Suppl no.1

HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

{CrlA (AS) No. 13/2019}

Reserved on: 22.08.2024
Pronounced on: 10.09.2024

State through P/S Pulwama

... Appellant

Through: Mr. Ab. Rashid Malik, Ld Sr. AAG with
Mr. Mohd. Younis, Assisting Counsel

vs.

1. **Nazir Ahmad Rather**
   S/o Mohd. Abdullah Rather
2. **Mohd. Yasin Ganaie**
   S/o Gh. Mohad. Ganaie
3. **Manzoor Ahmad Ganaie**
   S/o Gh. Nabi Ganaie
   R's/oTahab, District Pulwama

....Respondents

Through: Mr. Shabir Ahmad, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE MOHD YOUSUF WANI, JUDGE

J U D G M E N T

Mohd Yousuf Wani-J

1. Impugned in the instant appeal is the judgment dated 30-12.2016 passed by the Court of learned Principal Sessions Judge, Pulwama, (hereinafter referred to as the "Trial Court" for short), while culminating the trial of a police report/challan arising out of the case FIR No. 257/2013 of Police Station Pulwama, and filed u/s 173 of the Code of Criminal Procedure Samvat.1989 (already repealed but applicable in the case & hereinafter referred to as the "Code" for short) bearing file No. 21/2007- with date of institution as 19.09.2007, whereby the learned Trial Court acquitted the respondents/accused of their charges U/Ss 15/18, 29 of Narcotic

Drugs and Psychotropic Substances Act, 1985 (hereafter referred to as the "Act" for short).

2. The impugned judgment of acquittal has been assailed by the Appellant i.e., State of J&K (now UT) through SHO Police Station Pulwama, on the grounds, *interi alia* that same is liable to be set-aside, as being against the facts and the law. That the learned trial court has not appreciated the evidence of the prosecution led at the trial in the proper perspective and has proceeded to acquit the respondents/accused on hypothetical conclusions without any concrete basis, while under-estimating the fact of their being involved in serious offences under the Act. That the learned trial court has over looked the important aspect of the respondents' being found in conscious possession of the contraband narcotic substance i.e., poppy straw Raw and Grinded weighing total 21+79=100 Kgs on account of which fact presumption of culpable mental state stood amputated as against them with the shifting of burden to prove otherwise also on them. That the respondents at the trial, just simply pleaded that they have been falsely implicated in the case FIR without discharging their burden to prove that they were not in conscious possession of contraband. That the prosecution led sufficient evidence to establish the guilt of the respondents/accused but the learned trial Court did not appreciate the same. That the learned trial court pin-pointed minor contradictions occurring in the prosecution evidence which were not fatal for the prosecution case,

thereby denying the right of fair trial to the appellant. That the observations of the learned trial court made in the impugned judgment to the effect that investigation in the case has been conducted in a casual and cavalier manner as also in violation of the mandatory provisions of the Act, are far from the real facts. That the manner in which the investigation was conducted under the supervision of SHO concerned lends credibility to the fairness and impartiality of the same and as such strict adherence to the provisions of Section 42 (2) of the Act was not necessary. That prosecution has succeeded at the trial of the case to prove the guilt of the respondents beyond any shadow of doubt as the ingredients of the offences charged against them were proved by clear, sufficient and cogent evidence. That there is absolutely no bar under law for lending credibility to the evidence of the official/police witnesses inspiring confidence as the law requires quality of the evidence rather than the quantity of the same.

3. The case of the prosecution before the learned trial court was that on 23.06.2007, a reliable information was received by the Police Station, Pulwama to the effect that at Village Tahab, Pulwama, the respondents/accused have installed a machine and are busy in grinding poppy straw to make "Fuki" for doing the illegal business thereof and some quantity of "Fuki" is lying on spot. That on receipt of the said information, case FIR bearing No. 257/2013 was registered with the Police Station concerned and a raiding party

