

NAFR

**HIGH COURT OF CHHATTISGARH, BILASPUR****Criminal Appeal No. 54 of 2013**

Hiraman Nayak S/o Ratan Singh Nayak Aged About 55 Years R/o Vill  
Kotrimal PS Gharghoda Distt Raigarh, Chhattisgarh.

**---- Appellant****Versus**

State Of Chhattisgarh S/o Through Officer Incharge, PS Gharghoda,  
Distt Raigarh, Chhattisgarh.

**---- Respondent**


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|-----------------------|---|----------------------------------|
| For Appellant         | : | Shri Yogeshwar Sharma, Advocate. |
| For Respondent/ State | : | Shri Lav Sharma, P.L.            |

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**Hon'ble Shri Justice Rajendra Chandra Singh Samant****Judgment on Board****23/01/2019**

Heard.

(1) Challenge in this appeal is to the judgment of conviction and order of sentence dated 2.1.2013 passed by Learned Special Judge, Narcotic Drugs and Psychotropic Substances Act, 1985, Raigarh, District Raigarh, Chhattisgarh in Special Case No. 3 of 2009 whereby and whereunder the learned Special Judge after holding the appellant guilty for the offences under Section 20(B)(2)(B) of the NDPS Act, sentenced him to undergo rigorous imprisonment for 6 years and to pay fine of Rs.40,000/-, in default of payment of fine, to further undergo additional RI for 2 years.

(2) Conviction is impugned on the ground that without there being any iota of evidence, the trial Court has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

(3) As per case of the prosecution, in brief, on 27.5.2009, Sub-Inspector (Excise) Ashok Agrawal (PW-3) received confidential information that the appellant is in possession of narcotic substance (ganja) for the purpose of trading. As there was no time for obtaining search warrant, an intimation vide Ex. P/15 was sent to the office of Assistant Excise Commissioner, Raigarh and Ashok Agrawal (PW-3) alongwith the team of other constables proceeded to the spot. Witnesses – Khem Singh (PW-1) and Gouri Bai (PW-2) were summoned on the spot. The appellant was found present in his house who was served with a notice under Section 50 of the NDPS Act against which the appellant gave consent for the search of his house vide Ex. P/2. Initially Ashok Agrawal (PW-3) and other members of the search party were searched vide Ex.P/3, then the house of the appellant were searched, in which a white bag was found containing 5 kg of ganja, the narcotic substance. The appellant himself produced the weighing scale and the weights which were verified. The seized article was tested and identified on the spot vide Ex. P/5. After preparing 3 sample packets, rest of the contraband was preserved and sealed, which were seized vide Ex. P/7. A panchanama of the sampling of the seized articles in the procedure was made i.e. Ex. P/8 and search panchanama Ex. P/9 was prepared separately. Ashok Agrawal (PW-3) arrested of the appellant on the spot and prepared a spot map vide Ex. P/12 and also recorded the statement of the independent witnesses, namely, Khem Singh (PW-1) and Gouri Bai (PW-2). The information of the offence committed was recorded in Form No.8 Ex. P/16. The seized articles were handed over to the police station Garghoda for safe custody vide Ex. P/17. The sample of the

seized articles were sent for FSL examination, report Ex. P/26 was received, in which it was reported that the seized article was ganja, the narcotic substance. Information was collected regarding the ownership of the house of the appellant.

(4) Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short 'the Code'). The investigation was carried out and on completion of the same, the charge-sheet was filed before the concerned Court. The appellant was charged for the offence under Section 20B of the NDPS Act. He denied the charges and prayed for trial.

(5) In order to prove the guilt of the appellant, the prosecution examined 9 witnesses. Statement of the appellant was recorded under Section 313 of the Cr.P.C. in which he denied all the incriminating evidence against him, pleaded innocence and false implication in the crime in question. No witness was examined in defense.

(6) After affording opportunity of hearing to both the parties, learned trial Judge convicted and sentenced the appellant for the charge under Section 20B of the NDPS Act as aforementioned.

(7) I have heard learned counsel for the parties, perused the judgment impugned and records of the Court below.

(8) Learned counsel appearing on behalf of the appellant submits that the conviction of the appellant is bad in law as there is no reliable evidence adduced by the prosecution and the evidence brought is not proof beyond reasonable doubt. The independent witnesses of search and seizure, namely, Khem Singh (PW-1) and Gouri Bai (PW-2) have not supported the prosecution case and were declared hostile by the prosecution. Sub-Inspector Ashok Agrawal (PW-3) is the person who has conducted the raid and also conducted the investigation himself and he himself is the informant of the offence registered against the appellant. According to the ratio laid down in the case of **Mohan Lal vs. State of Punjab** reported in **AIR 2018 SC 3853**, the complainant and the investigator of the case cannot be the same, therefore, because of this principle of law, it can be said that no fair investigation has been done in this case and thus, the trial can also be not regarded as fair trial. Therefore, the appellant be acquitted of the charge.

(9) Per contra, learned counsel for the respondent/ State opposed the prayer and submissions. He further submitted that the prosecution has proved its case beyond reasonable doubt. The raid has been conducted by Excise Sub-Inspector, Ashok Agrawal (PW-3) who is not a police officer and he stands on different footing. Secondly, **Mohan Lal vs. State of Punjab** (supra) is not applicable in such a case and there is sufficient evidence present in this case that the house of the appellant was searched and he was found in possession of contraband ganja which was confirmed as ganja by the FSL report. Therefore, no case is made out for acquittal of the appellant in this case.

(10) In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution.

(11) Ashok Agrawal (PW-3) is the Sub-Inspector of Excise Department who was posted at Gharghoda at the time of incident. He has given statement about receiving the confidential information and after completing the formalities as required under the provisions of NDPS Act, he proceeded to the spot where the appellant resides, who was found in his house was searched in presence of witnesses and narcotic substance ganja was recovered from his house which was seized accordingly. He has also stated that after completion of raid procedure he has made the arrest of the appellant, recorded the statement of the witnesses, sent the samples for FSL examination and he himself prepared the charge-sheet which was filed before the Court. In **Mohan Lal vs. State of Punjab** (supra), the three Judges Bench of Hon'ble Supreme Court has observed in paragraph 25 as under:

“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.”

(12) From the facts in this case as discussed herein-above, it is clear that Ashok Agrawal (PW-3) had exercised the police powers by making arrest of the appellant on the spot and then by conducting the rest of the investigation procedures as was required in this case. Therefore, in view of the guidelines in the case of **Mohan Lal vs. State of Punjab** (supra) which is a judgment of three Judge Bench and this Court has bound to follow. Hence, it is held that no fair investigation has taken place in this case. Therefore, the trial cannot be regarded as fair trial. Apart from that, the independent witnesses of search and seizure, namely, Khem Singh (PW-1) and Gouri Bai (PW-2) themselves have not supported the prosecution case. Hence, for these reasons, due to lack of evidence of the independent witnesses and due to the aforesaid *lacuna*, I feel inclined to allow this appeal. The appellant is reported to be on bail.

(13) Consequently, the appeal is allowed. Conviction of the appellant under Section 20(B)(2)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 is hereby set aside. The appellant is acquitted of the charges framed thereunder. He be set at liberty forthwith if not required in any other case.

Sd/-

(Rajendra Chandra Singh Samant)  
**JUDGE**