IN THE HIGH COURT OF ORISSA, CUTTACK

CRLA No.36 of 2014, CRLA No.120 of 2014, CRLA No.150 of 2014 & CRLA No.296 of 2014

From the judgment and order dated 27.11.2013 passed by the Sessions Judge -cum- Special Judge, Ganjam, Berhampur in G.R. Case No.04 of 2010(N)/T.R. No.13 of 2010.

CRLA No.36 of 2014

1. Kamal Franklin Patra @ Raja
2. Dhiren Khilla
3. Gouri Shankar Pradhan..... Appellants

-Versus-

State of Odisha ..... Respondent

CRLA No.120 of 2014

Ramesh Gouda ..... Appellant

-Versus-

State of Odisha ..... Respondent

CRLA No.150 of 2014

1. Bharat Chandra Pradhan
2. Purna Chandra Panigrahi @ Kumar
3. Surendra Nayak ..... Appellants

-Versus-

State of Odisha ..... Respondent

CRLA No.296 of 2014

Sanatan Ray ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Mr. Rajib Bihari Mishra
Advocate
(*in all Criminal Appeals*)

For Respondent: - Mr. Arupananda Das
Addl. Govt. Advocate
(*in all Criminal Appeals*)

P R E S E N T:

THE HON'BLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 14.09.2023

S.K. SAHOO, J. The appellants Kamal Franklin Patra @ Raja, Dhiren Khilla and Gouri Shankar Pradhan in CRLA No.36 of 2014, appellant Ramesh Gouda in CRLA No.120 of 2014, appellants Bharat Chandra Pradhan, Purna Chandra Panigrahi @ Kumar and Surendra Nayak in CRLA No.150 of 2014 and appellant Sanatan Ray in CRLA No.296 of 2014 faced trial in the Court of the learned Sessions Judge -cum-Special Judge, Ganjam, Berhampur in G.R. Case no.04 of

2010 (N)/T.R. No.13 of 2010 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 21.09.2010 at about 3.45 p.m. near Ghati Kalua Temple of Golanthara in two four wheeler vehicles, i.e., Bolero bearing Registration No.OR-02-BA-2123 and Mahinda Xylo bearing Registration No.OR-10G-6726 were found in possession of 316 kgs and 150 grams of contraband ganja contained in 33 different packets in contravention of the provisions of 8(c) of the N.D.P.S. Act.

The learned trial Court vide impugned judgment and order dated 27.11.2023, found all the appellants guilty of the offence charged and sentenced each of them to undergo rigorous imprisonment for a period of eleven years and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default of payment of fine, to undergo rigorous imprisonment for one year.

2. The prosecution case, in short, is that on 21.09.2020 when Bhaskar Sahu, (P.W.8), S.I. of Police, Golanthara Police Station along with other police personnel

was on patrolling duty at Girisola, at about 3.45 p.m., He saw two four wheeler vehicles, i.e., Bolero and Xylo coming from Girisola and he suspected that those vehicles might be carrying some contraband items. He found eight persons in those vehicles and detained them. On search of both the vehicles, he found 33 packets, i.e., 13 packets from the Xylo vehicle and 20 packets from the Bolero vehicle. P.W.8 informed Mahendra Panda (P.W.9), Tahsildar, Konisi and requested him to come to the spot. He also called one J. Prakash Gupta (P.W.1) from the nearby place to come with a weighing machine and also called some local persons to come to the spot for the purpose of search and seizure. P.W.9 arrived at the spot at 04.10 p.m. and in his presence and others, the packets found in the two vehicles were opened and ganja was found in all those packets. Upon weighing, the total quantity of ganja came to 316 kgs and 150 grams and P.W.8 collected samples in duplicate from each packet and kept those in polythene packets and sealed them using his personal brass seal. The appellants, who were found in the two vehicles, were searched, but no such incriminating materials were found from them. After

collection of samples of ganja, all the 33 packets of ganja were also seized. P.W.8 prepared the seizure list vide Ext.4/1 in respect of 33 packets of ganja, sample packets and other personal belongings and thereafter prepared a written report vide Ext.6. P.W.8 sent the written report to the I.I.C., Golanthara Police Station (P.W.10), who immediately after registering the case reached at the spot. P.W.10 took up investigation and P.W.8 also prepared a seizure list at the spot in relation to the weighing machine and a zimanama by which P.W.1 was given in zima of the personal brass seal of P.W.8, which was used by him in sealing the sample packets and other packets. On arrival at the spot, P.W.10 found that near Ghati Kalua temple by the side of NH-5 running towards Ichhapur, half a kilometer away from the police station, P.W.8 was standing near the Xylo and Bolero vehicles, which were parked by the side of the road on NH-5 facing towards Berhampur and found those 33 jerry packets stacked by the side of the vehicles and the accused persons were near P.W.8 and a spot map was prepared marked as Ext.8. P.W.10 collected all the documents prepared by P.W.8 at the spot and recorded the

