

**IN THE COURT OF THE SESSIONS JUDGE-CUM-
SPECIAL JUDGE UNDER THE N.D. & P.S. ACT,
KHURDA AT BHUBANESWAR.**

Present:

Dr. D.P. Choudhury,
Sessions Judge-cum-Special Judge,
Khurda at Bhubaneswar.

Dated, Bhubaneswar the 18th July'14.

T.R. No. 15 of 2009.
(Arising out of P.R. No.15/2009-10.)

STATE

-V e r s u s-

1. Banamali Khatua, aged about 51 years, S/o. Late Birabara Khatua of Village – Mahukhanda, P.S. - Balipatna, Dist. - Khurda.
2. Pabitra Prusty @ Bapi Sahoo, aged about 34 years, S/o. Late Laxmidhar Prusty of Village/P.S. – Delanga, Dist. - Puri.

... **Accused persons.**

Counsel:

For prosecution -- Shri B.B. Mohanty,(P.P. in charge).
For accused No.1 -- Shri B.K. Singh & Associates.
For accused No.2 -- Shri B.K. Nayak & Associates.

Offence under section 21(b)(ii)(C), N.D. & P.S. Act, 1985.

Date of conclusion of argument : 14.07.2014.

Date of judgment : 18.07.2014.

J U D G M E N T

Both the accused persons stand charged for the offence punishable under section 20(b)(ii)(C) of the Narcotic

Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the Act”).

2. Factual matrix leading to the case of the prosecution is that on 04.09.2009 at about 4 P.M., while the S.I. of Excise and her staff were patrolling near Balipatna, they found both the accused persons coming on a motor cycle with a gunny bag. They stopped the motor cycle, called the witnesses and gave their identity. The accused persons also gave their identity on being asked. Then, the S.I. of Excise offered option to the accused persons whether they wanted to be searched before the Gazetted Officer or the Magistrate; but they univocally expressed their desire to be searched before the Excise Officer. The S.I. of Excise, after giving her search and search of the witnesses, searched the accused persons and recovered 29 Kgs. & 200 Grams of Ganja (Cannabis) being contained in a gunny bag from the possession of the accused persons. They made seizure of the same, a two-wheeler and two mobile phones and prepared seizure list. From the texture, colour, smell and burning a little taking sample, she found the same to be Ganja (Cannabis). Sample thereof was collected and sent to the State Drug Testing and Research Laboratory (“SDTRL”, for short), Bhubaneswar for chemical examination, which confirmed the same to be Ganja. After due inquiry, P.R. was filed against the accused persons.

3. Plea of the accused persons is squarely denial to the charge levelled against them.

4. The main point for determination is :
Whether the accused persons were in unlawful possession of 29 Kgs. & 200 Grams of Ganja (Cannabis), in contravention of section 8 of the Act ?
5. Prosecution in order to bring home the charge against the accused persons has examined four witnesses, out of whom P.Ws.1 and 2 are outsiders; P.W.3 is the A.S.I. of Excise; and P.W.4 is the S.I. of Excise. Defence has examined two witnesses, including accused Banamali.
6. It is well settled law that the evidence of official witnesses cannot be discarded merely because they are official witnesses, but their evidence should be scrutinized with due care and caution. It is also well settled law that the Court should separate the grain from the chaff. Bearing in mind the above principles, let me find out if the charge against the accused persons has been well proved by the prosecution.
7. P.W.4 is the concerned S.I. of Excise, who stated that on 04.09.2009, at about 4 P.M., while she was conducting patrolling duty near Balipatna, found both the accused persons coming on a motor cycle carrying a gunny bag. Suspecting them to have been carrying contraband articles, she stopped them and sought for their option as to whether they intended to be searched in presence of a Magistrate or a Gazetted Officer, to which both the accused persons gave their consent to go for a search by her without presence of any Magistrate or Gazetted Officer. Thereafter, she gave her personal search to the accused and witnesses. She proved the written option letters to accused

