search, seizure and arrest without warrant or authorisation.—

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs

control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such 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.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

This provision mandates that any information received regarding the commission of an offence has to be reduced into writing and the same has to be proved before the trial court. This is a mandatory provision which must be shown to have been complied with.

10. In the case of **Sukhdev Singh v. State of Haryana**, reported in (2013) 2 SCC 212, the Apex Court referring to its earlier decision of the Constitution Bench rendered in the case of **Karnail Singh v. State of Haryana**, reported in (2009) 8 SCC 539 held that the legislature in its wisdom has made the provision of Section 42 of the NDPS Act mandatory and not optional.

11. Examining the evidence on record in light of the above, it is seen that the authorized officer, who was

examined as P.W.-7, stated that on 10.07.2013 while he was performing law and order duty in the car festival at Mohana, the IIC of Mohana P.S. sent a message to him over telephone that there was illegal transportation of contraband ganja at Antabara area. He has proved the command certificate marked as Ext.-7. Perusal of Ext.-7 reveals that the same was issued in connection with law and order duty in the car festival. In cross-examination also, P.W.-7 reiterated such fact that during law and order duty at the car festival he received message from the IIC, Mohana P.S. about transportation of ganja at Antabara area. He further submitted that no such command certificate was issued to him by the IIC for patrolling duty at Antabara area. Again during cross-examination, he has admitted that as per the oral direction of the IIC, he went to the spot to detect the case.

12. Strangely, the IIC, who was examined P.W.-9, does not say anything at all in this regard. He simply stated that on 11.07.2013, the S.I., M. Kalo(P.W.-7) presented the plain paper FIR, basing on which he

registered P.S. Case No. 55/2013 and at that time the accused persons were also present at the Police Station. He did not whisper a word about sending a telephonic message or by any other means to P.W.-7. So the question that arises is, from where did the information regarding transportation of contraband ganja emanate. This is a serious gap in the evidence, which learned Special Judge appears to have overlooked. Reading of the impugned judgment reveals that while reiterating the legislative intent of Section 42, learned Special Judge has not considered the above referred discrepancy in the evidence of P.W.-7 and P.W.-9 regarding the receipt of information of transportation of contraband ganja. The so called station diary entry made by the IIC has not been spoken of by any of the other witnesses much less by P.Ws.-7 or 9. All this raises reasonable doubt as regards the sanctity of the procedure adopted by the raiding party.

13. As regards the violation of Section 55, it would be proper to first refer to the statutory provision, which reads as follows:

“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. As regards the violation of this provision, Mr. Behera argues that there is no evidence that the seized packets of contraband were kept in safe custody till their production for chemical analysis and before the Court. Referring to the evidence of P.W.-7, Mr. Behera submits that according to him, the authorized officer seized the contraband ganja after weighment but did not seal the same. Further, the I.O. also states to have re-seized the packets but has stated nothing about sealing or re-sealing the same. Mr. Behera further contends that the seizure was made on 11.07.2013 and was sent for chemical examination on 17.07.2013. So what happened in between is completely shrouded in mystery. The Malkhana Register was never produced to show that the seized article was kept in safe custody in Malkhana.

15. A reading of the evidence of P.W.-7 reveals that in paragraph-2 he has stated as under:

“2. Then in presence of the gazetted Officer I searched the said alleged vehicle and recovered 7 Nos. of Jari packets containing Ganja and it was weighed at the spot and including the jari packets the weight came to 107 K.Gs. and 35 Grams. Without Jari the weight came to 105 K.Gs. 635 grams. I attached the paper slips having the signatures of Gazetted Officer, weighment man and witnesses and self and affixed the same to each packets. Then I prepared the seizure list of the seized Ganja at the spot in presence of the witnesses and the Gazetted Officer vide Ext.2/1 and Ext.2/2 is my signature. I also drew sample from each of the Jari packet for chemical examination. I prepared the sample packets by taking ganja from each packet and homogeneously mixed the same. Then I seized the packets at the spot. I also seized the vehicle at the spot vide Ext.1/1 and Ext.1/2 is my signature. M.Os. I to VII are those packets, M.Os. VIII to XV are the sample packets. I seized the weighing machine on the production of Simanchala Sahu and prepared the seizure list vide Ext.3/2 and Ext.3/3 is my signature. Then I returned to the P.S. and produced the seized Ganja and the accused persons before the I.I.C., Mohana P.S. by presenting a plain paper FIR vide Ext.8 and Ext.8/1 is my signature. I was also examined by the I.O. in this case.”

16. Bare reading of the testimony of P.W.-7 as quoted above would show that he has stated absolutely nothing as regards sealing of the seized packets. P.W.-9 has stated that he re-seized the seized articles as per Ext.-9. He also does not say anything about resealing of the seized packets. The statutory intent of Section 55 is to

ensure that the seized article is sealed and kept in safe custody till its production before the Special Court. This is obviously keeping in view the stringent provisions of the Act and to ensure a fair and transparent procedure.

17. Learned Special Judge has not considered this aspect at all. Reading of the impugned judgment reveals that learned Special Judge appears to have made a superficial appreciation of the evidence thereby leaving out the significant omission therein. This Court further observes that learned Special Judge has referred to numerous decisions (27 to be precise). It goes without saying that the case laws are to be applied only to the facts and circumstances of the case at hand and not to be applied mechanically.

18. From the conspectus of the analysis made hereinbefore the position that emerges is, there is serious violation of the mandatory provisions of the statute as envisaged under Section 42 and 55 of the NDPS Act. Learned Special Judge has proceeded on an erroneous perspective and held otherwise.

19. In view of what has been discussed hereinbefore with reference to the evidence of the authorized officer and the investigating officer, this Court is of the view that the findings of the trial court cannot be sustained in the eye of law.

20. In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence is hereby set aside. The appellants be set at liberty forthwith, if they are not required to be detained in any other case.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 5th December, 2022/ A.K. Rana, P.A.