



2024:CGHC:33378

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR
CRA No. 1220 of 2024

Mehtaru Pal S/o Late Ajit Pal Aged About 77 Years Resident Of Nagar Panchayat Kunra, Gandhi Chowk, Ward No. 3, P.S. Dharsiwa, District Raipur, Chhattisgarh

----Appellant

versus

State of Chhattisgarh Through Station House Officer, Police Station Dharsiwa, Raipur, District Raipur (C.G.).

---- Respondent

CRA No. 1317 of 2024

Tushar Dewangan S/o Rekhraj Dewangan Aged About 22 Years R/o Village Arang, Netaji Chowk, Ward No. 14, Police Station Arang, District Raipur, Chhattisgarh.

----Appellant

Versus

State of Chhattisgarh Through Station House Officer, Police of Police Station Dharsiwa, District Raipur, Chhattisgarh.

---- Respondent

For Appellant : Mr. Vijay Sahu & Mr. Pramod Ramteke,
Advocates.

For State : Ms. Pragya Pandey, Dy. GA.

Hon'ble Shri Justice Arvind Kumar Verma
Judgment on Board

30.08.2024

1. Since above two appeals arising out of same incident, they are being disposed off by this common order.

2. Challenge in these criminal appeals is to the impugned judgment of conviction and sentence dated 25.06.2024 passed by learned Special Judge, (NDPS Act), Raipur, (CG) in Special Criminal Case No.173/2023, whereby the appellants stand convicted and sentence as under:

| Conviction | Sentence |
|---|---|
| Under Section 20(b)(ii)(B) of the NDPS Act. | Rigorous imprisonment for 02 years & fine of amount Rs.25,000/-, in default of payment of fine 03 months additional RI. |

3. Case of the prosecution, in brief, is that on 08.08.2023 Shri Brij Kishore Dixit Assistant Sub-Inspector of Police Station -Dharsiwa, received secret information that appellants/accused are carrying illegal contraband (ganja) on vehicle Maruti Swift bearing registration No.CG-04/PA-1245 at village -Kunra, Gandhi Chowk, Dharsiwaand . On receiving said information, they reached on spot and during course of search, 4.650 kg illicit contraband (ganja) was seized from the said vehicle. On the basis of seizure, appellants were arrested. After completion of other necessary formalities, the police returned to the Police Station and deposited the seized contraband in the Malkhana and lodged FIR against the appellants. Statements of witnesses were recorded under Section 161 of Cr.P.C.

4. After completion of investigation, charge-sheet/challan was filed against the appellants for offence punishable under Section 20(b)(ii)(B) of the NDPS Act.

5. In order to prove guilt of appellants, prosecution examined total 10 witnesses and their statements were recorded. However, no defence witnesses was examined. Statement of appellants (accused) were recorded under Section 313 CrPC in which they pleaded innocence and false implication.
6. After completion of trial, trial Court convicted and sentenced the appellant as mentioned in paragraph -1 of this judgment. Hence, this appeal.
7. In both appeals, learned counsel for the appellants submits that the impugned judgment passed by the learned trial Court is illegal, perverse and contrary to the evidence available on record, hence liable to be set aside. There is no specific evidence available on record which shows that the appellants were involved in the alleged crime. Appellants have been falsely implicated in this case as the contraband (ganja) so seized were from the open place and not in the exclusive possession of appellants. Independent witnesses/seizure witnesses (PW-1 & PW-2) have not support the case of prosecution and turned hostile. Apart from this, general procedure for sampling provided in Standing Order No.01 of 1989 dated 13.06.1989 has not been complied with by the prosecution. Investigating Officer received prior information but he has not complied with provision of Section 42(2) of the NDPS Act. There are major contradictions and omissions in the statement of PW-10/Investigating Officer, which cannot be relied upon. The learned trial Court failed to appreciate that the entire action of seizure and sampling is wholly illegal. It was done in violation of the provisions of Section 52A(2) of the NDPS Act as the procedure prescribed therein was not followed while drawing the samples and