under the supervision of SHO concerned left for the spot, raided the premises and caught the respondents red handed while grinding poppy straw to make "Fuki". That the investigating Officer, PW-6 Head constable Mohd Yousuf (67/PL), prepared the important documents/memo's including the memo's regarding the seizure of grinding machine and poppy straw and the statements of the witnesses u/ss 161, 164-A of the Code came also to be recorded, by him. That the seized contraband substance i.e., poppy straw/fuki upon weighing was found to be 21 Kgs raw poppy and 79 Kgs grinded poppy/fuki, total 100 Kgs being filled in five gunny bags. That the respondents were arrested and samples were taken out of the seized material in presence of Tehsildar, Pulwama, for being sent to FSL Srinagar for opinion, which was subsequently received as positive. That during investigation, the respondents were found to have committed the offences punishable U/Ss 15/18, 29 of the Act.

4. During the trial of the case, the respondents/accused came to be formally charged for the commission of the offences U/Ss 15/18, 29 of Act vide order dated 04.10.2007, who pleaded not guilty and instead claimed to be tried, pursuant to which the prosecution was directed to lead evidence in support of it's case. The prosecution, accordingly, could produce and examine only six witnesses i.e., PWs 1 to 6 out of its ten listed witnesses. After closure of the prosecution evidence vide order dated 01.06.2011, the statements of the respondents/accused U/s 342 of the Code came to be recorded

on 28.03.2013. After hearing the prosecution and the defense in terms of provision of Section 273 of the Code, a case of "No Evidence" was not found to be made out, pursuant to which the respondents/accused were directed to lead evidence in their defense. The respondents/accused despite availing of several opportunities did not opt to lead any evidence in their defense and accordingly, their evidence was closed vide order dated 16.08.2014. The learned trial court after hearing the prosecution and the defense passed the impugned judgment of acquittal. The learned trial court through the impugned judgment has acquitted the respondents/accused of their charges while observing that the prosecution has failed at the trial to establish their guilt beyond any shadow of doubt. As per the learned trial court, the evidence led by the prosecution at the trial is full of contradictions in relation to material particulars of the case thus giving rise to a grave doubt and a discrepancy, the benefit whereof goes to the respondents. It has also been *inter alia* observed in the impugned judgment that investigation of the case has been conducted in violation of the mandatory provisions of the Act as laid down under Sections 42, 52 and 57. The learned trial court in the impugned judgment has pin-pointed the flaws and irregularities having been committed during investigation of the case and has also referred to the contradictions in respect of material particulars in terms of the evidence of the prosecution witnesses examined at the trial.

5. We have heard the learned counsel for the parties.

6. Mr. Abdul Rashid Malik, Sr. AAG, while reiterating his stand taken in the memo of appeal submitted that the impugned judgment of acquittal dated 30.12.2016 is liable to be set aside as being bad in law, because the learned trial court has not appreciated the evidence led at the trial by the prosecution which is of clear and unequivocal character, pointing towards the guilt of the accused. He submitted that in a criminal trial, it is the quality of the evidence and not quantity which is material. He also submitted that the evidence of police witnesses is not to be under estimated or discarded as whole but to be appreciated having regard to the fact that independent civilian witnesses quite often hesitate to associate themselves with the occurrence when the investigation is being conducted in respect of the offenses under the Act and that too when raids are being conducted during odd hours on specific information. He further submitted that the prosecution at the trial produced and examined as many as six witnesses including the Investigation officer (I.O) of the case who supported and corroborated the material particulars of the prosecution case. The learned counsel, however, submitted that minor contradictions are not fatal for the prosecution case as they occur with the fading of the human memory.

Mr. Malik Sr. AAG, further submitted that the investigation of the case was conducted under the supervision of the SHO concerned and the requirements of sending any reports/information to the superior officers as per the provisions of Sections 42 and 57 of

the Act was not necessary in the facts and circumstances of the case. He submitted that the factum of the possession of contraband narcotic substance i.e., poppy straw weighing (100) Kgs with the respondents and the consequent recovery of the same from them was fully established at the trial by the prosecution witnesses. He contended that as per Sections 35 and 54 of the Act, culpable mental state is imputed as against the respondents in relation to the said contraband and the burden to prove that they were not in the conscious possession of the same was upon the respondents who failed to do the same. It was further contended that the reports in respect of the samples taken during investigation of the case before the Executive Magistrate were received as positive confirming the contraband substance as "poppy/fuki". The learned State counsel prayed for setting aside of the impugned judgment and the consequent conviction of the respondents.

