

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

PRESENT:-

Sri I.K. Das, LLB,  
Special Judge, Bhubaneswar.TR Case No. 5/13 of 2000  
(Arising out of Sahid Nagar PS case No. 147 of 2000)Date of argument- 15.11.13  
Date of Judgment- 30.11.13S t a t e  
Vrs.Satrughna Nayak, aged about 62 years  
S/o: Late Kumar Nayak, resident of : Nayapalli  
PS: Sahid Nagar, Bhubaneswar, Dist: Khurda

....Accused person

Advocate for the prosecution- Sri N.R. Ray, Addl. P.P. BBSR  
Advocate for Accused persons Shri P.K. Mohanty, Advocate  
Offence Under Sections:- Sec. 21 of NDPS Act.J U D G M E N T

The accused stand charged for the offence u/s 21 of Narcotic Drugs and Psychotropic Substances Act,1985.

2. Prosecution was started on the basis of written report filed by Sri P.K. Das, Inspector, CID, CB, Odisha filed before IIC, Sahid Nagar PS on dtd. 12.4.2000. As per the report, the informant received credible information that one Satrughna Nayak who was working as constable in the district of Khurda and attached to WT unit of Secretariat, Bhubaneswar staying at Sabar Sahi, Sahid Nagar was dealing with brown sugar with assistance of another namely, Jitu Nayak. The informant verified such information personally and was confirmed about such allegation. On the same day of FIR, he submitted a confidential report to the S.P., CID CB to conduct immediate raid to detect the offence. After obtaining the order, the informant alongwith Inspector Sri D.P. Mohanty, ASI A.K. Dey, ASI N.

Satpathy, constable H.K. Behera, SI K.C. Sahu, all of Sahid Nagar PS and two other lady constables proceeded to Sabar Sahi near Kalinga Stadium to the house of the accused Satrughna for conducting raid. Two independent witnesses were also procured namely, Dinabandhu Lenka and Radha Krishna Das in order to remain present at the time of search and seizure. By the time of arrival of the raiding party, accused Satrughna was busy in selling brown sugar packets near his house to the customers and another accused namely, Jitu Nayak was assisting him for such sale. Both the accused persons were detained and the informant disclosed the identity of all the police personnel to the accused persons and also disclosed the purpose of their search. The accused was asked as to whether he wants to be searched in presence of a Magistrate or a gazetted officer. A paper containing such questionnaire was also tendered to the accused and both the accused persons offered their written consent to be searched in presence of gazetted officer. As per the requisition of the informant, DSP CID, CB Sri L.N. Behera was called to be present at the time of search and seizure as gazetted officer. The police party and the independent witnesses gave their personal search in presence of the accused and the DSP and no incriminating article was recovered from their possession. Thereafter, the informant searched accused Satrughna Nayak and recovered 32 paper packets containing brown sugar from his waist line under the Lungi that he was putting on by the time of search. Cash of Rs.4877/- was also seized from his possession during the search. One brass weighing scale was lying near the accused. On being asked, accused Satrughna confessed that he was selling brown sugar to the customers with the help of his associate Jitu Nayak and also admitted that the cash seized from his possession was the sale proceeds of brown sugar. Thereafter, the other accused Jitu Nayak was also searched but nothing was recovered from his possession. The spot is very near to accused Satrughna and the house was damaged in the recent cyclone. Thereafter, the informant weighed 32 packets of brown sugar which came to 10 gms including the paper wrapper and the net brown sugar powder was weighed which came to 3gm 800mgm. The informant collected sample of brown sugar in two packets each containing 500mg marked as A1 and A2. The remaining

quantity was sealed in another packet marked as Ext.A. The papers used for preparation of packet of brown sugar were separately packed and sealed under Ext.B. All the articles were seized at the spot in presence of witnesses after preparation of a seizure list. The seized articles were sealed with the brass seal of the informant and thereafter, the brass seal was left in zima of witness Dinabandhu Lenka after executing zimanama. Both the accused persons were arrested at the spot after explaining the reasons thereof and copy of seizure list was supplied to the accused under proper acknowledgment. Thereafter, the raiding party alongwith seized articles came to PS at Sahid Nagar and lodged FIR.

The IIC on receipt of the FIR registered PS case No. 147 dtd. 12.4.2000 for the offence u/s 21 of NDPS Act and directed SI K.C. Sahu to take up investigation of the case.

