

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Criminal Appeal No.335 of 2012**

- Nem Kumar Singh, S/o Shri Shail Kumar Rathor, aged 28 years, R/o Jawahar Nagar, Police Station – Bodhghat, Jagdalpur, District Bastar (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh, Through Police Station – Civil Lines, Raipur (C.G.)

---- Respondent

For Appellant	:	Mr. R.N.Jha, Advocate.
For Respondent/State	:	Mr. Avinash K. Mishra, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Inder Singh Uboweja

CAV JUDGMENT**Delivered on 15 -10-2015****Per I.S. Uboweja, J.**

1. This appeal is directed against the judgment and order dated 21.02.2012 passed by the Special Judge under N.D.P.S. Act, Raipur, in Special Criminal Case No.05/2010 convicting the accused/appellant under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act of 1985') and sentencing him to undergo RI for fifteen years and to pay a fine of Rs.1,50,000/-, in default of payment of fine, to further undergo RI for two and half years.
2. Conviction is impugned on the ground that without there being an iota of evidence, the trial Court has convicted & sentenced the appellant as aforementioned and thereby committed illegality.

3. Facts of the case, in brief, are that on 14.12.2009, Mukesh Khare, Sub-Inspector (P.W.12), Police Station, Pandri, while he was on duty, received an information from the informer that one Nem Kumar Singh Rathore was in possession of *ganja* unlawfully in the Jeep and was in search of selling the same near Pandri Gurudwara. The information was reduced to writing vide Ex.P.19 and the same was forwarded to City Superintendent of Police, Civil Lines, Raipur, vide Ex.P.26. Thereafter, Police Party including panch witnesses Imran Khan (P.W.3) and Vinod Sharma (P.W.4) rushed to the spot, apprehended the accused/appellant and gave notice (Ex.P.5) to the appellant under Section 50 of the Act of 1985. Vide Ex.P.6 the accused/appellant has given his consent to be searched by P.W.12 Mukesh Khare. Likewise, Police Party has also given their consent to be searched by the appellant vide Ex.P.7. During search of the vehicle, 9 bags containing contraband *ganja* was found and the same was recovered vide Ex.P.8 from the vehicle. The same was identified to be *ganja* vide Ex.P.10. After recovery of the *ganja*, the same was weighed and physically verified vide Ex.P.9. Contraband was homogenized and total quantity of *ganja*, after its weighment, was found to be 279.100 kilograms vide Ex.P. 11. Samples of 50 grams each were taken out from all bags, they were duly sealed and after completion of the exercise, the accused was arrested vide Ex.P.15. After returning to Police Station, contraband *ganja* and its samples were deposited in *Malkhana* and entry of the

same was done in the register vide Ex.P.22. F.I.R. under Section 20 (b) of the Act was registered vide Ex.P.30. Samples were sent to Forensic Science Laboratory together with memo dated 16.12.2009, which were received vide acknowledgement dated 17.12.2009 vide Ex.P.24. F.S.L. report was received vide Ex.P.26 and after completion of investigation, charge sheet was filed under Section 20 (b) (ii) (C) of the Act of 1985.

4. In support of its case, prosecution has examined as many as 12 witnesses. Statement of the accused was also recorded under Section 313 of the Code of Criminal Procedure, in which, he denied the charges levelled against him and pleaded innocence and false implication in the case.
5. After providing opportunity of hearing to the parties, learned Special Judge has convicted and sentenced the appellant as mentioned in para 1 of the judgment.
6. We have heard learned counsel for both the parties and perused the judgment impugned including the record of court below.
7. Learned counsel appearing for the appellant submits that prosecution has failed to prove that contraband *ganja* was recovered from conscious possession of the accused and also failed to prove that vehicle belonged to the accused/appellant. The prosecution further failed to follow the mandatory provisions of the law, such as, the Police Party did not deposit the samples in

