

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 442 of 2012**

- Rajesh Prasad Kenvat S/o Shiv Prasad, aged about 20 years, R/o Khongapani, Thana- Ledari, Distt.- Korea (C.G.).

---- Appellant

Versus

- State of Chhattisgarh through: Police Station Khamtarai, Distt.- Raipur (C.G.).

---- Respondent

For Appellant	: Shri Samir Singh, Advocate
For Respondent/State	: Shri Wasim Miyan, Panel Lawyer

**Hon'ble Shri Manindra Mohan Shrivastava &
Hon'ble Shri Justice Gautam Chourdiya
Judgment on Board**

Per Shri Manindra Mohan Shrivastava J.**19.11.2018**

1. This appeal is directed against the judgment of conviction and order of sentence dated 21.03.2012 passed by Special Judge (NDPS), District Raipur in Special Case No. 22/2011 convicting the accused/appellant for the commission of offence under Section 20(b)(ii) and (c) of the Narcotic Drugs and Psychotropic Substance Act, 1985 (henceforth "Act, 1985") and sentencing him to undergo

rigorous imprisonment of 15 years and to pay fine of Rs.1,50,000/-, with default stipulation.

2. The case of the prosecution, in brief, is that on 23.01.2011, upon receiving information regarding transportation of contraband (Ganja), the police arrived at the spot and vehicle alleged to be carrying contraband was intercepted and it is said that in presence of witnesses, Ganja was seized. According to the prosecution case, accused, after having been apprised of his right under Section 50 of NDPS Act, was searched and was found to be in possession of huge quantity of Ganja. Further case of the prosecution is that weighment was done at the spot and Ganja allegedly found in possession of the appellant weighed 233.5KG. Further, according to the prosecution, at the spot, samples were seized and then entire quantity of ganja was taken to the police station alongwith accused by the informant Shri L. S. Rajput (PW5) Assistant Sub-Inspector Police Station- Khamtarai, District- Raipur. It followed registration of FIR in Ex. P-24 on 23.01.2011 itself. In the Police Station, the informant Officer Shri L. S. Rajput, who is alleged to have intercepted the vehicle and recovered the Ganja at the spot and brought the accused alongwith the quantity of Ganja in the police station, then recorded the FIR and conducted entire investigation of the case and then filed chargesheet, which led to prosecution of the appellant resulting in his conviction as aforesaid giving rise to filing of this appeal.

3. Learned counsel for the appellant argues that the appellant has been falsely implicated in the present case as the prosecution has failed to prove, beyond all the reasonable doubt, that it is the appellant who was carrying the quantity of Ganja and that it was seized from his possession because the two independent witnesses of the prosecution, namely- Shubhash Chandra Jain (PW1) and Md. Aslam (PW7) both have not supported the case of the prosecution on this material aspect and have turned hostile. The other important submission of learned counsel for the appellant is based on the recent judicial pronouncement of the Supreme Court in the case of **Mohan Lal Vs. The State of Punjab** in **Criminal Appeal No. 1880 of 2011** wherein as the informant and the investigating Officer was one and the same, the entire investigation as well as the trial was held to have been vitiated and the judgment of conviction was set aside. According to the learned counsel for the appellant, present is a case under the NDPS Act and Judgment of the Supreme Court rendered in **Mohan Lal (Supra)** related to a case of commission of offence under Section 18 of the NDPS Act only. He would next submit that in cases relating to prosecution under NDPS Act which carries a reverse burden of proof, the fact that the informant and investigating Officer are one and the same renders the entire investigation vitiated and prosecution case based thereon is also vitiated irrespective of whether or not the accused has proved independently any

prejudice. He would also submit that facts of the present is distinguishable from the decision rendered by the Supreme Court in the matter of **Surendra Vs. State of Haryana** reported in **(2016) 4 SCC 617** because it is not a case where more than one officer had investigated the matter and therefore, it would not fall in the category of those cases governed by decision of case of **Surendra (Supra)** and **State by Inspector of Police, Narcotics Intelligence Bureau, Madurai, tamilnadu Vs. Rajangam, 2010(15) Scc369** and **Megha Singh Vs. State of Haryana, 1996(11)SCC 709**. It has lastly been emphasised that in **Mohanlal Case** (supra), the Supreme Court has propounded that for fair investigation, which is very fundamental for a trial, it is necessary that the informant and investigating officer must not be the same and any possibility of bias or predetermined conclusion has to be excluded.

