

## IN THE COURT OF THE SPECIAL JUDGE: BHUBANESWAR.

PRESENT:-

Sri I.K. Das, LLB,  
Special Judge, Bhubaneswar.TR Case No. 84/9 of 2007Date of argument- 26.09.13Date of Judgment- 28.09.13S t a t e  
Vrs.Bijay Kumar Lenka, aged about 44 years  
S/o: Late Bichitrananda Lenka  
resident of : Laxmisagar, PS: Laxmisagar  
Bhubaneswar, Dist: Khurda

....Accused person

Advocate for the prosecution-

Sri N.R. Ray, Addl. P.P. BBSR

Advocate for Accused persons

Shri B.N Ray, Advocate

Offence Under Sections:-

Sec. 20 (b) (ii) (A) of NDPS Act.

J U D G M E N T

The accused stand charged for the offence u/s 20 (b) (ii)(A) of Narcotic Drugs and Psychotropic Substances Act,1985.

2. As per the prosecution report, on 19.4.07 at about 8.30 PM Sri Rama Chandra Mishra, SI of Excise EI & EB, Unit-I, Cuttack alongwith two constables of Excise were patrolling at Laxmisagar area and during such patrolling the SI of Excise received information that the accused is dealing with Ganja clandestinely. On receipt of such information, the SI of Excise reduced the information into writing and sent a copy thereof to the Inspector In Charge, EI & EB through his constable Udayanath Naik. They immediately proceeded to Brit Colony and saw the accused was standing carrying a bag in his hand. The SI detained the accused, gave his own identification and explained him regarding his intention to search him. He also informed the accused that the accused has a right to be searched in

presence of any gazetted officer or any Magistrate. But, the accused voluntarily stated to be searched by the SI without the presence of the gazetted officer or the Magistrate. Accordingly, the SI gave his personal search to the accused in presence of his staff and local independent witnesses. He seized a blue colour nylon bag and recovered 950gm of ganja (cannabis) consisting of flower, fruits and leafs and seeds. The contraband article was weighed at the spot and was tested by the SI from its smell and by burning some portion of ganja. From such preliminary test and out of long service experience, the SI could identify that it was nothing but ganja. Thereafter, two sample packets each containing 25 gms were prepared at the spot and the rest 900gm of ganja was again kept in the seized bag. The packets and the bag were sealed at the spot with the official seal of the SI wrapped with papers. The signature of the accused and witnesses were obtained in the seizure list and a copy was handed over to the accused with his endorsement. Prosecution report further reveals that on suspicion the SI searched the house of the accused located at Majhi Sahi, Laxmisagar, but no other contraband article was seized from his house. The brass seal of the SI was left in zima of one witness namely, Santosh Kumar Lenka and zimanama was prepared to that effect. The seized sample packets and the bag containing ganja were kept in the malkhana at Laxmisagar PS by executing zimanama and thereafter, the sample packets were forwarded to Drug Testing and Research Laboratory at Bhubaneswar for chemical examination. Later report was received from chemical examiner confirming that it was ganja. Accordingly, the accused faced the trial in the Court of law and hence the case.

3. Plea of the defence is complete denial to the allegation and of false implication.
4. The point for determination in this case is  
Whether on 19.4.07, the accused was in illegal possession of 950 gm of ganja and therefore, he will be liable for the offence ?
5. While prosecution examined 5 witnesses in support of its case, accused did not prefer to adduce any evidence during the trial. P.Ws.1 and 2 are the two independent witnesses stated to be present at the time of search and seizure.

P.W.3 is the SI of Excise who seized the articles from the accused and investigated the case. P.W.4 is the constable of excise at the relevant time who was present alongwith the SI at the time of seizure. PW.5 was the SI of Police, Laxmisagar PS who proved that the mal items were kept in the malkhana of the PS on the relevant night.

