



THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No.458 of 2009

(In the matter of an application under Section 374(2) of the Criminal Procedure Code, 1973)

Jagannath Panigrahi ***Appellant***

-Versus-

State of Orissa ***Respondent***

For the Appellant : Mr. Sanjay Kumar Pradhan, Advocate

For the Respondent : Ms. Sarita Moharana, ASC

CORAM:

THE HONOURABLE SHRI JUSTICE SIBO SANKAR MISHRA

Date of Hearing: 03.02.2026 :: Date of Judgment: 19.02.2026

S.S. Mishra, J. The present Criminal Appeal, filed by the appellant is directed against the judgment and order dated 30.10.2009 passed by the learned 2nd Additional Sessions Judge, Berhampur in 2(a) C.C. No.6 of 2008(N), whereby the appellant has been convicted for the offence under Section 20(b)(ii)(B) of the N.D.P.S. Act and on that count, he is sentenced to undergo R.I. for five years and to pay a fine



of Rs.50,000/- (rupees fifty thousand), in default, to undergo further R.I. for one year.

2. Heard Mr. Sanjay Kumar Pradhan, learned counsel appearing for the appellant and Ms. Sarita Moharana, learned Additional Standing Counsel for the State.

3. The prosecution case, in brief, is that on 16.04.2008 at about 7.30 A.M., while K.K. Rao, I.I.C., E.I. & E.B., Berhampur, was performing patrol duty in the Utkal Ashram Road area of Berhampur Town along with his staff, he noticed the accused Jagannath Panigrahi moving suspiciously near the Ganjam Kala Parisada Gate, carrying a *Jari* bag in his hand. Entertaining suspicion, the Sub-Inspector of Excise detained the accused and called an independent witness, namely Tuna Nayak. After observing the procedural formalities, a search was conducted, during which 5 Kg. 500 grams of Ganja was recovered from the *Jari* bag in possession of the accused.

After testing the seized contraband, the excise officer collected two representative samples of 50 grams each, which were duly packed and sealed, and the remaining bulk quantity of Ganja was also



sealed separately by affixing his personal brass seal. A seizure list was prepared at the spot and a copy thereof was supplied to the accused. Thereafter, the accused was arrested and produced along with the seized articles before the learned Special Judge, Berhampur on the same day.

Pursuant to the direction of the learned Special Judge, one of the sample packets was forwarded to S.D.T.R.L., Bhubaneswar for chemical examination through the learned S.D.J.M., Berhampur, along with the requisite forwarding letter. The chemical examination report was received directly by the Court. During course of investigation, the excise officer examined the accused and the independent witnesses, thereafter submitted a detailed report of search and seizure to his immediate superior, and upon completion of investigation, laid the prosecution report against the accused for the offence punishable under Section 20(b)(ii)(B) of the N.D.P.S. Act. Hence, the prosecution case.

4. In order to substantiate the charges against the accused persons, the prosecution examined only two witnesses, and both are the



official witnesses, P.W.1, the Constable of Excise and PW.2 is the Investigating Officer.

5. The plea of the accused is one of total denial and complete ignorance of the alleged occurrence. He has pleaded not guilty and has claimed to be tried. His specific defence is that while he was sitting near the hotel shop of his sister, the Excise staff forcibly apprehended him by dragging him away, obtained his signatures on various papers, and falsely implicated him in the present case. According to him, no Ganja was seized from his possession and he was subsequently forwarded to the Court on a fabricated allegation. Accordingly, he faced trial.

6. The learned trial Court, placing substantial reliance on the testimony of the official witnesses, and other exhibits placed on record arrived at the conclusion that the accused-appellant was in conscious possession of contraband ganja and observed as follows:

“12. Thus, from the entire discussion made above, I find that the seizure of M.O.I and M.O.II from out of the exclusive and conscious possession of the accused has been duly proved by the prosecution beyond all reasonable doubt.

As per the evidence of P.W.2, he collected two samples of Ganja from out of the Ganja contained inside the bag (M.O. I) which was seized from out of the exclusive and conscious possession of the accused, one of these two packets was sent to the



S. D.T.R.L., Bhubaneswar under forwarding letter of the S.D.J.M., Berhampur for chemical examination. The said forwarding letter is marked Ext.5. Accordingly the C. E report is directly received in the Court which is marked Ext. 6. On perusal of the said C. E. Report, I find that on chemical examination the sample is found to be Ganja as defined u/s.2(iii)(b) of the N.D.P.S. Act, 1985. This proves beyond doubt that the contents of the seized bag (M.O.I) is nothing but Ganja. On demand by the Excise Officer, the accused failed to produce any authority in support of his possessing and transporting such Ganja and therefore he is liable to be punished under the Act. The total quantity of Ganja seized in this case is 5 Kg.500 Grams which is below the commercial quantity but above the small quantity and as such the accused is liable to be punished us. 20(b)(ii) (B) of N.D.P.S. Act.”

