

(2018) 09 CHH CK 0246

**Chhattisgarh High Court****Case No:** Criminal Appeal (CRA) No. 361 Of 2015

Babli

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

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**Date of Decision:** Sept. 14, 2018**Acts Referred:**

- Narcotic Drugs And Psychotropic Substances Act, 1985 - Section 21(B), 42, 50

**Hon'ble Judges:** Rajendra Chandra Singh Samant, J**Bench:** Single Bench**Advocate:** Sunil Tripathi, Ashok Swarnakar**Final Decision:** Allowed

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**Judgement**

Rajendra Chandra Singh Samant, J

1. This appeal has been preferred against the judgment of conviction and order of sentence, passed by the learned Special Judge Â (N.D.P.S. Act),

Ambikapur, District - Sarguja (C.G.) in Special Criminal Case No.15/2013 on 18.02.2015 convicting the appellant for the offence under Section 21 (B)

of N.D.P.S. Act and sentencing her to under go R.I. for 10 years along with fine of Rs.50,000/- and in default of payment of fine, the appellant is

required to further under go R.I. for 1 year separately.

2. Facts of the case in brief is this that on 26.04.2013 at about 11.45 AM, A.S.I., Nirbhay Singh Rajput (P.W.-9) received confidential information that

the appellant is dealing with contraband brown sugar. As he had no time to obtain search warrant, hence, after sending requisite information to the

superior authority, he immediately proceeded to the spot with a team. On arriving on the spot, notice under Section 50 of the N.D.P.S. Act Ex.P.-21

was served upon the appellant and on her giving consent, she was searched by the woman constable Dolly Dos (P.W.-2) and in that search, a packet was found concealed in the clothes of the appellant. On opening the packet, the material present in it was identified as brown sugar, narcotics substance. After the procedure of weighment, sample seizure etc., FIR was lodged and after completion of investigation, charge-sheet has been filed before the concerned trial Court.

3. Appellant was charged with offence under Section 21 (B) of N.D.P.S. Act, 1985. The appellant denied the charges and prayed for trial. The prosecution examined as many as 9 witnesses on its behalf. On examining the appellant under Section 313, she denied all the incriminating evidence against her and pleaded innocence and false implication. No witness was examined in defence. On completion of trial, judgment has been delivered, in which the appellant stands convicted and sentenced as mentioned aforesaid.

4. It is submitted by the learned counsel appearing on behalf of the appellant that the trial Court has passed totally erroneous judgment of conviction without there being any basis of reliable and cogent evidence in support of the charge. The independent witness of search and seizure Ghanshyam Yadav (P.W.-4) and Shravan Dubey (P.W.-7) have not supported the case of the prosecution. The conviction is based upon only on the evidence of the investigation officer and the police witnesses. It is clear from the record of the trial Court that the provisions of Section 42 and 50 of the N.D.P.S.

Act have not been complied with. Secondly all the formats are typed copy with blanks, which were filled, which shows there had been no application of mind on the spot of search and seizure. Other than that the witnesses of search and seizure, who have been produced before the Court are pocket witnesses. It is submitted that there is legal question whether the constable is empowered to investigate the case under N.D.P.S. Act and secondly that after serving the notice to the appellant, the power of search was rightly delegated to another woman constable Dolly Das (P.W.-2). Hence, it is a case of non-compliance of the mandatory provisions of the N.D.P.S. Act. Because of lapses in investigation and unreliability of the prosecution witnesses, the appellant should have been acquitted by the trial Court. Hence, it is prayed that this appeal be allowed.

5. Counsel for the State opposes the grounds in appeal and the submissions made in this respect. It is submitted that the case against the appellant has been duly investigated by the persons authorized to investigate the same and for the specific reason that the appellant is a woman, she was searched by a woman constable and only for that reason, the result of search can not be discarded.

Although, the witnesses of search and seizure have not supported the case of the prosecution but the other witnesses present on the spot though belonging to police department, have clearly supported the case of the prosecution and it is not a rule to disbelieve the statement of the police witnesses only for the reason that they belongs to police department.