7. Per contra, the learned counsel for the respondents Mr. Shabir Ahmad, Advocate, submitted that the impugned judgment of acquittal does not suffer from any illegality or perversity as having been passed in accordance with law on the proper appreciation of the evidence adduced at the trial, and having regard to the breach of the mandatory provisions of the Act. The learned counsel submitted that the learned trial court has rightly been convinced to hold that prosecution at the trial has failed to bring home the guilt of the accused beyond any shadow of doubt. That the learned trial court

has pinpointed the violations having been committed during the investigation of the case by observing the mandatory provisions of the Act, especially contained under Sections 42, 52 and 57 in breach. The learned counsel while referring to the evidence led by prosecution at the trial submitted that the procedure as regards the search, seizure and sampling has been totally observed in breach and besides no independent witness despite availability has been associated with investigation which raises a reasonable doubt regarding the genuineness of the prosecution case. He further contended, that it is the cardinal principle of criminal jurisprudence that an accused person is presumed to be innocent till proved guilty and the burden of proving everything essential to establishment of his guilt, lies on the prosecution. He contended that the presumption under sections 35 and 54 of the Act is a rebuttable presumption and as such when the prosecution initially fails to discharge its burden, the accused need not to rebut the same. He further contended that the prosecution witnesses examined at the trial have given contradictory versions regarding material particulars. The learned counsel prayed for the dismissal of the appeal.

8. We have perused the memo of the appeal and the scanned copy of the trial court record especially the judgment impugned. We have also accorded our consideration to the rival arguments advanced on both sides.

9. In light of the aforementioned perusal and consideration, we are of the view that learned trial court has rightly appreciated the evidence adduced by prosecution at the trial and while doing so has justly opined that prosecution has failed at the trial to bring home the guilt of the respondents beyond any shadow of doubt. There accordingly appears to be no illegality or perversity with the impugned judgment.

10. It is an accepted principle of Criminal Jurisprudence that an accused person is presumed to be innocent till he is proved guilty and the burden of proving everything essential to establish of his/her guilt lies on the prosecution/State. There must be a clear and unequivocal proof of '*corpus delicti'*. The prosecution should stand or fall on its own legs and it cannot derive any benefit from the weaknesses of the defense. Suspicion however, strong cannot take the place of legal proof. There lies a long mental distance between "*may be true*" and "*must be true*". The vital distinction between conjectures and sure conclusions needs to be maintained in criminal trials.

11. As hereinbefore mentioned, the prosecution examined six witnesses at the trial i.e., PWs 1 to 6. There are fatal discrepancies and contradictions in the statements of aforesaid witnesses examined at the trial in respect of material particulars of the case especially with regard to preparation of necessary documents/memo's regarding

formal seizure and sealing of the alleged contraband substance on the spot.

Pw-1, S.I, Manzoor Ahmad No. 7119/PL in his cross examination *interalia,* deposed, that all the formalities were completed by the I.O on spot by preparing the seizure memo, site plan and recording the statements of witnesses. He deposed that it took them two to three hours on spot to complete all the formalities. That when they reached on spot, I.O Mohammad Yousuf No. 67/PL was accompanying them from start to end.

PW-2, Head Constable Gh. Mohi ud din No. 80/PL also *inter alia,* deposed in his cross examination at the trial, that documentation was done by the I.O on spot and as such he signed on spot.

PW-3, Constable Mohd Sultan No. 745/PL however, *inter alia* deposed that seized bags were again weighed in Police Station. That EXPW-3 i.e., seizure memo was prepared in the Police station and after that he and other witnesses signed on the same in the Police Station. That he gave his statement before the I.O in the Police Station. That no sealing of the bags was done on the spot.