seizing the alleged narcotic substance. There is serious doubt about the correctness of samples sent for analysis as to whether they were actually the samples of the seized contraband. There are several discrepancies in the prosecution case which makes the custody of the seized articles and sampling extremely doubtful. Trial Court has wrongly appreciated that the investigation has been done properly and mandatory provisions of the NDPS Act have been complied with. The prosecution has utterly failed to prove its case beyond reasonable doubt against the appellants by adducing cogent and reliable evidence, even then the learned trial Court has held the appellant guilty of the above offence. Therefore, the impugned judgment is liable to be set aside.

8. On the other hand, learned counsel for the State supporting the impugned judgment would submit that the investigating officer at the time of effecting search and seizure proceedings has substantially complied with all the mandatory provisions of the NDPS Act. Learned trial Court having appreciated the overall oral and documentary evidence has rightly recorded a finding of guilt against the appellant which needs no interference by this Court. Therefore, the present appeal being sans merits is liable to be dismissed.
9. Heard learned counsel for the parties and perused the record of the trial Court including the impugned judgment.
10. PW-10/Brij Kishore Dixit (Assistant Sub-Inspector) in his evidence has stated that on the date of incident, he received secret information from the Informer that the appellants were carrying illegal contraband (ganja) on vehicle Maruti Swift bearing registration No.CG-04/PA-1245 and trying to sell it near village -Kunra, Gandhi Chowk, Dharsiwaand. After

recording the said information in Roznamcha Sanha (Ex.P36/C), he reached on spot along-with other staffs and during course of search seized total 5 packets (containing 4.650 kg ganja) from the said vehicle. In his cross-examination, he stated that alleged incident spot is a public/crowded place where grocery shop, clothes shop, medical shop were remained, however, he has neither recorded the statements of any shopkeepers nor putting any question/enquiry with them regarding the incident. He also admitted that it is also not clear that whose thumb impression has been mentioned in place of second witness in weighing panchanama Ex.P-11 & P-10, search panchanama Ex. P-7, search panchanama of police and witness Ex.P-6, recovery panchanama Ex. P-8. He further admitted that he received the alleged information through the informer but on which mode he received the said information has not been mentioned in Ex. P-1 ie notice. He also admitted that in Ex.P-2 (information Panchnama) time of panchnama has been manipulated.

11. PW-1/Poshad Verma & PW-2/Duklaha in their cross-examination have denied that in his presence the police had prepared the information panchnama & search panchnama without warrant (Ex.P-2 & Ex.P-3). He also denied that he had gone to the incident spot with the Police force and found at spot the accused persons as per the informer information.

12. In order to test the above facts and submissions/evidences, it would be appropriate to refer to the mandatory provisions of the NDPS Act.

13. Relevant Sections of the NDPS Act read as under :-

“52A. Disposal of seized narcotic drugs and psychotropic substances.-

1. xxxxxx

(2).....Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in subsection (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of [such drugs or substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under subsection (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under subsection (2) and certified by the Magistrate, as primary evidence in respect of such offence.

55. Police to take charge of articles seized and delivered.— An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the

orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."

14. As per provision of Section 52A(2), (3) & (4) of the NDPS Act when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub-section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.
15. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under subsections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate.
16. In the matter of **Union of India v. Mohanlal and another** reported in **(2016) 3 SCC 379**, the Supreme Court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the

officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

17. Recently, the Supreme Court in the matter of **Yusuf @ Asif versus State (Criminal Appeal No.3191/2023)**, decided on **13.10.2023**, has held as under:-

“**16.** In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.

17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with fine of Rs.1 lakh and in default of payment of fine to undergo further imprisonment of one year is hereby set aside.”