4. Per contra, learned counsel for the State would submit that in the present case, upon receiving secret information that the present appellant is carrying Ganja in a vehicle, the same was intercepted and huge quantity of 233.5kg was found in the vehicle unauthorizedly. He submits that the investigating officer has elaborately stated that he fully complied with various provisions relating to rights of the accused of being searched by a gazetted officer and other provisions contained in the Act relating to

weighment of sample, sealing, safe custody and obtaining FSL report of the sample. Even if two independent prosecution witnesses of seizure may not have supported the prosecution case, notwithstanding, they admitted their signature on the seizure memo and, therefore, in such a situation where the investigating officer has proved having complied with the proceedings strictly in accordance with the provisions of law, his evidence could be relied upon that the contraband (Ganja) was found in illegal possession of the appellant, even if, two independent witnesses of seizure may not have supported the case of the prosecution.

5. On the applicability of the decision of the Supreme Court in the case of **Mohanlal**(Supra), learned State counsel would submit that the aforesaid decision would be applicable in a matter where the accused has suffered independent prejudice apart from and in addition to the irregularities that the informant and the investigating officer were one and the same, as in the present case. However, independent prejudice has not been proved by the appellant therefore, the appellant is not entitled to take benefit of the aforesaid judicial pronouncement of the Supreme Court.
6. We have heard the parties and perused the records.
7. It is apparent and beyond all pale of doubt that in the present case, the informant and the investigating officer are one and the same. Shri L.S. Rajput (PW5) Assistant Sub-Inspector Police Station -Khamtari, has deposed that on 23.01.2011 while he was posted

as ASI in the Police Station Khamtarai, information on Wireless set was received from sub Inspector Hardev, the police officer on traffic duty that a Bolero car was intercepted for checking but the driver did not stop the vehicle and moved towards Bhanpuri and the vehicle did not bear any registration number. He further deposed that upon receiving the said information, he proceeded to check the vehicle alongwith other police officials leaving behind the information in Rojnamcha sanha vide Ex. P/17. He has further deposed that at the spot, the said vehicle was stopped and when the driver attempted to run away he was apprehended at the spot and he disclosed his name as Rajesh Kewant. He further stated that in the said vehicle, Ganja was found kept in Bag (sacks) which was informed to City Superintendent of Police, Urla, through a constable and, thereafter, in the presence of witnesses, notice under Section 19 of the Act, 1985 was given to the accused and he was apprised of his right of being searched before a judicial Magistrate First Class or a Gazetted Officer and then, upon the consent of the appellant/accused, search was carried out and from the vehicle, Ganja kept in 24 sacks, was found. He has further stated in his evidence that thereafter, he made a prima facie test by smelling the seized article, which was smelling like Ganja and then weightment was done and from the entire quantity, sample was drawn the accused was given notice to produce valid authority for possession which he could not produce. The weighment of

entire quantity of Ganja seized was 233.500 kgs. In the seizure memo vide Ex. P/12, the sample seal was also affixed, thereafter, the entire quantity of Ganja alongwith accused and all other documents of having drawn proceedings at the spot were brought to the police station and the seized articles were sent to the custody of Malkhana Muhrir and then FIR was lodged vide Ex. P/24. He has proved this document FIR. From the aforesaid evidence by this witness, it is clear that he was informant in the Police Station and it is this officer who has intercepted the vehicle, caught hold of the accused and said to have drawn the proceeding of sealing sampling etc.

8. We then find from the evidence that after recording FIR, he proceeded further in the case as the investigating Officer by effecting the arrest of the accused vide arrest memo Ex. P/14 and also taking all other steps in his capacity as the investigating Officer including sending the information to the senior Officer Special Judge, NDPS information regarding arrest, sending the sample to the State Forensic Laboratory, recording case diary statements of the prosecution witnesses and filing of the chargesheet.
9. Since, in the present case, the investigation Officer and the complainant is one and the same, the question which arises for our consideration is whether, in view of recent judicial pronouncement by the Hon'ble Supreme Court in the matter of **Mohanlal (Supra)**,

the entire prosecution of the appellant stands vitiated warranting to his acquittal on this ground alone.

10. In the case of the **Mohanlal** (supra), Mohanlal suffered his conviction under Section 18 of the NDPS Act, for which he was sentenced to RI for 10 years on the allegation of having been found in possession of 4 kgs of opium in a bag carried by him.

11. The order of the conviction was challenged on various grounds, one of them was that the investigation was fundamentally flawed as the informant could not have investigated/observed himself. In the aforesaid matter the Hon'ble Supreme Court observed as under:-

5. “We have considered the submissions on behalf of the parties. The primary question for our consideration in the present appeal is, whether in a criminal prosecution, it will be in consonance with the principles of justice, fair play and a fair investigation, if the informant and the investigating officer were to be the same person. In such a case, is it necessary for the accused to demonstrate prejudice, especially under laws such as NDPS Act, carrying a reverse burden of proof.”

