

2023 PLRonline 0007

Narcotic Drugs and Psychotropic Substances Act, 1985 and its implications on search and seizure procedures.

1. *Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 applies only when there is a search of a person.*
2. *Finding the source of Narcotic Drugs is an important investigative effort, but failure to find out the source of procurement by itself is of no consequence in a trial.*
3. *The prosecution's failure to state where the accused procured the drugs does not necessarily mean the case should be disbelieved.*
4. *It is up to the investigating agency to collect the best evidence, and it may be difficult to secure the presence of passengers of a bus for their evidence in trial. Conductor/ driver best witnesses.*

Andhra Pradesh High Court - Amaravati

Dr. V R K Krupa Sagar, J

Edala Nooka Naidu v. State Of Ap Rep By Its Pp Hyd.

Criminal Appeal No. 958 Of 2010

03-04-2023

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8(c), Section 20(b)(ii)(C), Section 50, Section 52, Section 57 - CrPC S. 313, S. 374(2)

Narcotic Drugs And Psychotropic Substances Act, 1985 S. 50 - Recovery from luggage - A perusal of this provision shows that as and when search of a person was to take place the officers should inform the suspects or the accused that they were entitled to be searched before a Gazetted Officer or Magistrate - It is important to note that this provision operates only when there is a search of a person, which means search of the very body of the accused - In the case at hand, there was no personal search - Nothing was seized from the hands of accused or from the pant packets or from their body parts - The seizure was made from the luggage box of the APSRTC bus - Therefore, it is clear that there was no personal search - When there was no personal search, Section 50 does not operate. *State of Punjab v. Baldev Singh, 1999 (6) SC 172, relied. [Para 20]*

Narcotic Drugs And Psychotropic Substances Act, 1985 S. 52 , 57 - Report submitted by Pw.5 to his immediate official superior within 24 hours which means well within the time provided by Section 52 of NDPS Act - The arrested

individuals were also produced before the Court without any delay - While there is full compliance of Section 52 and 57 one may also notice that any infraction of any of these provisions do not ipso facto effect the trial or conviction. *Gurbax Singh v. State of Haryana 2001 (3) SCC 28. Relied.* [Para 20]

Narcotic Drugs And Psychotropic Substances Act, 1985 - Source - Plea that where from the accused procured this ganja is not stated by the prosecution and therefore the case of the prosecution shall be dis-believed - There is no merit in this contention - While it is true, finding the source of Narcotic Drugs is an important investigative effort but failure to find out the source of procurement by itself is of no consequence in a trial held against the accused. [Para 21]

Narcotic Drugs And Psychotropic Substances Act, 1985 - Non joining of witnesses - Recovery from luggage box of bus - Driver conductor joined as witnesses - Passengers of bus not joined as witnesses - Contentions that while according to both the witnesses 22 passengers were travelling in the bus, the Excise Officers did not examine any of those passengers and did not associate any of them in this alleged arrest and seizure - An incident may be witnessed by any number of individuals - It is up to the investigating agency to collect best evidence - The evidence so collected tested during the trial phase in a Court - For that purpose the witnesses are to be procured for their evidence - Two persons employed in APSRTC are certainly accessible for summoning - The passengers belonging to one place and going to a distant place, if associated in the search and seizure process, it would certainly be causing some difficulty for the investigating agency to secure his presence on a future date for his evidence in trial. [Para 15]

Advocate : Dr Challa Srinivasa Reddy

Judgement

Dr. V.R.K. Krupa Sagar, J - This Criminal Appeal under Section 374(2) of Code of Criminal Procedure, 1973 is filed by three appellants questioning the conviction and sentence in S.C.No.05 of 2010 in which they were tried by the learned I-Additional Sessions Judge, Guntur for a charge under Section 8(c) read with Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('for short NDPS Act, 1985') and by a judgment dated 10.08.2010 they were found guilty. Each of them was convicted and sentenced to undergo rigorous imprisonment for ten years and also pay a fine of Rupees One Lakh with a default sentence of simple imprisonment for two years.

