

IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE-CUM-
SPECIAL JUDGE, MALKANGIRI

Present: Smt. Pragnyanalini Mishra, M.A., LL.B.,
Additional Sessions Judge-cum-
Special Judge, Malkangiri

C.T. No.103/2017

(Arising out of Orkel P.S. case No.96, Dated
09.10.2017)

State.....

..... Complainant.

-Versus-

Subash Chandra Bose, aged about 45 years,
S/o Jatindra Kumar Bose
Village: M.V.59
P.S.-Podia, Dist. Malkangiri

.... Accused.

Date of Argument : 27.03.2018

Date of Judgment : 04.04.2018

Offence u/s 20(b)(ii)(C) of NDPS Act

Counsel for the Complainant : Sri Bijay Kumar Mohanty,
Spl. P.P.

Counsel for the accused : Sri Gouttam Sarkar &
Associate, Advocates

J U D G M E N T

The accused is charged u/s 20(b)(ii)(C) of NDPS Act for alleging transporting of 27 Kgs. 900 grams of GANJA.

2. The case as set out by the prosecution is that the S.I. of Orkel P.S. Sri Manas Ranjan Swain on dated 09.10.2017 at 7.30 P.M. alongwith his staff such as one Head constable and three constables proceeded towards Chitrakonda to Nuaguda village on the strength of command certificate No.1421533 for M.V. checking and blocking duty. During course of their duty they noticed one motor cycle coming from Chitrakonda jungle to which they stopped

and saw one person riding it and carrying one polythene bag fasten in rubber tube. On suspicion the S.I. of police arranged 2 independent witnesses and in their presence the polythene bag was opened which was found to be containing fruiting & flowering tops of cannabis plant. The rider disclosed his identity before the police personnel. He failed to produce any lawful authority for such possession and transportation of GANJA. Then the S.I. of police started procedure of seizure of the contraband articles. Accordingly, he seized the Hero Honda motor cycle bearing registration No.OR30-1105 loaded with a polythene bag containing GANJA. The accompanied constable Sri B.T. Sadhu arranged a weighmen namely S.K. Padhi who got the GANJA weighed at the spot by his electronic weighing machine. The sealing & packing kits were brought to the spot by the head constable Trinath Mohanty. The GANJA bag named as A was weighed which was found to be 27 Kgs. 900 grams and the net weight of the GANJA found to be 27 Kgs. 600 grams. 25 grams of GANJA from A bag in 2 separate packets were collected for chemical examination and it was named as A1 & A2. After observing all formalities the bulk quantity bag and the sample packets were sealed by putting the wax impression of the personal brass seal of S.I. Sri Swain. Thereafter, he prepared the connected documents in presence of the independent witnesses, official witnesses & the accused. He handed over the copy of such documents to the accused. He seized the weighing machine and left it in zima of the weighman. He left the brass seal used for the purpose of sealing of the contraband articles in zima of one independent witness namely Mohiddin Sarif under proper zimanama. He then arrested the accused. In this connection he drew up a FIR which was registered in Orkel P.S. case No.96/2017, dated 09.10.2017. In absence of the IIC the S.I. Sri Swain directed Sri S.K. Sethi to take up investigation, who after thorough investigation submitted charge sheet against the accused u/s 20(b)(ii)(C) of NDPS Act. Learned Sessions Judge-cum-Special

Judge took cognizance of the offence. Then, the case was transferred to this Court for disposal according to law.

3. The accused set up plea of clean denial of prosecution case. He pleaded not guilty and claimed for trial.

4. Thus, the point for determination in this case is:-

- (i) Whether on 09.10.2017 at about 8.15 P.M. on the road in between Chitrakonda chhak to Nuaguda village the accused was found transporting GANJA kept in a polythene bag by a motor cycle bearing registration No.OR30-1105 and is liable to be punished u/s 20(b)(ii)(C) of NDPS Act?

5. In order to substantiate the allegation, prosecution has examined 09 witnesses in all out of them P.W.7 is Manas Ranjan Swain S.I. of police who detected the accused while transporting GANJA. P.W.4, 6 & 8 are the accompanied police constables. P.W.3 is also accompanied the S.I. of police Sri M.R. Swain to the place of detection. P.W.1 & 2 are the independent witnesses. P.W.5 is the weighman and P.W.9 is the I.O. of this case.

On the otherhand defence examined none.

