

IN THE COURT OF 2ND ADDL.SESIONS JUDGE, KHURDA.

Present:

Sri A.K.Sahoo, LL.M.,

2nd Addl. Sessions Judge, Khurda.

T.R Case No.4/25 of 13/10

(Arising out of P.R No., 56 dtd. 7.3.10)

S T A T E

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Prosecution.

...Vrs...

Halu Jujharsingh, aged about 80 years, S/o Late Binod Jujharsigh,

Vill. Badapokharia, P.S. Nirakarpur, Dist. Khurda.Accused

OFFENCE U/S. U/s. 20(a) of N.D.P.S Act.

Counsel for the prosecution : Sri H.K.Swain, Addl. P.P

Counsel for the defence : Sri Binayak Dalasingh, Adv.

Date of argument : 09.7.14

Date of Judgment: 22.7.14

J U D G M E N T

The accused stands charged U/s.20(a) of N.D.P.S Act.

2. On dtd. 7.3.10 at about 9 a.m S.I of Excise, Balugaon with his staff at the direction of Excise Superintendent in presence of Excise Inspector, Mobile, Executive Magistrate as well as I.I.C, Nirakarpur P.S searched the backyard of the residential house of accused Haluri Jujharsingh in presence of gentlemen and found cultivation of cannabis plants by him. 362 nos. of cannabis plants of 2-3 ft height were counted, uprooted and seized, sample of the hemp plants were sent for chemical examination and then prosecution was launched against the accused for cultivating cannabis plants in the backyard of his house. The accused pleaded not guilty and claimed for trial. Hence this case.

3. Plea of the accused is mere denial.
4. Points for determination in this case are;
 - i) Whether the accused had cultivated cannabis plants without any authority?
5. Prosecution has examined the Excise constable (P.w.1) who had accompanied p.w.2, S.I of Excise, and one independent witness (P.w.3) in such case.
6. P.w.2 the S.I of Excise testifies that on 7.3.10 at the direction of Superintendent of Excise, Khurda, he himself alongwith P.w.1 and one Ashok Kumar Jali and Dinamani Naik, Excise constables proceeded to Badapokharia village and searched the back side of the house of the accused in presence of Manguli Jena and Executive Magistrate, so also the accused himself, and found 362 nos. of cannabis plants of 2-3 ft height standing on his bari. From the texture, smell and his 35 years of departmental experience he found those to be cannabis plants. P.w.1 also says about it. P.w.3 the only independent witness to the case did not support it. During argument it is contended by the defence that the mandatory provision U/s.42 of N.D.P.S Act has not been complied with by P.w.2. During cross-examination it has been elicited that P.w.2 had received the oral direction over phone from Superintendent of Excise, Khurda at 8 a.m on 7.3.2010 and had made entry in this regard in his diary and has also mentioned about the reason of search in his personal diary. Admittedly neither the diary has been produced in court nor that P.w.2 had sent a report regarding such information to his higher authority i.e Inspector of Excise, Khurda. P.w.2 the S.I of Excise, Balugaon operates under S.I of Excise, Khurda and also under Superintendent, Khurda.
7. Learned defence counsel relies on the case Purna Chandra Suar Vrs. State of Orissa (2000) 19, OCR, 225 and urged that when facts regarding search, seizure and arrest not reported to immediate superior, so also brass seal used for sealing samples and other articles not produced in court, the seizure

witnesses to whom seal was handed over not examined, possibility of tampering with seal could not be excluded. At the same time he also relies on the case Chhunna @ Mehetab vrs. State of M.P, in which larger bench of Hon'ble Apex Court held that for non-compliance of provisions of Sec.42 under N.D.P.S Act the trial stood vitiated. In such case no authorization or search warrants was obtained, nor explanation was given for not obtaining search warrant. In the present case the search has been conducted in presence of Executive Magistrate but search warrant has not been obtained.

8. The accused was forwarded to court on the same day, but the seized property was produced before the court on the next day and that the property was kept in possession of P.w.2 till produced before the court. As regards the seizure of the cannabis plants admittedly the independent witness P.w.3 has not corroborated it, no other local witness has been examined, though p.w.1 says that 15 to 20 local people gathered at the spot. P.w.1 the Excise Constable says that no documents of the landed property was verified by P.w.2 and that some houses situate near the spot, which is at a distance of 200 to 250 meters from such houses. No such persons having houses nearby was called by S.I of Excise. He says that he had handed over 10 nos. of cannabis plants at the S.D.T.R.L, Bhubaneswar for chemical examination. At the same time P.w.2 says that 5 nos. of such plants were taken as sample for chemical examination before S.D.J.M, Bhubaneswar and P.w.1 had taken such plants for testing to laboratory vide command certificate marked as Ext.2.

