

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 415 of 2012

Satyendra Kumar Pandey @ Sayendra Pandey, S/o Shri Brahaspatiram Pandey, aged about 31 years, R/o Village Dhankhori, Thana-City Kotwali, Seedhi, District-Seedhi, Madhya Pradesh

---- Appellant

Versus

State Of Chhattisgarh Through - P.S. Baagbahara , Distt. Mahasamund C.G.

---- Respondent

For Appellant	:	Shri Raza Ali, Advocate
For State	:	Smt. Fouzia Mirza, Addl. Advocate General

CRA No. 23 of 2015

Ramesh Kumar Pandey @ Rinku Pandey S/o Jagdish Pandey Aged About 28 Years R/o Village Pankhuri, Thana City Kotwali Sidhi, Civil And Revenue District Sidhi Mp, Madhya Pradesh

---- Appellant

Versus

State Of Chhattisgarh Through Police Station Bagbahara, Civil And Revenue District Mahasamund C.G. , Chhattisgarh

---- Respondent

For Appellant	:	Shri Akhilesh Kumar, Advocate
For State	:	Smt. Fouzia Mirza, Addl. Advocate General

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

Judgment On Board

02/01/2019

Per Manindra Mohan Shrivastava, J.

1. This order shall govern disposal of the aforesaid two appeals which arise out of common judgment of conviction and order of sentence dated

25.02.2012 passed by learned Special Judge (NDPS Act), Mahasamund (CG) in Special Criminal Case No.02 of 2011 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 under RI for 15 years with fine of Rs.1,50,000/- each and in default of payment of fine, to undergo further RI for 1 year and 6 months.

2. The allegation against the appellants which led to their prosecution is that on 20th December 2010, the police received an information regarding transportation of contraband (*ganja*). Whereafter, it is said, the police arrived at the spot. Appellants were intercepted and it is further alleged that from the vehicle of the appellants, 241.013 kg of ganja was found. Further case of the prosecution is that at the spot, notice under Section 50 of the NDPS Act was given for personal search and upon consent given, the appellants were bodily searched. When nothing was found in their possession, the vehicle was searched and in the vehicle, ganja was found which was seized in the presence of independent witnesses. The weighment had taken place and panchnama was prepared. Thereafter samples were drawn and sealed. Investigating Officer Vinod Kumar Mandavi (PW9) conducted entire proceedings right from the stage of interception up till all proceedings at the spot were drawn and then, appellants-accused along with seized ganja were brought to the police station and formal arrest was made. FIR was recorded at the instance of Investigating Officer Vinod Kumar Mandavi. Ganja was directed to be kept in *malkhana*. Further proceedings of investigation were thereafter drawn by the Informant and Investigating Officer Vinod Kumar Mandavi(PW9).

The learned trial Court relying upon the case of the prosecution, held the two appellants guilty of commission of offence and sentenced them as described above.

3. Assailing correctness and validity of the impugned judgment of conviction and order of sentence, learned counsel for the respective appellants would argue that the conviction of the appellants is not sustainable in law because the prosecution case is not supported by independent witnesses, though, there was ample opportunity to bring independent witness as the incident is said to have taken place near a family *dhaba* where

independent witnesses were easily available. Further submission is that the prosecution has failed to submit FSL report at the time of filing of charge sheet and further, there was serious lapse in depositing the CFSL form with the seized material in the *malkhana*. Moreover, the prosecution has failed to prove proper weighment.

In view of recent decision of the Supreme Court in the case of **Mohan Lal Vs. State of Punjab** (AIR 2018 SC 3853), learned counsel for the appellants argues that in the present case also, the FIR Informant and the Investigating Officer are one and the same. He would submit that Vinod Kumar Mandavi (PW9) has clearly deposed that it was he, who recorded mukhbir information, went to the spot, intercepted the appellants and claims to have seized ganja from their possession, prepared samples, brought them to police station. Thereafter, entire investigation was carried out by the same officer and charge sheet was filed. Therefore, entire investigation, so also prosecution of the appellants and consequent conviction is vitiated.

4. On the other hand, learned counsel for the State submits that the entire case of the prosecution is based on reliable evidence of Investigating Officer and other witnesses who have clearly proved that upon receipt of mukhbir information, they arrived at the spot, where the appellants were found carrying huge quantity of ganja in their vehicle which was seized in the presence of reliable witnesses, followed by weighment and sample proceedings and thereafter, the samples were duly sent to FSL, wherefrom, report was received that it was ganja. He would also argue that the appellants are not entitled to any benefit on the basis of judgment of the Supreme Court in the case of **Mohan Lal** (supra) as they have failed to establish any independent prejudice caused to them.
5. We have heard learned counsel appearing for the parties and perused the records of the Court below.
6. From the evidence on record, it is proved beyond all pale of doubt that in the present case the Informant and Investigating Officer are one and the same i.e. Vinod Kumar Mandavi (PW9) who has clearly stated in his evidence that entire proceedings, right from stage of receipt of mukhbir information, reaching at the spot, carrying out search, seizure, preparation

of sample and lodging of FIR followed by deposit of ganja was done by him. He also clearly stated that it is he, who carried out entire investigation of the case.

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 kgs 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 of 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. The Vehicle has already been given in interim custody to its registered owner Smt. Sadhana Singh. Disposal of the vehicle is accordingly ordered that interim custody is made final.

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

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