02. Respondent in this appeal is the State.

03. Inspector of Police and his Sub-Inspector and other staff of Excise Station, Mangalgiri having been instructed by the Commissioner of Excise were engaged in vehicle checking at Khaja Toll-gate on 19.02.2010 and at about 6-15 PM they intercepted APSRTC bus bearing registration No.AP 28Z 4604 travelling from Vijayawada to Chennai. After notifying the driver of the bus and after issuing search proceedings to the driver of the bus, they

searched the bus and they also searched the luggage box of the bus and they found three polythine bags. They suspected that they contain ganja as the bags were emanating such smell. They enquired with the two bus drivers available in the bus and found that A1 to A3 with tickets for seat Nos.15, 16 and 19 obtained luggage ticket also and those three bags belong to them. The officers questioned the accused who were there in their seats in the bus. Then in the presence of both the bus drivers and these accused the officers opened the bags and found in it ganja with flowers, leaves, stems and seeds. They got the bags weighed and found that one bag weighed Kg.18.700 grams, other bag weighed Kg.29.800 grams and third bag weighed Kg.28.200 grams.

Thus total weight of ganja of all the three bags put together was found to be Kg.76.700 grams. On questioning the accused, the officers found that they were bringing this ganja from Narsipatnam and they wanted to carry them to Koyambed. They seized the bus tickets and luggage tickets from the accused. From each of the bags they picked up the samples and pasted identity slips, over which they obtained the signatures of the accused as well as the panch witnesses/drivers of the bus. Having arrested the accused, along with the contraband they came back to the station. It is further stated that in evidence of arrest, seizure and sampling, they prepared Ex.P4 mediator report also. They got the bags photographed. The mediator report which they had prepared at the spot was registered as PR No.131/09-10 and F.I.R was issued and F.I.R was dispatched to the Court. The accused was forwarded to Court remand. The entire episode was informed by a report to the superior officers. The seized property was forwarded to the Court along with necessary forms. Directions of the learned Magistrate was obtained. The picked up samples, under a letter of advise, were forwarded to the analyst through Court. The analyst, by a report dated 06.03.2010, rendered the opinion that the samples that were examined were found to be ganja. The tickets that were seized from the accused were forwarded to APSRTC Depot which on verification certified that they are all genuine tickets. Seized ganja was subjected to inventory proceedings and photographs were also taken there and samples were also taken there. On conclusion of investigation, charge sheet was laid before First Additional Sessions Judge, Guntur.

04. The learned Additional Sessions Judge, took cognizance for the offences and secured the presence of accused and furnished them with copies of documents. After hearing both sides and after considering the material on record, he charged A1 to A3 for the offence under Section 8(C) read with 20(b) (ii)(C) of N.D.P.S.Act, 1985. The charge was read over and explained to the accused and they denied the charge mentioned allegations and pleaded not guilty.

05. At the trial, prosecution examined Pws.1 to 5. The two bus drivers testified as Pws.1 and 2. The Sub-Inspector testified as Pw.3. The Traffic Inspector, Nellore APSRTC Depot testified as Pw.4. The Inspector of Police testified as Pw.5. Exs.P1 to P14 were marked. Three samples that were picked up at the spot are marked as MOs.1 to 3. Three samples that were picked up at the time of inventory before the learned Magistrate are marked as MOs.4 to 6. The incriminating material available on record was offered to the accused under Section 313 Cr.P.C. All accused denied the truth of the entire evidence. On being invited to enter their evidence they reported no evidence on their behalf.

06. After hearing learned counsel on both sides and on considering the material on record and on considering the statute and the precedent, learned Additional Sessions Judge found that the evidence advanced by the prosecution clearly and fully established the presence of accused and that they were travelling in the bus and their connection with the contraband seized and after due compliance of all the procedural formalities they were arrested, contraband was seized, samples were picked up and the expert opined that it was ganja. Learned trial Court found possession of such ganja by the accused was established. These findings based on evidence made the learned trial Court to conclude the guilt of the accused for the charge that was framed. Accordingly, learned trial Court convicted them and sentenced them as indicated earlier.

07. It is against that judgment of conviction, all the three accused preferred this appeal. In the memorandum of grounds of this appeal, it is stated that Pws.1 to 5 are interested witnesses and the evidence did not indicate possession of ganja by these accused/appellants. No passenger from the bus was examined. The evidence of witnesses suffer from sever discrepancies. There is clear violation of Sections 50, 52 and 57 of NDPS Act. Violation of these mandatory provisions should have made the learned trial Court to grant benefit of doubt in favour of these accused. By ignoring all these, an erroneous judgment was rendered by the learned trial Court. Therefore they pray for upsetting the impugned judgment and pray for their acquittal.