6. On perusal of the evidence on record it appears that P.W.7 the S.I. of police Sri Manas Ranjan Swain has deposed corroborating the entire story of the FIR. He admitted the FIR as Ext.10 and his signature as Ext.10/1. He admitted his endorsement and signature on the FIR, the formal FIR as it was registered in absence of the IIC while he was in charge, the seizure list in respect of seizure of Hero Honda motor cycle alongwith bulk quantity of GANJA i.e. 27 Kgs. 600 grams and seizure of 2 sample packets. He also admitted the seizure list in respect of the weighing machine, zimanama prepared by him relating to the weighing machine and the brass seal. He admitted the paper slip prepared by him, the detail of Narcotic Drugs seized chart, the weighment chart, the envelope

containing sample sheet and the material objects produced that is the sample packets of the contraband articles.

So far the evidence of P.W.7 and the connected documents it appears that the polythene bag was containing 27 Kgs. 600 grams GANJA in net. P.W.3 & 4 the accompanied police personnels have stated regarding weight of the GANJA packet to be 27 Kgs. 900 grams whereas P.W.6 another accompanied constable stated regarding seizure of 27 Kgs.500 grams and 27 Kgs. 600 grams of GANJA and two sample paclets. However, P.W.8 another constable has stated regarding weight of the GANJA packet to be 27 Kgs.900 grams and net weight of GANJA to be 27 Kgs. 600 grams. P.W.9 has deposed regarding his investigation. P.W.1 & 2 the independent witnesses and weighman have not supported the prosecution case. P.W.5 Sri Suresh Kumar Padhi the weighman while deposing evidence failed to identify the accused who was standing in the dock. His evidence transpires that about 1 year back he went to Chitrakonda chhak alongwith his electronic weighing machine where, he saw two gunny bags kept on the ground which he got weighed as per direction of S.I. Sri M.R. Swain which was found to be 37 Kgs. He further stated that the police personnel managed to obtain his signatures on some papers.

7. The evidence of the witnesses alongwith the case was challenged by the learned defence counsel on the following grounds:-

Firstly he contended that the mandatory provision u/s 42(2) of NDPS Act has not been complied with. Secondly he contended that the independent witnesses have not supported the case rather the evidence of the official witnesses suffers from inconsistencies regarding exact quantity of GANJA seized and the place of occurrence. As P.W.6 in his cross-examination evidence has stated that “the operation was made at P.S. The witnesses signed on the documents at P.S.” This fact of the said witnesses has been corroborated by the evidence of P.W.3 Havildar as well as one of the

accompanied police personnel. Further, he contended that the brass seal used for the purpose was not produced which seriously affected the prosecution allegation of recovery and seizure of the contraband article rather P.W.1 to whom the brass seal was left in zima has totally disowned his knowledge about the seizure of the contraband article and about the brass seal left in his zima. Lastly he contended that the safe custody of the alleged seized material between the period for the alleged recovery and production before the Court to be doubtful. Under the circumstances he contended that the benefit of doubt be extended in favour of the accused.

8. So far non compliance of S.42(2) & 57 of the NDPS Act as contended by the learned defence counsel it is seen that P.W.7 has seized the original full report submitted by the informant from S.D.P.O. office and prepared the seizure list. He admitted the full report as Ext.18. There is no doubt that P.W.7 has complied with the provision u/s 57 of the NDPS Act. For S.42(2) of NDPS Act it requires that after "seizure of the contraband article is made whether an officer takes down any information in writing under sub-section(1) of S.42 shall within 72 hours send a copy thereof to his immediate official superior." In the instance case P.W.7 was IIC in charge then, who has stated in the evidence that he could not observe the formalities u/s 42 & 52 of NDPS Act as the said spot was totally naxal affected area and being it was a chance detection he could not observe the formalities required under the Act.

9. On going to the second point of the argument of learned defence counsel, admittedly P.w.1 & 2 the two independent witnesses have totally disowned their knowledge about the search and seizure of the contraband articles made by P.W.7 even if during course of trial they failed to identify the accused. Although in absence of any corroboration from the independent side there is no bar in believing the evidence of the official witnesses if it is corroborative, trustworthy and free from any discrepancies. As per my earlier discussion while

scrutinizing the evidence on record the witnesses such as Havildar and police constables have stated that the process of seizure was prepared at the P.S. Regarding quantity of the contraband article seized by P.W.7 the evidence of the official witnesses differs from each other. When the evidence of the official witnesses suffers from the inconsistency with regard to the fact of the case, the factum of seizure so made by P.W.7 appears to be doubtful.

