

**HIGH COURT OF JAMMU AND KASHMIR  
AT JAMMU**

*(Through Video conferencing)*

CRAA No.9900007/2013

Reserved on: 06.03.2020.

Pronounced on: 13.05.2020

State of J&K

.....Appellant (s)/Applicant (s)

Through :- Mr. Jamroth Singh, GA.

**V/s**

Waqar Ahmad and another

.....Respondent(s)

Through :- M/s P. N. Goja and  
Abhinav Jamwal, Advocates.

**Coram:**  
**HON'BLE THE CHIEF JUSTICE**  
**HON'BLE MS. JUSTICE SINDHU SHARMA, JUDGE**

**ORDER**

**GITA MITTAL, CJ**

1. The instant appeal has been filed by the State under Section 372 of the Cr.P.C. assailing the judgment dated 12<sup>th</sup> December 2012 passed by the Principal District & Sessions Judge, Ramban in the case titled State of J&K v. Waqar Ahmad and another arising out of the FIR No. 23/2010 registered by the Police Station, Ramban for commission of offences under Sections 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act').
2. The appellant has sought leave to appeal which was granted by this court by an order dated 5<sup>th</sup> August 2013.

3. We have heard Mr. Jamroth Singh, learned Government Advocate and Mr. P. N. Goja, learned counsel for the respondents.

4. The case of the prosecution rested on the allegation that PSI Charanjit Singh alleging that on 24<sup>th</sup> February 2010, a police party headed by him, as per the orders of the superior officers, intercepted Maruti Car No. JK02B-6850 which was coming from Srinagar at Hotel Shan Palace on NHW1-A at about 7.15 P.M. Two persons were alleged to have been found in the vehicle who disclosed their names as Waqar Ahmad, a policeman and Showkat Ahmad of Qazigund. On checking, two white coloured polythene bags were recovered from each of the front seats containing cannabis like material wrapped in maize crop. A docket was sent by PSI Charanjit Singh to the Police Station, Ramban, based whereon a case vide FIR No.23/2010 was registered under Sections 8/20 of the NDPS Act.

5. Premised on the receipt of the forensic report and investigation of the case, the charge sheet was laid before the Court for the commission of offences under Sections 8/20 of the NDPS Act against Waqar Ahmad Ganaie, Police constable, who was posted in CID/SBK and Showkat Ahmad.

6. The prosecution examined 8 witnesses who were cited in the column of witnesses.

7. The evidence led by the prosecution was considered at great length and after careful scrutiny, the learned Trial Judge by the judgment dated 12<sup>th</sup> December 2012 held that the prosecution has miserably failed to bring home the charges against the accused. The learned Trial Judge held that mandatory provisions of the NDPS Act were observed in breach by the investigating

officer during investigation. The learned Trial Judge further concluded that the prosecution has miserably failed to bring home the charges against the accused and consequently, by the judgment dated 12<sup>th</sup> December 2012, acquitted the respondents of the charges for which they have stood trial.

8. The appellant has assailed the judgment dated 12<sup>th</sup> December 2012 by way of instant appeal contending that the judgment was contrary to law; against the facts of the case; that it has been passed in a mechanical manner without appreciating the evidence led by the prosecution. It is submitted that the eight witnesses who were examined during trial have completely supported the prosecution and established the guilt of the respondents beyond any shadow of doubt. It is submitted by Mr. Jamroth Singh, learned GA that the prosecution had led not only oral evidence but had also adduced documentary evidence all of which were sufficient to establish the guilt of the respondents.

9. On the other hand, Mr. P. N. Goja, learned counsel for the respondents, supporting the judgment, has submitted that the prosecution had failed to establish even the basic requirements of a charge under the NDPS Act. It is submitted that the prosecution had led contradictory evidence with regard to the seizure of the contraband; search of the vehicle and recovery of the contraband. Mr. Goja has submitted that the prosecution had failed to establish the safe security and safe deposit of the contraband. Mr. Goja would contend that compliance with the provisions of Sections 55 and 57 of the NDPS Act was mandatory and the prosecution had violated these mandatory provisions and as such the prosecution had to fail.

