

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 337 of 2014

1. Kishan Nishad S/o Khorbahra, Nishad Aged About 28 Years R/o Chintram Chowk, Supela, Bhilai, Distt. Durg C.G. , Chhattisgarh
2. Rakesh Nagpure S/o Punaram Nagpure Aged About 30 Years R/o Tata Line Kohka, Near Bal Mandir, Supela, Bhilai, Distt. Durg C.G. , District : Durg, Chhattisgarh
3. Bhupendra Yadav S/o Bihari Yadav Aged About 26 Years R/o Housing Board, Kohka, House No. 301, 302 PS Supela, Distt. Durg C.G. , District : Durg, Chhattisgarh
4. Santosh Yadav S/o Shiv Kumar Yadav Aged About 20 Years R/o Bhatapara Kohka, Ps Smriti Nagar, Distt. Durg C.G. , District : Durg, Chhattisgarh

---- Appellants

Versus

State Of Chhattisgarh Through PS Farasgaon, Distt. Kondagaon C.G. , Chhattisgarh

---- Respondent

For respective Appellants : Smt. Renu Kochar and Shri Vikash Shrivastava, Advocates

For State : Shri Subhash Yadav, Dy. Govt. Advocate

D.B. : Hon'ble Mr. Justice Manindra Mohan Shrivastava & Hon'ble Mrs. Justice Rajani Dubey

Judgment On Board

11/01/2019

Per Manindra Mohan Shrivastava, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 22nd February 2014 passed by learned Special Judge (NDPS Act) Kondagaon, District- Kondagaon in Special Case No.2 of 2013 whereby and whereunder the appellants/accused have been held guilty of commission of offence punishable under Section 20 (b) (ii) (C) of the NDPS Act and sentenced to undergo RI for 20 years with fine of Rs.1,00,000/- each and in default of payment of fine, to undergo further RI for 3 years.

2. The prosecution case is that on 13.8.2010, upon receipt of information in the police station that ganja is being transported, after recording information in *rojnamcha sanha*, the police officer proceeded to the spot and tried to stop the vehicle which did not stop, whereafter, it was chased and finally the vehicle was caught. It is alleged that in the vehicle, the appellants were found. It is further case of the prosecution that the appellants were apprised of right and proceedings under Section 50 of the NDPS Act were drawn before carrying out personal search and after getting consent of the appellants, they were bodily searched and then vehicle was also searched in which, huge quantity of ganja was seized from the possession of each of the appellants. According to prosecution, a total quantity of 100 kg of ganja was found in the vehicle. Further case is that Kishore Chandrakar (PW8) S.I. had proceeded from the police station along with Constable, reached the spot, carried out search and seizure, prepared samples and then came to police station along with the appellants where they were formally arrested. FIR was also registered by him. The ganja alleged to be seized was also deposited in *malkhana* and later on, samples were sent to FSL, wherefrom, a positive report was received that the seized material was ganja.

Upon filing of charge sheet, the appellants were tried for commission of offence punishable under the NDPS Act. The learned trial Court relying upon the prosecution evidence held that the appellants were guilty of commission of offence punishable under Section 20 (b) (ii) (C) of the NDPS Act and each of them were imposed sentence as discussed hereinabove.

3. Assailing correctness and validity of the impugned judgment of conviction and order of sentence, learned counsel for the appellants would argue that the case of the prosecution is highly doubtful because the prosecution has failed to prove its case beyond reasonable doubt, inasmuch as, the independent witness of the prosecution has not supported the seizure of contraband (ganja) and the prosecution has come with pocket witness. It is also argued that there is discrepancy with regard to time when the police personnel proceeded from police station to the spot. It is also argued that what quantity was seized from the appellants is highly doubtful because

there is no specific detail of the quantity of ganja seized from each of the appellant in Ex.P-26. It has also been argued that the prosecution has failed to prove that samples were duly drawn and taken to FSL for examination and the very identity of the sample allegedly drawn from the ganja kept in the *malkhana* and then taken to FSL has not been proved beyond reasonable doubt. Moreover, the evidence with regard to weighment is also highly doubtful.

One of the main argument of learned counsel for the appellants, based on the judgment of the Supreme Court in the case of **Mohan Lal Vs. State of Punjab** (AIR 2018 SC 3853) is that in the present case, the Informant and the Investigating Officer are one and the same namely Kishore Chandrakar (PW8), S.I. Therefore, in view of the decision in the case of **Mohan Lal** (supra), FIR Informant and the Investigating Officer being the same, the entire investigation and consequently trial and conviction is also vitiated.

4. Per contra, learned counsel for the State submits that even though independent witnesses of the prosecution have not supported, the Investigating Officer and eyewitness have duly proved the entire proceedings right from the stage of receipt of information in the police station, sending a copy of the same to the higher authority, reaching at the spot and then complying with the provision of Section 50 of the NDPS Act with regard to search. He would also argue that from the vehicle of the appellants, huge quantity of ganja i.e. 100 kg was found and the sample was seized in the presence of witnesses who have also proved their signature. Even if the independent witnesses have not supported the seizure, the reliable testimony of the Investigating Officer who has scrupulously followed the requirement of Sections 42, 50 & 57 of the NDPS Act with regard to search, seizure, sampling and safe custody has rightly been relied upon by the learned trial Court to hold the appellants guilty.
5. We have heard learned counsel for the parties and perused the records of the Court below.
6. In the present case, the evidence of Kishore Chandrakar, Sub Inspector (PW8), the Investigating Officer of the case, clearly proves beyond all pale

of doubt that he was not only the Informant but also the Investigating Officer. He has clearly deposed in his evidence that upon receipt of information in the police station, he had proceeded to spot, intercepted the appellants and thereafter drawn all the proceedings relating to search, seizure, drawal of samples and bringing the accused- appellants to police station, recording their formal arrest and also recording FIR. He has also stated that the entire investigation was carried out by him.

7. 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 **Mohan Lal** (Supra), the entire prosecution of the appellants stands vitiated warranting their acquittal on this ground alone.
8. In the case of the **Mohan Lal** (supra), Mohan Lal 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 kg of opium in a bag carried by him.
9. 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.”
10. 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 on 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.”

11. 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.”

12. 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.

13. 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 appeal.

14. 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 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 is, therefore, overruled. We approve the view taken in Naushad (supra).’

15. 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."

16. 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/complainant/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, rendering the investigation so also their prosecution unsustainable in law. Consequently, the conviction of the appellants has to be set aside and is accordingly set aside.

17. 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 **Mohan Lal** (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.

18.The appeal is accordingly allowed. Impugned judgment of conviction and order of sentence is set aside. The appellants be set at liberty forthwith.

Sd/-
(**Manindra Mohan Shrivastava**)
Judge

Sd/-
(**Rajani Dubey**)
Judge