

IN THE COURT OF THE SPECIAL JUDGE: BHUBANESWAR.

PRESENT:-

Sri I.K. Das, LLB,
Special Judge, Bhubaneswar.TR Case No. 11/98 of 2001-2000Date of argument- 26.06.14
Date of Judgment- 03.07.14S t a t e
Vrs.Hrudananda Acharya, aged about 34 years
S/o: Bibhuti Bhusan Acharya, Qr. No. 2RA 31/2
Unit, VIII, PS: Nayapalli, 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. 20(b) (1) of NDPS Act.

J U D G M E N T

The accused stands charged for the offence u/s 20 (b) (1) of Narcotic Drugs and Psychotropic Substances Act,1985.

2. The prosecution in nutshell as revealed from PR that on 18.12.2000, the SI of Excise, Bhubaneswar No.II, alongwith inspector were patrolling infront of Agriculture College on the road. In the meantime, he saw the accused was coming with a Luna from Gandamunda side towards siripur. But, the accused on seeing the police party was annoyed and tried to slip away from the spot with high speed in the Luna. The SI suspected the activities of the accused and further detected that one Jari bag was kept on the front portion of the Luna. He suspected that the accused was transporting any contraband articles and therefore, chased the accused and apprehended him. On being asked the accused disclosed that he was carrying ganja in the gunny bag. Thereafter, the SI called some

independent witnesses from the locality and gave his identification to the accused and witnesses. He also expressed his intention to search the accused. One ASI of Excise namely, Dibakar Mishra was also present with the SI and he alongwith the ASI gave their personal search to the accused and also asked the accused if he wants to be searched in presence of any gazetted officer or executive magistrate in compliance to Sec. 50 of NDPS Act, 1985. One written query in this respect was also supplied to the accused and the accused also intimated in writing that he wants to be searched in presence of excise officer and thereby, he will not be prejudiced. Thereafter, the white colour fertilizer jari bag carried by the accused in the Luna was searched wherefrom about 5kg 400gm of ganja was recovered. The contraband articles alongwith the bag was also weighed at the spot which showed to be 5kg 550gm. The SI also seized the Luna Super blue colour moped bearing No. OR 02 B 3440. The SI from his personal experience and from the smell and tongue test of the seized article was confirmed that the seized article was nothing but ganja. A seizure list was prepared at the spot in presence of accused and witnesses and the contents of the seizure list having been readover and explained to them, their signatures were obtained at the spot. Their signatures were also taken on two pieces of paper slip and the ganja alongwith its jari bag were sealed at the spot with the paper slip. The SI put the print of his personal brass seal with lakha and a specimen print of his seal was also given on the seizure list. The brass seal was left in zima of one witness namely, Basanta Barik at the spot and a zimanama was prepared to that effect. The accused was arrested and a copy of seizure list was supplied to him obtaining his signature thereon. Thereafter, the accused alongwith the seized articles were produced before the Special Judge, Bhubaneswar and sample of seized article was collected for chemical analysis and on the direction of Special Judge, Bhubaneswar, SDJM, Bhubaneswar drew sample of 50 gms of ganja. Thereafter, the samples were forwarded to State Drug Testing and Research Laboratory, Bhubaneswar and the rest of the seized articles were kept in Court Malkhana vide CMR No. 102/2000 (S). The Lune was kept in police custody with entry in Malkhana register. Another packet containing sample of ganja also remained in custody of the SI in

the Malkhana. Thereafter, the SI sent a requisition to RTO, Bhubaneswar to ascertain the ownership of Luna, but it was intimated that the registration number of Luna belongs to one Bajaj Super Scooter in the name of one Adhikari Jena. Thereafter, prosecution report was filed in the Court warranting trial of the accused.

3. Plea of the defence is complete denial to the allegation and defence by examining one witness set up the plea that on the relevant day while the accused and his brother were going to Delta fire station, a police jeep stopped them on the way and directed to stand as witness in a case. They forcibly took signature of the accused on 3 to 4 blank papers and also took away him in the police jeep. Thereafter, the accused was forwarded in connection to this case.

