

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

CRAA No. 31 of 2015 (O&M)

Reserved on: 26.07.2024
Pronounced on: 09.08.2024

State of J&K

...Appellant(s)

Through :- Mr. Bhannu Jasrotia, GA vice
Mr. Ravinder Gutpa, AAG
v/s

Parshotam Singh and anr.

.....Respondent (s)

Through :- None.

Coram:

**HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE**

JUDGMENT

Rajesh Sekhri-J

1. Challenge in this appeal has been thrown to the judgment dated 21.08.2014, passed by learned Special Judge, Kathua, in file No. 71/Special, titled 'State v. Parshotam Singh and anr.' vide which respondents came to be acquitted, in FIR No. 63 of 2010, for offences under Section 7/20/21 of Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, for short).

2. Before we advert to the grounds of challenge urged in the memo of appeal, it shall be apt to have a bird's eye-view of the back ground facts.

3. The prosecution case is that on 01.09.2010, a police party of Police Station, Lakhanpur, headed by ASI-Ganesh Raj laid a nakka at Lakhanpur. At around 9:30 am, a scooter bearing Registration No. JK02N-7063 being driven by respondent No. 1, with respondent No. 2 as a pillion rider on its way from Punjab

to Jammu was intercepted and on checking the dicky of the said scooter, 3700 Pyremal Spas capsules, contained in a polythene bag, came to be recovered. According to the prosecution, respondents failed to furnish any satisfactory explanation much less a permission or a license for transportation of the said capsules. The aforesaid FIR came to be registered and during investigation, the investigation agency, besides other legal formalities, extracted a sample of 50 capsules for its chemical examination through FSL. The said sample came to be re-sealed from the Executive Magistrate. The respondents came to be arrested and statements of witnesses under Section 161 Cr.P.C. were recorded. As a result, the investigation concluded in the presentation of final report for the aforesaid offences in terms of Section 173 Cr.P.C. against the respondents, before the trial court. The respondents came to be charged by the trial court for the aforesaid offences whereby they pleaded innocence and claimed trial, prompting the trial court to ask for the prosecution evidence. Prosecution has examined all the witnesses but the Investigating officer.

4. On conclusion of the prosecution evidence, respondents were subjected to examination, in terms of section 342 Cr.P.C. whereby they denied the incriminating evidence, emanating from the testimonies of the prosecution witnesses in their depositions by stating that they have been falsely implicated. They did not examine any witness in defence.

5. Learned trial court, having analyzed and marshalled the prosecution evidence is of the view that besides serious discrepancies and infirmities in the prosecution evidence, the investigating agency has failed to adhere to the mandatory provision envisaged in the NDPS Act, therefore, respondents came to be acquitted.

6. The appellant-State has questioned the impugned judgment primarily on the ground that learned trial court has failed to appreciate the evidence, adduced by the prosecution in its right perspective and respondents have been acquitted by the trial court despite sufficient evidence to sustain their conviction.

7. Before a closer look at the grounds urged in the memo of appeal, a brief resume of the prosecution evidence being indispensable is given below.

8. **PW-1-Ganesh Raj** has stated that he along with police officials were on patrolling duty, in front of Police Station, Lakanpur where they had laid a nakka. At around 9:30 am, a scooter bearing Registration No. JK02N 7063 on its way from Punjab to Jammu was intercepted and on checking dickey of the said scooter, a polythene bag which contained packets of capsules, came to be recovered. Driver and pillion rider of the scooter disclosed their identities as Parshotam Singh and Chaman Lal. According to the witness, he could not read the name of the drugs. The accused along with capsules and scooter were taken to the Police Station and produced before the SHO, who conducted personal search of the accused persons and counted the capsules, which were 3700 in number. On cross examination by the defence, he has stated that dickey of the scooter was locked and was opened by the driver. Capsules were not counted by them on the spot but they were counted by the SHO in the Police Station after they left the place of occurrence and met in the Police Station. Capsules were counted by the Reader of the SHO in the room of Munshi and after counting, they were told by the reader that capsules were 3700 in number. Witness has reiterated that personal search of the accused were conducted by the SHO in the Police Station. A sample of 50 capsules was drawn for chemical examination and a small packet of contraband was prepared. He went to the Tehsildar for getting the sample re-sealed and his statement was recorded by the reader of SHO.