During investigation, the IO examined the witnesses, visited the spot, produced the seized articles before the SDJM, Bhubaneswar and forwarded the sample of seized articles for its chemical examination. After completion of investigation and obtaining the chemical examination report, charge sheet is filed against both the accused persons warranting their trial. During the course of trial, accused Jitu Nayak absconded and could not be apprehended for which the case has been split up against him and the present accused Satrugna contested 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 12.4.2000 at about 3 PM, the accused was in unlawful possession of 32 packets of brown sugar weighing about 3gm 800 mgm and thereby committed offence punishable u/s 21 of NDPS Act ?

5. Prosecution examined 11 nos. of witnesses in support of its case whereas defence did not prefer to adduce any evidence. Out of the prosecution witnesses, P.Ws.1,2 and 9 are three independent witnesses, P.W.3 is Inspector of Police. P.W.4 is one ASI, P.W.5 was Inspector of Police. P.W.6 is one constable, PW 7 is one ASI, P.W.8 is the IO of the case, P.W.10 is Inspector of Police who took up

investigation from P.W.8 and P.W.11 is the DSP in whose presence seizure was made.

6. All the witnesses examined on behalf of prosecution are witness to the search and seizure. P.Ws.1 and 9 are named in the FIR who accompanied the police staff with the raiding party and were present at the spot during search and seizure. Moreover, the brass seal of the informant was left in zima of P.W.9 after the seal of the seized articles. P.W.2 belongs to Sabar Sahi where the case was detected, but during their examination in the Court all the three witnesses did not support the prosecution and gave good bye to the prosecution case. P.Ws.1 and 9 proved their signature on the papers prepared by the informant, but said that nothing was seized in their presence. In their cross examination, they have been declared hostile u/s 154 of Evidence Act and are cross examined. Although, their previous statement recorded by the IO has been confronted to them, they have denied to have given such statement before the police. In their cross examination by the defence, they stated that they put their signature on blank papers at Sahid Nagar PS. This being the status of evidence of the independent witnesses, let me now examine the evidence of police witnesses.

7. P.W.3 is a police inspector and a member of the raiding party. He said that after giving their identity to the accused persons, they asked the accused persons if they want to be searched in presence of police or gazetted officer. Such option given to the accused is not in accordance with Sec.50 of the Act. The accused should have been asked if he wants to exercise his right to be searched in presence of the Magistrate or gazetted officer. Thereafter, this witness supported the fact of seizure and subsequent procedures as described in the FIR. During his cross examination, he further stated that the house of the accused consist of only one room and the family of the accused were staying therein. The raiding party reached at the spot at about 3.30 PM and after about half an hour, DSP L. N. Behera arrived at the spot. He admits although he was present at the spot at the time of seizure, he is not a witness to search and seizure. P.W.4 in his evidence said that he is not a signatory to the seizure list and search of the accused was made at a distance of about 20 ft from his house. He also supported regarding

seizure of brown sugar from physical possession of the accused. P.W.5 is the most important witness being the informant and seizing officer of this case. He said that he cannot say exactly on which date he received the information that the accused is dealing with brown sugar. But, it is about 4 to 5 days prior to dtd. 12.4.2000. He enquired into the matter and two to three days prior to the date of seizure he ascertained about the fact. During enquiry, he visited Sabar Sahi and ascertained the house of the accused which was demolished during the cyclone. He admits that prior to 12.4.2000 he had not submitted any report regarding the alleged transaction by the accused. In his cross examination he admitted that the inspectors are sub-ordinate to DSP, but he has not submitted any confidential report to the DSP, CIB, CB who are superior authority to him. He has also not submitted any compliance report to the DSP on the next date of seizure. The specimen seal used by him for sealing the seized articles was his personal seal, but it does not contain his name. But, it contains his symbol. Further, his evidence reveals that they stopped the police jeep at a distance of 20 ft from the spot where the accused was selling brown sugar. It was open place near the damaged house of the accused. The customers ran away from the spot, but the accused was standing thereon. In order to call the DSP as gazetted officer for conducting search of the accused, he sent constable Hari Behera to bring the DSP L.N. Behera to the spot. It is his further evidence that the DSP was not a member of the raiding party and only on his requisition to the SP, DSP came to the spot to stand as a witness. P.W.6 is a constable has also corroborated the evidence of the informant that he was deputed to bring the DSP to the spot before search and seizure. This witness defer from the evidence of other witnesses regarding the house of the accused and said that the house consist of two thatched rooms. P.W.7 one ASI of Police was present at the time of search and seizure. This witness in his evidence in Chief has completely differed from the prosecution case and said that all of them took personal search of the accused, but nothing was recovered from his possession. Again, the informant searched the accused and recovered 32 packets of brown sugar alongwith cash of Rs.4877/-. Thus, it raises a doubt as to how packets of brown sugar was recovered from the possession of accused during

