

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT
JAMMU
CRA No.02/2019**

Reserved on **07.12.2023**
Pronounced on: **28.12.2023**

Ravi Kumar (aged 29 years)
S/o Sh. Bansi Lal Sharma,
Resident of Village Dabrah, Krimchi,
Tehsil Udhampur, District Jammu.

.....Appellant.

Through: Mr. Siddhant Gupta, Advocate.

Versus

State, through Incharge
P/S Udhampur.

..... Respondent.

Through: Mr. Sumeet Bhatia, GA

CORAM; HON`BLE MR. JUSTICE VINOD CHATTERJI KOUL, JUDGE.

J U D G M E N T

1. Appellant through the present appeal has challenged the judgment and sentence order dated 24.12.2018 and 26.12.2018, whereby he has been convicted by the Pr. Sessions Judge, Udhampur (for short ‘trial Court’) for offence punishable under Sections 8/20 NDPS, Act and has been sentenced to undergo imprisonment for a period of 5 years and also to pay a fine of Rs. 50,000/-.
2. The order of conviction and sentence has been challenged in this appeal by him precisely, on the on the grounds that the same is contrary to the facts of the case and the law laid down by the statute; that the trial Court has ignored the fact that the witnesses produced by the prosecution, who were police witnesses, have contradicted on material aspects so far as

recovery and seizure is concerned; that the trial Court has not appreciated that the container (Thella) in which the alleged narcotic was found was neither seized nor produced in the Court; that the trial Court has ignored the legal aspect of the case i.e despite the independent witnesses being available were not cited nor produced and no reason has been shown as to why they were not cited or produced in the Court; that the I.O has not complied with the mandatory provisions of NDPS Act, the accused was not given any option before his search was conducted. Sealing of the sample also makes the prosecution story doubtful, as the FSL expert has stated in his testimony that seals on the samples were eleven in number which tallied with the specimen seal impression sent by Executive Magistrate 1st Class Udhampur and there was no seal of the police on the sample packet which he examined. Delay in sending the sample to the FSL has not been explained, NCB form was not filled; that the seal with which the sample was sealed was given in supurdnama of PW-4 Subash Singh who was posted in the same police station at the time of alleged occurrence, therefore, there was every opportunity for the I.O to tamper with the seals. Statement of PW Subash Singh, HC, is in total contradiction to the statement of the witnesses to the seizure memo.

3. Briefly, stating the facts of the case are that on 13.03.2014, while PSI Lakhvir Singh along with PW constable Vijay Kumar, constable Ved Parkash and HC subash Singh were on routine checking at Jakheni NHW Udhampur, accused was found carrying green colour bag (Thella) who was proceeding towards Udhampur Town on foot and when he saw the police party he tried to conceal himself which created suspicion

about him. He was caught and on enquiry he disclosed his name as Ravi Kumar son of Bansi Lal R/o Tabriha Krimchi Mansar and on checking 22 Chhallies (charas sticks wrapped in maize husk) was found in his possession, thus, had committed offence under section 8/20 of the NDPS Act. A docket was prepared by Lakhvir Singh informing SHO P/S Udhampur about the occurrence and same was sent to Police Station through PW Subash Singh. I.O Sh. Mohd Farid, ASI was deputed to the spot, who seized the contraband and upon weighing weight of the contraband was found to be 800 grams. He separated two samples of 50/50 grams each by scratching charas from each of the charas stick and the said two samples were sealed by him as A-1 and A-2 and rest of the charas about 700 grams was separately sealed with Mark-A. Sample A-1 was got resealed by the Executive Magistrate 1st Class Udhampur and thereafter the sample was sent to FSL for examination. Remaining charas was deposited in the police malkhana, report was received from FSL that the sample sent contains charas. The I.O on completion of the investigation concluded that offence punishable under section 8/20 NDPS Act has been found established against the accused and accordingly presented the challan.

4. Charges were framed against the accused for offence punishable under section 8/20 NDPS Act. He pleaded not guilty and opted for trial.
5. To prove the charge prosecution produced PWs Lakhvir Singh, constable Vijay Singh, Ved Parkash, HC Subash Singh, Hardeep Singh, Rattan Paul, Rattan Nath, Hamidullah Sheikh and the evidence of the prosecution was closed. The prosecution has not produced the I.O before the Trial Court.

