

IN THE COURT OF THE SPECIAL JUDGE: BHUBANESWAR.

PRESENT:-

Sri I.K. Das, LLB,  
Special Judge, Bhubaneswar.

TR Case No. 28/35 of 2010-07

**Vide Hon'ble Courts Letter No. 8017 (44) dtd. 9.9.2014**

**Status of the accused person/persons:**

1. In custody:
2. Present:

Date of argument- 17.10.14

Date of Judgment- 27.10.14

S t a t e  
Vrs.

Santosh Parichha, aged about 34 years  
S/o: Lajakh Parichha, resident of : Chandiput  
PS: Mohana, Dist: Gajapati

....Accused person

Advocate for the prosecution-

Sri N.R. Ray, Addl. P.P. BBSR

Advocate for Accused person

Shri N. Kanungo, SDC

Offence Under Sections:-

Sec. 20(b) of NDPS Act.

### J U D G M E N T

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

2. The prosecution in nutshell as revealed from FIR that IIC Capital PS alongwith one ASI boarded the auto bearing No. OR 02 P 1907 on dtd. 3.8.2003 at about 4.30 PM. Two other passengers were also coming in the same auto and at Rajmahal Chawk while the auto stopped, both the passengers started running leaving their belongings i.e. one box and one air bag. The IIC on suspicion chased one of the passenger and caught hold him at a little distance. On interrogation, he disclosed his name to be Madan Mali and the other passenger was the present accused Santosh Parichha. They were transporting Ganja of

about 20kg 500 gm in the box and air bag from the district of Gajapati for disposal at Bhubaneswar. The IIC intending to search the accused sent a detail report from the spot to the S.P., Khurda. Two independent witnesses Deva and Bamdev were called to the spot alongwith the auto driver Bishnu Muduli. The IIC asked the accused to give option in writing as to if he wants to be searched in presence of Magistrate or gazetted officer u/s 50 of NDPS Act. As the accused gave his willingness in writing to be searched in presence of gazetted officer, the IIC called Addl. S.P., Khurda over VHF and on his arrival, the IIC searched the accused and his belongings. The box was locked and the accused Madan gave the key. Thereafter, both the box and air bag having been opened 15kg of ganja was recovered from the box and 5kg 500 gm of ganja was there in the air bag. One weighman was called to the spot who also weighed the ganja as per the instruction of the IIC. Cash of Rs.20/- was recovered from the pant pocket of the accused. Two pockets of sample each containing 25 gms was prepared at the spot the ganja in the box which was sealed in presence of Addl. SP. Thereafter, seizure list was prepared and a copy was handed over to the accused. The brass seal of the IIC after giving impression on the seal of the sample packet was left in zima of Bamdev Jena and another detail report regarding search and seizure was sent to S.P., Khurda from the spot. A plain paper FIR was drawn at the spot by the IIC and he directed SI B. Barla to take up investigation of the case. On return to the PS the matter was reported in the station diary by the IIC.

The IO of the case proceeded to the spot and examined the informant and witnesses. He arrested the accused and forwarded him to the Court alongwith the seized articles. The sample of ganja was also forwarded to SFSL, Rasulgarh. He also seized the report submitted by the IIC to S.P., Khurda and on receipt of chemical examination report submitted charge sheet against the accused warranting his trial.

The present accused escaped from the spot and therefore, his case having been split up, the case against accused Madan Mali who was tried in a separate trial and has been disposed of in the meantime. The present accused on his arrest was produced before the Court on 21.1.09 and the trial proceeded against him

during which prosecution examined 10 witnesses and the accused examined himself on his behalf. Although the trial, the accused is in custody and faced the trial.

3. Plea of the defence is complete denial to the allegation and of false implication by the co accused due to village dispute.

4. The point for determination in this case is

Whether on 3.8.2003 at about 4.30 PM at Rajmahal Square, the present accused alongwith another Madan Mali were transporting 15 kg and 5kg 500gm of ganja in a tin box and an air bag without any authority in an auto rickshaw and thereby committed offence punishable u/s 20 (b) of NDPS Act ?

5. Prosecution examined 10 witnesses out of which P.W.2 is the weighman, P.W.4 is the auto driver and P.W.1 is an independent witness to the seizure. P.Ws.3 and 5 are the IIC and ASI respectively who were boarding the auto at the relevant time. P.Ws.6,7,8 and 9 are police witnesses who produced the accused in the Court and are witness to the seizure. P.W.10 is the IO.

6. P.W.1 completely denied his knowledge regarding the case and prosecution declared him hostile. Although,he was subjected to cross examination by the prosecution, nothing has been elicited from his mouth in support of prosecution case. P.W.2, the weighman also denied his knowledge and excepting his signatures he did not support the prosecution case in any manner. P.W.4 the auto driver supported the prosecution case that on the relevant day while he stopped the auto near the traffic stand at Rajmahal chawk both the passengers ran away and the IIC caught hold one of the accused. He also said that police seized ganja from the box and the air bag and thereafter, all of them went to PS where seizure was made. P.W.5, the ASI said he alongwith the IIC while proceeding in the auto, the case was detected. But, he failed to identify the accused during the course of trial. The IIC supported his FIR allegation in his evidence. The IO also supported his investigation during the trial.

