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**(2001) 01 AP CK 0007**

**Andhra Pradesh High Court**

**Case No:** Criminal Appeal No. 1185 of 2000

Pothireddi Sivaprasada Rao

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

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**Date of Decision:** Jan. 30, 2001

**Acts Referred:**

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20, 41, 42, 50, 8

**Citation:** (2001) 76 ECC 760 : (2001) 3 RCR(Criminal) 245

**Hon'ble Judges:** Vaman Rao, J

**Bench:** Single Bench

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**Judgement**

Vaman Rao, J.

This appeal is directed against the Judgment of the Special Judge to try the cases under the Narcotic Drugs and Psychotropic Substances Act-cum-Additional District and Sessions Judge at Srikakulam dated 26.6.2000 rendered in S.C. No. 1 of 1998, under which the appellant-accused has been convicted for an offence under Section 20(b)(i) read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (for short "the Act") and sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 2000.00 and in default to undergo rigorous imprisonment for four months.

2. The case of the prosecution may be stated, briefly, as follows: On 3.9.1995 at about 5.00 a.m., PW-4, Ch. Jaganmohan the then Prohibition and Excise Inspector of Pathapatnam, in charge of Vasundhara check-post along with his staff, stopped the Orissa State Transport Corporation bus bearing registration No. O.R. 05/4046 plying from Malkanagiri to Berhampuram and checked it at the check-post in the presence of mediators. PWs. 1 & 2, who were the driver and conductor of the bus respectively and PW-3. G. Krishna Rao, Deputy Tahsildar and another. According to PW-4, he informed the driver and conductor of the bus that he would check the bus in question. Then he checked the bus in the presence of the above mediators. During

that check, they checked the luggage of the passengers one after another and went to seat No. 16, on which the accused was sitting. He was asked to show his luggage, Initially, he kept quiet. When persisted, he brought down the suit case, which was kept on the luggage carrier above his seat. When the suit case was opened, they found 10 kgs., of Ganja packed in polythene cover. In that suit case there was a blue zip bag, also. The zip bag (MO-4), which was found by the side of the Polythene bag (MO-2) containing ganja, had three demand drafts totalling for a sum of Rs. 72,376.00 and cash of Rs. 18,470.00. On questioning, the accused revealed his identity. He also stated that he went to retail medical shops for collecting the dues on behalf of Padma Pharmaceutical Agencies. Berahampur and he was proceeding to Berhampur after collecting the money. The accused has also stated that he took the demand drafts from State Bank of India, Jeypore and another demand draft was given to him by Kalyani Medical Stores, Malakanagiri to hand over it to Meenakshi Medical Agencies, Berahampur. The accused is stated to have admitted that he purchased Ganja for Rs. 2,000.00 at Malkanagiri and was taking it to Berahampur, The bus ticket of the accused was also seized,

3. PW-4, the Prohibition and Excise Inspector, then took three samples from the ganja found in the polythene bag. He sealed both the ganja samples and the ganja packet and affixed the slips of Identification on those objects and also on the zip bag and the suit case. Thus, he seized the suit case, MO-1: polythene bag containing ganja, MO-2, blue zip bag, MO-4, the currency notes MO-5, and the demand drafts and also the ganja from which samples were taken. He arrested the accused. The above property was seized and the arrest of the accused was shown in the Mediators report, Ex. P-5, drafted by him. Himself and the mediators signed Ex. P-5. The accused has also signed on Ex. P-5. Thereafter, P.W. 5 handed over the accused and the property seized by him, along with the mediators report, the demand drafts, the currency notes and the bus ticket to the Prohibition and Excise Inspector, Pathapatnam, PW-5, who on return to the station registered a case in P.R. No. 290/94-95 u/s 20(b) of the Narcotic Drugs and Psychotropic Substances Act, on the basis of Ex. P-5 and original FIR is EX. P-6. He forwarded the accused along with the remand report to the Judicial Magistrate of First Class, Pathapatnam. He also sent the sample packets to the Chemical Examiner of Excise, Visakhapatnam along with a letter of advice, carbon copy of which is Ex P-7. The report of the analyst in respect of the samples, Ex. P-8, was received by him. Subsequently PW-6, who succeeded PW-5 filed the charge-sheet in the case after completion of the investigation.

