



HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No. 278 of 2024

DHANIRAM GENDLE **versus** STATE OF CHHATTISGARH

Order Sheet

05/05/2025	Shri BP Singh, Shri Samir Singh and Shri Sidhant Tiwari, Advocates for the respective appellants. Ms. Pragya Shrivastava. Dy. Govt. Advocate for the State. Heard on IA No.03/2025 which is an application filed by the appellant Dhaniram Gendle under Section 432(1) of BNSS, 2023 for taking addition evidence on record. Learned counsel for the appellant would submit that the present appellant has been convicted in Sessions Trial No.04/2023 passed by the Special Judge (NDPS Act) Bemerara, for the offence under Section 21(c) of the NDPS Act and sentenced for RI for 10 years with fine of Rs.1,00,000/- with default stipulations. The said Sessions Trial No.04/2023 is arising out of Crime No.220/2023 registered at PS Nandghat on 27.08.2023 at 22:20 hours. It was alleged in the case that on 27.08.2023 the police of police station Nandghat received a secret information that near Dabri Talab at village Jhulna Kanpapara the accused persons were trafficking the contraband and having possession of intoxicating drugs and waiting for its prospective purchaser. The police of Police Station Nandghat constituted a raid party consists of PW-15, Arvind Sharma, PW-16,

Rameshwar Mandle, PW-10, Rajendra Jaiswal, PW-17 Rejesh Dhruw and PW-18 Arti Nagdev. It is mentioned in the FIR that the time of incident is 17:10 Hours on 27.08.2023. At the same time, another FIR of Crime No.194/2023 was registered at Police Station, Nawagarh for the offence under Sections 21 & 22 of NDPS Act in which the time of incident is shown as 17:45 Hours on 27.08.2023 and the FIR was registered at 23:30 Hours on 27.08.2023. It is also alleged in the said Crime No. 194/2023 that on 27.08.2023 the police received secret information that near community toilet at Mishra Para Nawagarh, the accused is trafficking the intoxicating injection and engaged in dealing of contraband. The police of Police Station Nawagarh conducted a raid and arrested the accused in that case also.

He would also submit that in Crime No.220/2023 registered at Police Station Nandghat the witnesses PW-1, Arvind Sharma, PW-2, Rameshwar Mandle, PW-3, Rajendra Jaiswal, PW-4, Rejesh Dhruw and PW-16 Arti Nagdev who are the witnesses of Crime No.194/2023 registered at Police Station Bemetara, are also witness to the said Crime No.220/2023 registered at PS Nandghat. The same witnesses cannot remain present at almost same time in two different places having distance of 50-60 KMs from each place of incident. PW-1, Arvind Sharma has admitted in paragraph 2 of his evidence that at about 10:11 AM on 27.08.2023 the ASI Mohan Lal Sahu received a secret information about illegal trafficking of contraband and then they proceeded from P.S. Nawagarh to the place of incident at about 1 PM. PW-2, Rameshwar Mandle have also stated that during patrolling they reached PS Nawagarh at about 11 AM and when the ASI received a secret information about illegal trafficking of contraband, they proceeded to the place of incident at about 1-1:30 PM. Similar is evidence of PW-3, Rajendra

	Jaiswal, PW-4, Rajesh Dhruw and PW-16, Anita Nagdev. These witnesses have been examined in Sessions Trial No.04/2023 in which they have been examined as PW-10, Rajendra Jaiswal, PW-15, Arvind Sharma, PW-16, Rameshwar Mandle, PW-17, Rajesh Dhruw and PW-18, Arti Nagdev, which was arising out of Crime No.220/2023 registered at Police Station Nandghat. PW-10, Rajendra Jaiswal have stated that during patrolling they reached at Police Chowki Maro at 12:30 PM and at that time R.K. Kashyap, ASI, received a secret information about illegal trafficking of contraband and they proceeded to the place of incident. PW-15, Arvind Sharma, have also stated in his evidence that at about 12:30 PM when they reached Police Chowki Maro, the ASI Shri R.K. Kashyap received secret information and then they proceeded to the place of incident at about 2-3 PM. Similar is the statement of PW-16 Rameshwar Mandle, PW-17, Rajesh Dhruw and PW-18 Arti Nagdev. Since distance between both these places are more than 40 KMs, the witnesses cannot be present in both the places at same time. During their examination before the trial court this fact could not be put up before them due to miscommunication and by negligence of the counsel who represented the accused persons before the trial court and it only came into knowledge at the time when the appeal of the accused persons are being filed before this court that these witnesses are said to have been present at two different places at the same time in two different Crime Numbers which apparently reflects that the entire investigation of the prosecution is tainted. He would also submit that the appellant wants to lead further evidence in the case in his defence for which he filed the copy of FIR of Crime No.194/2023, registered at PS Nawagarh and copies
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of the deposition sheet of these witnesses PW-3, Rajendra Jaiswal, PW-1, Arvind Sharma, PW-2, Rameshwar Mandle, PW-4, Rajesh Dhruw and PW-16, Arti Nagdev and the same may be allowed as further evidence and the appellant may be permitted to prove these documents as the additional/further evidence. It is further claim of the appellant that the appellant has got CCTV footage from the shop of brother of Mahendra Sonkar in which it has been displayed that the witnesses Arvind Sharma, PW-1 and Rameshwar Mandle, PW-2, came into the shop and started abusing and assaulted Mahendra Sonkar and they took prohibited medicine which he was in possession and to prove this fact they want to lead further evidence which was stored in Pen Drive which is annexed with the present application as Annexure A/3. With respect to compliance of Section 65-B of the Evidence Act, 1872, the copy of affidavit of Bhupendra Sonkar has also been annexed. These documents are necessary as it affect the genuineness of the prosecution's case and the matter relates to constitutional rights of the appellant regarding life and liberty.

