

IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE,
BHUBANESWAR.

Present:-

Shri M. K. Mishra, LL. B,
Addl. Sessions Judge, Bhubaneswar.

T.R NO. 2 of 2013/16 of 2012.

(Arising out Jatni Charge P.R No. 2/ 2012-13,
dtd. 5.4.2013)

Date of argument- 28.10. 2014

Date of Judgment- 30.10. 2014

S t a t e -

- V e r s u s -

Nazma Bibi, aged about 39 years, W/o: Sk. Kalu of village:
Pandua, P.S. Pandua, Dist: Hoogly, West Bengal.

....Accused .

Advocate for the prosecution : Shri A.K.Pattnaik, Addl. P. P

Advocate for Accused : Shri Biranch Ray and assts.

Offence U/ss.: Sec.20(b)(ii)(B)of N.D.P.S. Act

J U D G M E N T

The accused of this case, is facing her trial being charged U/s.20(b)(ii)(B) of Narcotic Drugs Psychotropic Substances Act, 1985 (hereinafter referred as NDPS Act) for illegal possession of 6 Kg. 500 grams of ganja.

2. The case of the prosecution in short is that:- on dtd.5.4.2012 at about 12.15 PM to 12.30 PM while the then SI of Excise Jatni Charge namely: Dillip Kumar Behera alongwith his staffs namely: K.C.Pattnaik, ASI of Excise, Brundaban Parida, Excise constable, and a lady excise constable namely: Latika Behera proceeded to Khurda road

Rly. Station for the purpose of excise raid, they arrived at Platform No-2. The GRPS ASI namely: Parikhita Nayak and one GRP constable namely: Bijaya Ku. Das joined the excise team for the purpose of raid. During their movement in Platform No-1, they found that a lady was coming holding one jerry bag in her hand, and tried to escape from that area. Finding her movement to be suspicious, the SI of Excise Sri D.K.Behera had directed the lady excise constable Latika Behera to detain the aforesaid person. Accordingly, she was detained by Latika Behera, and the SI of Excise had given his identity to her, obtained the identity of that lady and regarding the contents of that bag which she was holding. The said lady disclosed her name to be Nazma Bibi of village: Pandua, Dist: Hoogly, West Bengal. As he suspected that the aforesaid bag contained some incriminating articles under NDPS Act, for that he had served a notice U/s.50 of the NDPS Act to the said lady there at the spot, disclosing his intention to search. Moreover, he had ascertained from the aforesaid lady in writing if she desired to be searched in presence of Gazetted Officer or Magistrate or by SI Sri Behera. That lady had consented, and expressed her desire to be searched by Sri D.K.Behera, SI of Excise there at the spot. After observing the legal formalities, the SI of excise Sri Behera had searched the jerry bag which she was holding, and found that it contained some quantities of ganja. He brought out a small quantity of ganja from that jerry bag, and tested the same by the smell. Thereafter, he burnt a small quantity, which gave the smell of ganja. From the aforesaid test, colour and basing on his departmental and service experience, and special training undergone by him, he was of the opinion that the jerry bag in the possession of the aforesaid lady namely: Nazma Bibi contained nothing but ganja. In presence of the witnesses, he weighed the ganja independently using weighing apparatus which indicated the weight to

be 6 Kg. 500 grams. He had put the aforesaid ganja inside that jerry bag, and closed the mouth of that bag using thread and paper slip. He also applied the brass seal using lac on the same. Prior to that, he had obtained the signature of the witnesses including the official witnesses on the paper slip and the LTI of the accused on the same. He has also put his own signature on that paper slip. After conducting the legal formalities, he had prepared the seizure list at the spot and obtained the LTI of the accused and the signature of the witnesses on the body of the seizure list. He had left the used brass seal in favour of the police ASI namely: Parikhita Nayak of GRPS, Khurda road on execution of zimanama. He prepared the rough sketch map at the spot. He then arrested the accused there at the spot after serving the ground of arrest in writing and after obtaining her LTI on the same. Thereafter, they all returned back to the Head quarter. He also took steps to produce the seized articles, and the accused before the Special Judge, Bhubaneswar on the same day. As per the direction of Special Judge, Bhubaneswar, sample ganja was drawn weighing about 50 grams out of the seized ganja, and the sample was kept inside a sealed paper envelop which was subsequently marked as Ext.A, and dispatched the same to the State Drugs Testing Research Laboratory, Bhubaneswar for chemical examination. The rest ganja was kept in that jerry bag with seal and deposited with the court malkhana. Then on completion of investigation, he has submitted the prosecution report against the accused to face his trial as per law for which charge was framed as against the accused in the court U/s.20(b)(ii)(B) of NDPS Act. Hence, this case.