Further, it can also be mentioned that the learned trial Court, while examining the issue of compliance with the mandatory provisions under Section 50 of the NDPS Act, held that the statutory requirements had been duly complied with. It's held that the Section 50 is as mandate only in the case of personal search and not when the search is from a bag or container or vehicle or premises, accordingly, found the accused persons guilty of the charge. The Court has observed thus:

“11.The learned defence counsel further argues that in the instant case, there is violation of mandatory provision of Sec.50 of N.D.P.S. Act which entitles the accused to get an order of acquittal. In this regard, Law is too well settled that the provision of Sec. 50 of the N. D. P. S. Act applies only in case of personal search of a person and it does not extend to search of a vehicle or a container or a bag or premises as has been held in the case of State of Haryana Vrs.. Mai Ram reported in (2008) 8 S.C.C. 292. The position of law in this regard is settled beyond doubt by the



Constitution Bench of the Hon'ble Apex Court in the land mark Judgment in the case of State of Punjab. Vrs.. Baldev Singh."

7. Aggrieved by the aforementioned Judgement of conviction and order of sentence, the present appeal has been filed by the sole appellant.

8. Mr. Pradhan, learned counsel appearing on behalf of the appellant, submitted that the judgment of the learned trial court is perverse and contrary to law. He contended that the sole independent witness to the search and seizure has not been examined by the prosecution, thereby casting serious doubt on the fairness of the investigation. It was further argued that the accused was not searched in the presence of a Magistrate or a Gazetted Officer, as mandated under Section 50 of the NDPS Act. Learned counsel also submitted that, as per the prescribed procedure, two independent witnesses ought to have been associated with the search and seizure in accordance with Section 50 (5) of N.D.P.S. Act r/w. Section 100 of Cr.P.C., whereas only one such witness was cited in the present case, who is not even examined. According to him, the procedural safeguards envisaged under Section 50 of the Act have not been complied with in its true spirit. In view of such non-compliance, it



was urged that the appeal deserves to be allowed and the impugned judgment is liable to be set aside, as the entire prosecution is vitiated.

9. Per contra, learned Additional Standing Counsel for the State submitted that all mandatory procedural safeguards have been duly complied with. It was contended that the I.I.C., E.I. & E.B., Berhampur, who was the Investigating Officer of the case, had obtained written consent from the accused-appellant expressing his willingness to be searched by the Investigating Officer himself, and that he did not insist upon being searched in the presence of a Magistrate or a Gazetted Officer. Therefore, according to the State, there has been no violation of Section 50 of the NDPS Act, and the conviction recorded by the learned trial court warrants no interference.

10. At this juncture, it would be apposite to examine the evidence of P.W.2, the Investigating Officer of the case, who, inter alia, deposed as follows:

“On 16.4.08 I was working as I. I. C., E.I & E.B., Berhampur. On that day, while I along with my staff were performing patrol duty in Utkal Asharam Road, Berhampur at that time near Ganjam Kalaparisa gate, I found the accused Jagannath Panigrahi moving



suspiciously on the road with a 'Jari' bag in his hand. Therefore, I detained him and by disclosing my identification, asked him regarding the contents of the bag. He disclosed that the bag contains Ganja. Thereafter I called one independent witness namely Tuna Naik and gave written option to the accused whether he wants to be searched before a Gazetted Officer or nearest Magistrate. The said option requisition is marked Ext. 3 in which Ext. 3/1 is my signature and Ext. 3/2 is the signature of the accused Jagannath Panigrahi in token receipt of the same. Accordingly, the accused gave written option to the effect that he has got no objection if he is searched by me. The said written option of the accused is marked Ext.4 in which Ext. 4/1 is the signature of the accused. Then by observing the formalities of search, I searched the accused and recovered the said 'Jari' bag from him opened it and found Ganja in it..."

A careful reading of the testimony of the Investigating Officer, coupled with the documentary exhibits marked Exts. 3 and 4, indicates that a written option was indeed furnished to the accused apprising him of his right to be searched in the presence of a Gazetted Officer or a Magistrate, and that the accused, by written endorsement, expressed his willingness to be searched by the Investigating Officer himself. Thus, prima facie, the requirement of informing the accused of his right under Section 50 of the NDPS Act appears to have been complied with.

11. However, it is also evident from the deposition of P.W.2 that only one independent witness was called to remain as a witness to the search and seizure. The prosecution has neither associated at least two



independent and respectable inhabitants of the locality, as contemplated under law, nor examined the sole independent witness cited in the search and seizure.

