

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

PRESENT:-

Sri I.K. Das, LLB,  
Special Judge, Bhubaneswar.TR Case No. 98/55 of 2013-12Date of argument- 16.10.14  
Date of Judgment- 24.10.14S t a t e  
Vrs.Jagamohan Pattnaik, aged about 44 years  
S/o: Kulamani Pattnaik, resident of : Natimangalasahi  
PS: Jatni, Dist: Khurda

....Accused person

Advocate for the prosecution-

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

Advocate for Accused persons

Shri B.K. Patnaik, Advocate

Offence Under Sections:-

Sec. 21(a) of NDPS Act.

J U D G M E N T

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

2. As it appears from the prosecution report that on 21.10.12 at about 8 AM, SI of Excise, Jatni alongwith her staff while patrolling at Nuagaon area received reliable information that the accused was selling heroin at the backside of Nati Mangala temple at village Nuagaon. The SI immediately proceeded to the spot with his staff and just after arrival of police party the accused started to run away but the police party chased him and apprehended. The SI thereafter, gave option to the accused to disclose his intention as to if he wants to be searched in presence of Magistrate or gazetted officer. But, the accused agreed to be searched by the SI of Excise and hence, he was searched at the spot. One paper envelop containing a polythene packet was recovered from the shirt pocket of the accused containing

1gm of brown sugar. The SI weighed the contraband article which was shown to be 1.200gms including the paper and polythene packet. Thereafter, the brown sugar was removed from the packet and on being weighed it was shown to be 1 gm only. The SI conducted smell and tongue test and out of his service experience he was confirmed that the contents of the packet was nothing but heroin and thereafter, the contraband articles was sealed at the spot with paper slip containing the signature of witnesses and brass seal impression of the SI. Thereafter, the accused was arrested at the spot. The witnesses were examined and their statements were recorded by the SI. The seized article was also produced before the Court and sample being collected it was forwarded to Drug Testing and Research Laboratory, Odisha, Bhubaneswar. After obtaining the chemical examination report, PR was filed against the accused warranting the trial.

3. Plea of the defence is complete denial to the allegation and of false implication. It is further disclosed during statement of the accused that the SI of Excise forcibly took the signature of the accused on some papers at Mahulagudi chawk without informing him about the purpose of his signature.

4. The point for determination in this case is

Whether on 21.10.12 at about 8 AM, at Nuagaon, the accused was found in exclusive and conscious possession of heroin weighing about 1gm without any license or authority and thereby committed offence punishable u/s 21 (a) of NDPS Act ?

5. Prosecution examined 3 witnesses whereas defence did not prefer to adduce any evidence. P.W.1 is one ASI of Excise who was accompanying the SI at the time of search and seizure of the accused. P.W.2 is an independent witness who was present at the time of seizure and P.W.3 is the SI of Excise who detected the case and submitted PR.

6. P.W.3 in her evidence said that on 21.10.12 at about 8 AM while patrolling at Jatni town with other staffs she received telephonic message that the accused was selling heroin near the temple. She immediately rushed to the spot and called one witness namely, Dilip Sahu to stand as witness in the case. She said that she reported to her immediate official superior Sri Prahallad Sahu about the case and

searched the accused. In the meantime, inspector reached at the spot and a written report was handed over to him at the spot. The accused was supplied with a notice for conducting his personal search vide Ext.2 informing him to exercise his right to be searched in presence of gazetted officer or Magistrate. But, the accused expressed his intention to be searched by the SI herself. The witness further stated regarding the search and seizure of heroin and the procedures maintained by her for the purpose of weighing and sealing of the contraband article. After seal, the brass seal of the SI was left in zima of the witness Dilip Sahu executing zimanama. Thereafter, seizure list was prepared at the spot and accused was also arrested. A copy of seizure list was handed over to the accused. The witness said from the spot the accused was taken to the Court alongwith the seized article. Sample of half gram of heroin was collected which was forwarded for chemical examination with the seal of the Court. She obtained a receipt from the Laboratory on delivery of the seized contraband articles. P.W.1, the ASI corroborated the evidence of P.W.3 regarding seizure of the article from the possession of the accused. He also supported that P.W.3 gave option to the accused to be searched in presence of gazetted officer or the Magistrate. Before search of the accused, P.W.3 gave her personal search to the accused and further said that 1.200gm of brown sugar was seized from the shirt pocket of the accused during his personal search. P.W.2 is an independent witness who was called to the spot by the SI at the time of search and seizure. In his cross examination, P.W.2 said that he cannot say before how much time of his arrival the accused was detained at the spot and if the SI gave her personal search to the accused before searching him. This witness is also not examined by the SI.