In support of his claim, he would rely upon the judgments passed by Supreme Court in ***Asim @ Munmun @ Asif Abdulkarim Solanki Vs. State of Gujrat, 2021(16)SCC 459, Brigadier Sukhjeet Singh (Retd.) MVC Vs. State of Uttar Pradesh & Others, 2019(16)SCC 712*** and the order dated 17.02.2023 passed by Division Bench of this court in ***Madhup Bhura Vs. State of Chhattisgarh, WPCR No.921 of 2022.***

On the other hand, the counsel for the State vehemently opposes the submissions made by the counsel for the appellant and have submitted that the timing in both these Crime Numbers with respect to receiving secret information as well as registration of FIR

are different. The proceeding from the police station towards the place of incident are also different. It comes in record that when the police party were in patrolling, they receiving secret information and proceeded towards the place of incident. Patrolling is a routine and anything can be happened at any time. Patrolling should never be conducted on the same way in each time because there is nothing predictable to the patrolling officer or their schedule. It cannot be expected that patrolling officer should patrol in a said schedule. The police officer may involve in multiple cases for investigation at the same time if they witnesses multiple offences on the same day and they could become witness in every cases. In both these cases, the investigating officers are different. In Crime No.194 of 2023, ASI Mohan Lal Sahu, PW-14 is the investigating officer whereas in Crime No.220 of 2023 registered at PS Nandghat, ASI, R.K. Kashyap, PW-13, is the investigating officer. The distance between the two places is not so much which makes their presence on the place of incident doubtful because there is some difference in the timing of their presence on the spot.

The State counsel would further submit that conviction of the appellants are not based on sole testimony of these five witnesses, but conviction has been made on the basis of entire material as well evidence of the investigating officer. Despite having ample opportunity, the accused persons have not confronted with the document of other case during examination of witnesses and now they cannot be permitted to fill up the lacuna in their defence by way of producing further evidence as it would amount to reopen the case. Therefore, the application filed by the appellant is liable to be rejected. She would rely upon the judgment passed by Supreme Court in ***Baldev Singh Vs. State of Haryana, 2015(17)SCC 554.***

I have heard the counsel for the parties and perused the records.

So far as stage of consideration of application filed by the appellant under Section 432(1) BNSS, 2023 is concerned, the Supreme Court in ***Asim @ Munmun (Supra)*** in paragraph 4 has held that as soon as the application is being filed by the appellant, the court where is application is being filed, is required to hear the application without waiting for final hearing of the appeal. Paragraph 4 of said judgment reads as under:

“4. Section 391 of the Cr.P.C. does not impose any restriction as to when the application filed for adducing additional evidence should be heard by the High Court. In fact, we are of the opinion that it is desirable that an application filed under Section 391 should be heard immediately after it is filed without waiting for the appeal to be finally heard.”

From perusal of document of Sessions Trial No.06/2023 and the documents annexed along with the application filed by the appellant, which are the copies of FIR of Crime No.220/2023 registered at PS Nandghat, and the deposition sheet of the witnesses PW-10, Rajendra Jaiswal, PW-15, Arvind Sharma, PW-16, Rameshwar Mandle, PW-17, Rajesh Dhruw and PW-18, Arti Nagdev, it transpires that these witnesses are also the witnesses of Sessions Trial No.06/2023 and they have been examined as PW-1, Arvind Sharma, PW-2, Rameshwar Mandle, PW-3, Rajendra Jaiswal, PW-4 Rejesh Dhruw and PW-16 Arti Nagdev. Their presence appeared on the spot along with police party in both the places during search and seizure proceeding. The appellant raised a doubt on the prosecution's case on the ground that timing and distance between these two places are overlapping with each other and these witnesses cannot remain present at the same time in two different places on the same day. Therefore, the entire investigation

is tainted.