6. Counsel for the appellant has placed his reliance on the judgment of Supreme Court in case of Gorakh Nath Prasad Vs. State of Bihar (2018) 2

SCC 306 in which it was held that it will not safe to rely upon the testimony of the police witnesses alone and also for the reason that the FSL report

was negative regarding the contraband, the appellant was acquitted in that case. It is argued that in case of Arif Khan @ Agha Khan Vs. State of

Uttarakhand 2018 SAR (Criminal) 564, Hon'ble Supreme Court has held that the mandatory requirements of Section 50 of N.D.P.S. Act were not

complied with, because of that, the appellant was acquitted of the charge. Reliance has also been placed on the judgment of this Court in case of

Bholaram & Ors. Vs. State of C.G. 2018 (2) C.G.L.J. 344 (DB) in which it was held that first informant police officer has himself assumed the role

of investigation officer and also other finding has been given that Section 50 and 42 of the N.D.P.S. Act are complied with and also on the ground of

other lapses in investigation, the appellant/accused in that case was acquitted.

7. I have heard the learned counsel for the parties and perused the record of the Court below.

8. The main witness in this case is Inspector, Nirbhay Singh Rajput (P.W.-9), has stated before the Court that he has received confidential information

and has prepared panchnama of confidential information Ex.P-1 and one information was immediately dispatched to the office of CSP, Ambikapur.

As he had no time to get search warrant, he proceeded to the spot along with a team with preparation. He found the appellant sitting near pond. She

was immediately informed that she would be searched and after serving her a notice under Section 50 of N.D.P.S. Act vide Ex.- P-21, the consent of

the appellant was obtained vide Ex.P-6 in presence of two witnesses. Prior to making search of the appellant, all the members of the team were

searched by the appellant and the result was negative, regarding which panchnama was recorded vide Ex.P-7, P-8 and Ex.P-9. It is further stated that

women constable Dolly Das (P.W.-2) searched the person of the appellant and found that she had kept in concealment under her Sari, a white

polythene packet, which was taken out. On opening the packet, it was found that it contained brown sugar regarding, which panchnama Ex.P-10 was

prepared on the spot. Weighment procedure was done vide Ex.P-11 and Ex.P-12 and the weight of the brown sugar was found to be of 6 grams. The

contraband was kept in a packet and the packet was sealed vide Ex.P-13 and the same was seized vide Ex.P-14. Subsequent to that FIR was lodged

by him vide Ex.P-22. Seized contraband was kept in security of the Malkhana vide Ex.P- 17 and then he also recorded the statement of the witnesses.

In the cross-examination, he has denied all the adverse suggestion given to him by the defence. He has denied that the appellant has been falsely

implicated in this case. Otherwise on perusal of the statement, there appears to be no omission or statement to contradict his statement made in

examination-in-chief.

9. The independent witnesses of search and seizure Ghanshyam Yadav (P.W.-4) and Shravan Dubey (P.W.-7) have not supported the case of the

prosecution because of which, they have declared hostile by the prosecutor. Hence, the statement of Nirbhay Singh Rajput (P.W.-9) does not finds

support from the statement of these witnesses.

10. Constable Dolly Das (P.W.-2) was a member of the team.

Subsequent to the consent given by the appellant, she made a search of the person of the appellant and found brown sugar vide Ex.P-10. Her

statement has remained un-rebutted in the cross- examination. Another witness constable Deendayal Singh (P.W.-8), who had accompanied with

inspector Nirbhay Singh Rajput (P.W.-9) to the spot has stated that in the raid conducted, the appellant was found sitting on the spot and thereafter,

the appellant was searched by constable Dolly Das (P.W.-2) and in that search, one packet of brown sugar was found. His statement has also remained un- rebutted in his cross-examination.

11. Other witnesses examined are the witnesses of investigative procedure. Rangrao (P.W.-3) is the person who has done weighment procedure of

the contraband he has partly supported the prosecution case. Head Constable Isdor Ekka (P.W.-5) has stated that, he received the seized article from

the Inspector, Nirbhay Singh Rajput (P.W.-9) regarding which he made an entry in the Malkhana register and later on he had handed over the seized

articles for FSL examination to constable Nirmal Xalxo (P.W.-6). His statement has remained un-rebutted in his cross-examination. Nirmal Xalxo

(P.W.-6) has stated that, he was the messenger and had produced the article before the FSL laboratory in Raipur. According to FSL report Ex.P-28,

the content of seized article were found Diacetyl Morphine, which is known as brown sugar.