7. During the course of argument, learned defence counsel has argued that the provisions under NDPS Act are stringent in nature considering the long term of imprisonment and huge fine in case of conviction. Therefore, any violation in

complying the mandatory provisions of the Act will entitle the accused for acquittal. On the other hand, learned Addl. PP argued that as the present accused ran away from the spot and was apprehended after about 6 years of the occurrence, there is no obligation on the part of the prosecution to comply with the mandatory provisions of the NDPS Act. It is argued that prosecution examined only two independent witnesses out of which P.W.1 is a shopkeeper very near to the place of seizure. But, he completely denied about such occurrence. P.W.2 who came to the spot with his weighing machine and weighed the ganja as per the prosecution case also denied his knowledge. The most important witness P.W.4 being the auto driver said that just after apprehension of the accused, the police party alongwith the seized article and the auto driver went to PS where seizure was made. Law mandates that u/s 50 of the Act, the gazetted officer or the Magistrate is to be present at the spot and in his presence the contraband article having been weighed is to be seized. But, in this case I find a defraction wherein the procedures were said to be adopted at the PS, but not at the spot. Excepting P.W.3 and 5, no other witness supported the prosecution in any manner. Hence, prosecution becomes doubtful and the evidence of departmental witnesses in such case should be very reliable and cogent in order to believe the prosecution case in such circumstance.

8. Learned defence counsel further argued that the notice issued u/s 50 of the Act to the accused is not in conformity with the provision under the Act. Ext.4 is the notice issued by the IIC intimating to the accused that he suspected that the accused was possessing ganja and therefore, he wanted to give option for the presence of gazetted officer or magistrate for conducting search. But, on perusal of evidence of P.W.3, the IIC, it appears that after obtaining the key, he opened the box and found it with ganja with the bag. Thereafter, he issued notice to the accused. Such procedure adopted by the IIC is not in conformity with law. Further, it appears from the evidence of P.W.4 that no search or seizure was made at the spot, he did not whisper also that the Addl. SP came to the spot in whose presence search and seizure was made by the IIC. The Addl. SP is also not examined in the Court to support the evidence of the IIC which creates doubt

regarding compliance of provision u/s 50 of the Act. In a decision reported in **1997 Cr.LJ 462 between Suresh Kumar Sahu vrs. State of Orissa**. Hon'ble High Court of Orissa while examining the evidence in connection to Sec. 50 of the Act held that violation of mandatory requirements u/s 50 of the Act will entitle the trial to be vitiated. Furthermore, if the evidence of auto driver is taken into consideration that the notice was served at the PS, it is also violation of the Act. The evidence of auto driver is also supported through the mouth of ASI (P.W.5) who was also boarding the auto alongwith IIC. He said that the IIC interrogated the accused and thereafter, seized ganja from the box and the bag. He does not say anything regarding compliance of provisions u/s 50 of NDPS Act by the IIC before seizure or after the same.

9. As regards compliance of provision of Sec.42 (2) of the Act, the detecting officer after getting information shall take down in writing about his knowledge or information at the spot and thereafter, he shall forthwith send a copy thereof to his immediate official superior. In the instant case, P.W.3 vide Ext.5 noted down his information and a copy thereof was sent to S.P., Khurda. There is no oral evidence or documentary evidence that such copy was sent to the immediate official superior of P.W.3 from the spot. Therefore, the action of P.W.3 in this respect is also violative of Sec. 42 (2) of the Act. In a decision reported in **(1996) 11 OCR 130 between Surendra Mohanty and another vrs. State of Orissa**. Hon'ble High Court of Orissa held that non compliance of provision u/s 42 (2) of the Act by not sending a copy of report to the immediate official superior is fatal to the prosecution and conviction cannot lie without complying of the provision. As regards Sec. 57 of the Act, when any person is arrested or seizure of any contraband article is made from his possession, such officer is to make a full report of all particulars of such arrest or seizure to his immediate official superior. In the instant case, P.W.3 made seizure of ganja from possession of accused and thereafter, directed P.W.10 to take up investigation who arrested the accused. But, none of them while examined in the Court deposed that they sent any report to their immediate official superior regarding such arrest or seizure which also tantamount to contravening the essential provisions of the Act and it cannot be

said that seizure of such article was made within the legal provisions of the Act.

