

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.163 of 2003**

Umesh Kumar Shukla S/o Damodar Shukla, aged about 26 years, R/o village Bara, PS University, Rewa, Distt. Rewa (MP).

---- Appellant

Versus

The State of Chhattisgarh, through Police Station, Railway Police, Bilaspur (CG).

---- Respondent

For Appellant
For respondent/State

Shri NK Malviya, Advocate.
Ms. M. Asha, Panel Lawyer.

Hon'ble Shri Justice P. Sam Koshy

JUDGMENT**Delivered on 29.11.2017**

1. The appellant stands convicted for the offence punishable under Section 20-B(ii)(b) of the Narcotic Drugs and Psychotropic Substance Act (in short the Act) and have been sentenced to undergo RI for 3 years with fine of Rs.500/- with default stipulation vide judgment dated 30.01.2003 passed by the Special Judge (NDPS Act), Bilaspur, in Special Case No.09/2002.
2. As per prosecution case, on receipt of secret information that two persons travelling from Raipur to Bilaspur in Train No.322 Down Tata-Nagpur Passenger were carrying Ganja with them, the Station House Officer, GRP, Bilaspur, initiated a proceeding under the Act. After the mandatory compliance as is required under the provisions of the Act, the team of police personnels reached the railway Station, Bilaspur

awaiting Train No.322 Down Tata-Nagpur passenger train at platform No.1 and as soon as the train stopped, two persons alighted from the train carrying suspicious bags. They were rounded up and subjected to search in accordance with the provisions of the Act and found that the present appellant was carrying Black bag and when searched, they found Ganja like substance and weighing the same, it was found to be of 7 kg of which one packet of 100 grams was collected as sample and after preparing Panchnama in this regard, seizure proceedings were drawn and seizure Panchnama was also prepared and the appellant was put to trial with charge for the offence punishable under Section 20-B(ii)(b) of the Act before the Special Judge, NDPS Act, Bilaspur.

3. During the course of trial, the prosecution in all examined five witnesses. After completion of evidence, the trial court vide impugned judgment found the appellant guilty of having committed offence, convicted and sentenced him vide the impugned judgment.
4. The contention of the appellant assailing the judgment of conviction is that the findings of trial court is bad in law as well as erroneous. The ground of challenge raised by the appellant is that the prosecution has not been able to produce any details in respect of the secret information received by the police authorities. It was further contended that the statement of prosecution witnesses would by itself reveal that the contents are not free from doubts and that there are many improvisation made by the witnesses. The ground of challenge is also on account of non compliance of mandatory provisions under Sections 42 and 50 of the Act. Without compliance of the same, the entire proceedings drawn

by the search authority stands vitiated for the reason that the information sent to the higher authorities were all done after the search was complete which again is in total contravention to the provisions of the Act. Another ground raised by the appellant is that the member of the officers who conducted search himself has further investigated the matter.

5. It was further contended that the case of the prosecution also stands disproved for the simple reason that the case of the prosecution is not supported by any of the independent witness which by itself gives a great element of doubt, inasmuch as only one of the witness of search and seizure namely Santosh Yadav was examined who too has been declared hostile and have not supported the case of the prosecution whereas, the other witness Shiv Shrivastava was not examined at all. This further weakens the case of the prosecution and creates a great element of doubt on the prosecution story and the benefit of doubt so created should go in favour of the accused as is the settled legal position under criminal jurisprudence. Thus, the appellant prayed for setting aside of the judgment of conviction.
6. The State counsel opposing the appeal on the contrary submits that a perusal of records and the evidence adduced before the court below, it would clearly establish that the prosecution infact has duly complied with all the provisions of the Act in its letter and spirit and there is no fault or lapse on the part of prosecution. It is further submitted that all due prerequisites as is required before search is conducted was ensured and the appellant was apprised of all his rights. Written consent

was also taken from the accused and only thereafter the appellant was searched. Similarly, search and seizure proceedings were also drawn in presence of independent witnesses.

7. It was further contended by the State counsel that even if the independent witnesses have not supported the case of the prosecution, there are judgments of the Supreme Court which envisages the proposal of proving the case of prosecution on the basis of evidence led by the prosecution before the trial court. Thus, prayed for rejection of the appeal.
8. Having considered the rival contentions put forth on either side, if we peruse the records of the court below, it would reveal that a secret information was received at Railway Police Station, Bilaspur, on 09.01.2002 at around 21:00 PM. An intimation in this regard was immediately sent to Raipur and entry was made in the Rojnamcha Sanha. However, who was the person sent with information at Raipur is not disclosed. Further, entries which are made in the Rojnamcha Sanha and the case diary would reveal that there is discrepancy so far as time of each of the proceedings which were drawn, inasmuch as, Ex. P/9 is the document by which the appellant is alleged to have given consent for physical examination and Ex. P/10 is the report of the actual physical examination done. The time entered for physical examination is 22:20 PM which has been marked as Ex. P/10 whereas, if we look at the subsequent proceedings i.e. weighment Panchnama prepared and the seizure memo made Ex. P/11 & P/12, they would reflect that the time entered for weighment Panchnama is 21:50 PM i.e. much before

physical verification was done and the seizure memo was made on 21:50 PM which again is prior to the physical verification done.