4. The point for determination in this case is

Whether on 18.12.2000 at about 2 PM on the road near OUAT the accused was in illegal possession of Ganja weighing about 5kg 400gm with Luna and thereby committed offence punishable u/s 20 (b)(1) of NDPS Act ?

5. During the course of trial, prosecution examined 4 witnesses, out of which P.W.1 is an independent witness to the seizure. P.W.2 is the ASI of Excise who was present at the time of search and seizure. P.W.3 is another independent witness to the seizure who took the brass seal of SI on zima. P.W.4 is the SI of Excise. Another witness namely, Balakrushna Mishra has been examined, but he is not the witness as per the prosecution report. Balakrushna Mishra, Inspector of Excise who is named in the PR has not been examined by the prosecution.

6. P.W.1 during his examination in the Court denied his knowledge about the case. But, he admitted his signatures on the seizure list and explained that excise police took his signature on the paper at Paikanagar without explaining the contents thereof. Learned Addl. PP declared hostile to the witness and cross examined by confronting his previous statements to which the witness completely denied. The other independent witness P.W.3 is also a signatory to the documents prepared by the SI, but he also denied his knowledge about the case and said on the relevant day, the excise police took his signature on the road without intimating the reasons therefor. He categorically stated that nothing was seized in

his presence. Even though, it is the prosecution case that P.W.3 was present at the time of search and seizure and took the brass seal of SI, after sealing of the seized articles. He also denied the said fact and said that nothing was kept in his zima. This witness was also declared hostile by the prosecution and was confronted with his previous statement which he completely denied. P.W.2 is the ASI of Excise. He said that on 18.12.1999 he was in charge of ASI of Excise, Bhubaneswar . On the same day, he alongwith one inspector of excise R. Bhoi and SI Benudhar Mohapatra were on patrol duty at Gandamunda Chawk and they found the accused was coming in Luna carrying a gunny bag. He supported the prosecution case regarding search and seizure. But, he said that in order to comply the provision of Sec. 50 of NDPS Act, the SI asked the accused whether he wants to be searched in presence of a Magistrate or by him. But, the accused gave his consent in writing to be searched in presence of the SI. This witness further advanced his evidence that SI examined the witnesses at the spot and recorded their statement. The witness exhibited some documents and his signatures thereon. During cross examination of this witness, he admitted that the inspector present at the spot directed the Sub inspector to take up investigation of the case. But, the said inspector has not been cited as prosecution witness nor examined in the Court to support the prosecution version. He said that Basanta Barik stood as witness to seizure, but he cannot say wherefrom this witness was procured. He again said that Ext.2 was prepared by the accused, but he cannot say whether it was prepared by him voluntarily or at the instance of any other. The lecturers appointed in agricultural veterinary college are officers but none of them was called to be present at the time of search and seizure. As regards identification of Ganja he said he has no knowledge about the types of Ganja. At about 4.30 PM all the procedures of search and seizure was completed and directly from the spot, they went to the Court where the accused and seized articles were produced before the Special Judge, Bhubaneswar. P.W.4 was the SI of Excise who is the most important witness in the case who conducted investigation of the case and prepared the papers at the spot. He supported the fact that the accused was carrying ganja in a Luna and was caught red handed near Siripur Chawk. On the