9. **PW-2-Constable Joginder Singh** has also deposed on the same lines about the laying of naka on 01.09.2010 at Lakhanpur and that at around 9:00 am, the aforesaid scooter on its way from Punjab to Jammu was intercepted at the naka point, the driver and pillion rider of the scooter disclosed their identities as Parshotam Singh and Chaman Lal (respondents herein). This witness has also reiterated that on checking the dickey of the scooter, one packet was recovered which contained Pyremol spas capsules and witness goes on to state that accused along with scooter and capsules were taken to the Police Station and they went to the room of the Munshi. He further stated that SHO came on the spot. Capsules were counted there, which were found to be 3700, out of which, a sample of 50 capsules were extracted for chemical examination through FSL which were marked as "B" and packets containing rest of the capsules were marked as "A". He has identified capsules in the open court. He has admitted the seizure memo regarding seizure of Rs. 110/- from personal search of respondent-Chaman Lal marked as EXTP-1 and seizure memo EXTP-1/1 regarding seizure of Rs. 125/- from the personal search of respondent-Parshotam Singh. He has also admitted seizure memo EXTP-1/2 regarding mobile phones of the accused. In cross examination, he has stated that when accused were enquired about capsules, they failed to furnish satisfactory reply. He has further stated that without opening the packet, accused along with bag and scooter were taken to the Police Station. They went to the room of the Munshi in the Police Station. After ten minutes, he reached the room of Munshi. Munshi and Reader counted the capsules and Munshi told him that capsules are 3700 in number. Personal search of the accused was conducted by the Munshi and after personal search, all the things were kept by Munshi in his possession. Packets were prepared by the SHO and proceedings were conducted by the SHO. SHO also recorded his statement.

10. PW-3-Constable Gulshan Kumar has corroborated the version of the aforesaid witnesses regarding laying a nakka at Lakahnpur and that aforesaid scooter on its way from Punjab to Jammu was intercepted at the naka point, dickey of the scooter was searched and capsules came to be recovered. This witness has stated that SHO was called on the spot from the Police Station who had drawn a sample of 50 capsules and after preparation of the samples, scooter capsules and accused were taken to the Police Station after seizure. He has also stated that personal search of the accused was conducted on the spot. In cross examination, he has stated that there was a huge rush at the place of occurrence and that no civil witness was present on the spot though people were passing by. He also stated that ASI-Ganesh Raj had read the name of the capsules. Constable-Sudhir Kumar went to call SHO and SHO came on the spot within 5-10 minutes. Capsules were counted by the ASI-Ganesh Raj in presence of SHO and sample was drawn on the spot and two packets were also prepared on the place of occurrence those are marked as 'A' and 'B'. Capsules were handed over to Munshi.

11. PW-4 Constable-Sudhir Kumar has stated that during naka at Lakhanpur, they checked the aforesaid scooter, from which, a black colored bag containing loose pyremol spas capsules came to be recovered from its dickey with respect to which respondents/accused failed to furnish satisfactory explanation. ASI took the scooter, contraband and accused persons to the Police Station and produced them before SHO. Capsules were counted and they were 3700 and same were handed over to the SHO by Ganesh Raj. Ring used for sealing was given to PW-Ashok Kumar. In cross examination, he has stated that during checking, there was huge rush but there was no civil/independent witness at the place of occurrence. After the recovery of the capsules, the name of the

capsules was read by the ASI-Ganesh and capsules were counted by the Munshi. He has stated that it was wrongly mentioned in his statement under Section 161 Cr.P.C. that seizure memo was prepared at the place of occurrence. He has reiterated that after the recovery of capsules at the naka, they came back to the Police Station at about 9:30-9:35 am. Constables Gulshan and Joginder Singh signed the seizure memos. Mr. Rao was the SHO. He has stated that he did not remember where the sample was kept.

12. PW-5 Ashok Kumar has stated that on 01.09.2010, in the morning, he was on his tea stall near Police Station, Lakhanpur where a naka was laid and vehicles were being checked. He has stated that on checking the dicky of a scooter, capsules came to be recovered from a bag and capsules and scooter were taken to the Police Station. On cross examination, he has failed to tell the number of the scooter of the respondents. He has stated that only one sample was prepared in his presence. Witness has stated that seizure memo was prepared in the Gypsy at the place of occurrence. Accused were taken to the Police Station and all the formalities were completed there. He signed the superdnama. He also stated that he cannot tell about the kind of capsules but said capsules were stated to be a Narcotic.

