

CASE NO.:
Appeal (crl.) 184 of 2008

PETITIONER:
Ghasita Sahu

RESPONDENT:
State of Madhya Pradesh

DATE OF JUDGMENT: 28/01/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T
(Arising out of SLP (Crl.) No.1743 of 2006)

V.S. SIRPURKAR, J.

1. Leave granted.

2. The appellant herein challenges his conviction for the offence under Section 8 read with Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as \023NDPS Act\024) recorded by the Trial Court and confirmed by the High Court.

3. On the prior information Arun Pandey (PW6) searched the house of the appellant and found 17.750 Kgs. Of Ganja kept in a gunny bag from one room. Before the search was taken, the Investigation Officer had completed all the formalities as per Section 42 of NDPS Act. At the time of search, the appellant was apprised of the information as also the proposed search and was also given an option to have a search in presence of a Gazetted officer. However, the appellant had not opted such an option and consented that the search by the search party led by Investigating Officer Arun Pandey (PW6). The Ganja (17.750 Kg.) was seized from one of the rooms and after samples were drawn, rest of it was sent to Malkhana for the safe custody. The sample packages were sent to Forensic Science Laboratory wherein it was confirmed that it was Ganja. The investigation having been completed, the appellant was charge-sheeted. The appellant pleaded not guilty. However, relying on the statement of Arun Pandey (PW6) and Shiv Kumar (PW1) as also the documents including the Panchanama, the appellant was found guilty and was convicted of the offences charged. He was directed to undergo Rigorous Imprisonment for a period of five years. He was also directed to pay a fine of Rs.20,000/- in default rigorous imprisonment of one year. This conviction was challenged before the High Court. However, the High Court, after going through the evidence confirmed the conviction and the sentence, necessitating the present appeal.

4. It was firstly contended by the counsel for the appellant that the search itself was illegal as the Panchas for the search firstly had not supported the same and secondly they were not the local panchas. We were, therefore, taken through the evidence of the two Panchas Raju (PW4) and Sanju Tiwari (PW5). We have carefully gone through their evidence. Both of them have not supported the prosecution inasmuch as they have even refused to identify the accused. There is nothing in their evidence to suggest that they were not local panchas. They have not even been distantly suggested that they were the usual panchas and stock witnesses of local police and were not residents of the area wherefrom the Ganja was recovered. Learned counsel tried to rely on the evidence of Arun Pandey (PW6). However nothing has been suggested to him in respect of panchas not being local panchas. The investigating officer seems to have taken all precautions as per Section 100 of Criminal

Procedure Code. Hence the contention is rejected.

5. Learned counsel secondly suggested that in fact this accused had met with an accident with the police jeep driven by Arun Kumar (PW6) and, therefore, he was falsely implicated at the instance of the police. Very curiously this is not suggested to the witness at all. In the absence of any suggestion or material in cross-examination such lame plea cannot be accepted.

6. Lastly, the learned counsel tried to suggest that the appellant was not given any idea about his right to have the search taken in presence of a Gazetted Officer in terms of Section 42 of the Act. We have carefully seen the evidence. To a specific question: "what did you say to the accused at the place of occurrence?", the answer by the witness is: "I told him that we have an information from Mukhbir that there is some Ganja hidden in your house and I have to take your search. If you want the search to be conducted in the presence of some gazetted officer or in the presence of a Magistrate or you had no objection if I conduct the search myself". Before that even in the examination-in-chief the witness had very specifically stated "Ghasita Sahu was informed about the information received from the informant and it was asked from him if he wanted any Magistrate to conduct the search or the police themselves could have done that". Learned counsel wanted to suggest that this was not the way to inform the accused of his right. Unfortunately, no such specific question was put to the witness and in our opinion considering the language, the search of the house cannot be said to be illegal in any manner.

7. In the first place, there is no question in this case, of any such right of the accused. Section 51 of the Act specifically provides that the provisions of Criminal Procedure Code shall apply in so far as they are inconsistent to the provisions of the Act to all warrants, arrest, searches and seizures made under this Act. The right of the search being taken only in presence of a Magistrate or a gazetted officer is restricted where the search is to be taken of a "person" of the accused. In this case the search was of a house and, therefore, all that the investigating officer had to follow was the conditions under Section 42 of the Act read with Section 100 Cr.P.C.. Therefore, the argument that the accused had any right in respect of the aforementioned search and that right has been breached is wholly incorrect. The law is now settled that this condition under Section 50 applies only where the search is of a "person" of accused [See State of H.P. v. Pawan Kumar [(2005) 4 SCC 350]. In this case the search was not of the person but of his house.

8. However, it is pointed out by the learned counsel that the quantity of Ganja was less than the commercial quantity though more than the small quantity and that the accused has all through been behind the bars after his arrest and he has almost completed four years in jail. Considering that the accused is a middle-aged man and comes from the poor background as claimed by the counsel, we would chose to modify his punishment of five years to the sentence already undergone. We also reduce the amount of fine from Rs.20,000/- to Rs.10,000/- and in default of payment of fine the accused would undergo further period of Rigorous Imprisonment for six months. Barring this modification, the appeal is dismissed.