

HIGH COURT OF CHHATTISGARH, BILASPUR**Reserved on : 17.09.2018****Delivered on : 01.10.2018****CRA No. 881 of 2012**

Rizwan Khan, S/o Subhan Khan, Aged About 31 Years, R/o Sector 7, Street No. 23, Q.No. 17A, Bhilai Sector 6, Kotwali, District-Durg (C.G.).

---- Appellant**Versus**

State of C.G., through P.S. Gudhiyari, Raipur (C.G.).

---- Respondent**CRA No. 958 of 2012**

Pukhraj, S/o Shri Beer Singh Chandel, Aged About 43 Years, R/o Tulsipur, Gali No. 3, Post Office Rajnandgaon, P.S. City Kotwali, District-Rajnandgaon (C.G.) Pin Code – 491441.

---- Appellant

State of Chhattisgarh, through Station House Officer, Post Office Gudiyari, Police Station Gudiyari, District-Raipur (C.G.) Pin Code – 492009.

---- Respondent**and****CRA No. 962 of 2012**

Rakesh Kumar, S/o Shri Janki Rao, Aged About 22 Years, R/o M.T. Housing Board, Jawahar Nagar, Opposite Petrol Pump, Vaishali Nagar, Post Office Housing Board, P.S. Jamul, District-Durg (C.G.) Pin Code – 490026.

---- Appellant**Versus**

State of Chhattisgarh, through : Station House Officer, Post Office Gudiyari, Police Station Gudiyari, District-Raipur (C.G.) Pin Code – 492009.

---- Respondent

For Appellants

: Mr. T.K. Jha & Mrs. Ruby Naz Khan,
Advocates in CRA No. 881 of 2012.
Mr. Mirza Hafeez Baig, Advocate in CRA No.

958 of 2012.

Mrs. Indira Tripathi, Advocate in CRA No. 962 of 2012.

For State : Mr. Sanjeev Pandey, Government Advocate.

Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1. Since all the three appeals are preferred against the same judgment, they are heard analogously and are being disposed of by this common judgment.
2. These appeals are preferred under Section 374(2) of the Code of Criminal Procedure, 1973 against judgment dated 31.08.2012 passed by Special Judge, NDPS, Raipur (C.G.) in Special Criminal Case No. 20/2012, wherein the said court convicted appellants - Rizwan Khan & Pukhraj for commission of offence under Section 20(b)(ii)(B) of Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "the NDPS Act") and sentenced to R.I. for 5 years and fine of Rs. 25,000/- each with further default stipulations and convicted appellant- Rakesh Kumar for commission of offence under Section 20(b)(ii)(C) of the NDPS Act and sentenced to R.I. for 10 years and fine of Rs. 1,00,000/- with further default stipulations.
3. As per the prosecution case, Assistant Sub-Inspector (ASI) J.K.Sen (PW-4) was posted at police station- Gudhiyari, Raipur (C.G.) and on receiving information on 26.04.2012 at 14:40 p.m. that all the appellants are in possession of contraband article ganja illegally for sale, investigating officer along with police personnels and other

witnesses arrived at the spot near Prince Dhaba, Gogaon and seized about 20 Kg. contraband from appellant- Rizwan, 20 Kg. contraband from appellant- Pukhraj and 46 Kg. contraband from appellant- Rakesh Kumar. Matter was investigated and all the appellants were charge-sheeted and after trial, they were convicted as mentioned above.

4. Learned counsel for the appellants submit as under:-

(i) The trial court committed error in convicting the appellants on the sole testimony of police officer-J.K. Sen without considering the mandatory provisions of the act which has not been complied with. Recording information in Rojnamcha Sanha is not proper but that aspect of the matter has not been taken in account.

(ii) Panchnama witness has not supported version of the prosecution and person who weighed quantity of ganja is also not supported version of the prosecution, therefore, case of the prosecution is not proved.

(iii) Seal of the police station was not kept in safe custody and there is every possibility of tempering the seal, therefore, prosecution case is not established.

(iv) Bolero vehicle and motorcycle were seized from the spot is not connecting piece of evidence because ownership of the said vehicles is not proved through registration certificate in the name of the appellants.

(v) ASI J.K. Sen who seized articles and lodged FIR has also

participated in investigation. The complainant and investigator is the same which is not permissible under the law. The prosecution is liable to be quashed on this count alone.

(vi) Constable- Devendra Dhruv & Digvijay Singh who accompanied, ASI J.K. Sen, but they have not been examined before the trial court.