08. Learned counsel for appellants and learned Special Assistant Public Prosecutor/respondent submitted their arguments. During the course of those arguments for appellants, it is further argued that prosecuting agency did not conduct any Test Identification Parade and there is no independent witness in support of prosecution case and that prosecution failed to prove the source of procurement of the contraband by the accused and the same is never revealed by the prosecution.

09. As against the grounds urged in the appeal and the points argued by the learned counsel for appellants, the learned Special Assistant Public Prosecutor submits that, during the course of regular search the empowered officers detected the contraband and the persons holding possession of the contraband and what was seized was found to be ganja and about its quantity and the analyst report the facts are never in dispute and based on evidence the learned trial Court arrived at appropriate conclusions and punished the accused in accordance with law and there are no procedural violations during the course of investigation and there are no procedural violations during the course of trial and therefore there is no merit in this appeal and he seeks for dismissal of the appeal.

10. In the context of the above facts and circumstances, the following points fall for consideration in this appeal:-

1) Whether the learned trial Court failed to appreciate the law with reference to Sections 50, 52 and 57 of NDPS Act and failed to apply the said law to the facts on case resulting in injustice?

2) Whether the evidence on record could not allow the Court of law to conclude that the

charge was proved beyond reasonable doubt?

3) Whether the impugned judgment suffer from any infirmity requiring interference?

11. POINT NOS.1 TO 3:-

The evidence before the learned trial Court was that Pws.1 and 2 were drivers on the bus at the material point of time. Their evidence is that the ticketing process is done by ticket issuing machine and at the end of the trip the machine itself produces statistical return and it is in those circumstances the bus does not have a conductor for the trip. According to the prosecution, on long distance buses the practice always has been to have two drivers who attend the duties for a safe and comfortable travel. The evidence of Pws.1 and 2 as to the facts is similar. There is absolutely no deviation between them. They said that on the day the Excise officers came and stopped the bus and checked the bus and then on their direction Pw.2 opened the luggage box and found three bags and when the officers questioned, Pw.2 replied them stating that these three accused booked the luggage and he issued Ex.P2 ticket for the luggage and these three accused purchased tickets for themselves and they are Ex.P1. All the three accused were found seated inside the bus in their respective seats namely seat No.15, 16 and 19. Their evidence further shows that on the direction of the Excise officers these three accused came down from the bus, verified the bags in the luggage box and claimed that they belonged to them. These two witnesses further said that the luggage ticket was booked by these accused by telling that there were bed sheets in the bags. It was for that reason the bus drivers issued the tickets to them. On verification of these bags, in the presence of the accused and in the presence of both this bus drivers the officers found ganja. The witnesses further said about Excise officers procuring the weighing machine and weighing them and about picking up one sample from each of the bags as per MOs.1 to 3 and further deposed about packing the contraband and the samples and sealing the contraband and the samples and affixing of identity slips on the bags as well as on the samples. They further said that both of them signed on the identity slips and the signatures of the accused were also obtained on the identity slips. They said that they also signed a contemporaneously prepared panchanama in Ex.P4 which evidences all these facts. A perusal of Ex.P4 and the details in it show they stand in tune with what these two witnesses deposed.

12. It is by the above referred evidence, the presence of accused, presence of contraband, the connection between accused and contraband and the seizure of the contraband, arrest of accused and picking up samples of the contraband and packing and sealing of the contraband was sought to be established by the prosecution.

13. As per the evidence of Pws.1 and 2 the tickets were seized from the accused. According to prosecution, they forwarded these tickets to the authorities of APSRTC to find out their genuineness so as to sustain the credibility of the prosecution case. It is in this regard, there is the evidence of Pw.4. At the relevant time he was Traffic Inspector, Nellore Depot, APSRTC. He said that on the requisition issued by the Excise officials as per Ex.P6, he verified Ex.P1 and Ex.P2 tickets and found them genuine and issued Ex.P7 certificate. This witness was tendered for cross examination but the defence reported NIL cross

examination.