6. Pws 1 and 2 during their examination in the Court stated that they do not know the accused who was standing in the dock. They have also no knowledge regarding seizure of ganja from the accused at any point of time. It is their evidence that the police by applying force took their signature on some documents which have been proved by them. Learned counsel for the prosecution declared both the witnesses hostile and cross examined them under provision of Sec. 154 of Evidence Act. No attempt has been made during their cross examination to bring any material to believe that the witnesses are suppressing truth or deposing falsehood in the Court. Only the prosecution case has been confronted to the witnesses which they completely denied. P.W.2 who is the custodian of brass seal of the SI of Excise denied regarding such assertions. On the other hand, P.W.1 in his cross examination by the defence stated that his signatures on the papers were taken on the papers in front of excise office at Kalpana Chawk. He said that he is a stock witness of excise officers in two to three cases. His signatures were obtained on blank paper and out of fear he signed on it. P.W.2 stated that he is having a tea stall in front of excise office and therefore, the excise officers take his signatures at different times on blank papers. P.Ws.3 and 4 both being excise personnel adduced evidence in support of their case in respect of search and seizure of ganja from possession of the accused. P.W.3 stated that after disclosing his identity, he asked the accused to be opted to be searched in presence of gazetted officer or executive Magistrate orally as well as in writing. But, the accused wanted to be searched by him without the presence of gazetted officer or magistrate. During his cross examination, learned defence counsel has confronted the endorsement of the accused on the intimation marked as Ext.4/1 and put forth that the endorsement does not belong to the accused. P.W.4 who was then then constable of excise supported P.W.3 in his evidence. He denied his

knowledge as to how P.W.3 received information regarding possession of ganja with the accused. P.W.5, the SI of police, Laxmisagar PS in his evidence stated that on the night of 19.4.07, P.W.3 presented a written requisition addressed to the IIC to keep seized sample packet in the PS Malkhana and he being the Malkhana incharge entered the fact in the malkhana register and also kept in the PS Malkhana.

7. This being the sum total evidence adduced from the side of prosecution, let me examine if the evidence on record has been able to substantiate the offence against the accused. Learned defence counsel during the course of argument has objected the manner of prosecution on different angles . It is his consistent case that Sec. 50 of NDPS Act which is mandatory provision has not been complied properly before search and seizure on the date of occurrence. He further argued that the place of seizure is a busy locality and only two independent witnesses were chosen to stand as witness on behalf of prosecution. They have completely denied their knowledge and gave good bye to the prosecution case. In addition to the case, they left doubtful remark that they are stock witnesses on behalf of the excise people and they are forced to sign on blank papers at different times. On basis of such evidence, learned defence counsel argued that prosecution has miserably failed to prove the case. On the other hand, learned Addl. PP argued that the mandatory provisions of the Act have been duly complied and in absence of any support from the independent witnesses court can rely on the evidence of departmental witnesses and a conviction can lie under such circumstance. As regards , compliance of Sec.50 of the Act, learned defence counsel relied on a decision reported in **(2011) 50 OCR (SC), 214 in the case of Nirmal Singh Pehlwan @ Nimma vrs. Inspector, Customs, customs House, Punjab**. I have gone through the said decision. It is held that u/s 50 of NDPS Act the right of the accused to be searched in presence of any gazetted officer or a magistrate is to be informed for strict compliance of the Act. A consent memo intimating the accused giving option to be examined in presence of the above named persons is not proper compliance of Section 50 of the act. Honble Apex Court while considering such aspect of the case directed for acquittal of the accused. In the

instance case P.W.3 the S.I of the Excise said in his evidence that he asked the accused if he opted to be searched in presence of gazetted officer or Executive Magistrate. P.W.4 also deposed in in the same line and said that the SI asked the accused if he wanted to be searched in presence of Executive Magistrate. There is no evidence that the SI informed the accused that he has a right to be searched in presence of the above named persons. The option given to the accused in the case is not in conformity with the mandate of the Act. Failure to comply with the provision would rendered the recovery of the illicit article vitiate any conviction of the accused. Ext.4/1 is the written option given to the accused prepared by P.W.3. On going through the documents it reveals that the accused was intimated regarding his right but both the departmental witnesses in their oral evidence did not say in support of such documents. Further I have examined that Ext.4/1 ,Ext.3/1 and Ext.1/2 were prepared by P.W.3 at the spot at the same time. And copy of such documents were supplied to the accused obtaining his signature. But it is noticed in all the documents the signature of the accused and his hand writing in the endorsement differs from each other. Further more the bail used by the accused for his signature is different. These circumstances create doubt as to if the documents were prepared at the spot and the copies thereof were supplied to the accused at the same time.