statements of some witnesses, arrested the appellants and seized the articles along with contemporaneous documents prepared at the spot, seized the station diary book of the police station containing the relevant entry relating to the case and prepared seizure list vide Ext.9 and on the next day, forwarded the appellants to the Court and made a prayer before the learned S.D.J.M., Berhampur for sending the samples to R.F.S.L., Berhampur for chemical examination and the prayer was allowed and the samples were sent for chemical examination. The bag containing residue ganja vide M.Os. I to XXXIII were deposited in the Court malkhana along with M.O.XXXIV which was the bag contanining residue samples. P.W.10 also informed the matter to the Superintendent of Police, Berhampur vide letter marked as Ext.10. P.W.10, the I.O. released the seized vehicles in favour of the respective owners. The chemical examination marked as Ext.11 confirmed the contents of the bags to be nothing but fruiting and flowering tops of cannabis plant (ganja). On completion of investigation, P.W.10 submitted the charge sheet against the appellants.

3. The defence plea of the appellants was one of complete denial.

Witness, Exhibits & Material Objects produced by the prosecution:

4. During the course of trial, in order to prove its case, the prosecution has examined ten witnesses.

P.W.1 J. Prakash Gupta is a businessman of that locality who stated that about eight months back, he was in his shop when police called him to take the weighing machine from him and they returned the same to him after one hour.

P.W.2 Dologobina Mahali was an A.S.I. of Police attached to Golanthara Police Station who was a part of the patrolling team which intercepted the two vehicles. He narrated the incident as it unfolded on the fateful day and supported the prosecution case. He stated that on being asked, he went to bring a weighing person for quantifying the contrabands. He is also a witness to the seizure of contraband ganja and two vehicles vide seizure list Ext.3.

P.W.3 A. Lingaraj was working as a Havildar and P.W.4 S. Ravindra Reddy and P.W.5 Jagannath Pradhan were working as Constables respectively in Golanthara Police Station who formed parts of the patrolling team which intercepted the two vehicles. They stated about detention of the appellants and the two vehicles along with contraband articles and they supported the prosecution case.

P.W.6 Balakrishna Nayak stated that he did not know the accused persons and nothing has been seized in his presence.

P.W.7 Devi Prasad Nanda was the S.I. of Police of Golanthara Police Station who accompanied P.W.10 to the office of Superintendent of Police, Berhampur. He stated that in that office, P.W.10 seized the detailed report sent to Superintendent of Police in connection with the case. He is also a witness to the seizure of the detailed report vide seizure list Ext.5.

P.W.8 Bhaskar Sahu was the S.I. of Police of Golanthara Police Station who was on the patrolling duty on the relevant day with other police staff. He intercepted the

vehicles, detained the appellants and recovered 33 packets of contraband ganja from the vehicles. Subsequently, he intimated the local Tahasildar (P.W.9) to come to the spot, before whom the packets were opened and weighed. He then sent the written report (Ext.6) to P.W.10 from the spot. He also prepared two seizure lists at the spot. He further stated that he cannot identify the occupants of the vehicles, who were detained on that day by him, but again stated that the accused persons standing in the dock were the occupants of the vehicles.

P.W.9 Mahendra Panda was the Tahasildar, Konisi who stated that he received a telephonic message from the Sub-Collector, Berhampur asking him to proceed to Golanthara Police Station. He could not say as to whether the accused persons standing in the dock were those eight persons, who had been detained by police. He stated that in his presence, those jerry packets were opened and samples were collected, which were found to be ganja.

P.W.10 Radar Charan Patnaik was posted as the I.I.C. of Golanthara Police Station and he is the Investigating Officer of the case.

The prosecution exhibited eleven documents. Ext.1 is the signature of P.W.1, Ext.2 is the zimanama, Exts.1/2, 3, 4/1, 5, & 9 are the seizure lists, Ext.6 is the written report, Ext.7 is the zimanama in respect of brass seal, Ext.8 is the spot map, Ext. 10 is the letter addressed to the Superintendent of Police, Berhampur and Ext.11 is the chemical examination report.