12. Considering the general principle of criminal jurisprudence and that, in particular, in cases involving NDPS Act which carries a reverse burden of proof under Sections 35 and 54, their Lordships observed as below:-

10 ‘ Unlike the general principle of criminal jurisprudence that an accused is presumed innocent

unless proved guilty, the NDPS Act carries a reverse burden of proof under Sections 35 and 54. But that cannot be understood to mean that the moment an allegation is made and the FIR recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of ten years, absence of any provision for remission, do not dispense with the requirement of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities.’

11 ‘ A fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution, would be a hollow promise if the investigation in a NDPS case were not to be fair or raises serious questions about its fairness apparent of the face of the investigation. In the nature of the reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may raise doubts about its veracity. The obligation

of proof beyond reasonable doubt will take within its ambit a fair investigation, in absence of which there can be no fair trial. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger vesting arbitrary powers in the police which may well lead to false implication also. Investigation in such a case would then become an empty formality and a farce. Such an interpretation therefore naturally has to be avoided.'

13. The duty of the prosecution under the NDPS Act, considering the reverse burden of proof, as observed in Noor Aga's case, was also referred to. Furthermore, the Supreme Court also made it clear that it was not necessary that bias must actually be proved, by observing thus:-

14 'In a criminal prosecution, there is an obligation cast on the investigator not only to be fair, judicious and just during investigation, but also that the investigation on the very face of it must appear to be so, eschewing any conduct or impression which may give rise to a real and genuine apprehension in the mind of an accused and not mere fanciful, that the investigation was not fair. In the circumstances, if an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof, makes the allegations, is himself asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. It would be illogical to

presume and contrary to normal human conduct, that he would himself at the end of the investigation submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the investigation would therefore be a foregone conclusion.’

14. The principles so enunciated were held not confined to the requirement of a fair investigation under the NDPS Act only carrying a reverse burden of proof.
15. The judgment rendered by the Supreme Court in the matter of **State of Punjab Vs. Baldev Singh**, (1999)6 SCC 172, has been held distinguishable on its own facts concerning an irregularity in investigation by an officer not especially empowered under the NDPS Act to do so. The decision in the case of Surendra Vs. State of Haryana, (2016)4 SCC 617 which related to the NDPS Act was distinguished taking into consideration that in that case, the Sub-Inspector who was the informant/complainant was not the sole person investigating the case and that the said ground was not raised before the High Court in an appeal.
16. The importance of the rights of the accused to a fair investigation and fair trial guaranteed under the article 21 of the Constitution of India was highlighted as below

24 ‘ The view taken by the Kerala High Court in Kader (Supra) does to meet our approval. It tantamounts to holding that the FIR was a gospel truth, making investigation an empty formality if not a farce. The right of the accused to a fair investigation and fair trial guaranteed under Article 21 of the Constitution will stand

negated in that event, with arbitrary and uncanalised powers vested? With the police in matters relating to the NDPS Act and similar laws carrying a reverse burden of proof. An investigation is a systemic collection of facts for the purpose of describing what occurred and explaining why it occurred. The word systemic suggests that it is more than a whimsical process. An investigator will collect the facts relating to the incident under investigation. The fact is a mere information and is not synonymous with the truth. Kader (supra) is, therefore, overruled. We approve the view taken in Naushad (supra).'

17. Finally, the conflicting opinions expressed by different two judge Benches were dealt with, resolved and law laid down authoritatively, as below:-

25 'In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the Courts in a State of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that

the informant and the investigate or must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.'

- 18.** We would thus find that in cases relating to alleged commission of offence under the NDPS Act which involves reverse burden of proof and excluding, as exception, those cases where the complainant was not the sole investigating officer, the law of the land which now stands is that independent proof of bias or prejudice is no longer necessary and once it is found that the complainant/informant and the investigation officer happened to be one and the same in cases involving of commission of offence under the NDPS Act and it is not a case where more than one officers have conducted investigation but the entire investigation has been conducted only by informant/complaint/police officer, the investigation and so also the trial of the person would stand vitiated. The aforesaid law, declared by Supreme Court is binding on this Court and therefore, only on the ground that in the present case, the complainant /informant and the investigating officer who are one and the same, right of the accused to fair investigation and fair trial is held violated renders the investigation so also his prosecution unsustainable in law. Consequently, the conviction of the appellant has to be set aside and is accordingly set aside.

19. One of the argument raised by the learned State counsel that even if entire investigation is carried out by the Police Officer who was the informant/complainant, independent prejudice is required to be shown, is liable to be rejected in view of the aforesaid decision in the case of **Mohanlal (supra)**, wherein, it has been very clearly spelt out that the investigation stands vitiated without proof of independent prejudice or bias of the investigating officer.

20. The appeal is allowed the appellant be set at liberty forthwith. The Vehicle has already been given in interim custody to its registered owner Rupsai @ Buchhu. Disposal of the vehicle is accordingly ordered then interim custody is made final.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Gautam Chourdiya)
Judge