10. We have given our considered thought to the submissions made before us and have closely scrutinized the evidence led by the prosecution in the

light of the applicable statutory provisions and the judicial precedents which have been placed before us.

11. It cannot be disputed that seizure of contraband is an event on which the entire case of the prosecution hinges in a case under the NDPS Act.

12. The prosecution has propounded PSI Charanjit Singh (PW-1) as the person who had recovered and seized the contraband. However, appearing as PW-1, PSI Charanjit Singh has testified that it was the S.H.O. who had recovered and seized the contraband. He has stated that he had recovered the material but the same was seized by the SHO after lodging of the FIR on a docket having been sent by him. Subash Chander, examined as PW-2, has stated that it was the SHO who came on the spot, and weighed the contraband which was found to be 3 kg 400 grams; that the seizure was made on the spot and he had signed the seizure memo which was prepared by the S.H.O.

13. The above statement is contradicted by Charan Dass (PW-3) who is the witness to the seizure memo and has stated that it was Charanjit Singh who had effected the seizure and prepared the seizure memo in the presence of the S.H.O.

14. PW-3 is also emphatic that Charanjit Singh did not seize the vehicle; that Charanjit Singh was the author of the seizure memo exhibit SB. This witness is categorical that the S.H.O. did not seize either the vehicle or prepare the seizure memo.

15. On the other hand, Farid Ahmad (PW-4) has stated that the SHO came on the spot while checking the vehicles; seized the contraband and

weighed the same. He stated that the SHO was already present there during checking and no civil person was present nor any shopkeeper called.

16. Our attention is drawn to the testimony of Jarnail Singh (PW-5) who has supported PW-1 in that he did not prepare any seizure memo.

17. Sachin Verma examined as PW-6, a civil witness, did not assist the prosecution case at all and stated that he could not identify the accused; that when he reached on the spot, the seizure memo already been prepared and he did not know either who had prepared the same or what was written in it. He completely denies the knowledge of the contents of the packets.

18. As if the above contradictions were not enough, the above evidence is completely contradicted by the Inspector Ravinder Singh, the investigating officer who was examined as PW-8 who claimed that it was he who had seized the articles and prepared the samples. At the same time, he stated that he neither signed the samples nor sealed them. PW-8 claims to have authored the seizure memo.

19. We find that the learned Trial Judge has also found contradiction as to the search of the vehicle and the recovery of the contraband. In this regard, Charan Dass (PW-3) had stated that it was Jarnail Singh (PW-5) who was the first to make the search and had recovered the contraband from the vehicle. Farid Ahmad (PW-4) contradicts this statement and has testified that it was Charanjit Singh (PW-1) who had conducted the search and recovered the contraband.

20. While the prosecution had claimed that four packets were seized, Charan Dass (PW-3) gave a contradictory version and stated that two packets

had been seized. Sachin Verma, the prosecution witness who was produced as having weighed the seized packets, stated that packets were probably six in number. He was unable to identify the accused persons.

21. Let us also advert to the grave contradiction in the important matter of safe custody of the seized material, taking of samples and their sealing. We find that the Investigating Officer has stated that the samples were taken out and sealed on the spot by him. Jarnail Singh (PW-5) has stated that packets were shifted to the police station before taking samples out of them.

22. It is also noteworthy that the prosecution has led no evidence at all about the safe custody of the contraband in the Malkhana after its seizure and before resealing by the Magistrate and then, till sending the same to the Forensic Science Laboratory.

23. It is pointed out that it was the prosecution case that the sealed samples had been got re-sealed by the Executive Magistrate. However, the Executive Magistrate has neither been cited nor examined as a witness. ASI Sham Lal the official who had been deputed to the FSL has also neither been cited nor examined during trial.