Malkhana, failed to prove that samples of contraband were deposited in *Malkhana* and no entry was proved. There is possibility of tampering with the samples. Neither the seized contraband was produced before the Court nor the witnesses have identified the same in Court at the time of adducing their evidence. In support of his submissions, learned counsel for the appellant has placed reliance upon judgments in the cases of ***State of Rajasthan vs. Gurmail Singh*, 2005 SCC (Cri) 641, *Rakesh Chakravarti vs. State of M.P.*, (2007) 1 SCC (Cri) 744, *State of Rajasthan vs. Bher Singh*, (2010) 3 SCC (Cri) 268 and *Govind Ram vs. State of C.G.*, 2007 (1) C.G.L.J. 272.**

8. On the other hand, learned State counsel opposed the arguments put-forth by the learned counsel for the appellant and supported the judgment of conviction and order of sentence passed by the Special Judge.
9. Sub-Inspector Mukesh Khare (P.W.12), in his evidence, stated as to how the manner in which he dealt with the case. Firstly, he stated that he received secret information from the informer and after completing all the necessary formalities, as required under Section 42 of the Act, proceeded to the spot, gave notice to the appellant under Section 50 of the Act and made seizure of the contraband vide Ex.P.12. After effecting seizure, he put the seal and weighed the contraband *ganja*. F.I.R. vide Ex.P.30 was registered against the appellant. He further stated that seized

ganja and the samples thereof were deposited in the safe custody and then sent the same to F.S.L. for its examination and after receiving the report Ex.P.25 charge sheet was filed. Sachin Pandey (P.W.10) is the Constable who took the samples to Forensic Science Laboratory, proved the same vide Ex.P.24 and Ex.P.25. Imran Khan (P.W.3) and Vinod Sharma (P.W.4) are the Panch witnesses of all the proceedings, who have been declared hostile witnesses as they have not supported the case of the prosecution. However, the above witnesses have admitted their signatures on documents Ex.P.4 to P.15.

10. Bishat Ram Gilhare (P.W.8) *Malkhana Moharrir*, supporting the case of the prosecution has stated that he received 279.100 kilograms of *ganja* and deposited the entire contraband in the *Malkhana* and made entry in the register vide Ex.P.22.
11. A minute examination of the evidence available on record makes it clear that prosecution has not produced Roznamchasana which was written on the basis of *Mukhbir* Panchnama. Brijeshwarram (P.W.11), Head Constable, stated that he has deposited *Mukhbir* Panchnama in the Office of City Superintendent of Police. Devchandra Bharti (P.W.2) supported the statement of P.W.2 Brijeshwarram, but the documents Ex.P.2 and Ex.P.3 show that there was a seal on those documents without date and time and did not contain register number nor did contain entry number.

12. Investigating Officer Mukesh Khare (P.W.12) has stated that when he reached the spot he saw that accused was present near the vehicle, but, he has not stated as to how he could identify that person as Nem Singh Rathore. It has not come in his evidence that he had enquired about the accused/appellant or had any conversation with the appellant before proceeding. He did not state as to who had brought the weighment machine and who had checked and verified that instrument. It is also not clear by his statement as to who had taken out the contraband from the bags and who had homogenized the contraband samples. It does not reveal from his evidence that how many packets of samples were prepared from each bag and whether those samples were deposited in the *Malkhana*. He simply stated that seized contraband was deposited in *Malkhana*. In his cross-examination, he admitted that Ex.P.22 shows that there is no entry of contraband sample deposited by him in the *Malkhana*. *Malkhana Moharrir* Bisahat Ram Gilhare (P.W.8) clearly stated that 279.100 kilograms of *ganja* kept in 9 bags were deposited in the *Malkhana* and entry thereof was made vide Ex.P.22. In cross-examination, he admitted that when bags were deposited he opened the same and after weighment kept them in safe custody in *Malkhana*. He also admitted that no sample of *ganja* was deposited with him. Therefore, there was every possibility of tampering with the samples.

