

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on: 01/11/2018****Judgment delivered on:29/11/2018****CRA No. 354 of 2015**

- Smt. Rekha Devi W/o Vimal Mandilwar Aged About 32 Years R/o Sheetla Ward Ambikapur, Police Station- Ambikapur, Civil And Revenue Distt. Surguja, Chhattisgarh, Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh S/o Through District Magistrate, Surguja, Distt.- Surguja, Chhattisgarh, Chhattisgarh

---- Respondent

For the Appellant : Mrs. Hamida Siddiqui, Advocate.

For the State/Respondent : Mr. Ashish Shukla, Panel Lawyer.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV Judgment****29/11/2018**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 2.2.2015 passed by the learned Special Judge (NDPS) Act, Ambikapur, District- Surguja, Ambikapur, Chhattisgarh in Special Criminal Case No.17/2013 convicting the accused/appellant under Section 21(B) of the Narcotic Drugs and Psychotropic Substances Act,

1985 (for short 'NDPS Act') and sentencing him to undergo RI for 10 years with fine of Rs.1,00,000/- plus default stipulation.

2. The prosecution case, in brief, is this that on 25.4.2013 SI Sanjeev Bairagi PW-6 received secret information that appellant is engaged in the business of selling brown sugar and she is waiting for customers. As there was no time to obtain search warrant, he recorded Panchnamas of ExP-1 & ExP-2 and thereafter immediately sent the information to the office of CSP. After summoning the witnesses, he raided the spot with a team of other police officers. The appellant was found on the spot, a notice under Section 50 of NDPS Act was served upon her. The appellant gave consent to be searched by a woman constable which was noted and signed by her in ExP-20 and Panchnama ExP-4.
3. After the search of members of the raiding party, the appellant was searched by lady constable Dolly Das PW-8 and she found a polythene packet concealed in the sari. Search Panchnama ExP-8 was recorded and the contraband was identified as brown sugar vide ExP-10. On weighment of brown sugar vide Ex.P-12, it was found to be about 10 gm. Thereafter the seizure was made vide ExP-13 and the appellant was arrested on the spot. Thereafter Sanjeev Bairagi PW-6 lodged FIR (ExP-22).

4. The appellant was charged for the offence under Section 20(1)(B) of NDPS Act, to which she denied and prayed for trial. Statement of appellant under Section 313 of CrPC has been recorded in which she denied all the incriminating evidence available against her, pleaded innocence and false implication. One witness was examined in defence. After completion of trial, impugned judgment has been passed in which the appellant stands convicted and sentenced as aforesaid.
5. It is submitted by counsel for appellant that appellant has been erroneously convicted without there being any evidence on record showing her complicity beyond reasonable doubt. The independent witness of search, seizure & weighment have not supported the prosecution case and the conviction is solely based on the evidence of police witnesses. It is also submitted that conviction of the appellant suffers from illegality for the reason that in the present case the informant and the investigator is the one and the same. According to the Judgment of Supreme Court in Mohan Lal Vs. State of Punjab reported in AIR 2018 SC 3853, in such a case the investigation cannot be held to be a fair investigation and also the trial. Hence, the conviction of the appellant is not sustainable in law and the appellant is entitled to be acquitted.
6. Learned counsel for the State has opposed the grounds raised in this appeal as also the arguments advanced by the

counsel for the appellant. It is submitted that prosecution has proved its case beyond reasonable doubt. Although the independent witnesses have not supported the prosecution case but there is no rule that the police witness should always be disbelieved. It is also submitted that the ratio laid down in Mohan Lal (supra) does not apply to the case in hand. Hence, it is prayed that the appeal be dismissed.

7. I have heard learned counsel for the parties and perused the record of the trial Court including the impugned judgment.
8. The main witness in this case is S.I. Sanjeev Bairagi PW-6. He has stated that after the preliminaries, he proceeded to the spot and on reaching there, served the notice of Ex.P-20 on the appellant. The appellant gave her consent to be searched by a woman constable vide ExP-4. He has stated that after formal search of constable Dolly Das PW-8, which was without any result, constable Dolly Das PW-8 searched the appellant and found one polythene packet, which the appellant had concealed inside her sari. Said packet was recovered vide ExP-8. Subsequent to that, the seized contraband was examined and found to be brown sugar, vide ExP-10. The weighment of seized narcotic substance was done and the same was found to be of 10 gm vide ExP-12. The recovered narcotics substance was seized vide Ex.P-13. He has further stated that he prepared the spot map vide ExP-21, made arrest vide ExP-14 and thereafter returned to

the police station and lodged FIR ExP-22. The information recorded by the police was dispatched to the CSP Ambikapur vide ExP-17. He has further stated that he handed over the seized article brown sugar for keeping in safe custody through constable Isdor Ekka PW-7. During investigation, he recorded statements of witnesses under Section 161 of CrPC. Seized article was sent for chemical examination to the FSL from where report of Ex.P-26 was received, opining that the contents of seized article was found to be diacetyl morphine, which is also known as brown sugar. The statement given by this witness has remained unrebutted in his cross-examination.

9. Shrawan Dubey PW-2 and Ghashyam PW-3 are witnesses of search and seizure who have not at all supported the prosecution case. Rangrav Bhosle PW-4 is the witness of weighment and though he has stated about the weighment of some article but he has not made a clear statement regarding the article which was weighed.
10. Constable Shailesh Kumar Tiwari is not the witness who was present on the spot. Constable Alijan Toppo PW-5 is the staff of office of City Superintendent of Police. He has given statement about the receipt of information from Sanjeev Bairagi PW-6. Constable Isdor Ekka PW-7 has stated about the receipt of seized article from Sanjeev Bairagi for keeping it

in safe custody.

11. Constable Dolly Das PW-8 has supported the version of Sanjeev Bairagi PW-6 by stating that she made search of the appellant and found one polythene packet concealed inside the sari worn by appellant. She has stated that the packet contained brown sugar. In cross-examination, her statement has remained un rebutted.

12. After close scrutiny of evidence of the witnesses of this case, it appears that although the notice under Section 50 of NDPS Act was served upon the appellant but it appears that this has been done for a mere formality because there is no statement given by any of the witnesses that the appellant was informed about her right to be searched in presence of a Gazetted Officer or Magistrate. Consent of the appellant, which is recorded in ExP-20, and Panchnama ExP-4 also does not show that the appellant had expressed that she does not want to be searched in presence of a Gazetted Officer or a Magistrate. In the statement recorded it is plainly mentioned that she wants to be searched by constable Dolly Das PW-8. This appears to be a flaw in the procedure followed. Section 50 of NDPS Act provides for a procedure which has to be strictly followed by completing all the formalities. In the present case, it cannot be said that the provisions of Section 50 of NDPS Act have been complied with. Hence, the investigation in this case suffers from this infirmity. Since the

search of appellant has not been conducted in accordance with the provisions of Section 50 of NDPS Act, the case tilts in favor of the appellant and heavily against the prosecution.

13. In the judgment of the Hon'ble Supreme Court in Mohan Lal's case (supra), Para-25 reads thus;

“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 investigator 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.”

14. On the basis of discussions made hereinabove and in view of the law laid down by the Hon'ble Supreme Court in Mohan Lal's case (supra) the only conclusion which can be drawn in this case is that the entire prosecution case was vitiated, on account of which, this appeal deserves to be allowed.

15. Accordingly, this appeal is allowed. Conviction and sentence of the

appellant under Section 21(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 is hereby set aside and the appellant is acquitted of those charges.

Sd/-

(Rajendra Chandra Singh Samant)

Judge

Nisha