9. Though P.w.2 says that he had made prayer to Tahasildar for identification of the land on which cannabis were cultivate through R.I vide Ext.5 and after demarcation in his presence R.I reported that the accused is the owner of the land under plot No. 2463, Khata No. 1143 of Mouza-Badapokharia, measuring an Ac. 0.270 dec vide Ext.6, but the R.I has not been examined in this case. The packet containing the seized plants after drawing sample plants marked as Ext.A1 by p.w.2 has been marked as M.O.I in court. The sample of 5 nos. of cannabis plants marked Ext. A by the I.O at the spot

has been marked as M.O.II in court. The packet containing broken seal put by the I.O on the packet of cannabis plants and also the seals broken in the court while sending samples has been marked as Exts. 3 and 4 respectively. Prosecution relies the case Ram Swarup Vrs. State of Hariyana, 2005 (2) Criminal Court cases 47 P&H in which Hon'ble court held that sending of plants of puppy taken as sample out of 780 plants for analysis and found as puppy plants after examination, the remaining plants can not be said to be not puppy plants. Relying on it prosecution contend that contradiction regarding sending of plants 5 or 10 nos is not material. In such case since the accused was found watering and tending 780 plants when raid was conducted, considering the statutory presumption U/s.35 and 54 of the Act Hon'ble Court held the accused in conscious possession and since no evidence was laid to rebut statutory presumption conviction was upheld. In such case even though public witness were not examined, Hon'ble court held that adverse inference can not be drawn when only independent witness is given up by the prosecution as own over by the accused. In the present case P.w.3 the sole independent witness did not support the case of prosecution, for which prosecution declared him hostile, but failed to elicit anything from him regarding the occurrence. At the same time he says that the accused live in the house with his five sons and grand son and his families, so also his agnates Uchhab Chandra, Sidheswar and Govinda Chandra. P.w.1 says that he has not seen the accused growing up cannabis plants. P.w.2 admits during cross-examination that he can not say when the cannabis plants were transplanted and by whom. There is no definite evidence to believe that the accused had taken care of the growing of the cannabis plants. When P.w.s.2 and others reached at the spot the accused was present at his house. Therefore and when he lives with his agnates and 5 sons with family and when there is no evidence that he had grown the plants, his presence during search and seizure is not sufficient to draw a conclusion against him. Sec.35 speaks about presumption, culpable, mental state. Defence relies on the case Lingaraj Mishra Vrs. State (1995) 8 OCR 264. In such case U/s.20(a)(i) of N.D.P.S Act. Considering the statement of Sub-inspector of Police when the

witnesses who had identified the house and bari of accused did not support the case of prosecution and that S.I police had also sent the requisition to Tahasildar to ascertain the ownership of the land and he had not produced the seized articles with the accused, Hon'ble court disbelieved the charge against the accused. Further held that there was no evidence that he had cultivated the cannabis plants. In the present case there is no evidence that accused had cultivated, watered or taken care of the plants.

10. In the present case admittedly 362 nos. of cannabis plants of 2-3 ft height have been seized. Except the report of R.I no R.O.R or any other document have been proved. Therefore, even though it is believed that 362 nos. of cannabis plants were standing over the land recorded in the name of accused, when the accused is living in his house situated at a distance of about 200 meters from the spot with his five sons with family and agnates, it is difficult to draw that the accused had grown such plants. There is no even an iota of evidence regarding his involvement in watering or giving manure in growing of such plants. Though P.w.2 says to have gone to the house of the accused and his bari and seized such plants, but he has not complied the provision U/s.42 of N.D.P.S Act by informing his higher authority, Inspector, Excise Khurda as required under the statute nor has proved the diary to corroborate it. Except the testimony of constable of Excise and said Inspector Excise, there is no other corroborative testimony in this regard. The material object produced indicates presence of the accused during seizure. It is not sufficient to hold him that he had cultivated the cannabis plants and exclusively having domen over it. No doubt from the C.E report available in record it can be inferred that the 5 nos. of sample plants are cannabis plants, but when the prosecution has failed to link that the accused had cultivated those, on presumption he could not be held guilty U/s.20(a) of N.D.P.S Act even in view of Sec.35 of N.D.P.S Act. Consequent upon this, it is held that the prosecution has failed to prove the charge U/s.20(a) of N.D.P.S Act against the accused beyond reasonable doubt, for which the accused is held not guilty U/s.20(a) of N.D.P.S Act and acquitted there from U/s.235(1) Cr. P.C.

He be set at liberty and discharged from his bail bond.

The seized articles be destroyed after expiry of 4 months of appeal period if no appeal is preferred and as per the order of appellate court if an appeal is preferred.

2nd Addl. Sessions Judge, Khurda.

The judgment is dictated, corrected and pronounced by me in the open court today i.e on 22 nd July, 2014, under my hand and seal of this court.

2nd Addl. Sessions Judge, Khurda.

List of P.ws examined for prosecution.

P.w.1 Amrendra Kumar Satpathy
P.w.2 Pravakar Acharya
P.w.3 Manguli Jena.

List of Dws examined for defence.

N i l.

List of exhibits marked for prosecution.

Ext.1 Seizure list.
Ext.1/1 Signature of P.w.1 on seizure list.
Ext.2 Command certificate.
Ext.1/2 Signature of P.w.2 on the seizure list.
Ext.2/1 Signature of P.w.2 on the command certificate.
Ext.3 Copy of carbon command certificate.
Ext.4 Forwarding letter dt. 8.3.10 bearing no. 310.
Ext.5 Copy of letter of carbon copy of identification of R.I.
Ext.6 Report of R.I marked as Ext.6

Ext.6/1 Signature of P.w.2 on the report of R.I

Ext.7 Spot map.

Ext.7/1 Signature of P.w.2 on the spot map.

Ext.1/3 Signature of P.w.3 on Ext.3.

List of Exhibits marked for defence.

N i l.

List of M.Os marked for prosecution.

M.O. I Ext.AI packet.

M.O.II Packet containing Ext.A

M.Os.III & IV Sample

2nd Addl. Sessions Judge, Khurda.