12. There is no denial on the part of the appellant that she had not put her signatures on the various panchnama recorded at the time of the procedure

and it has been clearly proved by Nirbhay Singh Rajput (P.W.-9) that appellant was the person who has put her signatures in all the panchnamas in his

presence. Notice Ex.P-21 is specific to show that Section 50 of the N.D.P.S. Act has been complied with and the appellant was informed that she

had option to get searched in presence of a Magistrate or any Gazetted Officer, even then, she gave consent to be searched by the women constable.

This remark is entered in the document Ex.P-10 and other. Her consent panchnama Ex.P-6 was separately recorded, in which the appellant has put

her signature. No question has been raised in the evidence or in the arguments regarding the search of the member of the raiding party and the result

of search of the appellant was recovery of packet of brown sugar has been stated clearly by the Investigation Officer, Nirbhay Singh Rajput (P.W.-9),

Dolly Das (P.W.-2) and constable Deendayal Singh (P.W.-8).

13. Compliance of Section 42 of N.D.P.S. Act appears to have been made by Investigation Officer Nirbhay Singh Rajput (P.W.-9), regarding which

information in proforma was sent to the superior officer vide Ex.P-1 and P-2 on the date of incident and the same was received in the office of CSP,

Ambikapur on 12.20 afternoon. Alijan Toppo (P.W.-1) has supported this statement of Investigation Officer Nirbhay Singh Rajput (P.W.-9) and has

stated that he was the person, who received the information Ex.P-2. This shows that requirement of Section 42 of N.D.P.S. Act has also been

complied with and for the reasons that time of raid on the spot was about 1.00 PM in the afternoon, clearly it appears that there had not been

sufficient time for the investigation officer, Nirbhay Singh Rajput (P.W.-9) to wait for obtaining search warrant in this case. It is not a case, in which

the investigation has been done by some constable. In this case, investigation has been done by the inspector, Nirbhay Singh Rajput (P.W.-9), who

was the Sub-Inspector at the time of the investigation, which fulfills the requirements of Section 42 of the N.D.P.S. Act.

14. Although it is a principle that in case, police officer making search and seizure and lodges FIR himself and then also investigates the case, then his

evidence is not considered to be safe to rely upon. This does not mean his statement has to be discarded in totality. If there is support of other

evidence oral or circumstantial, in that case, the evidence of the police officer can also be relied upon and made the basis of conviction. It is not a rule

that any police witness is to be disbelieved out rightly, in case the evidence of such police witness inspire confidence of the Court, then the Court can

hold conviction of the accused on the basis of such evidence, as it has been held in case of Baldev Singh Vs. State of Haryana Â 2016 Cr.L.J. 154 by

the Hon'ble Supreme Court.

15. In this case, nothing has been established in defence that the Investigation Officer (P.W.-9) nor other police witnesses had any personal interest

against the appellant and there are circumstances that the appellant has put her signatures on each and every documents, which were recorded on the

spot, shows her presence and participation in the proceedings, which is a strong corroborative circumstances against her. Hence for these reasons, I

am of this view that the prosecution has proved its case beyond all reasonable doubt. Hence, on this basis, the conviction of the appellant under

Section 21 (B) of the Narcotics Drugs and Psychotropic Substance Act, 1985 is upheld.

16. It has been prayed in the alternative that the sentence of imprisonment and fine that has been imposed upon the appellant is too harsh, for the reasons that the appellant does not have any criminal antecedents and she is a woman, hence, this Court may be pleased to reduce the sentence and the fine amount imposed upon her.

17. The appellant was in jail for a period of 2 months and 21 days during the period of trial and subsequent to the order of conviction dated

18.02.2015, she is in jail till date, which amounts to be in total 4 ½ of about 3 years and more than 8 months in jail.

18. After due consideration on all the facts and circumstances of the case, I am of this view that it is a fit case to allow the prayer of reduction in

sentence. Accordingly, the appeal is allowed in part. The conviction of the appellant under Section 21 (B) of the N.D.P.S. Act is upheld and for the

reasons aforementioned, it has appeared that the appellant has sufficiently undergone the sentence of imprisonment for about 3 years and more than 8

months, hence, she is sentenced with the period of her detention in jail already undergone and the fine is also reduced to Rs.20,000/-. In case of

default of payment of fine, the appellant shall be required to further under go for a period of four months rigorous imprisonment. The appellant is

reported to be in jail, she be set at liberty forthwith, if not required in any other case.