

**(2002) 10 OHC CK 0061**  
**In the Orissa High Court**  
**Case No : Criminal Appeal No. 79 of 1996**

Pandaba Nayak

APPELLANT

Vs

State of Orissa

RESPONDENT

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

**Acts Referred:**

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 41, 42, 43, 44

**Citation :** (2002) 94 CLT 772 : (2003) 85 ECC 770 : (2003) 24 OCR 10 : (2002) OLR 783 Supp

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

**Bench :** Single Bench

**Advocate :** Kishore Kumar Mishra, Dillip Mishra and P.K. Mishra, for the Appellant; Umesh Nayak, A.S.C., for the Respondent

**Final Decision :** Dismissed

## Judgement

P. K. Tripathy, J.—Appellant challenges his conviction u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "the N.D.P.S. Act").

2. Appellant was prosecuted for the offence u/s 15 of the N.D.P.S. Act on the allegation that on 6.2.1995 at about 8.30 P.M. the Sub-Inspector of Excise, Belpahar (P.W. 4) while on patrolling duty at Belpahar Railway Station - Bus stand area along with his staff he found the accused in possession of gunny bag (M.O. I). Because of the smell which was emitting from the article inside the gunny bag, P.W. 4 suspected that to be containing Narcotic substances and after intimating in writing about the intention to conduct search and whether appellant wanted his search in presence of a Gazetted Officer or Magistrate (Ext. 2) he got the consent in writing (Ext. 3) from the appellant for his search by P.W. 4. Thus, in presence of two independent witnesses of the locality (P.Ws. 1 and 2) and his Excise staff out of whom the A.S.I. of Excise has been examined as P.W. 3, P.W. 4, searched the gunny bag and found puppy straw. On weighment, he found a net weight 28 Kg. of puppy straw. He derived two sample packets of puppy straw

each weighing 25 grams and while sending one sample (M.O. II) to the Court along with the accused and the seized puppy straw in M.O.I. P.W. 4 forwarded the other sample packet for chemical analysis. Since the report of the Chemical Examiner revealed the sample to be puppy straw containing murphin, prosecution report was submitted against the accused for the offence u/s 15 of the N.D.P.S. Act.

3. In course of trial, prosecution examined the aforesaid four witnesses and relied on the above noted Exts, 2 and 3, the seizurelist Ext. 1, signatures of the witnesses on the paper seals vide Exts. 4 and 5 series, notice assigning the ground of arrest Ext. 6, intimation to the Superior Officer about detection of the case Ext. 9 and the forwarding letter Ext. 7 and report of the Chemical Examiner of the Stage Drugs Control and Research Laboratory, Bhubaneswar Ext. 10.

4. At the stage of consideration of charge, accused pleaded not guilty and claimed for trial. He advanced the plea of complete denial. At the stage of examination of the accused u/s 313, Cr.P.C. while denying to the allegations emerging from the evidence of P.Ws. appellant explained that on the date of occurrence having come to one friends house he had come to the Bus stand area and while he was purchasing "banana" from a thela he saw the Excise staff chasing somebody but they caught hold the appellant, made queries with him and obtained his signature to frame a case against him. Appellant also adduced defence evidence by examining one Mahendra Naik, a banana thela hawker and through his evidence appellant took the plea that appellant had come to the house of D.W, 1 as the youngest brother of his sister's husband to deliver an invitation card (Ext. A) and when appellant and the P.W. No. 1 had come to the banana thela of the D.W. No. 1 where D.W. 1 was to do the business, the D.W. No. 1 leaving the appellant at the thela went to purchase betels and during that time the Excise people came and took the appellant in a jeep. In other words, appellant has denied any nexus with M.O.I. and its possession.

5. On assessment of evidence on record, trial Court found P.Ws. 1 to 4 corroborating to each other on each material particulars relating to the factum of chance detection, search and seizure in the aforesaid manner. Referring to and relying on the report Ext. 10, he held that the articles in M.O.I. was puppy straw which was recovered from the possession of the appellant and since the appellant had no legal authority to retain the same the trial Court found him guilty of the offence u/s 15 of the N.D.P.S. Act. In that process, trial Court rejected the argument of the appellant that P.Ws. 1 and 2 do not stand the test of independent witnesses, that prosecution versions should be doubted for not sending to the Court the M.O.I. immediately after seizure and for not handing over the accused to the local police and not giving the brace seal of P.W. 4 in the custody of any independent witness, that no sample was sent from the Court for chemical analysis and the sample sent by P.W. No. 4 cannot be connected with the sample drawn from M.O.I. and that provision u/s 57 of the N.D.P.S. Act was not properly complied with. On each of the aforesaid points raised by the

appellant the trial Court referred to and discussed the evidence to reject such contentions of the appellant. For the conviction of the appellant u/s 15, trial Court sentenced him to the minimum sentence prescribed i.e. R.I. for ten years and a fine of rupees one lakh in default to undergo R.I. for a further period of two years.

6. While not arguing on violation of provision of law in Sections 55 and 57 of the N.D.P.S. Act appellant has argued that evidence of P.Ws. 1 and 2 runs contrary to each other so also evidence of P.Ws. 3 and 4. Those witnesses having been conferred with their previous statement, trial Court should have judged and doubted their credibility. Appellant also argued that the provisions in Section 42(1), 42(2) and 50 of the N.D.P.S. Act having not been complied with in view of the ratio in the case of *P. Simanchal Patra v. State*, 1995 (II) OLR 278, prosecution must fail for non-compliance of mandatory provisions.