6. The brief resume of the evidence is as under:

7. **PW Lakhvir Singh** stated that on 13.03.2014 he was on duty at Jakheni Chowk along with fellow police personnel when accused was intercepted and found carrying blue / red coloured bag which on checking was found containing in 20 challies, possession whereof he failed to account for. He therefore, prepared docket EXTP1 and forwarded the same to SHO Police Station, Udhampur where-after ASI Farid came on spot who took photographs besides have brought a weighing instrument which was used in weighing the contraband as well as its seal. On cross examination deposed that no such bag has been shown to him in the court. That it was a cloth bag on which pioneer was written. That charas was wrapped in maize husk. That Head Constable Subash Singh joined in investigation and remained on spot from very inception and only went out for delivery of the docket to the Police Station. That they saw the accused from a distance of 10 ft. he was coming from Jakheni towards Udhampur. Before checking his bag he was not informed that he is being searched neither he was asked whether he would like to be searched in presence of a Gazette Officer or a Magistrate nor he prepared any document of such a nature. He does not remember as to who had searched the bag. He did count the charas sticks. PW Subash Singh came back with the investigating officer and the photographer and photographs were taken on spot. That photographer took photographs of bag, seized contraband and parcel containing seizure. That the samples were stitched by I.O with the help of PW Head Constable Subash Singh. That except accused no other person was stopped for checking at and around the time of occurrence. That there were shops situated on either side of the road and even civilians were also moving there but none of them were examined nor asked to join and witness recording of the seizure. How many seals were put on the seizure and samples he does not remember? The ring used for sealing sample has been brought by I.O. It was of silver colour whereas weighing instrument was local one. That whole investigation was under taken on spot which went on till 11.30 in the night. He denied suggestion of accused having being picked up from home.
8. **PW-2 Ct. Vijay Singh** stated that he was part of naka party at Jakheni when at around 7 to 7.30 PM

they saw one person on way towards Udhampur carrying red/green colour Thella who tried to conceal himself. PSI Sahib stopped him and subjected to checking which led to recovery of 22 charas sticks (Challian) containing in the bag. He therefore wrote a docket and handed the same to PW Subash Singh for informing SHO Police Station for registration of a case. PW ASI Farid Ahmed came on spot and charas upon weighing was found 800 grams. The same was seized thereafter separated into three seizures in a manner that some charas was scratched from each of the charas sticks which upon total weighing was taken as sample of 50 grams. Therefore, two samples of 50 grams each were drawn from charas sticks and remaining 700 grams charas was separately seized. Sealed two samples were marked as A1 and A2 whereas remains was marked A which were sealed on spot. That seizure EXT-P2 and EXT-P2/I were recorded in his presence. That seizure has been shown to him in the court is the same that was recovered on spot. On cross examination stated that Thella has not been shown to him in the court. How many seals were put on each of the seizure is not known to him. That ring used for sealing of sample was of brown colour. That weight of the seizure was taken including that of Thella. Though Thella was neither 4 separately sealed. When accused saw police party he tried to conceal himself which made them suspicious. That auto stand is around 50 ft from the place of seizure besides there are shops on either side of the road and when accused was being searched, around that time shops were open. Besides private cars, scooters were also parked there. Some of the civilian personnel were invited by I.O on spot. He also sent SGCt Ved Parkash to request civilians to take part in the investigation process but none of the civil witness came to take part in the investigation. That accused was caught on road, leading to Jammu which place is nearer to permanent police naka point Jakheni. Rather he was caught on the road which lead towards Udhampur Town and was found roaming on the right side of said road.

9. **PW-3 Ved Parkash** deposed- that on 13.3.2014 he was part of naka party at Jakheni nallah under the supervision of PSI Lakhvir Singh at around 7 to 7.30 PM they saw accused who was carrying green colour bag which was subjected to search and where from 22 maize husk in which charas had

been wrapped was recovered. Where after PSI Sahib placed a docket through HC Subash Singh for registration of case. ASI Farid came on spot who immediately took control of the seizure and got it weighed that came to 800 grams. Thereafter he removed small pieces from each of the charas sticks total weighing 50/ 50 gms which were taken as a samples. Whereas remaining 700 grams was separately sealed. Three seizures were made of A1, A2 and A. Where A being the remaining 700 grams and A1 and A2 the two samples which were also got sealed with ring mark and said ring was placed at the supurdnama of Head Constable Subash Singh. He is witness to the seizure of EXTP2/1 and EXT-P2. On cross examination deposed that they never had any prior information about the occurrence. It was Head Constable Subash Singh who stopped the accused and PSI Sahib enquired about the name and particulars of the accused. Docket was written by ASI. There are lots of shops at Jakheni Chowk besides people were moving on either side. But during search and seizure no civilians were involved, ASI Farid came on spot at 9 PM and he weighed the contraband with weighing instrument which he had brought from Police Station. He prepared exhibits. The witness and Ct Vijay Singh helped him. They were also stitched by ASI Farid and Head Constable Subash. The ring used for sealing had been brought from Police Station. It was brown ring. Though he does not remember as to what was marked on the said ring. Though he does not understand Urdu but he did sign the documents which were prepared on spot can't say whether any NCB forms were filled by the I.O. Denied suggestion that they had brought accused from his house. Also denied suggestion that accused was not arrested on spot. He also denied suggestion that no such search and seizure took place in his presence.