3. The plea of the accused is that of complete denial of prosecution story. The accused during her examination U/s.313 Cr.P.C has denied that no ganja was recovered and seized from her possession.

4. Considering the rival contention of the parties, the point

for determination in this case is :

- i) Whether on 5.4.2012 at Platform No-1 of Khurda road Rly. Station, the Excise SI Sri D.K.Behera had recovered and seized 6 Kg. 500 grams of ganja kept inside a jerry bag from the exclusive possession of the accused Nazma Bibi which she had possessed without any authority?
- 5) In order to prove it's case prosecution has examined the then ASI-Parikhita Nayak attached to GRPS Khurda road as P.W.1, the SI of Excise D.K. Behera as P.W.2.

On the other hand, no oral or documentary evidence was adduced on behalf of the accused. Similarly, Ext.1 to Ext.9 series are marked on behalf of the prosecution which include the seizure list, zimanama, the signature of the witnesses, compliance report U/s.50 of NDPS Act, ground of arrest, spot map, and other documents as per the list of the exhibits marked. MO-I and MO-II are marked on behalf of the prosecution as per the list of Mos.

6. The P.W.1 Parikhit Nayak who was working as the then police constable attached to GRPS, Khurda road has stated that during the patrolling duty, at about 12.15 PM to 12.30 PM they found a lady was in possession of a white coloured polythene bag was moving in a suspicious manner in Platform No-1, Khurda Rly. Station. The Excise SI Sri Dillip Behera had questioned that lady and thereafter through the lady constable, the aforesaid white coloured polythene bag was searched. The SI Sri Behera had recovered and seized 6 kg. 500 grams ganja from the possession of the accused and prepared the seizure list where he put his signature vide Ext.1/1. He has also stated that the excise SI had tested the ganja at the spot.

However, the important witness is Dillip Ku. Behera who had searched the accused and her jerry bag and recovered the

incriminating article i.e. ganja and investigated into the case. According to him on dtd. 5.4.2012 at Platform No-1 he alongwith the other excise team and ASI, GRPS Sri Parikhita Nayak and others were moving in Platform No-2 for the purpose of excise raid. They found that a lady was coming in a suspicious manner and tried to escape holding one plastic jerry bag. The aforesaid lady was detained by excise constable Latika Behera. Thereafter, the P.W.2 himself had obtained the name and address of the aforesaid lady and issued a notice disclosing his intention to search U/s.50 of the NDPS Act. The accused exercised her option to be searched by him and desired to be searched by SI Sri Behera without the presence of any Gazetted Officer. Thereafter, the P.W.2 had searched the jerry bag in presence of the witnesses after observing the legal formalities, and found that the the jerry bag contained no writing or brand mark, or any label. During search, he recovered 6 kg. 500 grams of ganja. He had tested the ganja there at the spot by burning the same which gave the smell of ganja. From his departmental experience, and colour of the ganja, he could confirm that it was nothing but ganja. He had weighed the ganja, and came to know that the weight of the ganja was 6 kg. 500 gram. As the accused failed to produce any valid authority in respect of the aforesaid ganja, he had seized the same using paper slip, and brass seal, and thread. He had obtained the signature of the official witnesses and his own signature and the LTI of the accused on the paper slip, and also on the seizure list. He had prepared the spot map there at the spot. He had left the used brass seal in custody of ASI of Police namely: Parikhita Nayak after obtaining zimanama from him. He had arrested the accused and produced him alongwith the seized article before the court. Subsequently, sample was drawn weighing about 50 grams out of the said ganja and sent the same for chemical examination. The rest ganja was kept inside the sealed jerry bag and

deposited with the court malkhana. Thereafter, he submitted the prosecution report against the accused for commission of aforesaid offence on completion of investigation.

The cross-examination of the P.W.2 indicates that he has admitted to have complied with the legal formalities of the NDPS Act like Section 50.

7. During course of the argument, the Ld. Counsel for the accused has submitted that, the case of the prosecution is extremely weak, and vulnerable for the compelling reason that the Provision of Section 50 of the NDPS Act has not been pressed into service in letter and spirit by the P.W.2, and that without full compliance of Section 50, the accused is to get the benefit. While elaborating his argument, the Ld. Counsel for the accused has submitted that although the P.W.2, and other official witnesses deposed that he had conducted the search and the seizure, and prepared the documents including Section 50 of the Act and gave an option in writing to the accused if she desired to be searched in presence of a gazetted Officer, still then, that is not sufficient to press the provision of Section 50 into service for its full compliance. He has drawn the attention of the court to the fact that the P.W.2 admitted during his cross-examination that the GRPS is located near the spot i.e. khurda Road Rly. Station, and adjacent to Platform No-2 and 3. He also admitted that one Inspector of police(IIC) is posted at GRPS, Khurda road, who is a Gazetted Officer, which is within his knowledge. Although, the cross-examination of the P.W.2 reveals that, he had given the option to the accused if she desired to be searched in presence of a gazetted Officer or by himself in writing, the accused expressed her intention in writing that she desired to be searched by the P.W.2 and not in presence of a Gazetted Officer. But the right of the accused continues to exercise her option till she is actually physically produced or brought

