

**(2002) 10 OHC CK 0041**  
**In the Orissa High Court**  
**Case No : Criminal Appeal No. 203 of 1993**

Kanduri Charan Mohanty

APPELLANT

Vs

State of Orissa

RESPONDENT

**Date of Decision :** 28-10-2002

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 100, 100(3), 100(4), 100(7), 100(8)  
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 41, 42, 43, 50  
Penal Code, 1860 (IPC) — Section 187

**Citation :** (2003) CLT 210 (Suppl CrI)

**Hon'ble Judges :** P.K. Tripathy, J

**Bench :** Single Bench

**Advocate :** D. Nayak, M.S. Chhotray, R.C. Swain, S. Swain, A. Arod and D.P. Pradhan, for the Appellant;

**Final Decision :** Allowed

## Judgement

P.K. Tripathy, J.—Appellant has challenged his conviction u/s 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, "N.D.P.S. Act") as per the impugned judgment dated 26.6.1993 of the 2nd Additional Sessions Judge, Cuttack.

2. Prosecution case is that on 30.3.1991 morning while performing patrolling duty along with staff Sri Prafulla Kumar Pattnaik, S.I. of Excise, Intelligence Branch, Cuttack, at about 7.30 A.M. made a chance detection of Ganja weighing 5 kg. while it was being carried by the Appellant in a brief-case. The search and seizure took place by the said Prafulla Kumar Pattnaik (P.W. No. 3) in presence of his staff and one Raghunath Dalai (P.W. 1) and some independent witness. After the search and seizure was completed; the seized articles along with the sample drawn were kept in separate packets and sealed by affixing paper seal with use of the seal of P.W. 3. Accused was brought to office of P.W. 3 which situates near the Court of S.D.J.M. and on the self same day accused was produced before the S.D.J.M. Cuttack along with a copy of the seizure list. P.W. No. 3 sent the sample

drawn for chemical analysis and after receipt of the report (Ext. 6) he submitted the prosecution report.

3. Appellant advancing plea of complete denial claimed for trial.

4. Prosecution examined the above named P. Ws. 1 and 3 besides P.W. 2, an A.S.I. of the Excise who had accompanied in that patrolling duty. Prosecution also relied on the seizure list (Ext. 1/1), paper seals (Exts. 2 and 3), spot map (Ext. 4), the forwarding letter for chemical examination (Ext. 5) and the report of the Chemical Examiner (Ext. 6). The attache, a plastic "jari" bag in which the Ganja was preserved by the Appellant while keeping it in the attache and a railway ticket recovered from the possession of the accused, were respectively marked as M. Os. 1 to 3. In his defence accused filed certified copy of the deposition of P.W. No. 3 in another sessions case, i.e., S.T. No. 240 of 1991 relating to the proof of contradiction and the certified copy of judgment in S.T. No. 240 of 1991. Those two documents were marked Exts. A and B respectively without objection from the side of the prosecution.

5. Upon consideration of the evidence on record, trial Court rejected the contention of the Appellant that evidence of P. Ws. 2 and 3 is not reliable because of P.W. No. 1 not supporting the prosecution. On the other hand, trial Court held that P. Ws. 2 and 3 being official witnesses and they having no axe to grind against the Appellant, their evidence is not infested with malice or interestedness. For that reason he assessed and accepted the evidence of P. Ws. 2 and 3 relating to recovery of ganja from the possession of the Appellant. The trial Court also recorded the findings that the judgment in S.T. Case No. 240 of 1991 (Ext. B) has no binding effect on the trial Court inasmuch as each case is to be decided on its own merit and the deposition of P.W. 3 in the another sessions case, which is marked as Ext. A, per se does not sack the credibility of P.W. 3. In the Court below the Appellant also advanced the contention that when the detection was inside Cuttack town and while coming from the spot of detection up to the office of P.W. 3 there were several police-stations situated on the way, the conduct of P.W. 3 in not producing the accused and the seized articles before any of the Police Officer in any such Police-station and thereafter not producing the seized articles before the S.D.J.M., Cuttack, and, above all, non-following the procedure as provided for search and seizure and non-reporting the matter to the superior officer are all violation of the mandatory provisions in the N.D.P.S. Act and, therefore, the accused should be granted benefit arising out of the same. Learned 2nd Additional Sessions Judge while recording the findings that provision in Sections 42, 50, 52, 55, 56 and 57 of the N.D.P.S. Act are mandatory in nature, he held that noncompliance thereof would not vitiate the trial in the absence of proof of prejudice by the accused. In that respect, learned 2nd Addl. Sessions Judge referred to and relied on certain decisions of different High Courts. Thus repelling the contention of the Appellant and accepting the versions of P. Ws. 2 and 3 and the argument advanced by the prosecution, trial Court found the Appellant guilty of the offence u/s 20(b)(i) of the N.D.P.S. Act,

and accordingly convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs. 2,000/- and in default to undergo rigorous imprisonment for six months more. The trial Court also ordered for confiscation of the seized ganja and destruction of the attache and the bag.