The prosecution also proved thirty four material objects. M.Os.I to M.O.XXXIII are the bags containing residue ganga and M.O. XXXIV is the bag containing residue sample.

No witness was examined on behalf of the defence.

Findings of the Trial Court:

5. The learned trial Court formulated the following sole point for determination in this case:

> "Whether on 21.09.2010 at about 03.45 p.m. near Ghati Kalua temple of Golanthara in two four wheeler vehicles, i.e., Bolero bearing registration No.OR-02-BA-2123 & Xylo bearing registration No.OR-10G-6726, these eight accused persons were found in

possession of 316 kgs and 150 grams of contraband ganja in total, contained in 33 different packets."

After examining both oral and documentary evidence on record, the learned trial Court came to hold that 33 packets of contraband ganja was recovered from both the vehicles and the said vehicles were detailed almost with no time lag and the appellants were also found from the vehicles. It was held that section 43(b) of the N.D.P.S. Act comes into play that each can be taken to be the companion of the rest in the company. It was further held that the presumption of possession as provided under section 54 of the Act also got attaracted as regards the commission of offence for their possession when no evidence either has been laid from the side of the appellants nor any material surfaced from the side of prosecution evidence to say that it was not found from the conscious possession of the appellants. Accordingly, the learned trial Court held that the prosecution has proved its case beyond all reasonable doubt and convicted the appellants of the offence charged.

Contentions of parties:

6. Mr. Rajib Bihari Mishra, learned counsel for the appellants in the four criminal appeals, though does not dispute that on the basis of the materials available on record, the conviction of the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act is quite justified, but contended that the punishment imposed by the learned trial Court is not in accordance with law. He further submitted that section 32-B of the N.D.P.S. Act has not been taken into account while imposing higher than the minimum punishment prescribed under section 20(b)(ii)(C) of the N.D.P.S. Act. Learned counsel further submitted that some of the appellants have already undergone more than eleven years of substantive sentence and others have undergone more than nine years of substantive sentence and in such a scenario, if minimum sentence as prescribed under section 20(b((ii)(C) of the N.D.P.S. Act is imposed and the default sentence for non-payment of fine is reduced, some of the appellants will be released from custody as they have got no other criminal antecedent and rest of them will have to

undergo imprisonment for a lesser period. As per the previous of this Court, learned counsel for the State was asked to obtain the custody certificates of all the appellants and today the learned counsel for the State has produced the same from which it appears that appellant Kamal Franklin Patra @ Raja has undergone imprisonment for nine years nine months and five days, appellant Dhiren Khilla has undergone eleven years seven months and fourteen days, appellant Gouri Shankar Pradhan has undergone substantive sentence of nine years six months and three days, appellant Ramesh Gouda has undergone nine years ten months and twenty two days, appellant Bharat Chandra Pradhan has undergone nine years nine months and two days, appellant Purana Chandra Panigrahi @ Kumar has undergone nine years eleven months five days, appellant Surendra Nayak has undergone nine years nine months and four days and appellant Sanatan Ray has undergone eleven years nine months and two days of sentence.

Section 32-B of N.D.P.S. Act cannot be flouted mechanically:

7. In the cases of **Sambhulal Tibrewal -Vrs.- State of Odisha reported in 2017 (Supp.-II) Orissa Law Reviews 358** and **Rajesh K.R. and Another -Vrs.- State of Odisha reported in (2021) 84 Orissa Criminal Reports 309**, this Court had the occasion to deal with an identical point as far as the applicability of section 32-B of the N.D.P.S. Act is concerned, wherein it is held as follows:

> "11. Coming to the sentence imposed by the learned trial Court, I find that after convicting the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act, the learned trial Court has observed that the appellant had kept huge quantity of ganja even inside a secret place in Puja Ghar which he utilized for transaction and therefore, the Court was of the view that the appellant is not entitled to be leniently dealt with. It is further observed that dealing such huge quantity of ganja is an offence more heinous than the offence of homicide. With these reasons, the learned trial Court has imposed substantive sentence of R.I. for 15 years and also

directed to the appellant to pay a fine of Rs.1,00,000/-, (rupees one lakh only), in default, to undergo further R.I. for six months.