before the Gazetted Officer U/s.50 of Act, which the P.W.2 has failed to comply. So, by merely deposing that the accused desired to be searched by P.W.2 and not in presence of a Gazetted Officer, is not sufficient for full compliance of Section 50. Moreover, he has also challenged that the search operation is illegal, as the mandatory Provision of Section 50(4) of the NDPS Act has been violated which provides that no female shall be searched by any one excepting a female.

On the other hand, the Ld. Prosecutor for the State has submitted that since the incriminating ganja has been recovered weighing about 6 kg. 500 grams from the possession of the accused, there at the spot in presence of the other witnesses, and the seizure list which is marked as Exhibit-I, and other documents corroborate the same, and that for some minor irregularities, the case of the prosecution shall not be thrown away, and that those minor irregularities are not sufficient enough to give benefit to the accused.

8. Considering the rival contention of the parties, it is to be examined if the IO of this case has violated the Provision of Section 50 of the NDPS Act. In other words, if the mandatory Provisions of Section 50(1), Section 50(4) have been violated in any manner, and if the mandatory compliance of the provisions if deviated by the IO has any bearing on the merit of the prosecution case. Before making such examination, it is relevant to quote the Rulings of the Apex Court in the matter of **Narcotic Central Bureau...Vrs.....Sukh Dev Raj((2011)49 OCR (SC)-693)** which has relied the ruling and dictum of the Apex Court of a larger Bench relating to **Vijayasinhh Chandubha Jadeja..Vrs....State of Gujarat(2011) 1 SCC-609).**

In the aforesaid case it is held by the Apex court that, **“Section 50 gives an option to an empowered officer to take such person(suspect) either before the nearest Gazetted Officer or the**

Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoy more confidence of the common man compared to any other Officer. It would not only add legitimacy to the search proceeding, it may verily strengthen the prosecution as well.” The aforesaid principle has been reiterated in **(2011) 49 OCR(SC)-693 in the matter of Narcotic Central Bureau...Vrs.....Sukh Dev Raj** wherein the Hon'ble Court has held that **“the requirement U/s.50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a Gazetted Officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the Gazetted officer or the Magistrate and in Para-32 the Constitution Bench made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate personally.”**

9. On a careful reading of the aforesaid dictum of the Apex Court it is found that Section 50 of the NDPS Act has much importance. Section 50(1) of NDPS Act provides “when any Officer duly authorized U/s.42, is about to search any person under the Provisions of Section 41, Section 42 and Section 43 he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer or any of the Departments mentioned in Section 42 or to the nearest Magistrate.

In the present case, the IO has admitted during his cross-examination that he has not produced the accused before any Gazetted Officer or a Magistrate although he was aware of the fact that the IIC,

GRPS, Khurda road which is posted there is a Gazetted Officer. Apart from that, it was within his knowledge that a Rly. Magistrate is having his office at Rly. Station of Khurda road. The P.W.2 has admitted in his cross-examination that as the accused expressed her desire in writing not to be searched by a Gazetted Officer, for that he has not brought her before any Gazetted Officer or Magistrate. So, thereby the mandatory Provision of Section 50 has been violated, and it can't be stated that without actually producing the accused before any Gazetted Officer or Magistrate, the right of the accused to exercise the option to be searched in presence of a Magistrate or a Gazetted Officer ceases. The dictum of law in the afore-mentioned citations clearly mentions the right of the accused to exercise the option to be searched in presence of Gazetted Officer or Magistrate continues till he/she is produced before a Gazetted Officer Or a Magistrate, and not by merely ascertaining from the accused whether he/ she desired to be searched in presence of a Gazetted Officer or a Magistrate. So, the aforesaid view of the Apex Court is squarely applicable to the facts and circumstances of the present case. In other words, Section 50(1) of the NDPS Act has not been complied with in the letter and spirit, and the legislative intention behind it is violated by the IO. So, the mandatory provision of Section 50(1) has been violated, and mere recovery and seizure of the ganja from the possession of the accused is not sufficient without the full mandatory compliance of Section 50(1) of the NDPS Act.

