

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

Pronounced on: 06.03.2024

Case No. : CRAA No.29/2017

State of J&K through S.H.O,
Police Station, Batote.

..... Appellant(s)..

Through: - Mr. Pawan Dev Singh, Dy.A.G.

V/s

1. Charanjeet Singh S/o Mohan Singh,
2. Gurdeep Singh S/o Ram Singh
Residents of Kari-Sari, Tehsil Hoshiarpur,
Punjab.

..... Respondent(s)..

Through: - Mr. Yasin Zargar, Advocate with
Ms. Rabia Koser, Advocate.

**CORAM: HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE
HON'BLE MR JUSTICE PUNEET GUPTA, JUDGE**

JUDGMENT

06.03.2024

PER PUNEET GUPTA-J :

1. The appeal has been preferred against the judgment dated 29.05.2015, passed by the learned Principal Sessions Judge, Ramban, whereby the respondents herein stand acquitted of the charges framed against them under Section 8/15 NDPS Act. It is pleaded by the appellant that the judgment impugned has been passed in a mechanical manner without appreciating the evidence on record. The documentary as well as the oral evidence produced by the prosecution was sufficient to prove the guilt of the respondents.
2. The respondents are represented through their counsel.
3. The original record of the trial court is also before the court.
4. The respondents shall be referred to as accused for the purposes of discussion in the appeal.

5. The case of the prosecution before the trial court is that on 12.07.2011, vehicle One Ton Truck bearing registration No. 6309/PB-7AB was intercepted during checking at Amar Chashma NHW-1A Batote when the vehicle was on its way from Srinagar to Jammu. The vehicle on being signalled by the police party did not stop and was made to stop at some distance. The accused Charanjeet Singh was driver of the vehicle and the accused Gurdeep Singh was occupying the seat next to driver and both of them had one bag each lying near their seats. The vehicle was checked and during checking a secret chamber was found in the Truck which contained white plastic bags. The smell from the bags appeared to be of poppy husk and the accused could not provide any satisfactory explanation. The information in writing of the above was sent to P/S, Batote by SI-Maqsood Ahmad Khan through PW-Mohd. Saleem. FIR No. 60/2011 was registered with P/S, Batote against the accused on 12.07.2011 under Section 8/15 NDPS Act. Dy.S.P Head Quarter and Incharge Tehsildar, Batote and the Investigating Officer- Arun Koul came on spot. The seizure of total 13 bags was affected from the accused as well as from the secret chamber of the vehicle and which purportedly contained poppy husk. The total quantity of contraband weighed 1 quintal and 62 kilograms. The documents were prepared with regard to the seizure of the vehicle and contraband and which was sent to FSL and CRCL Delhi. The statements of witnesses were recorded during the course of investigation. The investigations led to filing of charge sheet against the accused under Section 8/15 NDPS Act. The court

framed the charges against the accused under Section 8/15 NDPS Act. The accused did not plead guilty to the charges and claimed trial.

6. The prosecution has examined number of witnesses in support of its case.
7. PW-2 Mohd. Sharief has deposed of the vehicle being intercepted by the police party and recovery of eleven gunny bags from the secret chamber of the vehicle and also of one bag each from the accused lying near their seats. The weight of the contraband was found to be 2 quintal and 62 kilograms. The seizure memo of the same was prepared. The seal was placed on the superdnama (Ext-P3/C) of PW-Jagdish Chander. The accused persons were not having beard though the photographs annexed with the file showed the accused persons having beard. The witness has neither seen the bags nor the seal in the court. Executive Magistrate also came on spot is also stated by the witness.
8. PW-3 Mohd. Saleem also from the police department has deposed that the total weight of contraband recovered from the vehicle as well as from the accused was 1 quintal and 62 kilograms. The ring used for sealing was placed on the superdnama of PW-Sarpanch Jagdish. He is witness to the arrest memo Ext-P3 and memo of personal search of accused exhibited as Ext-P3/A and Ext-P3/B. He also speaks of Dy.S.P and Magistrate being present on spot and the vehicle being checked in their presence. The witness has been shown the article seized in the case. The statement of the witness

was deferred but the cross-examination of the witness did not take place thereafter.