(vii) Alleged seizure of contraband from appellant- Rizwan Khan from his motorcycle is also doubtful as its number on the different documents is not same. In Ex. P/10 its number is mentioned as 8499 while in Ex. P/16 & P/37 its number is mentioned as 4489.

(viii) Samples seized from appellant- Rizwan Khan were marked as B1 & B2 whereas, the letter sent to Senior Superintendent of Police (SSP) as per Ex. P/33 shows article A1 was seized from appellant- Rizwan Khan, therefore, it is not proved that the contraband which is seized from appellant- Rizwan Khan was sent for examination. The sample was not deposited in safe custody and it is not mentioned in malkhana register.

(ix) The trial court did not formulate any point for consideration, therefore, finding of the trial court is liable to be reversed. They placed reliance in the matter of **Mohan Lal Vs. The State of Punjab (CRA No. 1880 of 2011)** wherein Hon'ble the Apex Court has held that informant and investigator must not be the same person. They further placed reliance in the matters of **Sheikhlal Vs. State of Madhya Pradesh** reported in **2007(3) M.P.H.T. 250** & **Dilip & another Vs. State of M.P.** reported in **2007 Cr.L.J. 880**.

5. To substantiate the charge, the prosecution examined as many as 8 witnesses. ASI J.K. Sen (PW-4) was posted at police station-Gudhiyari, Raipur on 26.04.2012. As per version of this witness, he received information at about 14.40 p.m. that six persons are standing behind Prince Dhaba, Gogaon with Bolero vehicle of silver colour and two motorcycles of black colour and they transported contraband article ganja in the said vehicles. As per version of this witness, he prepared a panchnama (Ex. P/34) and said information was sent to City Superintendent of Police (CSP), Urla, Raipur as per Ex. P/35. Version of this witness is supported by version of Head Constable-Ishwar Prasad Verma (PW-8) who was posted as Reader in the office of CSP, Urla, Raipur on 26.04.2012. He supported version of ASI J.K. Sen that information was received by office of CSP, Urla, Raipur. In this way, provision of Section 42(2) of the NDPS Act was complied with and argument advanced on behalf of the appellants on this count is not sustainable that there is flaw in sending information to superior officer.
6. ASI J.K. Sen (PW-4) further deposed that he reached to the spot with Constable Devendra Dhruv & Digvijay Singh along with two independent witnesses namely Kanhaiya & Golu. As per version of this witness, they have been searched and no objectionable article was found in their possession. Notice was served to the appellants regarding information of their right to be searched by Magistrate or Gazetted Officer and then after their consent, they started search. He further deposed that appellant- Pukhraj opened motorcycle in which

contraband article was kept. Again, appellant- Rizwan opened motorcycle in which contraband article was kept. Thereafter, appellant- Rakesh Kumar opened Bolero vehicle in which contraband article was found in three different bags in the said vehicle.

7. As per version of this witness, article seized from Pukhraj was weighed and quantity was found 20 Kg. from which two packets of sample of 100 gram. each were prepared and rest of the articles were sealed. Again, article seized from appellant- Rizwan Khan was weighed and quantity was found 20 Kg. from which two packets of sample of 100 gram. each were prepared and rest of the articles were sealed. He further deposed that the article seized from appellant- Rakesh Kumar was weighed and in first bag, it is found to be 20 kg., in second bag, it is found to be 19 Kg. and in third bag, it is found to be 7 kg. In all, it was found to be total 46 kg. contraband seized from appellant- Rakesh Kumar.
8. Sample of article which was seized from appellant- Pukhraj was marked as A-1 and it was sealed in which specimen seal was also marked. Again, in sample seized from appellant- Rizwan which was marked B-1 & B-2 and sample seized from appellant- Rakesh Kumar was marked as C-1, C-2, E-1 & E-2. He further deposed that Dehati Nalsi recorded on the spot as per Ex. P/36 and seized articles were handed over to the in-charge police station. He further deposed that the information regarding entire proceedings were sent to CSP Urla, Raipur as per Ex. P/37. Version of this witness is supported by version of Head Constable- Ishwar Prasad Verma (PW-8) who was Reader in