confession of the accused, he searched the jari bag wherefrom ganja was recovered. As per the direction of SDJM, Bhubaneswar he drew sample of 50 gms of ganja for chemical examination and forwarded the same to the laboratory with seal and signature of SDJM, Bhubaneswar. The rest seized ganja was kept in Court malkhana while the Luna was kept in excise malkhana. One entry was made in the register and on 19.12.2000, he produced the sample packets alongwith forwarding report in the laboratory. Again, on 20.12.2000 he submitted a report to his higher authority regarding progress in the case and thereafter sent requisition to RTO, Bhubaneswar to ascertain the ownership of Luna. During cross examination of this witness, the MO was produced from the Court Malkhana for identification, but the witness admitted that he cannot say the contents of the jari bag. It is his own admission that bhanga is the fruit only such fruits are available in the basta when produced in the Court during his cross examination. This witness also said that the inspector, Excise R. Bhoi was present at the spot alongwith him at the time of detection of the case. He also admitted that he has not complied the provision u/s 42 of NDPS Act by intimating his superior officer immediately about his search and seizure. The boundary of the spot as described by this witness is different as described by other witnesses. It is his own admission that he did not call any witness at the spot. Although, the accused confessed that he was carrying ganja, he did not record his statement at the spot. Before weighing ganja in the road, he brought out all the contents of basta and kept on a piece of paper and thereafter, weighed the same. He further admitted that the sample collected in the Court was kept with him during the night and on the next day, it was forwarded to the laboratory. But, he failed to say the entry in this respect in his malkhana register and it has not been produced in the Court. Although, he met the inspector of excise, mobile on the date of seizure, he did not intimate him about the case. He has also categorically denied the suggestion of learned defence counsel that the Luna seized from the possession of the accused is not the same in respect of which vehicle the report has been obtained from the office of RTO, Bhubaneswar. P.W.5 is a constable, excise working at Bhubaneswar in the year 2000. But, he has no role in this case.

From the side of defence, brother of accused has been examined who said that excise staff forcibly took away the accused with his vehicle obtaining his signatures on blank papers. This being the evidence available from both the sides, let me examine if prosecution has been able to prove its case beyond reasonable doubt.

7. During course of argument, learned defence counsel argued that there are material contradictions in the evidence of witnesses examined in the Court and furthermore, the senior most officer being the inspector of excise namely, R. Bhoi is not cited as a witness from the side of prosecution nor examined in the Court. The other inspector namely, Balakrushna Mishra, inspector of excise who is cited as a witness also did not prefer to be examined in the Court and in his place another constable is examined. The provisions under NDPS Act and the punishment for conviction under such Act being severe in nature, the standard of proof requires to be high than that of other cases and therefore, Hon'ble Superior Courts have consistently observed that the non compliance of any mandatory provision under the Act entitled the accused to be acquittal. In the instant case, the inspector of Excise who was very well present at the time of search and seizure did not examine himself in the Court. The prosecution also failed to examine other inspector. Moreover, the two independent witness to the seizure denied their knowledge regarding the case and completely gave farewell to the prosecution case. The only remaining witnesses i.e. P.W.2, the ASI and P.W.4, the SI of excise supported the prosecution case in the Court, although material contradictions are there in their evidence. The presence of the accused and seizure of ganja from his possession are yet to be proved as submitted by the learned defence counsel, although the signature of the accused is apparent on the seizure list. He relied on a decision in between **State of Odisha vrs. Nilakantha Sahu and another, reported in 1965 CLT, Vol. XXI, 991**. While examining similar question in a case under Bihar and Orissa Excise Act, Hon'ble Court held that u/s 25 Evidence Act, confession before an excise officer is not admissible as it is hit under the provisions of Evidence Act. It is further observed that signature of the accused in the seizure list cannot be used as an incriminating circumstance