8. The defence counsel has relied on a decision in the case of **Mayadhar Swain and another Versus State of Orissa: 91(2001) CLT 283:II(2001) CCR 96**. It is held that the lack of convincing evidence to reach the conclusion that the Ganja had been seized from exclusive conscious possession of the accused entitle for his acquittal. In another Case reported in *Abhimanyu Jena Versus State* : 1997(4) Crimes 365. Hon'ble court held that in a crowded place only one independent witness if examined and the SI giving intimation to the accused of his right to be searched before any Gazetted Officer or Executive Magistrate has been answered to be searched in presence of the SI makes the case doubtful. After examining the principle of the law as decided by the Hon'ble courts and taking into consideration the evidence of two independent witnesses and the manner of search and seizure from the accused, I feel that Section 50 of the Act has not been

properly complied by the prosecution and the circumstance of the seizure of Ganja from the accused is also doubtful.

9. In view of such finding it is unsafe to believe that the prosecution has been able to prove its case beyond reasonable doubt. In the result the accused is found not guilty for the offence u/s.20(b) (ii) (A) of NDPS Act and his acquitted therefrom in accordance with provision u/s.235 (1) of Code Criminal Procedure. He be set at liberty forthwith. His bail-bond be canceled and surety be discharged.

10. The seized article if any be destroyed after two months of appeal period if no appeal is filed against the judgment.

Pronounced in the open Court to-day the 28<sup>th</sup> day of September, 2013

Special Judge, Bhubaneswar.

Typed to my dictation and corrected by me.

Special Judge, Bhubaneswar.

List of witnesses examined for the prosecution

P.W.1:- Dwarikanath Patra  
 P.W.2:- Santosh Kumar Lenka  
 P.W.3:- Ram Chandra Mishra  
 P.W.4: Hrushikesh Hota  
 P.W.5: Deve Sankar Pratap

List of witness examined for the defence

Nil

List of exhibits marked for the prosecution

Ext.1: Signature of P.W.1  
 Ext.1/1: Signature of P.W.1  
 Ext.2: Signature of P.W.1  
 Ext.2/1: Signature of P.W.1  
 Ext.3: Signature of P.W.1  
 Ext.4: Signature of P.W.1  
 Ext.5: Signature of P.W.1  
 Ext.6: Signature of P.W.2  
 Ext.4/1: Letter  
 Ext.4/2: Signature of P.W.3  
 Ext.4/3: Signature of accused

Ext.1/2: Seizure list  
Ext.1/3: Signature of P.W.3  
Ext.1/4: Signature of accused  
Ext.6/1: Zimanama  
Ext.6/2: Signature of P.W.3  
Ext.7: Receipt in token of acceptance of seized item  
Ext.8: C.E. Report  
Ext.1/5: Signature of P.W.4  
Ext.1/6: Signature of P.W.4  
Ext.1/7: Signature of P.W.4  
Ext.2/2: Search of house of accused  
Ext.2/3: Signature of P.W.4  
Ext.3/1: Arrest memo  
Ext.3/2: Signature of P.W.4  
Ext.4/1: Option memo  
Ext.4/4: Signature of P.W.4  
Ext.6/3: Signature of P.W.4  
Ext.9 : carbon copy of requisition to Laxmisagar PS  
Ext.9/1: Signature of IIC  
Ext.10: Acknowledgment of mal challan  
Ext.10/1: Signature of P.W.5  
Ext.10/2: Signature of SI of Excise

Special Judge, Bhubaneswar.