PW-4, Sgct Gh. Qadir No. 945/PL during his cross examination *inter alia* deposed that they recovered nothing from the accused persons inside the machine premises. That he knows nothing about weighing as he was busy in un-mounting machine.

PW-5, constable, Jalal-ud-din No. 750/PL also during his cross examination *inter alia,* deposed that he knows nothing about the packing of bags and none of his signature was taken on the spot.

PW-6, Head Constable Mohd Yousuf No. 67/PL, who as per the prosecution case conducted the earlier investigation in the case has *inter alia* deposed in his cross examination at the trial that seizure memo was prepared on the second day of the occurrence as on the first day it was too late. That he prepared, the site plan, EXPW-3 (seizure memo) and report under section 173 of the Code, but did not record the statements of witnesses, under section 161 of the Code as same were recorded by some other head constable whose name he does not remember. That when seized material was taken to the police station, it was about mid night. That on second day the Tehsildar was called on phone to police station. That seized bags were not wrapped in any cloth. That he does not remember whether any mark was put on the seized bags. That he cannot explain as to where the seized material was kept from 11.07.2007 to 14.07.2007. That he did not send any separate report to his superior officers. That he does not know as to whether FIR had been registered when they laid the raid and whether he in his capacity as Head Constable was competent to investigate the case FIR under NDPS Act.

12. It is undisputed on the part of the prosecution itself, that no gazetted officer or any magistrate was accompanying the raiding party on the date of alleged occurrence i.e., 23.06.2007. There are fatal

contradictions in the evidence adduced at the trial by the prosecution as regards the material particulars of the case. The Investigating Officer of the case himself has stated at the trial in his examination that seizure was made on the second day of the occurrence. It is also discernable from the prosecution case that the investigation has been conducted in violation of the mandatory provisions of the Act as contended under Sections 42, 52 and 57.

It has been un-contradictionally deposed by all the six prosecution witnesses examined at the trial that no civilian independent witness was associated with the occurrence especially the seizure of the contraband substance.

13. The non compliance of the mandatory provisions of Sections 42, 52 and 57 of the Act is fatal for the prosecution case as seriously doubting the genuineness of the same. The intention of the legislature, obviously is that when stringent punishments are provided under the Act, there are sound safe guards to ensure that innocent persons are not harassed on unnecessarily detained by any arbitrary or whimsical actions of the police or authorities. The provisions of a statute have to be interpreted *inter alia* with reference to the intention of the legislature. It may also be assumed that the legislature would always intend to ensure just and fair action. A perusal of the provisions of the Act will leave no doubt that while the legislature wanted to curb menace of illicit traffic in Narcotic Drugs and Psychotropic Substances with a heavy hand by providing

stringent punishment, it was nevertheless conscious of the constitutional requirements that the liberty of an individual must not be lightly curtailed and in order to avoid or lessen the possibility of false implication, it provided sound procedural safeguards.

Under the provisions of section 42 of the Act, a police officer of the State Government not below the rank of constable being empowered by general or special order of the State Government, if he has reason to believe from his personal knowledge or information given by any person and taken down in writing to the effect that any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture in Chapter V-A of the Act is kept or concealed in any building, conveyance or enclosed place, may, between "sunrise and sunset":-

> "(a) enter into and search any such building, conveyance or place;
>
> (b) in case of resistance, break open any door and remove any obstacle to such entry;
>
> (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be

liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act."

The proviso appended to the said section 42 of the Act, further provides that if such an officer has reason to believe that a search warrant or authorization cannot be obtained without affording an opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building conveyance or enclosed place at any time between "sunset and sunrise" after recording the grounds of his belief.

Clause (2) of the Section says that where an officer takes down any information in writing under sub- section (1) or records grounds for his belief under the proviso thereto, he shall within 72 hours send a copy thereof to his immediate official superior.