10. PW-4 Head Constable Subash Singh narrated that on 13.3.2014 he was on duty with PSI Lakhvir Singh at Jakheni Chowk with other fellow personal including Ct. Vijay Singh and HC Ved Parkash when they saw accused carrying an envelope came from Jakheni towards Udhampur. That envelope was checked. It contained 22 charas sticks. PSI wrote a docket and also seized the consignment. Three exhibits were made. They all were sealed. One was sent for FSL. The ring used for re-sealing was kept on his supurdnama which he produced before the court. He admitted the contents of exhibit

EXTP2/1. On cross examination stated that it was PSI Lakhvir Singh who had brought ring which was used for re-sealing. He denied suggestion that he has no knowledge about the occurrence since he was not present on spot and hastened to add that he was present on spot. The police had laid naka near Jakheni Chowk and they saw accused on way towards Udhampur Town. He was caught from right side of the naka. The police saw him from a distance of 10 ft. It took around one and half an hour to police to conduct checking. In between they also checked other persons meaning thereby side by side other people were also subjected to frisking. Does not remember in which hand accused carried the said lifafa. It was green coloured lifafa. He does not remember whether lifafa was tied from top or was in open condition. That PSI Lakhvir Singh did enquire from accused whether he would like to be searched in presence of a gazetted officer or Magistrate. However, accused didn't reply. The police officer did prepare a docket on which he obtained signatures of accused. Besides PSI Lakhvir Singh, Ct. Vijay Singh also signed the said document. Who stitched the exhibits cannot say. Both PSI Lakhvir Singh and ASI Mohd Farid, they were engaged in the process of stitching and sealing of exhibits. In his presence PSI Lakhvir Singh and ASI did not associate the civilian persons in recovery. Though at that time civilians were moving on the road. The witness only received the docket for being delivered to the police Station. Besides, ring was kept on his supurdnama, except this he did not participate in any other activity. There were three exhibits, one big and two small. He did not observe as to how many seals were put on small exhibits, admitted to have stood as witness in 4 to 5 any cases. That the ring kept on his supurdnama was used for re-sealing of the exhibits. It was only used for that purpose and not for other. After one month of the occurrence the investigating officer had received ring from him and after keeping the same for 4/5 days; he handed over ring back to the witness. That he do understands the difference between a lifafa and Thella. Thella is generally made up of cloth whereas accused was found carrying a lifafa and not Thella. They had no suspicion of accused carrying any contraband items. He denied having stated that "on seeing the police party the accused tried to conceal himself which go rise to suspicion to the police personnel

so they subjected him to search", in fact, we had no suspicion on him.

11. PW-Hardeep Singh Tehsildar stated that on 15.03.2014 sealed packets were brought before him for re-sealing so he put his own seals over the sealed packets and issued re-sealing memo for expert opinion. On cross examination narrated that he does not remember as to how many seals had been put by him for re-sealing and also does not remember as to how many seals the packets were already having. That seal used for re-sealing was lying with the judicial clerk. That three packets were brought for re-sealing. He cannot say nor he remember that whether the packet on which re-sealing was made whether it contain seals of SHO because he did not open the packets.

12. PW-6 Rattan Pal narrated that on 13th March 2014, he was working as Moharar Police Station where on that day Mohd Farid I.O came with three sealed packets which he deposited with the police mal khanna thereby specifying that sealed packets were of charas weighing 800 grm. He made entry in the receipt register as item No. 6 of 13.03.2014 and issued certificate which is on record of the file as EXTP-6. That out of the three packets, packet A1 was required to be sent to F. S. L. That he handed over to ASI Rattan Nath on 22.3.2014. He had come with the letter issued by Dy. S. P Headquarter on the strength of that letter he handed over A1 to ASI Rattan Pal. That when he received packets in the Malkhana on that time he did not see the seals of SHO on the said packets. On depositing packets in the malkhanna he did not put any specified mark.