Banamali Khatua and Pabitra Prusty @ Bapi Sahoo vide Exts.2 & 3 and their reply vide Exts.2/2 & 3/2 respectively. At para-7 of her cross-examination, she stated that the accused persons were not taken or brought before any Executive Magistrate and she wrote the statements of the accused persons regarding their consent for having their search by her without the presence of Executive Magistrate or Gazetted Officer. She further admitted at para-7 that on the option letter, the accused persons did not write themselves about such willingness. On going through Exts.2 & 3, it appears that suspecting them to have carried the contraband article, she asked in writing whether they would like to be searched by the Gazetted Officer or the Magistrate; but, they replied to be searched by her. Exts.2/2 and 3/2, which are said to be the written option of accused Banamali Khatua and Pabitra Prusty, go to show that they have given option to be searched by the Excise Officer and all are written by the handwriting of P.W.4. When the accused persons are literate, it is not known as to why they themselves have not furnished their consent in writing. Apart from this, as per section 50(1) of the Act, the accused persons will give option either to be searched by the Gazetted Officer or by the Magistrate, but not by the concerned I.O. After amendment of the Act, section 50(5) says that when the Officer concerned 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, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person concerned. Thus, section 50(5) of the Act is only applicable where the option has been given or he has the reason to search in absence of such Magistrate or Gazetted Officer for the circumstances duly to be recorded by him. Exts.2 & 3 do not disclose that the accused persons have given any option in writing. But, on the other hand, they have given consent to be searched by the Excise Officer. The testimony of P.W.4 read with Exts.2 & 3 do not show that the manner of offering and exercising option under section 50 of the Act by the accused persons has been complied with the statutory provisions.

8. P.W.3 simply stated that the S.I. of Excise gave option to the accused persons to be searched in presence of the Magistrate or the Gazetted Officer; but the accused persons consented to be searched without the presence of Gazetted Officer or Magistrate, which is not revealed from Exts.2/2 & 3/2. Unfortunately, this witness has not proved his signature on Exts.2 & 3. If he was very much present there as an official witness, there was no bar for him to sign on the said option letter. Therefore, the evidence of P.W.3 is not consistent and trustworthy to lend corroboration to P.W.4 to prove compliance of section 50 of the Act.

9. P.Ws.1 and 2, who are outsiders, have not expressed their knowledge about search and seizure of the contraband article from the possession of the accused persons. They were

cross-examined by the learned Addl. P.P., but nothing more is revealed from the cross-examination. As such, the outsiders witnesses to the search and seizure are not coming forward to say about valid search and seizure of Ganja (Cannabis) from the possession of the accused persons. On the other hand, they do not lend support to P.W.4 about compliance of section 50 of the Act.

10. From the aforesaid analysis, I am of the opinion that the prosecution has not proved by consistent and trustworthy evidence about the lawful search of the accused persons in compliance to section 50 of the Act. Their Lordships of the Hon'ble Supreme Court in the case of ***State of Delhi Vs. Ram Avtar @ Rama*** [2011 (6) Supreme 134] at para-28 of the judgment have observed that :

“.....The Court clearly held that an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused, though any other material recovered during that search may be relied upon by the prosecution in other proceedings, against the accused, notwithstanding the recovery of that material during an illegal search. The proposition of law having been so clearly stated, we are afraid that no argument to the contrary may be entertained . What needs to be understood is that an illegal recovery cannot take the colour of a lawful possession even on the basis of oral evidence.....”.

11. With due respect to the above decision, I find that compliance with the provision of section 50 of the Act even before amendment and after amendment is strictly to be observed and in the absence of that the unlawful possession of such article cannot be proved. In the instant case, for the

discussions made above, the compliance of section 50 of the Act cannot be said to have been proved by the prosecution and, as such, unlawful possession of the accused persons over the seized Cannabis is not proved.

12. With regard to seizure, P.W.4 stated that after giving personal search, they searched the gunny bag carried by the accused persons and found Ganja like substance and from the texture, colour and smell and from burning a little sample, she came to know that the recovered substance was Ganja. She took weight of the same and found 29 Kgs. & 200 Grams of Ganja and with the bag it became 30 Kgs. & 200 Grams. Then, she prepared seizure list. She stated to have taken sample of the same and sent to the SDTRL. She proved chemical examination report vide Ext.5. On going through the seizure list, it appears that after giving personal search, she searched the accused persons and seized the gunny bag containing 29 Kgs. & 200 Grams of Ganja; but it does not disclose whether she has seized the gunny bag from the motor cycle or from the physical possession of the accused persons. The seizure list should be clear from that angle. Moreover, P.W.4 did not produce the seized property in the Court for verification. Of course, the chemical examination report vide Ext.5 shows that it was nothing but Ganja (Cannabis). Thus, the evidence of P.W.4 is not clear, cogent and above reproach to show that she has seized the Ganja in question from the exclusive and conscious possession of the accused persons. It requires corroboration.