10. Undoubtedly, the brass seal used for sealing & packing of the contraband article by P.W.7. In one hand he stated that after using the brass seal he left it in zima of witness namely Mohiddin Saraff under proper zimanama, but the said Mohiddin Sariff neither admitted about the existence of any brass seal nor admitted the factum of the seizure. Therefore, it is to be held that prosecution case is doubtful. In a decision reported in **(2016) 65 OCR-128 Santosh Kumar Pradhan & Babula Roula vs. State of Orissa**, that non production of brass seal creates doubt regarding seizure of contraband article. So nonproduction of the material evidence like the brass seal before the Court seriously affected the veracity of the prosecution allegation of recovery and seizure. As per the evidence of P.W.9 the Mal items produced before the Court for keeping it in safe custody was returned due to lack of space and thereafter it was kept in P.S. Malkhana vide CMR No.39/2017 but during course of trial neither the CMR register was not produced to prove the relevant entry against the present item nor the seized items were produced. The item which was produced is also sealed sample packet. There is no whereabouts of the bulk quantity GANJA as a result it remains unidentified. Prosecution failed to establish the proper safe custody of the seized articles. In a decision reported in **(2016) 65 OCR-128 Santosh Kumar Pradhan & Babula Roula vs. State of Orissa**, “the Hon’ble Court observed that the offence under NDPS act being serious in nature visited with severe punishment, the prosecution must prove its case beyond all reasonable doubt in respect of

material particulars leaving no room for any suspicious or hesitation. It is also the position of law that failure to establish proper safe custody of the seized material affects the very root of the prosecution case”.

In view of the observation made by the Hon’ble Court while going through the present case it is seen that there is missing link between the proper custody of the contraband article alleged to have been seized from the possession of the accused. So far non corroborative testimony of independent witnesses in a decision reported in **2002 (1) OLR (SC) 565**, the Hon’ble Supreme Court held that the recovery, seizure and deposit of the contraband articles having not proved through independent witnesses, no conviction will lie on the testimony of police witnesses.

11. Having regards to my above discussion, facts and circumstances of the case, un-corroborative testimony of the official witnesses, un-corroborative testimony of the independent witnesses, to prove the safe custody of the contraband article being failed on the part of the police personnel and having regards to the Courts observation in the aforesaid cases I am of the considered opinion that prosecution has failed to prove its case against the accused beyond any doubt.

12. In the result, therefore, I hold the accused not guilty of committing the offence u/s 20(b)(ii)(C) of NDPS Act and acquit him therefrom u/s 235(1) Cr.P.C. The accused be set at liberty forthwith.

The seized GANJA be destroyed and the seized motor cycle bearing registration No.OR-30-1105 be released in favour of the true owner four months after expiry of the appeal period if no appeal is preferred and in case of any appeal as per the direction of the Appellate Court.

Sd/-

Additional Sessions Judge-cum-
Special Judge, Malkangiri

The judgment is typed to my dictation, corrected by me and pronounced in the open Court today on this the 4th day of April, 2018 under my signature and seal of this Court.

Sd/-

Additional Sessions Judge-cum-
Special Judge, Malkangiri

List of witnesses examined for the Prosecution.

P.W.1 : Mohidden Sariff
P.W.2 : Durya Khara
P.W.3 : Trinath Mohanty
P.W.4 : Bidyut Tarang Sadhu
P.W.5 : Suresh Kumar Padhi
P.W.6 : Rohit Challan
P.W.7 : Manas Ranjan Swain
P.W.8 : Trinath Mohanty
P.W.9 : Saroj Kumar Sethi

List of witnesses examined for the Defence.

: None.

List of exhibits marked for the Prosecution.