13. PW-7 Rattan Nath narrated that on 22.03.2014 vide receipt no. be True 386 he delivered seized packet mark A to F. S. L. Thereafter, hastened to add it was mark A2. Further added that the packet that has been shown to him in the court today is reserve whereas he had handed over mark A1 packet to the F. S. L. HC Rattan Pal was the Moharar of the Police Station from whom he took the packets from malkhanna and deposited before the FSL on 22.03.2014

14. I.O Mohd Farid has not been examined.

15. PW Hamidullah Sheikh narrated that on 24.04.2014 Director FSL Srinagar received one

sealed packet marked as A1 bearing 10 intact seals; duly sealed by Executive Magistrate Ist Class, Udhampur vide his letter No. TUDR/JC/2013-14/774 dated 15.03.2014 from Dy. Director FSL Jammu which was received in his office on 22.3.2014 forwarded for examination by Dy. Supatt. Of Police (HQ) Udhampur vide his letter No. HQU/FSL/2014/2177-78 dated 18.03.2014 sent through ASI Rattan Nath No. EXJ-785940 of Police Station Udhampur. On the same date the case was allotted to him for examination: Packet A1: On opening was found to contain 50 grams of greenish coloured material in the form of pieces which was given exhibit No. H-209/14 by him in the lab. The above seals were opened in his presence and the contents of the exhibit were duly examined by him remaining under his immediate custody until the examination was completed. The exhibit was subjected to physical, chemical, microscopic and chromatographic examinations and the result arrived at is as under:-

Charas was detected in the exhibit No. H-209/14. Finally, he has prepared / signed the report on 02.06.2014 and forwarded the same to Director FSL Srinagar for approval from where the case was forwarded to Dy. Supdt. Of Police Udhampur as per office procedure. Today, on 06.04.2016 found the same report bearing No. FSL/663-C&T/Srinagar dated 04.06.2013. The certificate is of his hand and bears his signature. Same is exhibited as EXTP-HS. On cross examination stated that details of tests conducted is not mentioned in his certificate. The percentage of tetra hydro cannbinol is not mentioned in his report. He received the exhibit on 24.04.2014 and which was received by Dy. Director Jammu on 22.03.2014. He received the sample packet from director FSL Srinagar for examination. He has not mentioned in the certificate EXTP-HS that sample packet was received by him from Director FSL Srinagar. The sample packet was containing ten seals of Executive Magistrate Ist Class, Udhampur. Besides these ten seals there was no other seal present on the sample packet when he received it for examination. The weight of 50 grams of the sample as mentioned in the certificate is the net weight without packing. He started the tests on the sample before one week of issuing the certificate. Charas was present in the form of hashish. He is not aware about the definition of charas as given in

NDPS Act as he is not law knowing. When subjected to physical tests, he found certain pieces in green colour. During chemical tests, he performed the colour tests and under microscopic tests, he observed the trichoms. During the chromatographical tests, the sample shows the presence of cannibinol tetra hydro cannibinol, cannibidol and cannibidolic acid. Besides these tests he did not perform any other test and only these tests are basis of forming his opinion as given in the certificate. The shape of the cells was horn shaped when examined in the microscope.

16. I have considered the arguments advanced by learned counsel for the parties and perused the whole evidence on record.
17. While going through the evidence lead by the prosecution in the trial Court it reveals that I.O has not been examined. He was to prove the site plan which was prepared by him. He had drawn the samples from the seized charas sticks and sealed the same which was to be proved by him. He was to explain why he had not associated the independent witnesses which as per the evidence were available. It is true that police witness is also a competent witness to depose and cannot be doubted however when independent witnesses are available, investigating officer has not associated them with the investigation and such witnesses are required to be cited unless reasons for their non-inclusion is not explained.
18. The ring(seal) which was used by the I.O was required to be given on Supurdnama to such person which was not under the control of the I.O or which was not posted in the same police station in order to make it sure that there is no chance of the seal put on the sample or the contraband which is in the same police station being tampered. In this case PW Subash Singh was posted in the same police station in which the Investigating Officer was posted. The said Subash Singh was his

subordinate, therefore, the seal ought not to have been put under his Supurdnama because there is every chance of the sample being tampered before the sample could be produced and resealed by the Executive Magistrate. PW Hardeep singh has stated that he resealed the sealed packet but he does not remember as to how many seals were put by him for resealing and he also does not remember as to how many seals the packet was already having. He also does not remember whether the packet on which the resealing was made contained the seal of SHO because packets were not opened by him.