against him. It is the case of the defence that while the accused and his brother were passing through the road, the excise officers forcibly took away the accused in the jeep and took his signatures on some papers. The two independent witnesses did not support that the accused was searched in their presence and the jari bag containing ganja was seized from the possession of the accused. Prosecution should have examined any nearby witnesses to the spot in order to make believable the case as the spot of seizure is on the public road at Siripur Chawk which is a busy locality. Next contention of the learned defence counsel is that the provisions as enshrined u/s 42 (1) & (2) of NDPS Act are also not complied by the seizing officer. Under the said section, whenever any public officer authorized under the Act intends to search any place or person suspecting concealment of such contraband articles, he shall within 72 hours send a copy of such information to his immediate official superior. I do not find sufficient force with such contention of learned defence counsel. Hon'ble Apex Court of India in a decision reported in AIR 2009 Supreme Court 1378 in between Hamid Bhai Azam Bhai Mallick vrs. State of Gujurat held that Sec. 42 will be invocable only if search is made by police official or the concerned authority upon the prior information. When such an information or intimation or knowledge comes to the notice of the investigating officer in course of the regular patrolling or an investigation of some other offence, it is not necessary to follow the conditions incorporated u/s 42 of the Act. In the instant case, it is the case of the prosecution that the case was detected at the spot by the patrolling party and there was no prior information regarding the involvement of the accused with such contraband articles.

8. Next contention of the defence is that the provisions u/s 50 of the Act are not complied by the prosecution in terms of its spirit and objective. Under Sec. 50 of the Act, whenever any officer wants to search any person under the provisions of Sec. 41,42 or 43 of the Act, he shall take such person if so requires to the nearest gazetted officer or to the nearest Magistrate without unnecessary delay. In the instant case, admittedly, the accused was not taken to any gazetted officer or Magistrate by the Investigating Agency to conduct his personal search

or search of his belongings. P.W.4, the SI in his evidence said that the accused confessed before him that he was in possession of ganja in the gunny bag and thereafter, the SI gave option in writing to the accused in accordance with provisions u/s 50 of the Act. The carbon copy of such writing is marked X on behalf of prosecution. P.W.4 himself was questioned in this aspect by the learned defence counsel and the witness said that he gave option in writing if the accused would like to be searched before a gazetted officer or not. P.W.3 during his cross examination said that SI asked the accused whether he wants to be searched by a Magistrate or by himself. If the evidence of these two important witnesses are taken into consideration, it appears that the SI of excise did not intimate the accused that he has right to be searched either in presence of Magistrate or in presence of gazetted officer. Learned defence counsel has vehemently argued that Sec. 50 of the Act being the most important section has not been complied by the SI, Excise which is the mandatory provision under the Act and therefore, the trial is vitiated. No presumption to that effect can be raised without conclusive prove produced in the Court. The original written information is not available in the Court instead of carbon copy containing carbon signature of the accused and witnesses is produced in the Court which could not be proved as inadmissible. Defence relied on decisions reported in **1997 CrLJ 462 in the case of Suresh Kumar Sahu vrs. State of Orissa**. Hon'ble Court held that when no option was given to the accused of being searched either before the nearest gazetted officer or near the Magistrate, there is clear violation of mandatory requirements of Sec. 50 of the Act and therefore, trial is vitiated. He also relied on another decision reported in **(1996) 11 OCR 130 in the case of Surendranath Mohanty and another vrs. State of Orissa**. In the said decision the contraband article was recovered from the living room of the accused which was kept in a trunk, but Hon'ble Court interpreting Sec. 50(1) of the NDPS Act held that compliance of the section is mandatory and non compliance to the said provision will lead to set aside any conviction. Similar observation has also been made in another decision as reported in **(1994) 7 OCR 445 in the case of Ajay Kumar Naik vrs. State of Orissa**.