4. It may be mentioned that PWs. 1 & 2, who are the driver and conductor of the bus, who acted as mediators did not support the prosecution version. The prosecution relied on the evidence of PW-4, the Prohibition and Excise Inspector, who conducted the search and the evidence of PW-3, G. Krishna Rao, the Mandal Revenue Officer, the then Special Deputy Tahsildar, Vasundara Check post. PW-3 has corroborated the version of PW-4 as to the search of the vehicle and the suit case of the accused and finding of ganja in the said suit case, as narrated by PW-4 as seen

above.

5. The learned Counsel for the appellant/accused seeks to challenge this Judgment on various grounds. It is firstly submitted that in this case the mandatory provisions of Sections 42 and 50 of the Act have not been complied with and as such the whole trial of the case has been vitiated. In support of his contention, learned Counsel relied on the judgment of the Supreme Court in *State of Punjab v. Balbir Singh* 1994 SCC 634. The Supreme Court in the said judgment has held that Section 41(2) contemplates that only empowered officers or duly authorized officers, as nominated in Sections 41(2) and 41(1) of the Act, can conduct the search. "If any search or seizure were made under the provisions of the Act by any one other than such officers, the same would be illegal.

6. In this case, the competence of P.W.4, in terms of the provisions of Section 41(2) of the Act to conduct search and seizure is not challenged. The learned Counsel for the appellant, however, submits that the provisions of the proviso to Section 42 have been violated. The submission is that, admittedly, the search of the vehicle in question was undertaken by PW-4, the Prohibition and Excise Inspector, without obtaining a warrant and was conducted between the sun-set and sun rise. The contention is that he has not recorded the grounds of his belief for that search and seizure without obtaining a warrant, that it would afford an opportunity for concealment of the contraband material or facilitate the escape of the offender. It is further contended that in this case there is no other material to show that the officer has taken down the information in writing and that he sent a copy of such information to his immediate superior official, as contemplated u/s 42(2) of the Act. It is further contended that in this case the evidence of the prosecution discloses that the search of the vehicle in which the contraband material was seized was undertaken on the basis of the information, but, as contemplated u/s 42(1) of the Act that information was not reduced into writing. Thus, it is contended that in view of this violation of the mandatory provision of Section 42, the search, itself, is illegal and accordingly the trial is vitiated. It may, however, be seen that for application of Section 42, it is necessary to show that the search and seizure was undertaken either on the basis of prior information or on the basis of the personal knowledge of the officer concerned. This is not a case, where personal knowledge has been attributed to the officer concerned. The real question is whether the seizure and search was conducted on the basis of prior information given by any person to the searching officer.

7. The learned Counsel for the appellant with reference to the evidence of PW-4, who conducted search, points out that PW 4, in his cross-examination admitted that on 2.9.1995, he had information that some persons would be transporting ganja in a bus on 3.9.1995. The information was oral. The learned Counsel refers to the admission made by PW-3, in his cross-examination, that information was received in advance by PW-4, who was on duty at the same check-post at 1.00 O'clock during

the intervening night of 2/3.9.1995. He also stated that the information was not received in writing.

8. It may be pointed out that PW-4 is a Prohibition and Excise Inspector attending to the duties at the check-post, which was a combined check post of Revenue and Excise Officers. As an officer, on duty, at the check post, it is his duty to check the vehicles passing through the check post. In his examination-in-chief, PW-4 stated that he told PW-1, who was the conductor of the bus that he would check the bus as there was information regarding the illegal transport of ganja, IML etc., in the said bus. Even in the admission on which the learned Counsel for the appellant relies, PW-4 stated that he Had information that some persons would be transporting ganja, IML and ID liquor on 3.9.1995. This so-called information was not given by any specific person. The said information did not mention that any specific person was going to transport the contraband-material. Further the information did not specify that the illegal transport of contraband material would be undertaken in a particular bus plying on that road. Thus, the so-called information, in fact, cannot be considered as a prior information contemplated u/s 42 of the Act for holding that the provisions of Section 42 of the Act would be applicable.