The provision of section 42 of the Act are needed to be read and understood conjointly with the provisions of Section 41 of the Act. As per the clause (1) of the Section 41 of the Act a metropolitan magistrate or magistrate of the first class or any magistrate of the second class specially empowered by the State

Government in this behalf may issue a warrant for arrest of any person whom he has reason to believe to have committed any offence punishable under the Act or for search whether by day or by night of a building conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or contraband substance in respect of which an offence punishable under the Act has been committed, or any document or any other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed. However, under Clause (2) of the Section 41 of the Act any such officer of the gazetted rank of the department of State Police etc if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed any offence punishable under this Act or that any narcotic drug or psychotropic substance or contraband substance in respect of which an offence under the Act has been committed etc is kept or concealed in any building or conveyance or place may authorize any officer subordinate to him but superior in rank to a constable to arrest such person or to search such building, conveyance or place whether by day or by night or himself arrest such a person or search building, conveyance or place. An officer to whom a warrant under sub section (1) of

section 41 is addressed and the officer who authorizes the arrest or search or the officer who is so authorized under sub section (2) shall have all the powers of an officer acting under section 42 of the Act.

14. A conjoint reading of the provisions of sections 41 and 42 of the Act makes it abundantly clear that an officer/official of the State Police Department, who has not obtained warrant for search in terms of the provisions of Section 41 (1) of the Act or is not so authorized by gazetted officer of his department or is not himself a gazetted officer, cannot under any circumstances make search of any building or conveyance or enclosed place despite his belief from personal knowledge or information received and taken down in writing regarding keeping or concealing of any narcotic drug or psychotropic substance or contraband substance in any such building or the conveyance or enclosed place, search such building or conveyance except between "*sunrise and sunset*". The SHO police station, Pulwama, being the head of the raiding party was not a gazetted officer and as such he was not under any circumstances authorized to conduct search of the premises of the respondents machine at 11 PM or thereafter on 23.06.2007. He was not also authorized to do so by any of his superior gazetted officer. It is also not disputed that no search warrant had been obtained.

Even, if, such a non-gazetted officer of the police department has a reason to belief that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of

the offence or facility for escaping of an offender and records grounds of the belief, he cannot enter and search such building, conveyance or enclosed place at any time before "*sunrise or after sunset"*.

15. In the instant case, where the search is alleged to have been made by a non-gazetted officer after sunset beyond 11 PM, as such, the sending of report regarding taking down of the information in writing and recording the grounds of his belief to his immediate official/superior within 72 hours even cannot legalize the search and it is needless to mention that in the instant case even no such report has been admittedly sent to his immediate officer/superior by the I.O (PW-6).

The Investigating Officer in the case has also observed the provisions of Sections 52 and 57 of the Act in breach. As per the mandatory provisions of Section 52 of the Act, the respondents/accused were needed to be informed of the grounds of their arrest which has not been done. The report regarding the arrest of the respondents and the seizure of the alleged narcotic substance from them which was needed to be sent to the immediate superior officer of the SHO, Pulwama within 48 hours as per the Section 57 of the Act, has not been so sent in the case. The non-compliance of the mandatory requirements as per the provisions of Sections 52 and 57 of the Act, in the facts and circumstances of the case doubt the genuineness of the prosecution version of the case. The

provisions which stand incorporated under sections 52 (1) and 57 of the Act to be followed after search and arrest of the accused are mandatory in character. The reason is that the right to be informed about the grounds of arrest guaranteed by section 52 (1) and the requirement regarding making of full report regarding arrest and seizure to the immediate superior officer within 48 hours under section 57 of the Act confer a valuable right on the accused. When informed about the grounds of arrest at the earliest, the accused becomes aware at the very outset about the probable charge against him, so as to allow him to prepare his defense. Similarly the provisions requiring the person making arrest and seizure to make a full report to his immediate superior within 48 hours, bring into existence a document which can be used for the purpose of cross-examination in defense. The making of reports within 72 hours as per the provisions of section 42 (2) and within 48 hours as per section 57 respectively will also bring to an end the possibility of antedating or improving the prosecution case/version.