19. PW Hamidullah Sheikh, Assistant Scientific Officer, FSL in his examination says that there were ten seals of Executive Magistrate 1st Class Udhampur on the sample packet which were received by FSL for examination and there was no other seal on the said packet. This statement makes it clear that there was no other seal on the sample packet except the seals put by the Executive Magistrate. It creates a doubt about the seals which were put on it at the time of resealing by the Investigating Officer. As according to the prosecution, the sample was sealed and was put in malkhana of the same police station and ring used for sealing was kept on supurdnama of constable Subash Singh who was posted in the same police station. The statement of Hamidullah that only 10 seals were found on the sample creates doubt about the sample being sealed and creates suspicion about the tampering of the same. The sample was received by the FSL on 24.4.2014 with 10 intact seals, sealed by Executive Magistrate 1st Class. According to PW Rattan Paul Sharma, who was Incharge of the Malkhana, three packets Mark A (700 grams of charas), A-1 and A-2 (two samples of 50/50 grams each) were

deposited by ASI Mohd Farid in the Malkhana on 13.03.2014 at 11 a.m, entry regarding which was made in Malkhana register and entry was made in the said Malkhana register (EXTP-6). This certificate certifies that on 13.3.2014 I.O had deposited three packets A,A-1 and A-2 containing charas, total weighing 800 grams. According to this witness, the said sample was taken out from the Malkhana on 22.04.2014 at about 10 a.m by ASI Rattan Nath for being sent to the FSL. This witness does not say about taking out of the sample for resealing when it is shown that the packets were resealed on 15th of March 2014 by the Executive Magistrate 1st Class. Entries would have been made in Malkhana register as to when the sample was taken out from the Malkhana, by whom it was taken out, when it was deposited back in the Malkhana but nothing is stated by this witness regarding the same nor any proof has been produced by the prosecution. The sample having been deposited on 13th and then taken out on 22nd and as there is no other evidence of it being taken out for resealing makes it doubtful how the sample got resealed when it was in Malkhana. Either the sample was not deposited in Malkhana and only an entry was made in Malkhana register or it was not even taken out till 2nd or it was never deposited in Malkhana.

20. The prosecution was to prove that the packets were in safe custody.

There should have been proper entry regarding the samples and how the sample and the packets were dealt. The person in possession of the seal is the employee of police and posted in the same police station in which the I.O who is superior is posted. According to FSL expert sample which was received contained only 10 seals that of the Executive

Magistrate and there being no other seal found on the sample creates a doubt regarding the sample being tampered with.

21. There are material contradictions as are evident from the evidence recorded and also there is evidence that civilians as a witness were available but no reason has been given why they have not been associated with the investigation. I.O was to explain this fact but he has not been produced. It was he who could say why the witnesses who are independent available on the spot were not associated. He would have also stated when FSL witness has stated that the sample contained only 10 seals that of Executive Magistrate and no other seal, he was to prove the site plan prepared by him. He was also to explain the contradictions which have occurred in the statement of the witnesses who are none other than the police witnesses. He had to explain why the seal was not put on Supurdnama of any independent witness so that the apprehension of the sample being tampered was removed. He has also to explain when the record of Malkhana shows that the packets were deposited with it on 13th of March 2014, when the samples were taken out for resealing and who got it resealed and when the samples were deposited back before being sent to FSL. All this has remained unexplained because I.O has chosen not to appear for being examined in the case. The Executive Magistrate has stated that the packets were produced before him by the ASI Farid on 15.03.2014, how he came in possession of the packets on that date when there is no evidence produced by the prosecution that it was taken out from Malkhana on that date and there is also no evidence that in case ASI took the sample from Malkhana when he deposited it back. Either the packets were with the ASI and

were not deposited in the Malkhana or it is wrong that the samples were produced before Executive Magistrate for resealing.

22. All these circumstances in this case make the prosecution story doubtful and also make it clear that the provisions of the act have not been strictly followed by the Investigating Officer while investigating the case.

23. For the reasons stated hereinabove, it is held that the prosecution has failed to prove the charges framed against the accused beyond any doubt. Therefore, this appeal deserves to be allowed and as such order of conviction and sentence recorded by the Trial Court is set aside and the accused acquitted. The file be consigned to records after due compilation.

(VINOD CHATTERJI KOUL)
JUDGE

Jammu
28.12.2023
BIR