13. PW-6-Krishan Kumar is the Naib Tehsildar (Executive Magistrate 1st Class) who has re-sealed the sample in the present case. He has stated that on 04.09.2010, ASI-Ganesh Raj produced a sealed packet in his office with the request for re-sealing the same and obtaining an authority letter in the name of Director, FSL Jammu. He re-sealed the packet and issued the authority letter in the name of Director, FSL, Jammu. He has admitted his certificate EXT-P6. In cross examination, he has stated that he had not opened the packet, therefore, he

could not say what was there in the packet. He has also stated that he could not tell about number of seals.

14. PW-7-Pawan Abrol is the Scientific Officer, FSL, Jammu, who has examined the contraband in question. He has stated that on 08.09.2010, he received one sealed packet forwarded by Dy. SP, DAR, Kathua vide letter No. 5057-60/DAR dated 04.09.2010 through ASI-Ganesh Raj No. 1033/CID of Police Station, Lakhanpur in case FIR No. 63 of 2010 under Sections 8/21/22 NDPS. The exhibit was found sealed with five intact seals. The exhibit marked 'B' was further given exhibit No. P-1732/10 by him. Out of five intact seals of the said packets, two seals tallied with the specimen seal impression forwarded by the Tehsildar, Executive Magistrate 1st Class, Kathua and three seals tallied with Specimen impression forwarded by the Dy. SP, DAR, Kathua. It was found to contain 50 number of cherry red coloured gelatine capsules labeled as Pyremol Spas. The exhibit was found to contain some white coloured powdered material which was subjected to various chemical tests and chromatographic examination and Dextropropoxyphene Hydrochloride, Dicyclomine Hydrochloride and Paracetamol were detected. Witness has stated that Dextropropoxyphene Hydrochloride is a Narcotic analgesic. As per the literature, one capsule of pyremol spas contains 65 mg Dextropropoxyphene Hydrochloride. He has admitted his certificate as EXTP-7. In Cross examination, he has stated that seal with which packet was sealed was also sent to FSL, but he does not remember the impression of the seal. The seal with which the re-sealing of the packet was done was also sent but he does not remember the impression of the said seal also. He had not detected the percentage of the Narcotic for want of facilities in the FSL, Jammu.

15. PW-9-Amit Sangra was SHO, Police Station, Lakhanpur at the relevant time. He has stated that when he joined in Police Station, Lakhanpur on 16.10.2010, the investigation of the present case was in progress which came to be entrusted to him on 18.10.2010. During investigation, he obtained 12 days judicial remand of accused-Chaman Lal. The other accused was on bail. He obtained FSL report on 20.10.2010 from FSL Jammu and found that offences punishable under Sections 8/20/21 NDPS were established against the accused. In cross examination, he has clarified that he neither recorded the statements of the witnesses nor prepared the site plan of the place of occurrence nor prepared the seizure memos.

16. This is the crux of the prosecution evidence.

17. Mr. Bhannu Jasrotia, learned GA appearing for the appellant-State has reiterated the grounds urged in the memo of appeal. However, learned defence counsel, besides highlighting material contradictions in the testimonies of the prosecution witnesses has vehemently argued that mandatory provisions as contained in the NDPS Act have not been adhered to by the investigating agency and the acquittal of the respondents can be maintained on this count alone.

18. At the foremost, learned trial court has noticed over-writings in the site plan. These interpolations in the site plan assumes significance in view of the fact that it is the prosecution case that after the contraband in question came to be recovered from the dickey of the scooter, being driven by respondent No. 1, while respondent No. 2 was the pillion rider, both the respondents/accused along with contraband and the offending scooter were brought to the Police Station and all the formalities including the preparation of seizure memos were carried out in the Police Station. There is nothing in the prosecution case to indicate that on whose Nishandehi, the site plan came to be prepared by the investigating agency.