9. Another distinguishing feature which is reflected from the proceeding is that Ex. P/18 is a document dated 09.01.2002 written by the police personnel at Bilaspur sent to the Superintendent of Police (Rail), Raipur. Ex. P/19 is a letter issued on 16.01.2002 by the Superintendent of Police (Rail) to the FSL for determining the contraband. Ex. P/19 is the correspondence made by the SP (Rail), Raipur to FSL which has date of 16.01.2002 but the signature in the said letter by the concerned authority reflects the date as 19.01.2002. There is no reference in the case diary as to who took the contraband from Bilaspur to Raipur. No detail is available as to where the contraband was placed from the date of seizure i.e. 09.01.2002 till 16.01.2002 when S.P. (Rail), Raipur, had sent it to the FSL.
10. Another striking feature which is reflected is that, PW-5, R.L. Bada, as the main witness on behalf of the prosecution i.e. Investigating Officer. From the deposition of I.O. also it is not reflected as to who was the person who had informed the superior authority on telephone. No proof in this regard has been adduced in the court. Further, from the statement of I.O. it does not reflect who was the persons accompanying him at the time of search and seizure. No police personnels from the said team have been examined. The evidence also reflects that the Investigating Officer himself has weighed the contraband with no details from where he brought the weighing machine. There appears discrepancy so far as deposition of PW-5 is concerned when compared

to Ex. P/19. According to PW-5, he had sent samples to Raipur on 22.01.2002 whereas, Ex. P/19 reflects that it was sent by the SP (Rail) to FSL on 16/19.01.2002. This further creates an element of doubt on the prosecution story.

11. Further, another aspect which gives rise to an element of doubt is that the seizure witness have turned hostile and has not supported the case of the prosecution. However, the independent witnesses so far as weighment Panchanama which was conducted in the presence of two witnesses Manjhi and Saddam Husain is concerned, both these witnesses have not been examined before the trial court.

12. As regards the provisions of the NDPS Act is concerned, since the penal provisions are stringent, the compliance required under the provisions of the Act has to be strictly followed. The Constitution Bench of Supreme Court in case of Karnail Singh Vs. State of Haryana, 2009(8) SCC 539, in a very categorical terms have held that non compliance of Section 42 of the Act are grave. Since the provisions of the Act are stringent, a duty is casted upon the prosecution to strictly follow the procedure and comply with all its safeguards. Likewise, the Supreme Court in case of Sukhdev Singh Vs. State of Haryana, 2013 (2)SCC 212 has observed that, “the provisions of Section 42 are intended to provide protection as well as lay down a procedure which is mandatory and should be followed positively by the investigating officer.” It is further held that the provisions of Section 42 of the Act is mandatory and there cannot be escape from its strict compliance.

13. The Supreme Court in case of State of Rajasthan Vs. Parmanand, 2014

(5)SCC 345 has held that, “most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement.”

14. Another ground which the appellant has raised also seems to have force in it inasmuch as the Inspector who had received secret information has subsequently drawn all proceeding by himself and that the Supreme Court in Megna Singh Vs. State of Haryana, 1996 (11) SCC 709 has vitiated the entire investigation and trial on this ground. The said view has further been re-iterated by the Supreme Court in case of State by Inspector General of Police, NIB. Vs. Rajangam, 2010(15)SCC 369 where the officer who had received secret information subsequently assumed the role of Investigating Officer and drawing further proceedings of investigation.

15. Recently, Division Bench of this court in Criminal Appeal No.123 of 2011, Bholaram & Ors. Vs. State of Chhattisgarh, decided on 07.06.2017 have followed the decision in case of Megna Singh (Supra) so also the case of Rajangam (Supra).

16. In case of Noor Aga Vs. State of Punjab & Anr. 2008(16)SCC 417 in paragraph 58, the Supreme Court has held as under:

“58. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”

- 17.** This proposition of Supreme Court further stands reiterated in recent decision of Supreme Court in Criminal Appeal No.1053 of 2016 Naresh Kumar @ Nitu Vs. State of Himachal Pradesh, decided on 27th July, 2017.
- 18.** In the light of aforesaid authoritative pronouncement, if we look into the discrepancies which are there in the prosecution case, so also the fact that it was the person who received secret information himself had later on turned as Investigating Officer and conducted investigation and also presented the case of the prosecution before the trial court, the proceedings for the reasons mentioned in the preceding paragraphs stands vitiated including the trial and conviction made thereon. Further, the impugned judgment is not sustainable on account of discrepancy and non compliance of statutory provisions.
- 19.** Thus, granting benefit of doubt to the appellant, the impugned judgment of conviction stands set aside and the appellant is acquitted of charges under Section 20(B)(ii)(b) of the NDPS Act. The bail bond of the Appellant shall remain in operation for a period of six months from today in view of provision contained in Section 437-A Cr.P.C.

Sd/-

(P.Sam Koshy)
Judge