The non-compliance of the mandatory provisions of Sections 42, 52 and 57 of the Act would be an infirmity bound to reflect on the credibility of the prosecution. Even where under compelling circumstances an authorized officer invokes the provisions of proviso to Section 42 (1) and dispenses with obtaining a search warrant upon recording the grounds of his belief to the effect that a search warrant or authorization cannot be obtained without

affording an opportunity for the concealment of evidence or facility for the escape of an offender and proceeds to go for the search of a building, conveyance or enclosed place, he shall at least comply with the provisions of section 100 (4) of the Code of Criminal Procedure by associating at least two independent civilian witnesses/inhabitants with the search process.

16. Perusal of the scanned copy of the trial court record reveals that the prosecution evidence in the case was called vide order dated 04.10.2007 upon framing the formal charges against the respondents/accused and was closed vide order dated 01.06.2011 in dispensation of the examination of unexamined witnesses i.e., PW-7 to 10, whom the prosecution failed to produce despite innumerable opportunities. The un-examined witnesses include an Investigating Officers (PW-7), FSL expert (PW-9) and then SHO of the Police Station concerned PW-8 who is alleged to have expressed his satisfaction with the investigation process and an independent witness (PW-10). Non-examination of said important witnesses during a period of about four years despite innumerable opportunities tantamounts to with holding thereof and justifies an adverse inference against the prosecution. The investigation in the case as rightly opined by the learned trial court appears to have been conducted in a casual and cavalier manner. No arrest memo or a memo regarding weighing of the alleged narcotic substance appears to have been prepared by the Investigating officer.

The I.O of the case was required in terms of the provisions of Section 52 (1) to prepare a memo testifying that he informed the respondents/accused of the grounds their arrest which has not been done.

It is also revealed from the perusal of the scanned copy of the trial court record that one independent witness Gh. Rasool Sheikh (PW-10) is reported to have been associated with the occurrence who has not been examined at the trial. Even in his statement u/s 161 of the Code recorded during investigation, he does not testify the seizure of the alleged narcotic substance i.e. poppy straw in his presence. As hereinbefore mentioned, no reports as needed under the provisions of Sections 42 and 57 of the Act have been sent to superior officers as required. The SHO Police Station Pulwama, who was a part of the raiding party cannot be supposed to be a superior officer of the I.O (PW-6) for the purpose of the Sections 42 and 57 of the Act. The I.O of the case (PW-6) who conducted the initial investigation in the case should not have been a part of the raiding party. His action and the proceeding as I.O of the case, does not in the facts and the circumstances of the case, appear to be independent. It is very needful to mention that the I.O (PW-6) has during his examination at the trial *inter alia* deposed that he was not knowing whether any FIR had been registered at the time when they laid the raid. He also *inter alia* deposed that every thing was being done under the supervision of the SHO.

17. The prosecution has failed before the trial court to prove the important aspects of sampling as also the analysis report. The executive Magistrate before whom the sampling is alleged to have been done, has not been listed or examined as a witness in the case.

18. The learned state counsel during his arguments *inter alia* contended that the learned trial court has underestimated the operation of the provisions of Sections 35 and 54 of the Act which raise presumptions with regard to culpable mental state on the part of the accused found in possession of the narcotic substance and as such with the proof of the seizure of the narcotic substance involved in the case i.e., poppy straw from the machine premises of the respondents, they ought to have been convicted.

19. The presumption under Sections 35 and 54 of the Act is never absolute but rebuttable presumption. The initial burden is always on the prosecution to establish a *prima facie* case against the accused, only where after burden will shift to the accused.

20. Admittedly section 54 of the Act provides for a reversal burden of proof upon accused, contrary to normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This however, does not dispense with the requirement of the prosecution to establish a *prima facie* case in the backdrop of sufficient, cogent and clear evidence with observance of mandatory provisions under sections 42, 50, 52 and 57of the Act, where after the accused has to be called to account for his possession. The

provisions of sections 35 and 54 of the Act are in the form of an additional advantage to the prosecution and the factum of alleged possession does not *ipso facto* make the accused liable.

21. The Investigating agency can take the benefit of presumptions under sections 35 and 54 of the Act, for finalization of the investigation process, and even for purposes of bail, the prosecution can rely upon the said presumptive provisions. But for the purposes of the trial, the accused can be called to account for his alleged possession of the narcotic substance as being, "not conscious" only after the prosecution proves the foundational facts of its case beyond any doubt.