the office of CSP Urla and received the information of the entire proceeding as per Ex. P/37. In this way, it is established that the articles were kept in safe custody as per provision of Section 55 of the NDPS Act. Version of this witness is supported by version of Head Constable- Nagendra Singh (PW-7) who was in-charge of malkhana in police station- Gudhiyari, Raipur. As per version of this witness, two packets marked as A-1 & A-2 was kept by him as the same is handed over by ASI J.K. Sen. Again, he received packets marked as B-1 & B-2 which is seized from appellant - Rizwan Khan and received packets C-1, C-2, D-1, D-2 & E-1 & E-2 which is seized from appellant- Rakesh Kumar. He produced malkhana register (Ex. P/44 & P/45) and as per version of this witness, the seized article was handed over for keeping the article in safe custody is entered in malkhana register and the same was kept in malkhana. He further deposed that the samples were withdrawn from malkhana for depositing the same to forensic science laboratory for examination. Version of this witness is supported by version of Sudeep Prasad Mishra (PW-3) who received all the packets and deposited the same in forensic science laboratory for examination and received acknowledgement as per Ex. P/33. Version of this witness is supported by report of forensic science laboratory (Ex. P/38) in which it is clearly mentioned that Constable No. 2576 Sudeep Mishra deposited the seized packets in the laboratory as sample A-1, B-1, C-1, D-1 & E-1 were examined and test of contraband article was found positive. In this way, version of ASI J.K. Sen and Head Constable Nagendra Singh (PW-7) is supported by version of Constable- Sudeep Prasad Mishra (No. 2576)

(PW-3). From the evidence, it is established that article seized in the case were kept in safe custody of malkhana and it is handed over to Constable- Sudeep Prasad Mishra for depositing the same in forensic science laboratory which was deposited by him and test of contraband article is found positive. True it is that Constable- Devendra Dhruv and Digvijay Singh were not examined by the prosecution who accompanied with ASI J.K. Sen, but their non-examination is not fatal for the prosecution. The material witness for seizure proceeding is ASI J.K. Sen who examined before the trial court and he deposed at length regarding entire procedure. His version was subjected to searching cross-examination, but nothing could be elicited in favour of the defence

9. It is settled law that quality of the evidence which is to be weighed not its quantity. No minimum number is required to prove any fact in term of Section 134 of the Indian Evidence Act, 1872, therefore, non-examination of other persons who accompanied during search and seizure is insignificant. Though, independent witnesses namely Bholu (PW-1) and Kanhaiya (PW-6) have not supported version of the prosecution, but their version is not rebutted the version of material witness ASI J.K. Sen. If they are not the real witnesses then their version is not acceptable and if they are suppressing any facts even then their version is not acceptable. Same formula will apply to Algu Sao (PW-2) who weighed contraband article. His version is also not rebutting the version of ASI J.K. Sen.
10. The case is based on seizure of contraband article ganja from the

appellants at their instance, it is not a case where ownership of Bolero vehicle or motorcycle is to be determined. Even in absence of registration certificate, the appellants are found on the spot with contraband article are liable for their criminal act.

11. Learned counsel for the appellants submit that ASI J.K. Sen is the complainant in the case where he cannot be investigated. In view of this Court, ASI J.K. Sen is entitled to proceed on information and he can record Dehati Nalsi on the spot and FIR in the police station. Dehati Nalsi or FIR is not part of investigation. Investigation starts after registration of FIR. In the present case, Police Inspector- Ashish Shukla (PW-5) has investigated the matter after registration of FIR and recorded statement of witnesses, therefore, it cannot be said that ASI J.K. Sen has investigated the matter, argument on this count is not acceptable.
12. Quantity of 20 kg or more is commercial quantity. After evaluating the entire evidence adduced by the prosecution, the trial court opined that appellant- Pukhraj & Rizwan Khan were in possession of less than 20 Kg. contraband article ganja which is less than commercial quantity and their act is punishable under Section 20(b)(ii)(B) of the NDPS Act and article seized from appellant- Rakesh Kumar was more than 20 Kg. i.e. more than commercial quantity and he has been convicted for commission of offence punishable under Section 20(b)(ii)(C) of the NDPS Act.
13. This Court reassessed the evidence and there is no reason to substitute contrary finding, therefore, finding arrived at by the trial

court is hereby affirmed. For commission of offence under Section 20(b)(ii)(C) of the NDPS Act, the trial court awarded minimum sentence to appellant- Rakesh Kumar and for offence under Section 20(b)(ii)(B) of the NDPS Act which is punishable upto imprisonment of 10 years, the trial court awarded imprisonment of 5 years which cannot be termed as harsh, disproportionate or unreasonable. Sentence part is also not liable to be interfered with.

14. Accordingly, these appeals are liable to be and are hereby dismissed.

Sd/-
(Ram Prasanna Sharma)
Judge