Ext.1 : Signature of P.W.1
Ext.1/1 : Signature of P.W.2
Ext.1/2 : Paper slip.
Ext.1/3 : Signature of P.W.3 on Ext.1/2
Ext.1/4 : Signature of P.W.4 on Ext.1/2
Ext.1/5 : Signature of P.W.5
Ext.1/6 : Signature of P.W.6
Ext.1/7 : Signature of P.W.7
Ext.1/8 : Signature of accused.
Ext.1/9 : Signature of P.W.8
Ext.2 : Signature of P.W.1
Ext.2/1 : Signature of P.W.2
Ext.2/2 : Sample sheet.
Ext.2/3 : Signature of P.W.3 on Ext.2/2
Ext.2/4 : Signature of P.W.4 on Ext.2/2
Ext.2/5 : Signature of P.W.5
Ext.2/6 : Signature of P.W.6
Ext.2/7 : Signature of P.W.7
Ext.2/8 : Signature of accused.
Ext.2/9 : Signature of P.W.8
Ext.3 : Signature of P.W.1

Ext.3/1 : Signature of P.W.2
 Ext.3/2 : Narcotic Drugs Chart.
 Ext.3/3 : Signature of P.W.3 on Ext.3/2
 Ext.3/4 : Signature of P.W.4 on Ext.3/2
 Ext.3/5 : Signature of P.W.5
 Ext.3/6 : Signature of P.W.6
 Ext.3/7 : Signature of P.W.7
 Ext.3/8 : Signature of accused.
 Ext.3/9 : Signature of P.W.8
 Ext.4 : Signature of P.W.1
 Ext.4/1 : Signature of P.W.2
 Ext.4/2 : Weighment Chart
 Ext.4/3 : Signature of P.W.3 on Ext.4/2
 Ext.4/4 : Signature of P.W.4 on Ext.4/2
 Ext.4/5 : Signature of P.W.5
 Ext.4/6 : Signature of P.W.6
 Ext.4/7 : Signature of P.W.7
 Ext.4/8 : Signature of accused.
 Ext.4/9 : Signature of P.W.8
 Ext.5 : Signature of P.W.1
 Ext.5/1 : Signature of P.W.2
 Ext.5/2 : Seizure list.
 Ext.5/3 : Signature of P.W.6
 Ext.5/4 : Signature of P.W.7
 Ext.5/5 : Signature of accused.
 Ext.5/6 : Signature of accused.
 Ext.6 : Signature of P.W.1
 Ext.6/1 : Signature of P.W.2
 Ext.6/2 : Seizure list.
 Ext.6/3 : Signature of P.W.6
 Ext.6/4 : Signature of P.W.7
 Ext.6/5 : Signature of accused.
 Ext.6/6 : Signature of accused.
 Ext.7 : Signature of P.W.1
 Ext.7/1 : Signature of P.W.2
 Ext.7/2 : Seizure list.
 Ext.7/3 : Signature of P.W.5 on Ext.7/2
 Ext.7/4 : Signature of P.W.6
 Ext.7/5 : Signature of P.W.7
 Ext.8 : Signature of P.W.1
 Ext.8/1 : Signature of P.W.2
 Ext.8/2 : Zimanama
 Ext.8/3 : Signature of P.W.5
 Ext.8/4 : Signature of P.W.7
 Ext.9 : Signature of P.W.1
 Ext.9/1 : Signature of P.W.2
 Ext.9/2 : Seizure list.
 Ext.9/3 : Signature of P.W.7

Ext.10 : Plain paper FIR
 Ext.10/1 : Signature of P.W.7
 Ext.10/2 : Signature of P.W.7
 Ext.10/3 : Formal FIR
 Ext.10/4 : Signature of P.W.7
 Ext.11 : Envelope containing sample sheet.
 Ext.12 : Spot map.
 Ext.12/1 : Signature of P.W.9
 Ext.13 : Copy of R.C. book
 Ext.14 : Seizure list.
 Ext.14/1 : Signature of P.W.9
 Ext.15 : Command certificate.
 Ext.16 : RFSL receipt.
 Ext.17 : Seizure list.
 Ext.17/1 : Signature of P.W.9
 Ext.18 : Full report.
 Ext.18/1 : Signature of P.W.7
 Ext.19 : Seizure list.
 Ext.19/1 : Signature of P.W.9
 Ext.20 : Zimanama.
 Ext.20/1 : Signature of P.W.9
 Ext.21 : Chemical Examination Report.
 Ext.22 : Mal Challan
 Ext.22/1 : Signature of P.W.9
 Ext.23 : Forwarding letter of SDJM, Malkangiri
 addressed to RFSL, Berhampur

List of exhibits marked for the Defence.

: Nil.

List of M.O.s marked for the Prosecution.

M.O.I : Sample packet

List of M.O.s marked for the Defence.

: Nil.

Sd/-
 Additional Sessions Judge-cum-
 Special Judge, Malkangiri