24. In this regard Mr. Goja has placed before us pronouncement of this court reported at **2016 (2) JKJ 159, State v. Ashok Kumar**, wherein it is observed as follows:

*“4. We have been taken through the impugned judgment. The Trial Court found that the sample of seized capsules had been sent for chemical analysis on 05.08.2005 and it was received in FSL on 10.08.2005. It also found that the occurrence was of 26.07.2005 and the sample had been resealed on 03.08.2005. The Trial Court observed that it was not known where the sample was lying for such a long time and under these circumstances the entire*

*prosecution case shades into suspicion and the chances of tampering could not be ruled out. It appears that the **standing instructions issued by the Narcotics Control Bureau New Delhi that the samples must be dispatched to the laboratory within 72 hours of seizure to avoid any legal objection have not been adhered to.** Such instructions are in the nature of guidelines ensuring a fair procedure to be adopted during investigation and non-adherence thereto would put a question mark on fairness of investigation. NDPS Act contains stringent provisions and provides for harsh punishment to curb the menace of drug trafficking. It contains statutory safeguards to ensure fair investigation. Breach of such safeguards goes to the root of search, recovery and seizure of Narcotics or Psychotropic substances. Instructions issued by NCB are in furtherance of such statutory safeguards and breach thereof adversely affects fairness of investigation. In the instant case, there is no explanation as to where the sample was kept after sealing and resealing. Learned Sessions Judge has observed that there **was no evidence on record to demonstrate that it was kept in safe custody** from the date of its sealing till its receipt in FSL. It found that the seal used in sealing of the sample had not been deposited in the Malkhana. It also found that there was no evidence on record to establish that the sample had been deposited in Malkhana till its dispatch to FSL. Keeping in view these glaring defects, learned Sessions Judge found that the link evidence was incomplete. After going through the impugned judgment, we have no doubt in our minds that the evidence brought on record by prosecution during trial failed to establish that the sample subjected to chemical analysis at FSL which was opined to contain Dextropropoxyphene Hydrochloride a narcotic agent was a representative sample of the seized capsules marked 'PROXY-VON'. This is apart from the fact that the circumstances attending upon the seizure of the capsules alleged to be contraband are highly doubtful as indicated by learned Sessions Judge upon close scrutiny of prosecution evidence."*

(Emphasis supplied)

25. On the same aspect, reference has been made to the pronouncement of this court reported at **2011 (1) JKJ 751, Sudarshan Bakaya and another v. State of J&K**, wherein in similar circumstances, it was observed by the learned Single Judge as follows:

"10. Another **material weakness** highlighted by Mr. Sethi is with regard to **missing of the link evidence in this case.** Dwelling upon his arguments on this aspect, he submits that after the alleged recovery it is not made clear as to when the sample and the remainder of the contraband was deposited with SHO of Police Station Bakshi Nagar. The only evidence, which has been brought

*on record is that on 18.09.1997, Puran Chand SGC had produced one sealed packet marked B before Mohd. Rashid Shaheen-NaibTehsildar for re-sealing and the said packet was ultimately sent by Dy. SP Mohd. Hussain Malik to the FSL on 19.09.1997 alongwith a letter, which reached the hands of the Assistant Director FSL on 20.09.1997. The said sample was sent through Tajinder Singh SGC as is clear from the FSL report. Mr. Sethi submits that it was incumbent upon the prosecution to prove by producing cogent evidence on record, may be in the shape of affidavit(s) of concerned police official(s), who had handled the case property at different stages to show that the sample was not tampered with at any stage till it reached the hands of the examiner of FSL. In the case on hand, neither the Incharge of the Malkhana of Police Station Bakshi Nagar nor Puran Chand SGC, who brought the sample before NaibTehsildar on 18.09.1997, nor SGC who took the sample to the FSL on 19.09.1997 have stepped into the witness box as prosecution witnesses nor their affidavits have been tendered to prove the link evidence in this regard and, therefore, possibility of tampering with the sample till it reached the hands of concerned official of FSL cannot be ruled out.*