18. The Supreme Court in the matter of **Sanjeet Kumar v. State of C.G.** reported in **2022 SCC OnLine (SC) 1117**, has held as under:-

“**18.** But if the Court has - (i) to completely disregard the lack of corroboration of the testimony of police witnesses by independent witnesses; and (ii) to turn a Nelson’s eye to the independent witnesses turning hostile, then the story of the prosecution should be very convincing and the testimony of the official witnesses notably trustworthy. If independent witnesses come up with a story which

creates a gaping hole in the prosecution theory, about the very search and seizure, then the case of the prosecution should collapse like a pack of cards. It is no doubt true that corroboration by independent witnesses is not always necessary. But once the prosecution comes up with a story that the search and seizure was conducted in the presence of independent witnesses and they also choose to examine them before Court, then the Court has to see whether the version of the independent witnesses who turned hostile is unbelievable and whether there is a possibility that they have become turncoats.

31. Therefore, it is clear that the I.O. examined as PW-7 claims to have done everything only in the presence of independent witnesses. But those independent witnesses not merely denied their presence and participation but also came up with an explanation as to how their signatures found a place in those documents.

32. In such circumstances, a serious doubt is cast on the very search and seizure allegedly made by PW-7. But unfortunately, both the Special Court and the High Court went by the law in theory, without applying the same to the facts of the case.”

19. The Supreme Court in the matter of **State of Rajasthan versus Bher Singh** reported in **(2009) 16 SCC 293** has held as under:-

“**2.** We have perused the evidence of PW 7 who seized the opium in question, as also the evidence of PW 9 who was the officer in charge of the malkhana and from their evidence, we find that it is not possible to hold that the seal allegedly put by PW 7 while taking the sample opium remained intact right through the time it reached the forensic science laboratory. This being a mandatory requirement to establish the fact that the seized goods was in fact a prohibited drug under the NDPS Act, we agree with the High Court on facts of this case that the prosecution has failed to establish this part of its case, hence, we find no reason to interfere in this appeal. Therefore, we dismiss the same.”

20. Perusal of records would show that on the date of alleged incident during search 05 packets (containing 4.650 kg) of illicit contraband (ganja) was seized from vehicle. However, only two sample packets

containing 100 grams each were prepared for testing out of 05 packets of contraband. The samples were not taken in each of the packets by PW-10/Investigating Officer (IO) and before taking samples, IO has mixed-up the entire contraband in presence of the Judicial Magistrate, Raipur. Hence, it is clear that there is breach of Standing Order No.01 of 1989 dated 13.06.1989 and complete non-compliance of mandatory provision of the NDPS Act.

21. Considering facts of case, submissions advanced by the learned counsel for the parties, general procedure for sampling provided in Standing Order No.01 of 1989 dated 13.06.1989, mandatory provisions of NDPS Act, further the fact that independent/seizure witnesses (PW-1 & PW-2) have not support the case of prosecution and turned hostile, other material/ evidence available on record, further considering the principles laid down by the Supreme Court in **Mohanlal** (supra), **Yusuf @ Asif** (supra), **Sanjeet Kumar** (supra) & **Bher Singh** (supra), I am of the considered opinion that the prosecution has failed to prove its case beyond reasonable doubt and the trial Court has also committed grave legal error in convicting and sentencing the appellants for offence under Section 20(b)(ii)(B) of the NDPS Act. As such, the judgment impugned deserves to be set aside.

22. For the foregoing reasons, both Criminal Appeals are allowed. The impugned judgment of conviction and sentence dated 25.06.2024 passed by learned Special Judge, (NDPS Act), Raipur, (CG) in Special Criminal Case No.173/2023, is hereby set-aside. Both the appellants are acquitted of the charge under Section 20(b)(ii)(B) of the NDPS Act.

Appellants are reported to be in jail. They shall be set at liberty forthwith if no longer required in any other criminal case.

23. Both the appellants are directed to file personal bond with one surety in the like amount to the satisfaction of the Court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973.

24. Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for necessary information and compliance.

Sd/-
(Arvind Kumar VErma)
Judge

J/-