7. On a perusal of the evidence of record, it appears that P.Ws. 1 and 2 deposed supporting the prosecution. When P.W. No. 1 stated that he had not signed on the paper seal, with the permission of the Court leading question was put to him and during that course he admitted his signatures on the paper seals. Similarly while supporting the prosecution when P.W. No. 2 stated that contents of seizure list was not read over and explained to him, prosecution sought for the permission of the Court and put leading question and got the answers relating to the signing on the paper seals etc. Therefore, the aforesaid aspect does not shake the credibility of P.Ws. 1 and 2 relating to the occurrence and recovery of seized article from possession of the appellant.

8. P.W. No. 2 in his evidence has stated that after search and before preparation of the seizure-list he remained absent for a temporary period of 15 to 20 minutes as he went to his house and when he returned he signed on the seizure-list on the information of P.W. No. 4 that Narcotic Substances were recovered from the appellant. Capitalising on that learned counsel for the appellant argued that P.W. No. 2 was not a witness to discovery of puppy straw in M.O.I. nor he was a witness to weighment and therefore, that circumstance shakes credit-worthy of the prosecution case. Indeed, such evidence is available on record but that evidence does not dispel credibility of the prosecution case inasmuch as it is nobody's case that something was put into M.O.I. after departure of P.W. No. 2. He (P.W. 2) has stated in paragraph 4 of his deposition (in cross-examination) that he saw puppy straw in M.O.I. before his first departure from the spot. Apart from that P.W. No. 1 another independent witness was present and he has categorically stated about recovery of puppy straw from M.O.I. P.W. No. 3 and 4 have tendered their supportive version in that respect. Simply because P.Ws. 3 and 4 are official witnesses their version is not to be doubted for no reason. On the other hand, when the appellant was an unknown person to P.Ws. 3 and 4 so also to P.Ws. 1 and 2, any motive cannot be attributed to them so as to pursue a false case against the appellant. Thus, this Court does not find any reason to vary from the view of the trial Court regarding credibility of witnesses or proof of

the fact of search and recovery as alleged by the prosecution.

9. Learned counsel for the appellant argued that provision in Section 42(1) and 42(2) of the N.D.P.S. Act was not followed. It be noted here that provisions in Sections 41, 42, 43 and 44 are the four provisions relating to search and seizure under different circumstances. Keeping in view the fact that in this case P.W. No. 4 made it as a case of chance detection after the sunset and in a public place like a Bus stand the provision in Section 43 of the N.D.P.S. Act is applicable and not Section 42. Be that as it may, P.W. No. 4, as far as practicable, followed the procedure meticulously so as to inform the appellant about the reason for which he wanted to search M.O.I. in possession of the appellant, wanted to ascertain if the appellant wanted to be searched in presence of a Gazetted Officer or Magistrate and thereafter, on consent of the appellant, he conducted search in presence of two independent witnesses (P.Ws. 1 and 2) and thereafter, reported the fact of detection to his superior officer. Therefore, this Court does not find breach of the provision in Sections 43 and 50 of the N.D.P.S. Act. In that context, the ratio in the case of P. Simanchal Patra (Supra) thus does not help the appellant in any manner.

10. Learned counsel for the appellant also argued that prosecution case should be doubted because, M.O.I. was not produced before a Police Officer i.e., the Officer-in-charge, Belpahar Police Station. No such question was put to P.W. No. 1 as to why he did not do so. Be that as it may, that provision in Section 52(3) of the N.D.P.S. Act is there to safeguard the accused from any manipulation by the detecting officer. In the case at hand, the conduct of P.W. No. 4 is not found doubtful inasmuch as at the earliest opportunity he forward the accused with M.O.I. to the Court besides reporting to his superior authority about detection of the case. Under such circumstance, no adverse inference can be drawn against the prosecution. Apart from that the appellant has not shown how he was prejudiced for not sending him to Police-station before forwarding him to the Court.

11. Another argument which was advanced by the appellant was that the sample packet which was sent to chemical analysis was not sent through Court. There is no dispute to that contention but learned Additional Standing Counsel argued that provisions in the N.D.P.S. Act does not mandate any obligation for sending the sample packet through Court. On consideration of the aforesaid points raised by both the parties, this Court finds that sending the sample through the Court ensures faith and belief regarding sending the correct material in a properly sealed condition. Though P.W. No. 4 did not do so in this case but taking an over all picture of the entire evidence on record this Court does not find a case of possible manipulation in sample packet inasmuch as the report Ext. 10 discloses that the seal put on the sample packet was found intact and in order. Comparing the seal which was there on M.Os., the trial Court has formed the opinion that there is no discrepancy on the seals which were affixed on seized articles and sample packets. It is the consistent case of the prosecution that two sample

packets were prepared at the spot and each of them was sealed in the same manner and by use of the same seal. Thus, circumstantially it clearly indicates that there is no manipulation whatsoever in the sample packet which was sent for chemical analysis. Before consideration of charge, appellant was supplied with entire prosecution papers. Therefore, if the appellant had any doubt about genuineness of the sample packet sent for analysis or if he had any doubt on the conduct of P.W. 4, in any manner, in that respect then he could have applied to the Court to send the second sample packet (M.O.II) for chemical analysis. Without doing that appellant cannot succeed when prosecution evidence in respect of sending correct sample is found credible and acceptable. See the case of Baidyanath Mishra and Anr. v. The State of Orissa, 34 (1968) CLT 1, where in a similar circumstance such a view has been taken.

12. Learned counsel for the appellant also states that due consideration was not made to the defence evidence. In that respect it is noted that prevaricating and contradictory plea taken by the appellant has rendered the defence evidence not believable. This Court finds or illegality in the impugned judgment for not believing the defence evidence.

13. For the reasons indicated above, this Court finds no infirmity in the impugned judgment of conviction and as the trial Court has awarded the minimum punishment provided u/s 15 of the N.D.P.S. Act, therefore, this Court does not propose to modify or reduce the same.