9. As to the alleged violation of the provisions of Section 50 of the Act, it may be mentioned that the provisions of Section 50 would come into play only where the provisions of Section 42 would apply. Further, Section 50 would apply to the search of a person and not a conveyance or a vehicle. As seen above, when Section 42 is not applicable, the question of violation of Section 50 would not arise. Further in the judgment of the Supreme Court in Balbir Singh's case (cited supra) it has been held that in the normal course of investigation if there is recovery under the NDPS Act the Enquiry Officer from such stage shall carry out investigation as per the provisions of the NDPS Act and that Section 50 of the Act would not be applicable to such search. In this case, as noted above RW.4 was an officer deputed on duty at the check post and as an officer at the check post it was his routine duty to check the vehicle passing through that check post and what has been found from the accused was during one of the routine searches carried out by the Officer at the check post. Section 50 of the Act cannot be said to apply to such searches. There is no ground for holding that the provisions of Sections 42 and 50 have been violated in conducting the search in this case. The learned Counsel for the appellant also relied on the judgment of the five members Bench of the Supreme Court in the case of [State of Punjab Vs. Baldev Singh, etc. etc.](#), wherein it has been observed that whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Though in the Balbir Singh's case the Supreme Court held that non-compliance with the provisions of Section 42 or Section 50 would vitiate the trial in the latter judgment of the five member Bench the Supreme Court in Baldev Singh's case (cited supra) did not express any opinion whether the provisions of Section 50 are mandatory or directory but however held that failure to inform the concerned of his

right as emanating from Sub-section (1) of Section 50 may render the recovery of contraband suspect and the conviction and sentence of an accused would be bad and unsustainable in law. These observations were based on finding of fact that there has been violation of Section 50 of the N.D.P.S. Act. In this case, as stated above, there is no basis for holding that the provisions of Section 42 or 50 have been infringed. The question of trial being vitiated on that ground or recovery being suspect therefore would not arise.

10. The next contention of the learned Counsel for the appellant is that inasmuch as the mediators for the search P.Ws. 1 and 2 have not supported the prosecution case, the evidence of RW.4 who is an interested witness being Excise Officer who conducted search cannot be believed. It may however, be noted that the evidence of P.W. 4 the Excise Officer is amply corroborated by the evidence of the Deputy Tahsildar RW.3. The evidence of these witnesses would show that the accused was travelling in the bus, which was searched by RW.4 that a suitcase was found in the luggage carriage over the seat of the accused. Though at first the accused denied later he admitted that suitcase belongs to him and on opening the suitcase the illicit material namely bag of ganja was found in it. Apart from corroborating evidence of RW.3, there is some intrinsic material in this case, which lends assurance to the prosecution version that the contraband material was seized from the accused. It is pertinent to mention here that the suitcase from which the polythene bag containing ganja was seized, also contained a zip bag containing demand drafts worth rupees more than seventy two thousand and case in currencies more than eighteen thousand rupees. Admittedly, two of the demand drafts were obtained by the accused being the collections made by him for passing on to his employer towards price of cloth purchased by the dealers. The other demand draft was said to have been given by a friend of the accused to him for passing on to Meenakshi Traders the employer of his friend. The finding of the demand drafts and huge cash claimed by the accused to be the collections from the dealers would establish a nexus between these articles and the polythene bag containing ganja inasmuch as according to P.Ws. 3 and 4 both these articles were recovered from the same suit case. This circumstance affords intrinsic assurance of the oral evidence of P.Ws. 3 and 4. It is difficult to conceive that P.W. 4 would have planted these materials on the accused. It is difficult to believe that P.W. 4 would take risk of planting huge amount of cash for the purpose of foisting the case against the accused. Further, the demand drafts have a specific identity, which could not be created and planted by the Excise Inspector RW.4. The plea of the accused is not that these demand draft do not belong to him. His plea is that the zip bag in which these articles were kept was lying separately with him and was not in the suitcase. This version cannot be accepted in the face of positive evidence of P.Ws. 3 and 4 that this zip bag was also found in the suit case in which polythene bag containing ganja was found, Even the evidence of P.Ws. 1 and 2 who have been permitted to be cross examined would corroborate the version of P.Ws. 3 and 4 that the bus in question in which the

accused was travelling was stopped at the check post and was subjected to search.

11. Considering these circumstances the finding of the learned Special Judge that the accused was found in possession of ganja must be held to have been based on credible and adequate evidence. In view of this there are no merits in the appeal and the recording of conviction u/s 20(1) of the N.D.P.S. Act does not deserve to be interfered with.

12. As to the sentence the appellant was sentenced to undergo imprisonment for one year. The learned Counsel for the appellant pleads that even according to the prosecution version the appellant was an employee of a cloth merchant and was not a professional dealer in Narcotic Drugs. Considering these circumstances and considering the fact that a small quantity of ganja that was said to have been recovered from the possession of the accused I think the ends of justice would be met if the sentence of imprisonment is reduced to the extent he has already undergone. With this modification in the sentence the appeal is dismissed. In view of this the appellant shall be released forthwith from jail if not required in any other case.