In this context, it becomes necessary to advert to Section 50(5) of the NDPS Act read with Section 100(4) of the Code of Criminal Procedure, which underscore the importance of associating independent witnesses in the process of search. The relevant provisions are reproduced herein for ready reference:

“NDPS Act - 50. Conditions under which search of persons shall be conducted:

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(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

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“Cr.P.C Section – 100. Persons in charge of closed place to allow search:-

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(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be



searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

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12. At this point, when the aforesaid provisions are read conjointly, it is manifest that the statute envisages the presence of at least two independent and respectable witnesses during the search and seizure. In the present case, the non-association of minimum two such witnesses and the failure of the prosecution to examine even the sole independent witness cited cast a serious doubt on the fairness and transparency of the search procedure. The procedural safeguards being mandatory in nature, their non-compliance vitiates the entire prosecution case and entitles the accused to the benefit of doubt.

In this context, it is apposite to refer to the decision of the Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja v. State of Gujarat*¹, wherein the scope and effect of sub-sections (5) and (6) of Section 50 of the NDPS Act were elaborately considered. The Hon'ble Apex Court observed as follows:

¹ (2011) 1 SCC 609



“26. The object and the effect of insertion of sub-sections (5) and (6) were considered by a Constitution Bench of this Court, of which one of us (D.K. Jain, J.) was a member, in Karnail Singh v. State of Haryana [(2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] . Although in the said decision the Court did observe that by virtue of insertion of sub-sections (5) and (6), the mandate given in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] is diluted but the Court also opined that it cannot be said that by the said insertion, the protection or safeguards given to the suspect have been taken away completely. The Court observed: (Karnail Singh case [(2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] , SCC p. 553, para 31)

“31. ... Through this amendment the strict procedural requirement as mandated by Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] was avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance with Section 50 by Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] is diluted.”

*27. It can, thus, be seen that apart from the fact that in Karnail Singh [(2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] , the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] insofar as the obligation of the empowered officer to inform the suspect of his right enshrined in sub-section (1) of Section 50 of the NDPS Act is concerned. **It is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, sub-section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorised officer to***



send a copy of the reasons recorded by him for his belief in terms of sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.”

Thereafter, in its authoritative pronouncement, the Hon'ble Supreme Court laid down as follows:-

29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

30. As observed in Presidential Poll, In re [(1974) 2 SCC 33] : (SCC p. 49, para 13)

“13. ... It is the duty of the courts to get at the real intention of the legislature by carefully attending [to] the whole scope of the provision to be construed. ‘The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole.’ ”

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32. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire



proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.”

The aforesaid enunciation of law unequivocally reiterates that compliance with Section 50 of the NDPS Act is not a mere formality but a mandatory obligation. The safeguard is intended to ensure fairness and to prevent misuse of power, and any deviation therefrom renders the recovery itself doubtful.

Similar view was taken by this Court in, *Narayan Sahu v. State of Orissa*² by relying upon its earlier pronouncement in *Kanduri Charan Mohanty vrs. State of Orissa*³ and has held thus:

*“13. I have taken into consideration all the evidences in toto and also given a careful thought to the contention raised by the parties and the judgment cited at the Bar. I am of the opinion that in a case of the present nature where a special stringent offence is alleged against the accused-appellant, the statutory procedural safeguard needs to be scrupulously followed. However, the evidence of P.W.1, the only witness in this case, not inspiring confidence regarding the fairness of the investigation and compliance of the statutory provisions particularly provisions under Section 42 and 50 of the N.D.P.S. Act. With regard to this, reliance can be placed upon the judgment of this Court in the case of *Kanduri Charan Mohanty vrs. State of Orissa* reported in (2003) 24 OCR 3, wherein this Court noticing the lacuna in following the procedural safeguards, acquitted the accused giving*

² CRA 228 of 1999

³ (2003) 24 OCR 3



him the benefit of doubt for the offence in similar nature. Therefore, the imperative conclusion would be to extend the benefit of doubt to the appellant.”

13. The learned Trial Court placed reliance upon the decision of the Hon'ble Apex Court in *State of Haryana Vrs. Mai Ram*,⁴ wherein it was held that personal search pertains only to the search of a person and not to “*premises, vehicles or articles*”. However, in the present case, even the mandatory requirements envisaged under Section 100 of the Cr.P.C. have not been complied with in their true letter and spirit, thereby rendering the search procedure legally infirm and vitiating the prosecution case.

14. In view of the precedent and regard being had to the lapses in adherence to the mandatory procedural safeguards provided to the accused under the statutes, this Court is of the considered opinion that the prosecution has failed to establish its case beyond reasonable doubt. The benefit of such doubt must necessarily enure to the accused.

⁴ (2008) 8 SCC 292



Hence, the judgment of conviction and order of sentence passed by the learned trial court are hereby set aside. The accused is acquitted of all the charges levelled against him. His bail bonds stand discharged.

15. Accordingly, the CRLA is allowed.

(S.S. Mishra)
Judge

The High Court of Orissa, Cuttack
Dated 19th of February, 2026/ Subhasis Mohanty