14. While cross examining Pws.1 and 2 and other witnesses defence never suggested their absence in the bus and their presence elsewhere and they did not offer any explanation as to how they were entitled to possess the contraband from which MOs.1 to 3 were picked up. The evidence of these two witnesses and the various suggestions given to them by the defence do disclose that earlier to this incident these accused and these witnesses were strangers to each other and there was absolutely no grouse between them for one to speak false hood against the other. Therefore the credibility of Pws.1 and 2 who are engaged in their own duty of driving the bus and witnessing investigative process is credible and natural and their evidence is consistant.

15. One of the contentions raised before the trial Court as well as before this Court is that while according to both the witnesses 22 passengers were travelling in the bus, the Excise Officers did not examine any of those passengers and did not associate any of them in this alleged arrest and seizure. Therefore, the story of prosecution may not be believed. An incident may be witnessed by any number of individuals. It is up to the investigating agency to collect best evidence. The evidence that is collected during the course of investigation would normally be tested during the trial phase in a Court. For that purpose the witnesses are to be procured for their evidence. Two persons employed in APSRTC are certainly accessible for summoning. The passengers belonging to one place and going to a distant place, if associated in the search and seizure process, it would certainly be causing some difficulty for the investigating agency to secure his presence on a future date for his evidence in trial. Learned trial Court explained stating that when a passenger is associated with this investigative process the questions about his identity, his travel etc. would all escalate the volume of proof of a fact and therefore omission on part of investigating agency in not associating a passenger of the bus to witness the search and seizure had absolutely not caused any prejudice to the accused. Be it noted, if the accused could not hint even one name of the passenger so as to sustain the theory of false-hood attributed to prosecution version. As pr the evidence of Pws.1 and 2 and other witnesses all the passengers were in fact asked to remain in their seats, excepting these three accused when the investigating agency weighed the contraband, picked up the samples and seized the contraband and prepared the mediator report. In that view of the matter, it is quite likely that rest of the passengers may not have witnessed all the facts also. When two responsible employees of APSRTC were available, there was no further need for Excise officials to have some more witnesses to prove the incident. Pws.1 and 2 are strangers to accused and police and are neutral. Their position is equivalent to the position of any of the other passengers in the bus. Therefore, there is no merit in the contention of the accused on the omission of prosecution for not having a passenger to witness the episode.

16. Pw.3 is the Sub-Inspector. Pw.5 is the Inspector. Their evidence speak all those facts which are recorded when the evidence of Pws.1 and 2 was considered as above. Ex.P5 photographs which are shot at the spot showed the bags in which the contraband was there about which the entire sequence of events were recorded in Ex.P1 panchanama. The evidence of Pw.5 shows that from each bag they picked up a sample of 100 grams. Their evidence is that they were properly packed and sealed. Pw.5 said that the contraband was

forwarded to the Government Regional Prohibition & Excise Laboratory, Guntur. Ex.P12 is the report of the analyst. A perusal of Ex.P12 shows that samples substance that was received by the laboratory had seals intact and these samples were tested and found each sample weighed 100 grams and each sample was ganja. Ex.P12 shows that on 23.02.2010 the samples were received by the laboratory and thereafter they were tested and signed their report on 06.03.2010. The incident occurred and the contraband was seized and samples were picked up on 19.02.2010. The seizure work was over at 8-15 PM. A per the evidence of Pw.5 crime was registered and Ex.P8 FIR was issued at 8-45 PM. The evidence of Pw.5 further shows that under Ex.P9, he informed the entire episode to his superior namely the Prohibition & Excise Superintendent, Guntur. A perusal of these documents shows that on 20.02.2010 Pw.5 submitted this letter to his superior. Thus soon after the detection of the offence and immediately on the next day it was reported to superiors. Ex.P10 is the list of the property that was sent to the Court. Pw.5 said that at the immediate opportunity he forwarded the property under Ex.P10. It shows that on 20.02.2010 the contraband and samples were produced before the Court. Ex.P11 is letter of advice prepared by Pw.5. This shows the contraband was forwarded to the laboratory through the trial Judge. The above evidence further shows how in quick succession the case property was dealt with. From the evidence of Pw.5 one could see that the case property was secured under his custody and the evidence indicated that from the time of seizure of the contraband and MOs.1 to 3 were picked from the contraband, till they were produce before the Courts and were forwarded to the laboratory the seals and packing are correct and intact. It is in the light of this, perhaps, defence did not specifically challenge the quantity of the contraband, the contents of the contraband, the correctness of samples picked up and the correctness of report of the analyst. However, one of the contentions raised is about non-compliance with Section 50, 52 and 57 of NDPS Act.