However, a perusal of the site plan on the file would show that it has been prepared by SHO, Police Station, Lakhanpur namely PW-8 Surinder Rao. There is over-writing in the site plan regarding the number of capsules, which appears to have been written as 3800, overwritten as 3700 and distance of the place of occurrence from Police Station appears to have been over-written from 150/175 to 050/075. The scribe of site plan PW-8 Surinder Rao has not been examined by the prosecution, during the trial to explain the aforesaid interpolations in the site plan.

19. Again, it is specific case of the prosecution that after the contraband in question came to be recovered allegedly from the possession of the respondents, the contraband along with scooter and accused persons were taken to the Police Station, where legal formalities, including preparation of the seizure memos and drawing of samples came to be conducted. PW-1-Ganesh Raj, who was heading the naka party, PW-2 constable-Joginder Singh, PW-4-Constable-Sudhir Kumar and PW-5-Ashok Kumar have also stated in tune with the prosecution case that after the recovery of capsules, from the possession of the respondents, the scooter, capsules and accused were taken to the Police Station, where rest of the formalities, including seizure and sampling were conducted. However, PW-3 constable Gulshan Kumar, who happens to be one of the members of the naka party, has contradicted the statements of the aforesaid witnesses by stating that SHO was called on the spot from the Police Station, who prepared the samples of 50 capsules on the spot and after preparation of the samples, the scooter, capsules and accused were taken to the Police Station. He has also stated that personal search of accused was conducted on the spot by the SHO, which is also contradicted to the statements of rest of the members of the naka party including the Incharge naka PW-1. Contrary to all, independent witness PW-5-Ashok

Kumar in cross examination has stated that seizure memo was prepared in the Gypsy at the place of occurrence. In our opinion, there are serious contradictions in the testimonies of prosecution witnesses, who happened to be the police officials.

20. Another contradiction in the statements of prosecution witnesses is regarding counting of the capsules and the place where the counting was done. According to PW-1 Ganesh Raj, accused along with capsules and scooter were taken to the police station, where it was the SHO who conducted personal search of accused and counted the capsules. He rather clarified in his cross examination he did not count capsules on the spot, but they were counted by the SHO in the Police station. He also stated in his cross examination that it was reader of the SHO who counted the capsules in the room of Munshi. However, PW-2 Joginder Singh has deposed that when they returned to the Police Station they went to the room of the Munshi, SHO came there where the capsules were counted.

21. It is apparent from the prosecution case as also the statements of the prosecution witnesses that legal formalities and requirements regarding search seizure and recovery have been given a complete go bye by the investigating agency in the present case. After the recovery of the contraband, the incharge naka party was obliged to seize the contraband on the spot and thereafter, he was required to flash a message to the Police Station for registration of the FIR or produce the seizure before the investigating officer of the case. However, in the present case, the contraband after its recovery along with accused were taken to the Police Station without formal seizure by the incharge naka party.

22. Be that as it may, another staggering circumstance to shake the credibility of the entire prosecution case is that there is nothing in the prosecution case as also in the prosecution evidence to suggest as to where the contraband after its

recovery and seizure was kept. The recovery came to be effected on 01.09.2010 and whether the contraband after its recovery and even after its seizure was lying with the SHO or was kept in the safe custody in the malkhana of the Police Station is not coming forth from the prosecution case or the prosecution evidence. This discrepancy could have been well explained by the investigating officer, who conducted these legal formalities, but he has not been examined by the prosecution.

23. It is pertinent to note that in view of stringent provisions regarding punishment and grant of bail, the legislature in its wisdom enacted Section 55 of the NDPS Act to ensure that officer Incharge of Police Station shall immediately take charge and keep the alleged contraband in safe custody, in order to rule out any possibility of tampering with the contraband. Prosecution is obliged to prove that the contraband after its recovery and seizure from the accused was kept in safe custody, in the Malkhana of the concerned Police Station under proper entry in the Malkhana register. The prosecution is also obliged to prove that said sample of the contraband was forwarded to FSL without any delay.