his second time search and during first time, nothing was seized from his possession. P.W.8 supported the informant during his evidence, but said that the DSP was a member in the raiding party. P.W.10 took over charge of investigation from P.W.8 and re-examined the witnesses and thereafter, submitted charge sheet. P.W.11 being superior officer in the cadre of DSP in whose presence the seizure was made gave a different story regarding seizure. He said that cash of Rs.4877/- was seized from the house of the accused. In addition to such oral evidence of prosecution witness, prosecution relied on the seizure list and the questionnaire prepared by the DSP u/s 50 of NDPS Act.

8. During the course of trial, learned defence counsel has argued that the case is doubtful from initiation of the case and there is no consistency in the evidence of seizure witnesses although all of them are police witnesses. All the independent witnesses to the seizure did not support the prosecution case and said that at the instance of police, they signed on some papers at Sahid Nagar PS. Thus, on examination of factual aspect of the case, it cannot be said that prosecution has come up with clean hand rather it transpires that the case has been planted with some ulterior motive. Admittedly, accused Satrughna was working as constable in police department and was attached in the Secretariat. A reliable information was received by P.W.5 before 4 to 5 days of seizure that accused Satrughna was dealing with brown sugar. Learned defence counsel has argued that Sec.42 (1) of NDPS Act has not been complied by noting down the information by the prosecution which is a mandatory provision of the Act. Such non-compliance affects the prosecution and vitiates the trial. In support of his contention, he relied on a decision reported in **(1996) 11 OCR 130 in the case of Surendra Nath Mohanty and another vrs. State of Orissa**. Hon'ble High Court of Orissa in the said decision observed that when empowered officer has prior information, he is required to take down in writing the same fact and in its absence the case will end in acquittal. In the case before the Hon'ble Court, one Sub inspector of Excise admitted in the Court that he did not reduce the information received by him regarding drug trafficking into writing, but orally informed this fact to the DSP of Excise. But, the witness stated that after

detection he informed his immediate authority which was not reflected in the case diary. Hon'ble Court on examination of such evidence held that the police officer did not reduce to writing the information received by him confidentially. Had he done so, a copy of such writing would have been found in his case diary and another copy would have been found with his immediate superior as he was obliged to send a copy of such writing to his superior officer as required u/s 42 (2) of the NDPS Act. In the said decision, Hon'ble Court after examining the evidence has observed that Sec.50 (1) of NDPS Act has not been complied with its proper prospective. Taking into such irregularities, Hon'ble Court have held that conviction u/s 21 of NDPS Act cannot sustain due to non-compliance of the mandatory provision of Sec. 42 and 50 of the Act. In another decision reported in **AIR 1995 SC 1157 in the case of Mohinder Kumar vrs. The State of Panaji, Goa**, the Hon'ble Court held that the prior information regarding illicit transaction dealing with narcotic drugs is required to be reduced into writing u/s 42 (1) of the Act and sending a copy thereof to the superior officer is the requirement of law u/s 42 (2) of the NDPS Act. Any case where the mandatory requirements of the proviso of Sec. 42 (1) and Sec. 42 (2) of the NDPS Act has not been adhered to, the conviction of the accused cannot lie. Another decision reported in (2011) 50 OCR (SC), 214 in the case of Nirmal Singh Pehlwan @ Nimma vrs. Inspector, Customs, Customs House, Punjab has also been relied on by the learned defence counsel. Hon'ble Court in the decision held that u/s 50 of the Act consent memo of the accused could not be said to be information conveyed to an accused to exercise his right u/s 50 of the Act. Any deviation therefrom would vitiate the prosecution. Information need not be in written form. It is held that information has to be conveyed in the same form or manner as per provision of the Act. If the right of the accused was not informed to him and only option was taken as to whether he would like to be searched before the gazetted officer or a Magistrate, it is held to be complete non compliance with the provision u/s 50 of the Act. In the instant case, I have examined the evidence of witnesses wherein they have stated that the accused was asked to be searched in presence of gazetted officer or the Magistrate. Ext.4 is the notice prepared for the purpose. There is no mention in

the notice or in the oral evidence of witnesses that the accused was asked to exercise his right if he wants to be searched in presence of the Magistrate or the gazetted officer. Giving option to the accused and asking him to exercise his right are two different phenomenon as per the direction of Hon'ble Apex Court. In the instant case, I find neither the accused was informed that it was his right to be searched in presence of Magistrate or a gazetted officer nor the notice was prepared in compliance to Sec. 50 of the Act. Hon'ble Apex Court in the above decision set aside the conviction on the ground that the mandatory provision of the Act is not complied.