17. Section 50 is a very important procedural safeguard. It speaks about various measures to be taken when arrest and search and seizure takes place. They provide a right to the accused to be searched in the presence of Gazetted Officer or a learned Magistrate. The contention of the appellants is about violation of this Section 50 of NDPS Act. A perusal of this provision shows that as and when search of a person was to take place the officers should inform the suspects or the accused that they were entitled to be searched before a Gazetted Officer or Magistrate. It is important to note that this provision operates only when there is a search of a person, which means search of the very body of the accused. In the case at hand, there was no personal search. Nothing was seized from the hands of accused or from the pant packets or from their body parts. The seizure was made from the luggage box of the APSRTC bus. Therefore, it is clear that there was no personal search. When there was no personal search, Section 50 does not operate is the law laid down by the Hon'ble Supreme Court of India consisting of five Judges, in State of Punjab vs Baldev Singh 1999 (6) SC 172. Their Lordships made a clear distinction between personal search and search of any premises or a vehicle. In that view of the matter the contention raised by the appellants about investigating agency's failure to comply Section 50 of NDPS Act is misplaced and is thus negated.

18. Section 52 of NDPS Act speaks about duties of the arresting officers to immediately forward the arrested individuals before the learned Magistrate or to the nearest police

station or producing them before the empowered officers.

19. Section 57 of NDPS Act speaks about submitting a full report of all particulars of arrest and seizure to the immediate official superior within 48 hours after the arrest and seizure.

20. From the evidence of Pw.3 and Pw.5 one would see full compliance of both the provisions. Ex.P9 was the report submitted by Pw.5 to his immediate official superior. It was done within 24 hours which means well within the time provided by Section 52 of NDPS Act. The arrested individuals were also produced before the Court without any delay. While there is full compliance of Section 52 and 57 one may also notice that any infraction of any of these provisions do not ipso facto effect the trial or conviction as per the law laid down by the Hon'ble Supreme Court of India in Gurbax Singh v. State of Haryana 2001 (3) SCC 28.

21. Learned counsel for appellants argued that where from the accused procured this ganja is not stated by the prosecution and therefore the case of the prosecution shall be disbelieved. There is no merit in this contention. While it is true, finding the source of Narcotic Drugs is an important investigative effort but failure to find out the source of procurement by itself is of no consequence in a trial held against the accused.

22. No person shall transport Narcotic Drug (vide Section 8(c)). Cannabis (hemp) is Narcotic Drug (Section 2 (xiv)). Ganja, that is, the flowering or fruiting tops of the cannabis plant is Narcotic Drug (Section 2 (iii)). MOs.1 to 3 depicts these ganja. Pws.1 and 2 and Pws.3 and 5 categorically established by sworn testimony and the relevant record and documents, that these accused were in conscious possession of such ganja and they were engaged in transporting it. The quantity is undisputedly commercial quantity and the very transportation of commercial quantity is an offence. The source from where the accused fetched ganja being not explained by the prosecution is of no relevance. Therefore, this contention of the defence is negated.

23. A reading of entire record and on consideration of the defence contentions the case do not indicate any investigative lapses or trial lapses. The Court below rightly appreciated the evidence and reach to proper conclusions. The contentions raised by appellants do not have any merit. Points are answered against the appellants/Accused Nos.1 to 3.

24. In the result, the Criminal Appeal is dismissed confirming the Judgment of First Additional Sessions Judge, Guntur in Sessions Case No.05 of 2010 dated 10.08.2010. The appellants shall undergo the punishment.

25. As per the letter of learned I-Additional District & Sessions Judge, the appellants/A1 to A3 are in Central Prison, Rajahmundry. Registry is directed to dispatch a copy of this order along with the lower Court record, if any, to the Court below on or before 10.04.2023. A copy of this order be placed before the Registrar (Judicial), forthwith, for giving necessary instructions to the concerned Officers in the Registry.

As a sequel, miscellaneous applications pending, if any, shall stand closed.