From perusal of document it transpires that there are overlapping of timing in both these places on the same day with respect to search and seizure proceeding and the apprehension/defence taken by the accused requires to be clarified by the witnesses and the investigating officer.

In Brigadier Sukhjeet Singh (Supra), the Supreme Court has observed in paragraph 23 to 26 as under:

"23. The key words in Section 391(1) are "if it thinks additional evidence to be necessary". The word "necessary" used in Section 391(1) is to mean necessary for deciding the appeal. The appeal has been filed by the accused, who have been convicted. The powers of Appellate Court are contained in Section 386. In an appeal from a conviction, an Appellate Court can exercise power under Section 386(b), which is to the following effect:-

386 (b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

24. Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the Appellate Court to secure ends of justice. The scope and ambit of Section 391 Cr.P.C. has come up for consideration before this Court in Rajeswar Prasad Misra Vs. State of West Bengal and Another, AIR 1965 SC 1887. Justice Hidayatullah, speaking for the Bench held that a wide discretion is conferred on the Appellate Courts and the additional evidence may be necessary for a variety of reasons. He held that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. Following was laid down in Paragraph Nos. 8 and 9:-

"8.Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy

between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.

9. Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise....."

25. This Court again in *Rambhau and Another Vs. State of Maharashtra*, (2001) 4 SCC 759 had noted the power under Section 391 Cr.P.C. of the Appellate Court. Following was stated in Paragraph Nos. 1 and 2:-

"1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of Section 391 of the Code of Criminal Procedure. A plain look at the statutory provisions (Section 391) would reveal the same....."

2. A word of caution however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in the case of *Rajeswar Prasad Misra v. State of W.B.* in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in

that regard."

26. From the law laid down by this Court as noted above, it is clear that there are no fetters on the power under Section 391 Cr.P.C. of the Appellate Court. All powers are conferred on the Court to secure ends of justice. The ultimate object of judicial administration is to secure ends of justice. Court exists for rendering justice to the people."

Considering the submissions made by the counsel for the parties and also in view of law laid down in the aforesaid cases and further considering that application under Section 432(1) BNSS, 2023 provides that if the appellate court is convinced that additional evidence is necessary to be taken, then it shall either take the evidence itself or direct it to be taken by a Magistrate or when the appellate court is a High Court, by a court of session, it shall certify such evidence to the appellate court and such court shall thereupon proceed to dispose of the appeal. The accused intended to file further evidence which have been obtained from Sessions Trial No.06/2023 regarding FIR of Crime No.194/2023, registered at Police Station Nandghat and the copy of deposition sheets of Rajendra Jaiswal, Arvind Sharma, Rameshwar Mandle, Rajesh Dhruw and Arti Nagdev and to confront the timing and their presence on the spot.

A careful reading of both these documents would show that the grounds raised by the accused are their plausible defence which requires to be clarified for which they intended to produce the document. This is a valuable ground of defence for the appellant for which he cannot be deprived as the matter pertains to life and liberty of the accused and therefore he should have provided an opportunity to seek explanation from the investigation officer and the witnesses who were said to have been present in both these places at the same time. Hence, this court deem it appropriate to allow this

	application filed by the appellant. Accordingly, IA No.03/2025 is allowed. Record of trial court be remitted to the trial court with a direction to summon witnesses Arvind Sharma, Rameshwar Mandle, Rajendra Jaiswal, Rejesh Dhruw and Arti Nagdev and the investigating officer Mohan Lal Sahu for giving the opportunity to cross examine the appellant only to the extent of seeking explanation regarding presence of these witnesses on both these places and timing of search and seizure proceedings and Pen Drive said to have been prepared with respect to CCTV footage of the shop of brother of Mahendra Sonkar subject to its admissibility under Section 65-B of the Evidence Act, 1872 and to prove the documents of Crime No.194/2023 registered at PS Nawagarh which has been filed as additional/further evidence in the appeal. Registry is directed to do the needful for sending the record and communicating this order to the trial court. The trial court is directed to send the record back to this court along with further/additional evidence, to be taken in the case, at the earliest. Let this appeal be listed along with CRA No.192 of 2024 and other connected matters after receipt of record from the trial court after recording further evidences. Sd/- (Ravindra Kumar Agrawal) Judge
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