Section 20(b)(ii)(C) of the N.D.P.S. Act prescribes, inter alia, that whoever, in contravention of any provision of the Act or any rule or order made or condition of license granted thereunder possesses cannabis which involves commercial quantity, he shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees. Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

Section 32-B of the N.D.P.S. Act deals with factors to be taken into account for imposing higher than the minimum punishment which reads as follows:-

> "**32-B**. Where a minimum term of imprisonment or amount of fine is prescribed for any offence committed under this Act, the Court may, in

addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine, namely:-

(a) the use or threat of use of violence or arms by the offender;

(b) the fact that the offender holds a public office and that he has taken advantage of that office in committing the offence;

(c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence; and

(d) the fact that the offence is committed in an educational institution or social service facility or in their immediate vicinity of such institution or faculty or in other place to which school children and students resort for educational, sports and social activities;

(e) the fact that the offender belongs to organized international or any other

criminal group which is involved in the commission of the offence; and

(f) the fact that the offender is involved in other illegal activities facilitated by commission of the offence."

On a bare reading of this section, it is apparent that ordinarily minimum term of imprisonment or fine has to be imposed where it has been so prescribed but if the case comes under any of the clauses i.e. (a), (b), (c), (d), (e) or (f) of section 32-B or any other factors as it may deem fit then the Court may award more punishment than the minimum. On going through the reasons assigned by the learned trial Court in the impugned judgment, it is clear that none of reasons falls within the category of the clauses (a), (b), (c), (d), (e) or (f). The reasons assigned were not sufficient enough to award more punishment than the minimum. It is clear that while imposing a substantive sentence of R.I. for fifteen years, the learned trial Court has not kept in view the provision under section 32-B of the N.D.P.S. Act which was inserted in the N.D.P.S. Act w.e.f. 02.10.2001. The

> occurrence in this case took place on 11.06.2002 and therefore, at the time of imposing sentence, it was the duty of the learned trial Court to take into account the provision under section 32-B of the N.D.P.S. Act. It is the well settled principle of law that substantive provision unless specifically provided for otherwise intended by the Parliament should be held to have a prospective operation. One of the facets of rule of law is also that all statutes should be presumed to have a prospective operation only."

Learned counsel for the appellant submitted that the conviction of the appellant by the learned trial Court is based on sound reasons and he does not want to challenge the order of conviction but contended by placing reliance on section 32-B of the N.D.P.S. Act that the imposition of substantive sentence of eleven years is contrary to the settled position of law.

Mr. Arupananda Das, learned Additional Government Advocate appearing for the State does not dispute that in view of the ratio laid down by this Court in

the aforesaid two decisions and the provision under section 32-B of the N.D.P.S. Act, the imposition of substantive sentence of eleven years cannot be sustained in the eye of law.

While imposing the sentence of eleven years of rigorous imprisonment on the appellants, the trial took into consideration some factors and observed as follows:

> "Taking into account the deleterious effect of such kind of drug abuse shattering the fabric of the society and economy of the Nation and also looking at the age of the convicts, in the absence of any material as regards their prior involvement in such kind of offences, each of them is sentenced to undergo Rigorous Imprisonment for a period of 11 (eleven) years and to pay a fine of Rs.1,00,000/- (Rupees One Lakh) in default to undergo further Rigorous Imprisonment for a period of 1 (one) year."

A cautious glance on the aforementioned reasons assigned by the learned trial Court make it clear that the factors taken into account by it are generic and mechanical

in nature and hardly any reason has been indicated for which it can be said that the learned Court was justified in flouting the mandate under section 32-B of the N.D.P.S. Act for imposing higher than the minimum sentence.

It is no more res integra that the judicial wings of Court are not clipped to go beyond the factors which are specifically enshrined under clauses (a), (b), (c), (d), (e) and (f) of section 32-B while sentencing more than the minimum terms. The Hon'ble Supreme Court in the case **of Gurdev Singh -Vrs.- State of Punjab reported in (2021) 6 Supreme Court Cases 558** has held as follows:

> "7. Therefore, while imposing a punishment higher than the minimum term of the imprisonment or an amount of fine, the court may take into account the factors enumerated in Section 32-B of the Act referred to hereinabove. However, it is required to be noted that Section 32-B of the Act itself further provides that the court may, in addition to such factors as it may deem fit, take into account the factors for imposing a punishment higher than the minimum term of imprisonment or amount

> of fine as mentioned in Section 32-B of the Act. Therefore, while imposing the punishment higher than the minimum term of imprisonment or amount of fine, the court may take into account such factors as it may deem fit and also the factors enumerated/mentioned in Section 32-B of the Act. Therefore, on fair reading of Section 32-B of the Act, it cannot be said that while imposing a punishment higher than the minimum term of imprisonment or amount of fine, the court has to consider only those factors which are mentioned/enumerated in Section 32-B of the Act."