10. It is further argued that the police officers violated the mandate of the Act u/s 55 which prescribes that the seized article shall be kept in custody of in charge officer of the PS till its production before the laboratory. The IIC himself seized the ganja and its containers and sealed the same with his personal seal. Thereafter, he drew plain paper FIR at the spot and directed one of the SI (P.W.10) to take up investigation. The evidence of IIC does not disclose whether he handed over the seized article to the IO for the purpose of his investigation. P.W.10 also did not whisper as to in whose custody the seized article was kept before its production at SFSL, Rasulgarh. But, the IO said that he seized the station diary entry in connection to this case and Malkhana register in order to substantiate that the seized article was in police Malkhana during the intervening period. Extract of the station diary entry is filed in the Court, but neither the extract of Malkhana register nor the malkhana register itself are produced in the Court in order to believe that the IIC kept the seized article in police malkhana in his safe custody. Hon'ble High Court of Orissa in a decision reported in **(2000) 19 OCR 58 between Arjuna Gochhayat vrs. State**, held that unless the seized article is kept in custody of officer in charge of nearest police station for intermediate custody, the possibility of tampering with the sample could not be ruled out and in such case, it would be hazardous to convict the accused. In the instant case, the IIC although said that he handed over charge of investigation to P.W.10, he did not say as to which documents or articles were handed over to the IO for the purpose of investigation and which was retained by him. The IO also did not say which of the item he received from the IIC and which was kept in his custody. The malkhana register could have thrown some light to explain such circumstance, but the said register has not been produced in the Court for its verification. Therefore, it cannot be said positively that Sec. 55 of the Act has been complied in its true spirit.

11. It is true that the present accused was neither arrested at the spot nor the articles were seized from his custody. But, the fact remains that the provisions under the Act are to be complied before search and seizure and subsequent

thereto. If the provisions under the Act were not complied, then the prosecution itself would be illegal. The only material against the present accused that Madan Mali confessed before police during his interrogation that the present accused was accompanying him in the auto rickshaw and ran away. As per the reports prepared by the IIC and his evidence, such confession was made at the spot in presence of witnesses. The IIC also did not prefer to record the confessional statement of the accused. Even if such confession is hit u/s 25 of Evidence Act, but it has got some presumptive value. The accused was also not produced before the Magistrate to record his confessional statement u/s 164 Cr.P.C. None of the witnesses present at the spot also said that during interrogation of the IIC at the spot, the accused confessed that the present accused was accompanying him with the seized article. The accused while examined himself as D.W.1 stated that due to inimical term with Madan Mali he has been falsely entangled in the case. Thus, after examining the evidence on record and the procedure adopted by the police officers during search, seizure and investigation of the case, I believe prosecution has not been able to prove the case beyond all reasonable doubt.

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

13. The seized articles if any be destroyed after four months of appeal period if no appeal is preferred and 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 27<sup>th</sup> day of October, 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:- Ajay Kumar Subudhi

P.W.2:- Benudhar Jena

P.W.3:- Rahas Bihari Pani

P.W.4: Bishnu Charan Muduli

P.W.5: Niranjan Sundary

P.W.6: Rahas Bihari Mohanty

P.W.7: Banambar Naik

P.W.8: Bhagaban Patra

P.W.9: Md. Khan

P.W.10: Birsa Barla

List of witness examined for the defence

D.W.1: Santosh Parichha

List of exhibits marked for the prosecution

Ext.1: Signature of P.W.2

Ext.2: Signature of P.W.2

Ext.3: Signature of P.W.2

Ext.4: Option u/s 50 of NDPS Act

Ext.4/1: Signature of P.W.3

Ext.4/2: Endorsement and signature of accused Madan Mali

Ext.3/1: Weighment chart

Ext.3/2: Signature of P.W.3

Ext.3/3: Signature of Addl. S.P.

Ext.3/4: Signature of auto driver Bishnu Muduli

Ext.1/1: Seizure list

Ext.1/2: Signature of P.W.3

Ext.1/3: Signature of Addl. SP

Ext.1/4: Signature of auto driver Bishnu Muduli

Ext.5: Information to SP

Ext.5/1: Signature of P.W.3

Ext.6: Impression of specimen seal of paper

Ext.6/1: Signature of p.W.3

Ext.6/2: Signature of Addl. SP

Ext.6/3: Signature of Bishnu Muduli

Ext.2/1: Zimanama

Ext.2/2: Signature of p.W.3

Ext.7: Plain paper FIR

Ext.7/1: Signature of P.W.3

Ext.7/2: Formal FIR

Ext.8: Written report of SP, Khurda

Ext.8/1: Signature of P.W.3

Ext.9: Copy of station diary

Ext.10: Seizure list

Ext.10/1: Signature of P.W.7

Ext.11: Forwarding letter

Ext.11/1: Signature of P.W.10

Ext.12: Zimanama

Ext.13: Chemical Examination Report

List of Exhibits marked on behalf of defence

Nil

List of M.Os. Marked on behalf of Prosecution

M.O.I : Dasta Box

M.O.II: Air Bag

M.O.III: Purse

List of Exhibits marked for identification

Mark X: Signature of Ajay Kumar Subudhi

Special Judge, Bhubaneswar.