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23. *Let the aforesaid weakness be now appreciated in the present case with regard to the non-compliance of provisions of [Section 55](#) of the Act also. No doubt, that non-compliance of the provisions of [Section 55](#) by itself would not vitiate the case of the prosecution so as to extend acquittal as is well settled by law, but if such non-compliance causes prejudice to the accused, in that situation it can be said to be damaging one. In the present case, in my view, non-compliance of [Section 55](#) of the Act does cause prejudice to the accused especially when the link evidence is missing in this case. **The prosecution is not clear with regard to the deposit of the contraband in the police station and its safe custody till it was produced before the Magistrate. Kailash Chibber was the SHO Police Station Bakshi Nagar and within the jurisdiction of that police station the recovery was allegedly effected. The case property should have been produced before him alongwith accused and he was supposed to keep the same in his safe custody. He does not say a word in this regard. Therefore, non-compliance of [Section 55](#) of the Act is writ large. This all creates lot of doubt about the complete link evidence and investigation conducted and, thus, causes prejudice. Had the prosecution taken all the safeguards with regard to link evidence like filling of Form at the spot, putting the seal impressions on it and producing the witnesses who handled the sample at different stages, this situation would not have arisen.***

24. *Filling of F.S.L. form at the spot is a very valuable safe-guard to ensure that the seal sample is not tampered with till its analysis by the F.S.L. The FSL form in all respect should not*



*only be prepared by the officer making seizure at the place where the case property is seized from the accused, it should also be kept in safe custody by the SHO to whom the sample and the case property is handed over and then the same should accompany the sample to Chemical Examiner for tallying the seals. The idea behind taking such a precaution is to complete the material link in the prosecution case by eliminating the possibility of the sample being tampered with at any stage. One should not forget that the stringent provision is provided under the Act where the sentence is very severe. It cannot be less than 10 years R.I. and a fine of Rupees one lac. **Therefore, it is the duty of the Court to insist for the standard of proof beyond shadow of all reasonable doubt against the accused and to see that the investigation is not faulty at any stage. As observed hereinabove, the investigation in this case is very weak on vital issues.***

(Emphasis supplied)

26. The learned Trial Judge has held that the investigating officer has dealt with matter in a routine and casual manner with important aspects of the prosecution completely overlooked.

27. During his examination, the investigating officer has stated that the accused had confessed before him as having connived and bought seized contraband from a person namely Maqbool of Bijbihara @ Rs. 5,000/- per kg. Shockingly the Investigating Officer made no efforts either to record the confession statements of the accused or investigate the matter with regard to the source of the contraband. There is, therefore, substance in the submission of the learned counsel for the respondents that none of the witnesses have established as to where the contraband or the samples were kept; and in whose custody they were sent to the Forensic Science Laboratory for the chemical analysis.

28. So far as the Forensic Examination is concerned, Mr. P. N. Goja Advocate points out that the next day after the seizure, after drawing the samples and subsequently after re-sealing they were sent to the Forensic

Science Laboratories at Jammu and Chandigarh. The laboratory at Chandigarh expressed its inability to conduct test in view of heavy workload.

29. The witness examined to prove the taking of samples has admitted that whatever number of samples were obtained, were neither sealed nor signed by him. He has further stated that he did not obtain the receipt of the incharge of the Malkhana and that the samples tagged M,N,O,P were kept in the Police Station, itself. The witness has further stated that the same did not bear the signatures of the incharge of the Malkhana. The witness has stated that when the samples were produced before the Tehsildar Ramban for re-sealing, even at that time he had not signed the samples nor he had endorsed that the samples stood obtained from the Malkhana on the 25<sup>th</sup> February 2010. The witness has stated that he had not certified anywhere that the samples were obtained from the Malkhana on 9<sup>th</sup> March 2010 and sent to the FSL.

30. PW-8 had claimed that PSI Charanjit Singh has seized the Car as well as the four bags in which the contraband was found; that on weighing the Bags marked A,C and D were found to contain 950 grams each of cannabis while bag B contains of 550 grams of cannabis. PW-8 claims that he had taken out 150 grams of samples from the bags which were further sampled into four samples of 50 grams each and marked as E,F,G,H,I,J,K and L. Samples marked E,F,G were sent to FSL, Jammu whereas samples I,J,K,L were sent to FSL Chandigarh. He added that samples M,N,O and P were kept in his custody. PW-8 had claimed that the samples were sealed on the spot and that the seized charas had been weighed on the spot through PW- Sachin Verma who had been brought by Sg. Ct. Subash Chander. Thus, taking of the samples is not supported by the same.