Having utmost regard for the above point of law as stand settled by the authoritative pronouncements of the Hon'ble Apex Court, this is clarified that even though no doubt the factors stipulated under section 32-B are not exhaustive and learned trial Court has the authority to take into account some additional factors beyond the ones prescribed under the said provision, but it has to be particular as to why it deems apposite to impose a higher punishment. In other words, it must specify reasons which made it to opine that a specific factor is grave enough to

attract higher punishment than the minimum prescribed sentence. It is not at all advisable for the trial Court to provide general reasons without being specific as to which particular factor appealed to its judicial mind for which it was compelled to resort to the exceptions provided under section 32-B rather than following the main provision. Failure on the part of the concerned Court to pass a reasoned order of sentence leads to unwanted and blatant infringement of the precious right to liberty of a convict.

In the case in hand, looking at the reasons given by the learned trial Court in imposing sentence of rigorous imprisonment for eleven years, I am of the humble view that the learned Court has not at all kept in view such provision and simply awarded the sentence, which is higher than the minimum punishment prescribed for the offence and therefore, it is not sustainable in the eye of law.

Conclusion:

8. On a bare perusal of the operative parts of the judgment, it is apparent that the learned trial Court while

imposing eleven years of substantive sentence has not taken into account the provision of section 32-B of the N.D.P.S. Act. Therefore, while upholding the conviction of the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act, I reduce the sentence of imprisonment handed down to them from eleven years to ten years. So far as the fine of Rs.1,00,000/- (Rupees one lakh) is concerned, it is the minimum amount prescribed. Therefore, I deem it proper to uphold the same, but at the same time, I reduce the default sentence of R.I. for a period for one year to R.I. for two months.

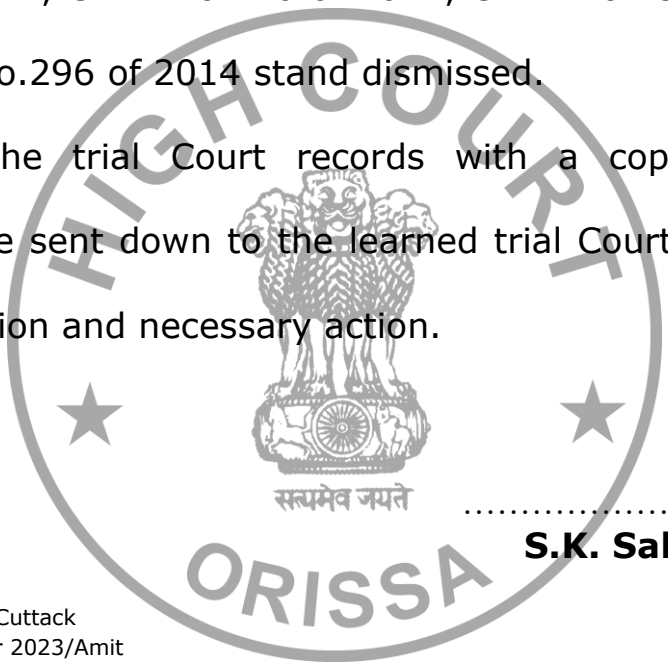
It is stated that the appellant Sanatan Ray in CRLA 296 of 2914 is on regular bail. Since I have reduced the substantive sentence to ten years and the default sentence to two months, whichever appellant has already undergone such period in judicial custody in connection with this case, is to be released forthwith from judicial custody, if his detention is not required in any other case.

If the appellant Sanatan Ray has already undergone the period of sentence which has been imposed

by me today, he is not required to surrender before the learned trial Court. However, if it is found by the learned trial Court from the custody certificate submitted by the Jail Superintendent that he has to undergo any further sentence, then he will be taken into judiclal custody to serve out the remaining part of the sentence.

With the modification in the sentence, CRLA No.36 of 2014, CRLA No.120 of 2014, CRLA No.150 of 2014 and CRLA No.296 of 2014 stand dismissed.

The trial Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.



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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 14th September 2023/Amit