6. Reiterating the same circumstances in favour of the Appellant and the same lacuna alleging against investigating/prosecuting agency relating to the detection of the case, Appellant has prayed for an order of acquittal by grant of benefit of doubt and accordingly to set aside the impugned order of conviction and sentence.

7. There is no dispute on the principle of law that evidence of official witnesses shall not be discarded for want of independent corroboration or on the mere ground that they are official witnesses. It is however well settled that evidence of official witnesses in the absence of independent corroboration because of hostile attitude of the independent witnesses, should be assessed carefully while considering the truth or falsity in the allegation and merit of that evidence. Thus, in the present case evidence of P. Ws. 2 and 3 is not discardable, as argued by the Appellant, for the reason that P.W. 1 did not support the prosecution. P. Ws. 2 and 3 have consistently stated regarding detection of this case in the manner noted in the prosecution report and also in the respective depositions. That has already been indicated in this judgment while mentioning about the prosecution case. Learned Counsel for the Appellant argued that when P.W. 3 appearing as P.W. 1 in S.T. No. 240 of 1991 has stated about detection of two cases on the self same day therefore his deposition in this case relating to detection of this case alone runs contrary to what was deposed by him in the other case. This Court does not find any substance in that argument as well as in the criticism to the evidence of P.W. 3 on that score. Relevant evidence of P.W. No. 3 is quoted below:

11. I do not recollect if I have detected another case wherein this P.W. 1 was cited as a witness. I do not recollect if I have deposed before the Court of Sessions in that case, in S.T. 240-91. I do not recollect I have deposed before the Court of Session in ST 240-91 that after detection of this case I brought the accused Kanduri Mohanty and the witness Raghunath Dalai and articles to my office. The accused was brought to the Court with the help of my staff as per my direction to produce him before Court on that day.

In Ext. A (i.e., deposition of P.W. 3 as P.W. 1 in S.T. No. 240 of 1991) at paragraph 3 of his deposition (during cross-examination) this witness stated that "on the same day at 7.30 A.M. I detected another person who was committing illegal trafficking of Ganja. In that case I have cited Raghunath Dalai as a seizure witness. After detecting Kanduri Charan Mohanty in 2(a) CC No. 124 of 1990 I brought the accused Kanduri and the witness Raghunath Dalai and the articles to the office. On a comparative reading of both the quoted passage this Court does not find any contradiction having the effect of shaking his credibility. In that context, contention of the Appellant that on the basis of such evidence the

accused in other case was granted an order of acquittal as per the judgment Ext. B. As rightly held by the trial Court, that is no ground to grant an order of acquittal in favour of the Appellant in the present case. This Court also finds no logic in such a contention advanced by the Appellant, because each case is to be decided on its own merit on proper appreciation of evidence on record. Even if the evidence of P.W. 3 shall be read together with the confronted portion of his deposition in the other case, as noted above, there is nothing to find any contradiction so as to discredit the version of P.W. 3 on the issue of detection of the case against the Appellant. For the reasons indicated above, this Court also concurs with the findings recorded by the Courts below that Exts. A and B neither shakes the credibility of P.W. 3 nor affects merit of the prosecution case.

8. The trial Court has followed the principle that though the above quoted provisions in the N.D.P.S. Act (as noted above in paragraph 5) are mandatory, but unless the accused establishes prejudice non-performance of such mandate of law shall not vitiate the trial. In that context this Court finds that the trial Court made a confusion in distinguishing between "vitiating a trial" and "shaking credibility of the prosecution witnesses". The accused can plead relating to prejudice due to non-performance of the mandatory provision by bring such non-performance into record and unless the witness explains the reason for which such mandatory provision was not followed then the non -performance of the mandatory provision undoubtedly goes against the prosecution because otherwise that causes prejudice to the accused. The principle of law in the aforesaid manner was failed to be considered and judged by the trial Court.

9. So far as the present case is concerned, search and seizure was made in accordance with the provision in Section 43 of the Act. Since it was a case of chance detection, therefore, the procedure provided for search and seizure in Sections 41 and 42 could not have been followed by P.W. 3 and that is clearly readable from his evidence. Section 50 of the Act was not complied with because it is not the case of the Appellant that though he wanted to be searched in presence of a gazetted officer or a Magistrate but that chance was declined to him. Therefore, virtually there is no breach of law of Sections 43 and 50 so far as the present case is concerned. But the provision in Section 100, Code of Criminal Procedure relating to securing the attendance of two or more witnesses of the locality was completely departed from and in that respect no explanation is forthcoming from P.W. 3 or the prosecution. Sub-sections (3), (4), (7) and (8) of Section 100, Code of Criminal Procedure which are relevant for the present purpose and not followed are quoted as hereunder;

100.\*\*\* \*\*

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made such person may be searched and if such person is a woman, the search shall be made by another woman with strict decency.

