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DAYALU KASHYAP

v.

THE STATE OF CHHATTISGARH

(Criminal Appeal No. 130/2022)

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JANUARY 25, 2022

**[SANJAY KISHAN KAUL AND M.M. SUNDRESH, JJ.]**

- Narcotics Drugs and Psychotropic Substances Act, 1985 – s.50 – Effect of – Search conducted by Sub-Inspector and not by a Gazetted Officer or Magistrate, recovery of ganja from a polythene bag on a Kanwad carried by appellant – Appellant convicted u/s.20(b)(ii)(c), NDPS Act – Relying on State of Rajasthan v. Parmanand & Anr. [2014] 3 SCR 522 and seeking to expand the scope of the observations made, the appellant contended that the option given to him to get himself searched from the Officer concerned not being part of the statute, the same could not have been offered to him and thus, if the personal search is vitiated by violation of s.50, the recovery made otherwise also would stand vitiated and thus, cannot be relied upon – Held: Such an extended view cannot be given – Recovery of ganja was from a polythene bag which was being carried on a Kanwad – The recovery was not in person – Relief not granted to the appellant – However, since the appellant had already undergone 10 years of sentence and served about six months in the alternative sentence of one year for non-payment of fine, the sentence of one year against non-payment of fine was substituted by the sentence of about six months and the appellant was already set free.*

*State of Rajasthan v. Parmanand & Anr. (2014) 5 SCC 345 : [2014] 3 SCR 522; State of Punjab v. Baldev Singh 1999 (6) SCC 172 : [1999] 3 SCR 977 – referred to.*

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Case Law Reference

[2014] 3 SCR 522	referred to	Para 4
[1999] 3 SCR 977	referred to	Para 4

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CRIMINAL APPELLATE JURISDICTION: Criminal Appeal A  
No. 130 of 2022.

From the Judgment and Order dated 28.03.2019 of the High Court of Chhattisgarh, Bilaspur in CRA No.857 of 2011.

Devansh A. Mohta (AC), Adv. for the Appellant.

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Sumeer Sodhi, Gaurav, Advs. for the Respondent.

The following Order of the Court was passed:

**ORDER**

1. Leave granted.

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2. The present appeal arises *qua* an incident of 11.09.2010 of 10.30 in the morning when Sub Inspector K.S.Singh (PW-5), on the basis of the information received, apprehended the appellant and found that he was carrying Ganja in a green polythene bag on a wooden Kanwad from Bhaisabeda to Pithapur for transportation. The appellant was charged under the Narcotics Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') and tried by the Special Judge who convicted the appellant under Section 20(b)(ii)(c) of the NDPS Act and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1 lakh. The appellant preferred an appeal before the High Court of Chhattisgarh but that appeal was dismissed by the impugned order dated 28.03.2019.

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3. We issued notice on 01.02.2021 including on the bail application as the appellant had undergone sentence of 10 years and his inability to pay fine was resulting in him serving out the remaining sentence of one year. In the course of hearing this matter with some other matter, on 01.03.2021, we noticed that the only point which really arose for consideration was from the effect of provisions of Section 50 of the NDPS Act. Since the petitioner had already undergone 10 years of sentence and served about six months in the alternative sentence of one year for non-payment of fine, we considered appropriate to substitute the sentence of one year against non-payment of fine by the sentence of about six months and directed the appellant to be set free. The appellant was accordingly set free on 03.03.2021.

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4. We have heard learned counsel for the appellant on the aforesaid question posed by him. Learned counsel has drawn our attention to the

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- A testimony of the Officer (PW-5) carrying out the search. Para 6 of the testimony reads as under:
- “6. Thereafter, on the spot, at the side of Pithapur Thothapada Chowk, Murumroad, the accused was served notice u/s 50 of the NDPS Act at 12.45 O’Clock that the information has been received from the informer that the Ganja is kept at both ends of his Kanwad for which it is necessary to conduct search. You can get the search conducted from any Gazetted Officer, Magistrate or even by me. The accused was explained about the meaning of Gazetted Officer and Magistrate. Then, the accused gave verbal consent to get the search conducted by me. The consent given for search was recorded as dictated by the accused. The notice served by me is Exhibit P.5 which bears my signature at part C to C. On the same date at 13 O’ clock, at the spot itself, on getting the consent from the accused, I got myself, accompanying staff and motorcycle searched from the accused. No objectionable article was found in the search. Our personal search is Search Memo (Exhibit P.6) which bears my signature at part C to C. At 13:15 O’clock, at the spot, the green coloured polythese bundle wrapped at both ends of Kanwad kept in the possession of accused and accused Dayalu Kashyap were searched. Then, the article similar to Ganja were found inside both the polythene bundles. Search Memo is Exhibit P.7 which bears my signature at part C to C.”
5. Learned counsel submits that the option given to the appellant to take a third choice other than what is prescribed as the two choices under sub-Section (1) of Section 50 of the Act is something which goes contrary to the mandate of the law and in a way affects the protection provided by the said Section to the accused. To support his contention, he has relied upon the judgment of *State of Rajasthan v. Parmanand & Anr.* – (2014) 5 SCC 345, more specifically, para 19. The judgment in turn, relied upon a Constitution Bench judgment of this Court in *State of Punjab v. Baldev Singh* – 1999 (6) SCC 172 to conclude that if a search is made by an empowered Officer on prior information without informing the person of his right that he has to be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to take his search accordingly would render the recovery of the illicit article suspicious and vitiate the conviction and sentence of the accused where the conviction has been recorded only on the basis of possession of illicit

articles recovered from his person. The third option stated to be given to the accused to get himself searched from the Officer concerned not being part of the statute, the same could not have been offered to the appellant and thus, the recovery from him is vitiated.

6. In the conspectus of the facts of the case, we find the recovery was in a polythene bag which was being carried on a Kanwad. The recovery was not in person. Learned counsel seeks to expand the scope of the observations made by seeking to contend that if the personal search is vitiated by violation of Section 50 of the NDPS Act, the recovery made otherwise also would stand vitiated and thus, cannot be relied upon. We cannot give such an extended view as is sought to be contended by learned counsel for the appellant.

7. The aforesaid being the only aspect for consideration, we are not inclined to grant relief to the appellant and appeal is accordingly dismissed leaving parties to bear their own costs.

Divya Pandey  
(Assisted by : Deepak Panwar, LCRA)

Appeal dismissed.