9. PW-4 Constable Abdul Rashid has tried to depose in the manner in which the aforesaid two witnesses have deposed with regard to the occurrence. The witness has not seen the contraband seized in the court. As per the witness, the contraband weighed 1 quintal and 62 kilograms. The shops are situated at a distance of 300/400 meters from the place of occurrence. The occurrence is of 2 PM. The presence of Tehsildar and Dy.S.P on spot is also recorded by the witness.
10. PW-5 Jagdish Chander has deposed that the weight of the poppy straw was 1 quintal and some kilograms and had seen the poppy straw in 20/25 polythene bags which were lying on the spot. The witness has admitted his signatures on the memos prepared but denies the contents of the same which pertain to memo of arrest, memo of superdnama and memo of personal search. As per the witness he had seen a woman and a sikh on spot. He had signed the documents on the next day in the Police Station. He does not know of the place from where the contraband was recovered by the police.
11. PW-7 Abdul Hamid has failed to recognize the accused persons and also feigned his ignorance of the occurrence. He had weighed the contraband which was 1 quintal and 5 kilograms. As per the witness, he had weighed the contraband at Amar Chashma. Witness admits the recovery memo Ext-P7 and has also seen the bags in the court. He also speaks of the presence of one sikh person and a

woman on spot with SHO. The contents of recovery memo were not read over to him by the police. The statement given by him before the court in Batote was on the asking of Arun Koul. Neither had he seen the vehicle nor the accused persons on spot nor in the police station.

12. PW-11 Pawan Abrol is Scientific Officer and has deposed that the article checked by him was poppy straw and that 13 samples were received on 16.07.2011 by him. The certificate issued by him is exhibited as Ext-P11.
13. No other witness was produced by the prosecution.
14. The statements of accused were recorded under Section 342 Cr.P.C and incriminating evidence appearing against the accused was put to them but they denied the same. The accused did not produce any evidence in defence.
15. The perusal of the judgment reveals that the learned trial court has taken note of the depositions of the prosecution witnesses with regard to the quantity of the alleged contraband seized by the police on spot. The court has held that the witnesses have not stated in unison with regard to the quantity of contraband seized from the Truck and thus as per the trial court the recovery becomes doubtful and is fatal for the prosecution.
16. Learned Deputy Advocate General has argued that though there is some contradiction with regard to the depositions of prosecution witnesses regarding weight of the contraband seized, the same is, however, not fatal in the case as there could be some lapse on the

part of the witnesses while stating of the quantity of the contraband seized on spot from the Truck.

17. It is pertinent to mention herein that PW-Mohd. Sharief has deposed that the total weight of contraband was 2 quintal and 62 kilograms whereas PW-3Mohd. Saleem and PW-4 Abdul Rashid who are from the police department have deposed that the weight of the contraband seized was 1 quintal and 62 kilograms. The other witness, namely, PW-5 Jagdish Chander has only deposed that the quantity seized of the poppy straw was 1 quintal and some grams. He has not given definite weight of the article seized on spot by the police. Similarly, PW-Abdul Hamid, independent witness, has deposed the weight of the contraband as 1 quintal and 5 kilograms. The discrepancy with regard to the quantity of the poppy straw seized from the secret chamber of the Truck and from the accused is evident from the statements of the prosecution witnesses. The very fact that even the police personnel have failed to depose of the quantity seized of the contraband in a similar manner not to speak of the independent witnesses stating in different tones of the contraband, the prosecution case gets weakened on that ground alone. It cannot be said by any stretch of imagination that such discrepancy can be overlooked so as to give the leverage to the prosecution on this aspect of the matter. The quantity seized in such like case is the core of the prosecution case which is to be set up against the accused. The prosecution case is on slippery wicket for which it had to suffer before the trial court as well as in appeal.

18. It is trite proposition of law that more severe is the punishment of an offence so is the stricter proof required to bring home the guilt against the accused. The contention, thus, raised by the appellant that the weight of the contraband seized is proved beyond shadow of doubt cannot be accepted by this Court.
19. The trial court has also found serious lacuna in the case of the prosecution on the count that the superdnama of seal which is stated to have been placed on the superdnama of PW-5 Jagdish Chander has not been proved. It is indeed important to note that the said witness has categorically denied that the seal was given on his superdnama by the police. Not only that, he has denied the contents of the other memos pertaining to recovery of the vehicle, personal search of the accused and seizure of contraband. PW-5 is an independent witness and is Sarpanch. The witness has categorically stated before the trial court that he had signed the memos on the next day of the occurrence in the police station. The seal used for sealing of article is an important link in the present case as any fudging or interference with the sample collected of contraband is required to be ruled out. The seal is not obviously produced in the court by the so called superdar PW-Jagdish Chander. Undoubtedly, the prosecution has failed to prove the superdnama of seal in the case in hand.
20. The seizure memo EXPW-7 pertaining to alleged contraband reveals that in addition to PW-Jagdish Chander the names of PWs-Parshotam Singh, SI-Arun Koul, Investigating Officer and Dy.S.P-Aftab Ahmad Sheikh, also figure in it. PW-Abdul Hamid is

purportedly is as well kept as witness to the proceedings. Neither the scribe of the seizure memo PW-Arun Koul nor Parshotam Singh nor Dy.S.P have appeared before the court to record their statements. PW-Abdul Hamid, whose name appears on the document, has otherwise denied having seen the occurrence and has deposed of the weight of the contraband different from the other prosecution witnesses who have appeared in the witness box.