7. During the course of argument, learned defence counsel argued that the penal provisions for conviction under NDPS Act mandates imprisonment for a long period and fine of huge amount. Therefore, the quality of evidence adduced in the Court should be consistent and reliable in order to prove the case against the accused. In the instant case, evidence reveals that the spot of seizure is very near to the village, but none of the villager was called before search and seizure. The IO herself in her cross examination admitted that the procedure continued for

about 35 minutes and many witnesses were passing through the road, but none of them has been cited in this case as a witness. P.W.3 also admitted that two excise constables and the office driver were present, but none of them is also cited as a witness in order to corroborate the evidence of P.W.3. Section 50 of NDPS Act is a mandatory provision before conducting search. Any lapses in compliance with the provision will lead to acquittal of the accused. Hon'ble Apex Court held that before conducting search of the accused, the accused must be intimated that he has liberty to be examined either in presence of Magistrate or a gazetted officer. Simply, giving option to the accused will not suffice the legal requirements. In the instant case, P.W.3 in her evidence said that he received telephonic message that the accused was selling heroin near the temple. Therefore, it is obligatory on the part of P.W.3 to reduce such information in writing and if he intends to search the person he shall forthwith send a copy of such information to his immediate official superior as provided u/s 42 (2) of NDPS Act. Ext.5 is said to be the information of P.W.3 to his immediate official superior. This document is filed in the Court at the stage of argument. It is a printed form, but law mandates that such intimation is to be noted down by the seizing officer just after getting information. P.Ws.1 and 2 who were present at the spot have not stated a single line that PW.3 prepared Ext.5 at the spot nor the inspector of Excise who received the same has been examined in the Court. I have also perused the seizure list which contains the procedure adopted by P.W.3 during search and seizure. It also does not disclose that any information was given to the inspector from the spot. Therefore, it is not possible to believe that the SI complied with the provision u/s 42 (2) of the Act in accordance with the procedure.

8. As regards Sec. 50 of the Act, SI also used two printed forms which is not at all the intention of the law makers. Ext.1 and 2 are proved to be the written information to the accused. Ext.1 only contains the signature of the accused without any endorsement that he received a copy of such printed form and in Ext.2 it is already printed that the accused does not want to be searched in presence of Magistrate or gazetted officer and only intends to be searched in presence of the concerned officer. It is strange as to how such written forms are

used violating the legal provisions and only by obtaining signature of the accused will not lead to believe that the accused in fact intended to be searched in presence of P.W.3 and denied to be searched in presence of gazetted officer or Magistrate. This is direct violation of Sec. 50 of the Act. Again, learned defence counsel pointed out that P.W.3 said that heroin and brown sugar are the same. This speaks of that the SI has no knowledge regarding identification of contraband articles. P.W.3 in her evidence said that the colour of the contraband articles seized from the accused was redish. But, the chemical examination report marked as Ext.6 discloses that the powder forwarded for examination was of yellow colour. But, the report discloses that the powder was opium derivative. Further, I find P.W.3 in her evidence said that on 21.10.12 she seized the article and after observing all formalities forwarded the same to the laboratory on the same day. But, Ext.6 discloses that the sealed packets were received by the laboratory on 26.10.12 i.e. after 5 days of seizure. No evidence has been led as to in whose custody, the articles were kept during those 5 days. Under Sec. 55 of NDPS Act, the seizing officer after seizure of the same shall hand over the seized article to the officer in charge the station who will keep the article in his custody. In the instant case, I find this provision has also not been complied which is also violation of the Act. Sec. 57 of the Act mandates that after seizure of the article and arrest of the accused, the seizing officer shall make a full report of all the particulars to his immediate official superior. But, I find the SI has not taken any steps in compliance to provision u/s 57 of the Act. Such procedure adopted by the SI is highly irregular which is not at all expected from a responsible excise officer. Learned defence counsel has also argued that total 1 gm of brown sugar was seized from the accused as per the seizure list. But, the report reveals that it was heroin giving positive indication for diacetyl morphine. The quantity of the seized powder is also disputed in the mouth of the witnesses while one of the witness said half gram of the powder was sealed in the packet, some other said it was 1gm. Thus, I find entire prosecution case is full of contradictions and latches in respect of all the provisions of the Act and accordingly, prosecution cannot be believed in any manner

9. After examining all the materials on record, I came to the conclusion that the prosecution has miserably failed to prove the case against the accused beyond reasonable doubt.

10. In the result the accused is found not guilty for the offence u/s.21(a) 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. 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 24<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:- Kumar Chandra Pattnaik

P.W.2:- Dilip Sahu

P.W.3:- Manasi Sahu

List of witness examined for the defence

Nil

List of exhibits marked for the prosecution

Ext.1: Written Memo

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

Ext.2: Memo of accused u/s 50 of the Act

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

Ext.3: Seizure list

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

Ext.4: Zimanama

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

Ext.2/2: Signature of the accused

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

Ext.1/2: Acceptance letter

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

Ext.4/2: Signature of P.W.2

Ext.2/4: Signature of P.W.3

Ext.3/2: Signature of P.W.3  
Ext.4/3: Signature of P.W.3  
Ext.5: Information receipt  
Ext.5/1: Signature of P.W.3  
Ext.5/2: Signature of P.W.3  
Ext.6: Chemical Examination Report  
List of Exhibits marked on behalf of defence

Nil

List of M.Os. Marked on behalf of Prosecution

M.O.I : Brass seal  
M.O.II: Seal envelope containing heroin

Special Judge, Bhubaneswar.