(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.

(5) \*\*\* \*\*

(6) \*\*\* \*\*

(7) When any person is searched under Sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this Section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence u/s 187 of the Indian Penal Code (45 of 1860).

The seizure list Ext. 1/1 indicates that P. Ws. 1 and 2 are the two witnesses to the search and seizure. Admittedly, P.W. 2 is one of the staff associated with P.W. 3 for patrolling duty. According to P. Ws. 2 and 3, P.W. 1 was a mere pedestrian who was then moving on the road. It has been admitted by P. Ws. 2 and 3 that the spot at which accused was detained and searched is a crowded place and besides that it was almost in front of Bombay Hotel. P.W. 3 has not even breathed a word as to why two independent respectable persons of the locality were not requested to witness the search far less explaining that any such local inhabitants refused to be the witnesses. Therefore, in that way the provision in Section 43 read with Section 50 was not complied with because of non-following the procedure provided in Section 100, Code of Criminal Procedure in view of the provision in Section 51 of the N.D.P.S. Act. Apart from that, according to the provision in Sub-section (3) of Section 52, the person arrested and the article seized shall be forwarded without unnecessary delay, to the officer-in-charge of the nearest police-station or an officer empowered u/s 53 of the Act. The trial Court wanted to wriggle out of this crisis of the prosecution by explaining that since the accused along with seizure list was immediately produced before the S.D.J.M., Cuttack itself on the date of detection, therefore, there cannot be any doubt about detection of the case. Trial Court did not take note of the fact that though the accused and the seizure list was produced before the S.D.J.M., Cuttack, but the seized article was not produced. It has been stated by P. Ws. 2 and 3 that sample had already been drawn and sealed at the spot. Therefore, there was no reason for P.W. 3 to not to forward the seized article to the Court along with the accused and the seizure-list. On the further verification of the record it appears that the seized article was not made available to the Court till the time of commencement of the trial inasmuch as there is nothing on record maintained by the S.D.J.M. that the seized article was ever produced before that

Court. The sample was not sent for chemical analysis through Court, but it was directly sent by P.W. 3. A seal has been affixed on the forwarding letter for its comparison with the wax seal on the sample packet. Though the chemical examiner found the seal in tact but there was nothing before the trial Court to be satisfied that any particular seal was used. When P.W. 3 states that he is an experienced officer in the Department of Excise, it was not expected from him to commit so many flaws in the matter of detection of the Crime and conducting the investigation. Be that as it may, even those lacunae could have been duly considered if there would have been any explanation from P.W. 3 in that respect. In his evidence P.W. 3 is completely silent as to why he did not seek for attendance of two witnesses in accordance with the provision in Sub-section (4) of Section 100, Code of Criminal Procedure He is completely silent as to why he did not produce the accused in any Police-station numbering 3 to 4 which comes on the way from the spot to his office. He has not explained as to why he did not produce the seized article before the S.D.J.M., Cuttack. On this aspect the contention advanced by the learned Govt. Counsel that dearth of space in the Court's Malkhana may be a ground. If that was so, P.W. 3 could have said that. As noted above, P.W. 3 has not explained at all as to why the seized articles were not produced. P.W. 3 has not produced the seal which was used when the packets were sealed. He also did not produce the sample packet before the Magistrate to grant some credibility to the circumstances. He did not report about the detection of the case in writing to his superior authority. Individually each of the circumstances in the absence of plausible explanation are glaring enough to opine that the conduct and evidence of P.W. No. 3 is not that sacrosanct as he posed it to be cumulative effect of all the above lacunae undoubtedly create a doubt notwithstanding the consistent and corroborative evidence of P. Ws. 2 and 3 relating to detection of the case and once such a doubt is created that has to go in favour of the accused.

10. For the reasons indicated above, this Court finds that for the aforesaid lacunae in detecting the case from the stage of search and seizure and no explanation coming from P.W. 3 in that respect gives rise to a suspicion about the genuineness of the case and truthfulness of the evidence of P. Ws. 2 and 3 even if corroborative. Since the trial Court failed to consider such aspects therefore, the trial Court erred in convicting the Appellant. Thus, Appellant is granted benefit of doubt and acquitted from the charge. If in the meantime fine has been paid, that be returned to the Appellant on proper application. Seized property be disposed of in accordance with the direction of the trial Court.

The Criminal Appeal is allowed accordingly.

Crl. Appeal allowed accordingly.