13. P.W.3 stated about seizure of such 29 Kgs. & 200 Grams of Ganja in a gunny bag being carried by the accused persons, a motor cycle and two mobile phones and he proved the seizure list vide Ext.1/4. In cross-examination, he could not recollect the wearing apparels of the accused persons at the time of search and seizure. His evidence does not disclose as to how he came to know that the same was Ganja when his evidence is silent as to any experience he has got to know the texture and tenor of the seized property as Cannabis. Hence, his evidence is equally not trustworthy to prove the seizure of Cannabis from the possession of the accused persons. On the other hand, he has not corroborated the evidence of P.W.4 as to seizure of Cannabis from the exclusive possession of the accused persons.

14. While seeking corroboration from the independent witnesses, I find that P.Ws.1 and 2 have clearly denied about seizure of any contraband article from the possession of the accused persons in their presence. They have proved their signatures in the seizure list only. There is cross-examination to these two witnesses by the prosecution, but nothing is revealed to find out that they are hostile witnesses. On the other hand, they have not lent support to the evidence of P.Ws.3 & 4 about seizure of Ganja from the exclusive and conscious possession of the accused persons.

15. Prosecution has not produced the seized Ganja in the Court for which the case of the prosecution becomes more doubtful. The reason for withholding the same is best known to

the prosecution.

16. From the foregoing discussion, I find that there are no consistent, trustworthy, clear and cogent evidence to prove that the Excise Officials after observing formalities of search, seized 29 Kgs. & 200 Grams of Ganja (Cannabis) from the exclusive and conscious possession of the accused persons. Hence, prosecution has failed to prove by cogent, clear and trustworthy evidence about illegal possession of Ganja (Cannabis) by the accused persons. The evidence adduced on behalf of the defence needs no discussion when prosecution has failed to prove the alleged possession of Ganja by the accused persons.

17. In the result, therefore, I hold the accused persons not guilty of the offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and I acquit them under section 235(1) of the Cr. P.C. They be discharged from the bail-bonds.

18. The seized Ganja be handed over to the Superintendent of Excise, Khurda for destruction in accordance with law and the seized two-wheeler and two mobile phones be confiscated to the State on expiry of four months of period of appeal if no appeal is preferred; in case of appeal, the same be dealt with as per the orders of the Hon'ble Appellate Court.

**Sessions Judge-cum-Special Judge,
Khurda at Bhubaneswar.**

18.07.2014.

Dictated, corrected by me and pronounced in the open Court this day the 18th July, 2014.

**Sessions Judge-cum-Special Judge,
Khurda at Bhubaneswar.**

18.07.2014.

List of witnesses examined for prosecution.

P.W.1 -- Harihar Behera,
P.W.2 -- Ugrasen Rout,
P.W.3 -- Dibakar Mishra &
P.W.4 -- Smt. Krishna Nayak.

List of witnesses examined for defence.

D.W.1 -- Kanhu Das &
D.W.2 -- Banamali Khatua.

List of documents admitted in evidence for prosecution.

Exts.1 & 1/1-- Signatures of P.W.1 in seizure list,
Exts.1/2 & 1/3 Signatures of P.W.2 in seizure list,
Ext.1/4 -- Seizure list,
Ext.1/5 -- Signature of P.W.3 in seizure list,
Ext.1/6 -- Signature of P.W.4 in Ext.1/4,
Ext.1/7 -- Signature of Banamali Khatua,
Ext.1/8 -- Signature of Pabitra Prusty,
Ext.2 -- Written option,
Ext.2/1 -- Signature of P.W.4 in Ext.2,
Ext.2/2 -- Signature of Banamali Khatua in Ext.2,
Ext.3 -- Written option,
Ext.3/1 -- Signature of P.W.4 in Ext.3,
Ext.3/2 -- Signature of Pabitra Prusty in Ext.3,
Ext.4 -- Report of R.T.O.,
Ext.5 -- Chemical Examination Report,
Ext.6 -- Detailed report of P.W.4 &
Ext.7 -- Spot map.

List of documents admitted in evidence for defence.

Ext.A -- Certified copy of deposition of P.W.1 in T.R.
No.16 of 2009 &
Ext.B -- Certified copy of deposition of P.W.2 in T.R.
No.16 of 2009.

List of M.Os. marked for prosecution and defence as well.
Nil.

**Sessions Judge-cum-Special Judge,
Khurda at Bhubaneswar.
18.07.2014.**