13. The evidence of Mukesh Khare (P.W.12) and Bisahat Ram (P.W.8) coupled with *Malkhana* register Ex.P.22 shows that all those samples of contraband seized were not deposited in the *Malkhana*. In the *Malkhana* register, there was no entry made when samples of *ganja* were deposited and when the sample of *ganja* was sent for chemical examination to F.S.L., it shows that sample of *ganja* was not in safe custody from its seizure till sending the same to F.S.L. It is also not proved by the prosecution that samples of *ganja* were sent to F.S.L. vide memo Ex.P.23, but, Ex.P.23 does not show that from which place the Office of Superintending Police has received the samples of *ganja* and thereafter sent the same to F.S.L. On the contrary, Constable Sachin Pandey (P.W.10) has stated that he had brought the samples of *ganja* for its examination from Police Station. There is no such evidence that seal of the Officer-in-Charge of the Police Station was affixed on the samples. There is nothing on record to show as to when the sample packets were returned to the Office of Superintendent of Police. It has also not come in the evidence that when the sample packets of *ganja* and rest of *ganja* was produced before the trial Court. There is no such evidence to show that the same *ganja* and seal were identified by the witnesses in Court below. There is also no evidence on record to show that seized bags and sample packets were entrusted separately to *Malkhana Moharrir* in a sealed condition. No evidence has come on record to show that seal was affixed on the

18 sample packets by the Station House Officer when the same was entrusted for safe custody in *Malkhana*. There is no such evidence to show that specimen impression of the seal on such articles and after affixing the seal on such articles the same were deposited in the *Malkhana*, as contained under Section 55 of the Act. Therefore, the provisions as contained in Section 55 of the Act have not been fully complied with by the Police authorities.

14. In the case of **State of Rajasthan v. Gurmail Singh**, while observing that there were infirmities in the prosecution case, such as, malkhana register was not produced in support thereof despite the seized articles claimed to have been kept in malkhana on 20.5.1995 till it was taken over on 5.6.1995, no sample of seal sent along with the sample to Excise Laboratory for comparing with the seal appearing on sample bottles and thus there was no evidence to prove that the seals found were the same as were put on the sample bottles immediately after seizure of the contraband, the Supreme Court held that the link evidence adduced by prosecution was not satisfactory and in view of the loopholes in the prosecution case, the High Court was justified in acquitting the accused-respondent. In the case of **Ritesh Chakravarti vs. State of M.P.** the Supreme Court while dealing with proviso of Sections 42 and 50 of the Act, held that it is a grave one and hence procedural safeguards provided to the accused require strict compliance and recovery of contraband in presence of

independent persons is important and emphasised that search should normally be conducted by a Magistrate or a gazetted Officer. The Supreme Court, in the case of **State of Rajasthan vs. Bher Singh**, while dealing with Sections 55 and 17 r/w Section 8, held that failure by prosecution to prove that the seal on seized opium sample had remained intact till its examination in FSL which is a mandatory requirement to establish the fact that the seized goods was in fact a prohibited drug under the NDPS Act. While dealing with Sections 22, 50 & 55, this Court, in the case of **Govind Ram vs. State of C.G.**, held that there was non-compliance of mandatory provision. All the independent witness did not support the prosecution case. Notice given under Section 50 of the Act does not contain this fact that the accused was informed about his legal right and option was given to him to be searched before the Gazetted Officer. *Malkhana* register does not show that the polythene packets which were alleged to contain brown-sugar and seized from the accused were delivered at the *Malkhana* in a sealed condition and seal of the Officer In-charge of the Police Station was affixed and thus this is total non-compliance of Sections. 50 & 55 of the Act.

15. After considering the evidence adduced by the prosecution and documents available on record, it is clear that prosecution has not complied with the mandatory provisions of the Act. There were gross infirmities and illegalities in the prosecution case. We are of

the considered opinion that prosecution has failed to prove its case beyond reasonable doubt, therefore, the Court below was unjustified in arriving at the conclusion on the basis of evidence collected by the prosecution. The findings of Court below being erroneous call for interference. Conviction of the appellant and sentence imposed thereunder by the trial Court are not sustainable in the eye of law.

16. For the foregoing discussion, we are of the opinion that the appellant is entitled to be acquitted of the charge by giving him benefit of doubt.
17. Accordingly, the appeal is allowed. Conviction of the appellant under Section 20(b)(ii)(C) of the Act of 1985 and the sentence imposed thereunder by the trial Court, being not sustainable in law, are hereby set aside. The appellant is directed to be set at liberty at once, unless required in any other case.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(I.S. Uboweja)
JUDGE