21. PW-Mohd. Sharief and PW-Mohd. Saleem have deposed in unison that Dy.S.P and the Magistrate had come on spot after the registration of FIR in the case. The case reflects sorry state of affairs as neither the Dy.S.P nor the Executive Magistrate who were reportedly brought on spot after the registration of FIR had not been examined in the case. Both the officers are important and considered to be responsible officers in their respective hierarchy of organisation and whose statements would have definitely carried weight for the prosecution. The most important witness PW-Arun Koul-Investigating Officer has also not been examined by the prosecution during the course of trial and the reason for not examining him is found wanting by the court. The independent witnesses having not supported the prosecution case and the exact quantity of the contraband having been seized had discrepancy the statement of the investigating officer assumed significance.

22. PW-Naseem Javed Choudhary is the Executive Magistrate who has re-sealed the packets as per the list of witnesses mentioned in the challan. He has not been examined rather the prosecution had chosen not to record his statement in the court. This indeed is very

surprising. The examination of this witness was indispensable as he was an important link in the chain of circumstances as he was the person who could have deposed atleast that the packets when produced before him for re-sealing were intact and not tampered with. Not only that, PW-Arun Koul, I.O in the case, has not been examined by the prosecution in the case. It is not that the statement of every witness not produced by the prosecution is to result into the failure of the prosecution case. However, the withholding of key witnesses in the case can prove fatal for the prosecution. The court has no doubt in holding that non production of Executive Magistrate who re-sealed the packets before the court is a flaw in the prosecution case which cannot be overlooked or can be said to be inconsequential to the prosecution case.

23. The contraband was poppy straw and the same cannot be doubted in view of the statement of PW-11 Pawan Abrol, Scientific Officer and the document EXTP-11 issued by the said witness. Merely because the article put to chemical examination is found to be poppy straw does not mean that the accused have to be held guilty on that score. It is the totality of the circumstances which prove the guilt or innocence of the accused. The seizure though is stated to have been effected on 12.07.2011 the sample has been received by the Scientific Officer on 16.07.2011, that is, after four days of the alleged seizure. There is no explanation forthcoming as to where the seized article remained during those four days. It was for the prosecution to satisfy the court that right from the time the article was seized till it was received by the FSL the contraband sample

remained intact and without any tampering. There is absolutely no evidence on record to convince the court that the samples obtained on 12.07.2011 remained intact till they reached at FSL for examination. Admittedly, the malkhana register was also not brought on record nor proved so as to convince the court of the safe custody of article during the relevant period, that is, during the period the contraband was sealed and the sample of the same sent to FSL for examination. This lacuna which has crept in the prosecution case definitely causes dent in the prosecution case and remains incurable.

24. In case titled 'Jitendra and another Vs. State of M.P', reported as 2003 Supp (3) SCR 918, the Hon'ble Apex Court took notice of the fact that the Investigating Officer was not examined as the panch witnesses having turned hostile and, therefore, the non-examination of the I.O. is fatal for the prosecution. The non-production of the seized drugs and non-examination of malkhana Moharir during the trial were also held fatal in the case.
25. In case titled 'Mohammed Khalid and another Vs. The State of Telangana' Cr. Appeal No. 1610 of 2023, decided on 01.03.2024, the Apex Court highlighted the importance of malkhana register in a case of NDPS and the consequences of not producing the same during trial. The court held the non-production of the malkhana register as fatal for the prosecution case.
26. Thus, what is made out from the evidence that has been brought on record by the prosecution is that the prosecution has failed to prove the exact quantity of the contraband seized in the case. The sterling

witnesses including Dy.S.P, two Executive Magistrates and even the I.O have not been examined by the prosecution. The superdnama of seal is not proved and so is the safe custody of the contraband allegedly seized from the vehicle. The independent witnesses did not support the prosecution case.

27. The very facts revealed from the prosecution case leave no doubt in the mind of the court that the prosecution has failed to prove its case against the accused beyond shadow of doubt. This Court finds that the trial court has not committed error while holding the accused as not guilty in the case in hand.

28. In the light of the discussion made above, the Court is of the firm opinion that no interference is required in the judgment impugned whereby the trial court has dismissed the prosecution case and acquitted the accused. The appeal is without merit and is, accordingly, dismissed.

29. The original record received from the trial court be sent back.

(PUNEET GUPTA)
JUDGE

(TASHI RABSTAN)
JUDGE

JAMMU:
06.03.2024
Pawan Chopra

Whether the Judgment is speaking : Yes
Whether the Judgment is reportable : Yes