9. After perusing the evidence on record, I have observed above that the evidence of independent witnesses did not support the prosecution in any manner and further the evidence of departmental witnesses are not consistent with each other. Therefore, the witnesses do not appear to be trustworthy and reliable. In addition to such inconsistencies, non compliance of mandatory provision u/s 42 and 50 of NDPS Act sufficiently speaks that prosecution fails to prove the case against the accused beyond all reasonable doubt.

10. In the result the accused is found not guilty for the offence u/s.21 of NDPS Act and is 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.

11. There shall be no order regarding seized articles as the case against other accused is pending.

Pronounced in the open Court to-day the 30<sup>th</sup> day of November, 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:- Radha Krushna Das

P.W.2:- Bijay Naik

P.W.3:- Baladev Prasad Mohanty  
 P.W.4: Narayan Satpathy  
 P.W.5: Pradipta Kumar Das  
 P.W.6: Harekrushna Behura  
 P.W.7: Ajay Kumar Dey  
 P.W.8: Kailash Chandra Sahu  
 P.W.9: Dinabandhu Lenka  
 P.W.10:Kulamani Rath  
 P.W.11: Loknath Behera

List of witness examined for the defence

Nil

List of exhibits marked for the prosecution

Ext.1: Signature of P.W.1  
 Ext.2: Signature of P.W.1 on zimanama  
 Ext.3: Signature of P.W.1  
 Ext.1/1: Seizure list  
 Ext.1/2: Signature of P.W.5  
 Ext.2/1: Zimanama  
 Ext.3/1: Sample seal  
 Ext.4: Personal notice  
 Ext.4/1: Signature of P.W.5  
 Ext.4/2: Signature of accused  
 Ext.4/3: Signature of Loknath Behera  
 Ext.4/4: Signature of accused  
 Ext.5: Personal search  
 Ext.5/1: Signature of P.W.5  
 Ext.5/2: Signature of Jitu Naik  
 Ext.5/3: Signature of Loknath Behera  
 Ext.5/4: Signature of Jitu Naik  
 Ext.6: FIR  
 Ext.6/1: Signature of P.W.4  
 Ext.6/2: Signature of IIC, Sahid Nagar PS  
 Ext.7: Confidential report  
 Ext.7/1: Signature of P.W.4  
 Ext.8: Confidential report  
 Ext.8/1: Signature of P.W.5  
 Ext.9: Chemical Examination report  
 Ext.1/3: Signature of DSP  
 Ext.1/4: Signature of accused  
 Ext.1/5: Signature of Jitu Naik  
 Ext. 1/6: Specimen seal  
 Ext.6/3: Endorsement of IIC  
 Ext.10: Forwarding letter of SDJM, BBSR  
 Ext.11: Command certificate

Ext.12: Receipt of SFSL, BBSR  
Ext.1/7: Signature of P.W.9  
Ext.2/2: Signature of P.W.9  
Ext.3/2: Signature of P.W.9  
Ext.13: Station diary of Sahid Nagar PS from 4.4.2000 to 6.5.2000  
Ext.13/1: Entry No. 292  
Ext.13/2: Signature of Bijay Kumar Sethy  
Ext.14: Entry No. 295  
Ext.14/1: Signature of B.K. Sethy  
Ext.15: Malkhana Register  
Ext.15/1: Carbon copy of entry in Malkhana Register  
Ext.15/2: Signature of IIC  
Ext.15/3: Signature of B.K. Satpathy

List of Exhibits marked on behalf of defence

Nil

List of M.Os. Marked on behalf of Prosecution

M.O.I : Residue of brown sugar  
M.O.II: Wrappers  
M.O.III: Weighing scale  
M.O.IV: Cash of Rs.4877/-

Special Judge, Bhubaneswar.