9. The custody of seized article with the SI of Excise has also been challenged by the defence in the instant case. P.W.4, the SI of Excise in his cross examination admitted that the sample of ganja collected in the Court to be forwarded to the laboratory for chemical examination was kept with him on the same night and on the next day he forwarded the sample to DFSL, Bhubaneswar. His evidence does not reveal if he kept the sample in his office malkhana and entered the fact in his malkhana register. The record also does not disclose the malkhana entry number to that effect nor it is produced in the Court. Learned defence counsel has taken exception to such procedure adopted by SI and relied on a decision reported in **1997 (1) Crimes 331 in the case of Kanduri Sahu vrs. State of Orissa**. Hon'ble Court was dealing with similar matter where the seized article was kept in custody of the seizing officer. But, no relevant register with such entry was produced in the Court. Hon'ble Court held that in absence of corroborative evidence, it was difficult to believe that the seized article was in malkhana and there was no tampering in any manner. Accordingly, Hon'ble Court held that any conviction u/s 20 (b)(i) of the Act is not sustainable. Similar observation has been taken in the decision as reported in 2001 (20) OCR 113 inbtween Bhaskar Kumar Karan @ Bhaskar Chandra Karan vrs. State and another decision reported in 1996 (1) OLR 287 in between Shayamsundar @ Rathia Rana vrs. State and 1996 (1) Crimes 607 in btween Trinath Gouda vrs. State. In all the above decisions, Hon'ble Court held that unsatisfactory evidence regarding the manner of sealing of the sample packet, custody of seized articles are not safe to convict the accused. In the instant case, I have already mentioned above that by the time of production of M.O from the Court malkhana neighter the seal containing the signature of accused and wtnesses was available on the jari bag nor the seized ganja in its proper form was inside it. Furthermore, the sample which was collected in the Court wasnot immeidately forwasrded to the laboratory for chemical examination, rather it was detained in custody of the SI for one night. There is also no evidence that it was kept in office malkhana with entry in the malkhana register. The said register is also not produced in the Court. As per the principles of law, the seized articles if required to be kept in PS malkhana, it is to

be in custody of the in charge officer of the malkhana. On perusal of evidence and after hearing argument, I find no conclusive evidence is available on record that the sample was kept full proof in the excise malkhana without any tampering.

10. After examining all the materials on record, I came to the conclusion that the prosecution failed to comply the mandatory provision of Sec. 50 of NDPS Act and failed to prove that the sample was in safe custody without any interpolation which raises adverse inference against the prosecution regarding search, seizure and custody of seized articles. Accordingly, prosecution has miserably failed to prove its case beyond reasonable doubt.

11. In the result the accused is found not guilty for the offence u/s.20(b)(1) 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.

12. The seized articles if any be destroyed after four months of appeal period if no appeal is preferred or if appeal is preferred the same be dealt with in accordance with the direction of the Appellate Court.

Pronounced in the open Court to-day the 3rd day of July, 2014.

Special Judge, Bhubaneswar.

Typed to my dictation and corrected by me.

Special Judge, Bhubaneswar.

List of witnesses examined for the prosecution

P.W.1:- Lambodar Pradhan

P.W.2:- Dibakar Mishra

P.W.3:- Basanta Barik

P.W.4: Benudhar Mohapatra

P.W.5: Balakrushna Mishra

List of witness examined for the defence

D.W.1: Hrushikesh Acharya

List of exhibits marked for the prosecution

Ext.1: Signature of P.W.1

Ext.2: Signature of P.W.1

Ext.3: Signature of P.W.2 kept in separate packet

- Ext.3/1: Signature of P.W.2
- Ext.1/1: Seizure list
- Ext.1/2: Signature of P.W.2
- Ext.1/3: Signature of accused
- Ext.1/4: Endorsement of accused
- Ext.4: Paper slip
- Ext.4/1: Signature of P.W.2
- Ext.2/1: Signature of P.W.3
- Ext.5: Signature of P.W.3
- Ext.2/2: Signature of P.W.4
- Ext.1/5: Signature of P.W.4
- Ext.3/2: Signature of P.W.4
- Ext.5/1: Zimanama
- Ext.5/2: Signature of P.W.4
- Ext.6: Sketch map
- Ext.6/1: Signature of P.W.4
- Ext.7: Requisition to ascertain ownership of Luna
- Ext.8: Report of RTO
- Ext.9: Chemical Examination Report

List of Exhibits marked on behalf of defence

Nil

List of M.Os. Marked on behalf of Prosecution

M.O.I Gunny bag

Special Judge, Bhubaneswar.