31. It cannot be disputed that the prosecution was required to establish the safety of the seized material and that it was essential to examine the Incharge Malkhana, the Executive Magistrate as well as person who took the samples to the Forensic Science Laboratory as witness. The prosecution has led no evidence at all with regard to safe deposit of the contraband in the malkhana; failed to produce or prove the malkhana register; failed to examine the magistrate or the person who took the samples to the Forensic Science Laboratory. These persons were not even cited as witnesses, let alone examined during the trial. In this background, the finding of the Trial Judge that the prosecution has miserably failed to comport to the requirements of the law in establishing the charge against the respondents, cannot be faulted.

32. The respondents have submitted that apart from the above contradictory evidence regarding the seizure; non-deposit of samples in the malkhana; and non-examination of material witnesses, the prosecution has failed to comply with the mandatory provisions of Sections 55 & 57 of the NDPS Act.

33. In this regard, our attention is drawn to the testimony of PW-8 who has submitted that there is no communication on the file regarding the compliance of Section 57. This witness has himself observed the non-observance of the provisions of Section 55 of the NDPS Act.

34. On the issue of non-compliance of Sections 55 and 57, we may advert to the pronouncement of the Supreme Court reported at *(2001) 3 SCC 28, Gurbax Singh v. State of Haryana*, where the Supreme Court has held as follows:

“9. The learned counsel for the appellant next contended that from the evidence it is apparent that the I. O. has not followed the procedure prescribed under Sections 52, 55 and 57 of the N.D.P.S. Act. May be that the I.O. had no knowledge about the operation of the N.D.P.S. Act on the date of the incident as he recorded the FIR under Section 9/1/78 of the Opium Act. In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, I.O. cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the present case, I.O. has admitted that the seal which was affixed on the muddamal article was handed over to the witness P.W.1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required under Section 55 of the N.D.P.S. Act. The prosecution has not led any evidence whether the Chemical Analyser received the sample with proper intact seals. It creates a doubt whether the same sample was sent to the Chemical Analyser. Further, it is apparent that the I.O. has not followed the procedure prescribed under Section 57 of the N.D.P.S. Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the I.O., particularly when he did not know that the substance was poppy husk., but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that Muddamal seal used by the PSI was a wooden seal. As against this, it is the say of PW2 SI/IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellant for a serious offence of possessing poppy-husk.”

35. In the present case, the Trial Judge has observed contradictions in material particulars in the evidence of the official witnesses. The Supreme Court had occasion to consider the consequences of such contradictions in the judgment reported at AIR 2017 (SC) 3751, *Krishan Chand v. State of Himachal Pradesh* where the court observed as follows:

“21. In view of the material contradictions which have come on record, we find that the High Court wrongly convicted the appellant as the evidence adduced by the prosecution was not carefully scrutinized by the High Court. We are of the considered

*opinion that the High Court committed error in convicting and sentencing the appellant.”*

36. We are of the view, the learned Trial Judge has rightly held that the offences punishable under the NDPS Act attracts stringent punishments on convictions and therefore evidence and proof is also required to be of a higher standard. In the light of the above evidence which is replete with contradictions in material particulars, the conclusion of the learned Trial Judge that the attesting witnesses have denied knowledge and that the seizure itself had become doubtful, has to be accepted.

37. On a scrutiny of the evidence led by the prosecution, in the present case, when examined against the binding legal provisions and the judicial precedents on the subject, we have no manner of doubt that the prosecution has failed to establish the case against the respondents beyond reasonable doubt.

38. In view thereof, this appeal is without any legal merit and is hereby dismissed.

**(SINDHU SHARMA)**  
**JUDGE**

**(GITA MITTAL)**  
**CHIEF JUSTICE**

**Jammu**  
13.05.2020  
Raj Kumar

Whether the order is speaking: Yes/No.  
Whether the order is reportable: Yes/No.