10. Now it is to be seen if Section 50 (4) has been violated by the IO in any manner at the time of search and seizure . The Section 50(4) of the NDPS Act provides “ no female shall be searched by any one excepting a female.” So, a bare reading of Section 50(4) of the NDPS Act clearly indicates that the legislative intention of the Provision is to search a female suspect by a female person only, and not by a male

person. A male is legally not empowered to search a female person or female suspect under no circumstance. In the present case, one lady excise constable was present in the raiding team namely: Latika Behera. The evidence of P.W.1 as well as the evidence of P.W.2 Dillip Kumar Behera indicate that as per the direction of the P.W.2, Latika Behera the lady excise constable had detained the accused who was moving in a suspicious manner at the spot, and tried to escape. But the evidence of P.W.2 and the other witness indicate that the search operation of the accused took place not by Latika Behera, but by the P.W.2 who is a male person. In other words, the mandatory Provision of Section 50(4) of the NDPS Act has been violated in letter and spirit without any ambiguity. The view of Hon'ble Calcutta High Court in the matter of **Pratima Ghosh ...Vrs....State of West Bengal(1996) (2) CRIMES 118** indicate that “ **Section 2 and 50 Code of Criminal Procedure, 1973-Section 482 – Quashing of Proceedings-Search and Seizure-person to be searched to be taken without any delay to nearest Gazetted Officer or to Magistarre-Search conducted on her person not by female but by male**”.

The view of the Hon'ble Calcutta High Court in the aforesaid citation indicates that the mandatory requirement of Section 50(4) of the NDPS Act will be complied with when a female suspect is searched by a female person and not by a male person. The legislative intention of Section 50(4) was that the search of a female suspect has only to be conducted not by a male, but by a female which has been violated in the present case by the IO, although a female constable namely: Latika Behera was physically present at the spot alongwith the raiding party. So, the mandatory provision of Section 50(4) has been completely violated by the IO.

11. As already discussed above Section 50(1) and Section 50(4) of

the NDPS Act are the mandatory Provisions, and these Provisions should have been complied with in letter and spirit, and as the aforesaid compliance has not been conducted in the proper manner, for that the seizure and the recovery of ganja from the possession of the accused is not sufficient to effect conviction against the accused and the accused is entitled to get the benefit for the lapses of the prosecution.

12. Hence, after going through the facts and circumstances of the case, and taking into consideration the lapses committed by the IO as discussed above regarding non-compliance of Section 50(1) and Section 50(4) of N.D.P.S.Act, for that, I am of the opinion that the accused is entitled to get the benefit. Accordingly, the prosecution has failed to prove its case against the accused U/s.20(b)(ii)(B) of the NDPS Act beyond all reasonable doubts, and she is not found not guilty thereunder, and acquitted U/s.235(1) of Cr.P.C and she be set at liberty.

The seized ganja be sent to the Superintendent, Excise Jatni Charge, for destruction as per law, the seized brass seal be confiscated to the state, the lac be destroyed and the zimanama be cancelled, four months after the appeal period is over, if no appeal is preferred, if preferred subject to the order of the Appellate Court.

Addl. Sessions Judge, Bhubaneswar.

Typed to my dictation, corrected by me and pronounced in the open Court today this the 30th day of October, 2014 given under my signature and seal of this Court.

Addl. Sessions Judge, Bhubaneswar.

List of witnesses examined for the prosecution

P.W.1 Parikhita Nayak

P.W.2 Dillip Kumar Behera

List of witness examined for the defence

Nil

List of exhibits marked for the prosecution

Ext.1	Seizure list
Ex.1/1	Signature of P.W. 1 on Ext.1
Ext.1/2	Signature of P.W.2 on Ext.1
Ext.2	Memo of arrest
Ext.2/1	Signature of P.W.2 on Ext.2
Ext.3	Inspection memo
Ext.3/1	Signature of P.W.2 on Ext.3
Ext.4	forwarding letter
Ext.4/1	Signature of P.W.2 on Ext.4
Ext.5	Compliance report
Ext.5/1	Signature of P.W.2 on Ext.5
Ext.6	Compliance letter
Ext.6/1	Signature of P.W.2 on Ext.6
Ext.7	Spot map
Ext.7/1	Signature of P.W.2 on Ext.7
Ext.8	Zimanama
Ext.8/1	Signature of P.W.2 on Ext.8
Ext.9	Ground of arrest served on the accused
Ext.9/1	Signature of P.W.2 on Ext.9

List of Exts. Marked on behalf of the defence

Nil.

List of M.Os marked on behalf of the prosecution

M.O.I	Seized jerry bag containing the ganja
M.O.II	Paper envelope containing sample ganja

List of M.Os marked on behalf of the defence

Nil.

Addl. Sessions Judge, Bhubaneswar.