24. Hon^{ble} Supreme Court in **State of Rajasthan v. Gurmail Singh** reported as **AIR 2005 SC 1578** has clearly ruled that if the link evidence adduced by the prosecution is not satisfactory and Malkhana Register is not produced to prove that contraband was kept in the safe custody of the Malkhana and further that if no sample of seal is sent along with samples to the Chemical Analyst, the prosecution case can be viewed doubtful. The relevant extract of the judgment has been culled out below as a ready reference:

“We have perused the judgment of the High Court. Apart from other reasons recorded by the High Court, we find that the link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though the seized articles are said to have been kept in the malkhana on 20th May, 1995, the Malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by PW-6 on June 5, 1995. We further find that no sample of the

seal was sent along with the sample to Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles.

Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband. These loopholes in the prosecution case have led the High Court to acquit the respondent.”

42. A similar view has been expressed by the Apex Court in **State of Rajasthan v. Daulat Ram** reported as **AIR 1980 SC 1314**.

25. Reverting to the present case, as already discussed, there is nothing in the prosecution case as also in the prosecution evidence to indicate as to where the contraband in the present case after its recovery and in particular, after its seizure was kept. Neither incharge Malkhana has been cited as a witness in the case nor prosecution has made any effort during the trial to send for the malkhana register to produce any semblance of evidence to show that contraband in the present case after its recovery and seizure was kept in the safe custody. We are of the view that present appeal is liable to be dismissed on this count alone.

26. Another serious infirmity in the prosecution case is regarding delay in forwarding of the contraband, after its re-sealing to the FSL. The contraband in the present case is stated to have been recovered on 01.09.2010 and it is the prosecution case that samples were re-sealed by the Executive Magistrate on 04.09.2010. As per the prosecution case, the samples after re-sealing were sent to the FSL on 08.09.2010. The prosecution has not only failed to explain as to where the samples during the intervening period from 01.09.2010 to 04.09.2010 and after its re-sealing on 04.09.2010 upto 08.09.2010, were kept and remained in whose custody, but also the delay in sending the sample to the FSL, after its re-seal by the Executive Magistrate.

27. Further Section 52(A)(2) of the NDPS Act provides for preparation of an inventory of the narcotics drugs and psychotropic substances containing details

like description, quality, quantity, mode of packing, marks, numbers and other identifying particulars etc. and forwarding the same to the officer of the nearest Police Station or to the officer empowered under Section 53 of NDPS Act and making an application to the Magistrate for the purpose of certifying the correctness of the inventory so prepared; or taking, in the presence of such Magistrate, photographs of such drugs or substance and certifying photographs as true; or allowing drawing representative samples of such drug or substance; in the presence of Magistrate and certifying the correctness of any list of samples so drawn. The Magistrate is bound to allow such application as soon as may be. In the present case, neither any such inventory has been prepared nor application made to the Magistrate as mandated nor any form has been filled up by the Executive Magistrate.

28. Commenting upon the import of section 52(A)(2) of the NDPS Act, Hon^{ble} Supreme Court in **Gurbax Singh v. State of Haryana** reported as **2001 (1) Supreme 625** has observed as under:

“ that non-compliance of the provisions of Sections 52, 55 and 57, which are no doubt, directory and violation thereof, would not ipso facto violate the trial or conviction. However, the Investigating Officer cannot totally ignore these provisions, and, as such, failure will have bearing, on the appreciation of evidence, regarding search and seizure of the accused.”

29. It is evident from the afore-quoted observation of Hon^{ble} Supreme Court that compliance of Section 52(A)(2) of the NDPS Act is an indicator towards reasonable, fair and just procedure adopted by the investigating officer during search and seizure and non-compliance thereof, deliberately and intentionally, must be viewed with suspicion. It may be underlined that if such mandatory provisions are observed in breach by the investigating agency and if Courts condone such acts or violations of statutory safeguards, the legitimacy of the judicial procedure may come under cloud.

30. For what has been observed and discussed above, we are of the view that the prosecution case, being replete with material contradictions and legal infirmities, does not inspire confidence. The mandatory provisions of NDPS, in the present case, have been observed in breach. Viewed thus, we do not find any illegality in the well reasoned judgment recorded by learned trial court, which calls for interference of this Court. Hence, the present appeal is dismissed and impugned judgment is upheld.

(RAJESH SEKHRI)
JUDGE

(RAJNESH OSWAL)
JUDGE

JAMMU
09.08.2024
Paramjeet

Whether the order is speaking?
Whether the order is reportable?

Yes
Yes

