

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 275 of 2017**

- Vipin @ Vifal Chauhan S/o Ramkumar Chauhan, Aged About 18 Years Occupation Khalasi, R/o Namnakala Near Shani Mandir, Gandhinagar, District Sarguja, Chhattisgarh., Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh Through Police Station Gandhinagar, District Sarguja, Chhattisgarh., Chhattisgarh

---- Respondent

For the Appellant : Mr. Sunil Otwani, Advocate.

For the State/Respondent : Mr. Arun Shukla, Govt. Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Judgment on board**17/01/2019**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 18.1.2016 passed by the learned Special Judge (NDPS Act), Ambikapur in Special Case No.23/2013 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 26.6.2013 ASI N.K. Dubey received a secret information from an informer that the appellant is selling brown-sugar on the spot. On receipt of such information, as there was no time to obtain search warrant, he forwarded an intimation to his superior Officer after making an entry in rozmancha. After summoning the witnesses, he reached the spot with a team of other police officers. On reaching the spot, the raiding party found the appellant present there. The appellant was served with a notice ExP-1 informing him about his right to be searched in presence of the Executive Magistrate or Gazetted Officer. The appellant consented to be searched by N.K. Dubey PW-3. Before searching the appellant, the raiding party gave their search to the accused on which nothing objectionable was found. Thereafter the appellant was searched and a polythene packet containing some white substance was recovered from his possession, which was identified as Brown Sugar, a narcotic substance. The substance contained in packet was identified as Brown Sugar vide ExP-12. On weightment of the contraband being done vide Ex.P-3, it came to be 5.2 gram, which was seized vide ExP-15 in presence of the witnesses along with cash amount found in possession of the appellant. The appellant was arrested and FIR was lodged against him. After completion of investigation, charge-sheet was filed before the concerned Court.

3. The appellant was charged with the offence under Section 21(B) of the NDPS Act, to which he denied and prayed for trial. The appellant was examined under Section 313 of CrPC, in which he denied all the incriminating evidence available against him, pleaded innocence and false implication. No witness was examined in defence. After completion of trial, the trial court vide impugned judgment convicted and sentenced the appellant in the manner as mentioned herein above.
4. It is submitted by counsel for appellant that independent witness of search and seizure have not supported the prosecution case and turned hostile. Investigating Officer N.K. Dubey (PW-3) himself is the complainant in this case and this practice has been strongly deprecated by the Hon'ble Supreme Court in catena of decisions including in the matter of **Mohan Lal Vs. The State of Punjab**, (2018) 2 SCC 1314 and it has been held that in such cases it would not amount to fair investigation and the trial would itself be vitiated. Apart from this, according to entry in the weighment memo ExP-3, it is clearly made out that the quantity of contraband that was seized the appellant was below 5 gm, which is a small quantity, hence, the appellant could not have been sentenced with imprisonment as he has been sentenced with. Hence, it is prayed that appellant is entitled to be acquitted of the charge on the basis of aforementioned reasons.

5. 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. There is no such rule that the evidence of any police witness should always be disbelieved even though the independent witnesses have not supported him. Hence, no case is made out for acquittal.
6. I have heard learned counsel for the parties and perused the record of the trial Court including the impugned judgment.
7. The main witness in this case is ASI N.K. Dubey PW-3. On examining his statement, it is found that he is the person who received the secret information which was recorded in station house diary at ExP-4 and after completing the initial formalities, he reached the spot and after giving the notice of ExP-9 to the applicant, proceeded to search him and recovered the contraband from his possession vide Ex.P-12, which was identified as brown-sugar, a narcotic substance. After completing the weighment procedure, seizure of the article recovered was made vide ExP15. Subsequent to which the appellant was arrested on the spot. Thereafter this witness reached the police-station where he himself as complainant lodged FIR ExP-19 and he himself is the scribe of FIR. It is also reflected that this witness himself has recorded the statement of all the witnesses under Section 161 of CrPC before the filing of charge-sheet against the

appellant.

8. After appreciating the evidence of N.K. Dubey PW-3 there is no room of doubt that this witness being a police-officer himself has made search and seizure, he himself lodged the FIR and thereafter conducted remaining investigation. In the matter of Mohan Lal (supra), a Bench of three Judges of the Hon'ble Supreme Court has laid down the law 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.”

9. In view of the discussions made herein above and keeping in the mind the decision of the Hon'ble Supreme Court in the matter of Mohan Lal (supra), it can be safely said that the appellant has been denied opportunity of fair investigation and trial. Hence, the entire criminal proceeding initiated against him is liable to be declared as vitiated and the appellant is entitled to be acquitted in this case.

10. Accordingly, this appeal is allowed. Conviction and sentence of the appellant under Section 21 (B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 are hereby set aside and the appellant is acquitted of that charge.

Sd/-

(Rajendra Chandra Singh Samant)
Judge

Nisha