22. The extent of the applicability and the relevance of the presumptions under sections 35 and 54 of the Act came for consideration before the Hon'ble Supreme Court in "***Noor Aga vs. State of Punjab and anr (2008) 16 SCC 417***" decided on 9th July, 2008. It is appropriate to reproduce the relevant extracts from the judgment as under:-

> **"18.** ……The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., `proof beyond all reasonable doubt' would be more onerous. .....
>
> Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show

> that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is `preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the *actus reus* which is possession of contraband by the accused cannot be said to have been established.
>
> With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt..."

23. The law laid down in ***Noor Aga case*** (supra) was again followed by the Hon'ble Apex Court in "***Mohan Lal v. State of Rajasthan (2015) 6 Supreme Copurt Cases 222 and Bawindar Singh (Binda), appellant vs. Narcotics Control Bureau, respondent with Satnam Singh, appellant vs. Narcotics Control Bureau, 2023 SCC online SC 1213.***

Balwinder Singh (Binda) vs. Narcotics Control Bureau" cited (supra) was decided by a three judge bench of the Hon'ble Apex Court. It is also felt appropriate to reproduce the relevant paras of the judgment for ready reference:

> **"30**. We may first test on the anvil of certain law, the plea taken by learned counsel for the appellant-Satnam Singh that the prosecution has failed to establish a *prima facie* case against the accused and therefore, the burden of proving his innocence did not shift back to him. In the case of Noor Aga 38 (supra), a two-Judges Bench of this Court was required to decide several questions, including the constitutional validity of the NDPS Act and the standard and extent of burden of proof on the prosecution vis-à-vis the accused. After an extensive discussion, this Court

upheld the constitutional validity of the provisions 10 of Sections 35 and 54 of the NDPS Act 43 , but went on to hold that since the provisions of the NDPS Act and the punishments prescribed therein are stringent, the extent of burden to prove the foundational facts cast on the prosecution, would have to be more onerous. The view taken was that courts would have to undertake a heightened scrutiny test and satisfy itself of "proof beyond all reasonable doubt". Emphasis was laid on the well-settled principle of criminal jurisprudence that more serious the offence, the stricter would be the degree of proof and a higher degree of assurance would be necessary to convict an accused. *[Also refer: State of Punjab v. Baldev Singh 44, Ritesh Chakarvarti v. State of M.P.45 and Bhola Singh39 (supra)]*.

31. Thus, it can be seen that the initial burden is cast on the prosecution to establish the essential factors on which its case is premised. After the prosecution discharges the said burden, the onus shifts to the accused to prove his innocence. However, the standard of proof required for the accused to prove his innocence, is not pegged as high as expected of the prosecution. In the words of Justice Sinha, who speaking for the Bench in ***Noor Aga****38* (supra), had observed that:

> 58……Whereas the standard of proof required proving the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the *rigours* of Section 35 of the Act, the *actus reus* which is possession of contraband by the accused cannot be said to have been established."

32. The essence of the discussion in the captioned case was that for attracting the provisions of Section 54 of the NDPS Act, it is essential for the prosecution to establish the element of possession of contraband by the accused for the burden to shift to the accused to prove his innocence. This aspect of possession of the contraband has to be proved by the prosecution beyond reasonable doubt.**"**

24. In the backdrop, we are of the view that learned trial court has rightly appreciated the law as also the evidence while rendering the impugned judgment. The opinion of the learned trial court to the effect that prosecution has failed at the trial to establish the guilt of the accused i.e., respondents beyond any shadow of doubt, does not

call for any interference. There accordingly, does not appear to be any illegality with the impugned judgment. The instant appeal, as such, is ***dismissed*** as meritless.

Sd:- Sd:-

(Mohd Yousuf Wani) (Sanjeev Kumar)
Judge Judge

Srinagar
10/ 09/2024
Ayaz

i) *Whether order/judgment is speaking:* ***Yes***
ii) *Whether the order/judgment is reportable.:* ***Yes***