

Neutral Citation No. - 2024:AHC-LKO:63530

Court No. - 16

Case :- CRIMINAL APPEAL No. - 2453 of 2007

Appellant :- Prem Narayan Pandey

Respondent :- State of U.P.

Counsel for Appellant :- Rajendra Prasad Misra

Counsel for Respondent :- Govt. Advocate

Hon'ble Shamim Ahmed, J.

1. Heard learned Counsel for the parties.
2. This criminal appeal is filed under Section 374(2) of the Criminal Procedure Code (Cr.P.C.) against the judgment and order dated 25.08.2007, passed by learned Additional Sessions Judge, Fast Track Court-I, Lucknow, in Criminal Case No. 18/2001 (Crime No. 97/01), under Sections 8/21/22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), Police Station Mohanlalganj, Lucknow, whereby the appellant was convicted and sentenced to the period already undergone in custody and fined ₹300/- with default stipulations.
3. Brief facts of the prosecution story are that on 24.04.2001, Sub-Inspector Banshraj Bhartiya along with Constable Sundar Lal Gupta and Constable Ganpatram were conducting routine patrolling and area checks in Mau. They received information from an informant that a person was selling small packets of "smack" (heroin) near Dugani Temple in Mau Bazar. Acting on this tip, the police officers reached the location, and upon noticing, the accused tried to flee but was apprehended around 1:00 AM. Upon questioning, the accused identified himself as Prem Narayan Pandey, resident of Mau, Mohanlalganj, Lucknow. He was informed about the suspicion of carrying "smack" and was asked whether he wishes to be searched in presence of a magistrate or a gazetted officer. The

accused declined, stating the police could conduct the search. After ensuring no unlawful items were present on the police officers themselves, they searched Prem Narayan Pandey and found 10 small packets of "smack" in a plastic bag in the right pocket of his trousers. In addition, an Indian Postal Department identity card (No. 42991617) bearing his name and ₹25 in cash were recovered from his left pocket.

4. Learned counsel for the appellant submits that the appellant has already served the sentence but has filed this appeal due to the stigma of conviction, which is adversely affecting his career as a Central Government employee in the Post Office Department.

5. Learned counsel for the appellant further submits that the prosecution alleges that on 24.04.2001, the appellant was found in possession of 10 small packets of smack intended for sale, which were recovered based on prior information. However, the appellant challenges the reliability of the prosecution's case.

6. Learned counsel for the appellant further submits that the recovery witnesses, P.W.2 Sundar Lal Gupta and P.W.3 Bans Raj Bhatti, are police officers whose statements are inconsistent and contradictory. Their testimonies cannot be relied upon for the purpose of conviction.

7. Learned counsel for the appellant further submits that the alleged recovery was made in the middle of the town, yet there were no public witnesses to the incident, raising doubts about the veracity of the prosecution's case.

8. Learned counsel for the appellant further submits that the analysis report from the Forensic Science Laboratory (FSL) was submitted without following the proper procedure under Section 294 Cr.P.C., as the Scientific Officer was not examined in court. Since he was not notified under Section 293 Cr.P.C., his report (Exhibit Ka-5)

is inadmissible as evidence. The trial court wrongly based its judgment on this inadmissible report.

9. Learned counsel for the appellant further submits that the total recovered contraband weighed only 2.05 grams, which was insufficient for proper analysis to determine the percentage of morphine, as previously held by the courts of law. Given the negligible quantity, the case should have been tried by a Magistrate.

10. Learned counsel for the appellant further submits that P.W.2 Sundar Lal testified that only 1 gram of the sample was drawn at the spot, but the recovery memo does not mention this. Moreover, P.W.3 Bans Raj Bhatti denied drawing the sample at the scene. These contradictions cast serious doubt on the prosecution's case.

11. Learned counsel for the appellant further submits that the trial court wrongly believed that a notice under Section 50 of the N.D.P.S. Act was served before the search. The appellant was not properly informed of his right under Section 50, and the choice was not properly made.

12. Learned counsel for the appellant further submits that the prosecution's claim that the appellant was selling only 10 packets of smack is not believable due to the negligible quantity involved in the alleged recovery.

13. Learned counsel for the appellant further submits that the prosecution failed to record any information under Section 42(1) of the NDPS Act, nor was such information sent to a superior officer. This is a violation of the mandatory provisions of Section 42 of the Act.

14. Learned counsel for the appellant further submits that the prosecution claims the contraband was sealed in cloth and kept in a matchbox, but P.W.2 Sundar Lal denied this. The contraband

produced before the trial court was found in a different container (E.T.O. SAL DE TOL packet), indicating possible tampering.

15. Learned counsel for the appellant further submits that prior to 02.10.2001, a police officer was not authorized to search under Section 42 of the NDPS Act. The search conducted by P.W.3 was illegal, and the appellant's conviction under these circumstances is unlawful. The new provision under Section 50(5) NDPS Act, incorporated after 02.10.2001, did not apply at the time of arrest, making the search procedure invalid.

16. Learned counsel for the appellant further submits that the arresting officer violated the mandatory provisions of Sections 55 and 57 of the NDPS Act, causing prejudice to the appellant's rights.

17. Learned counsel for the appellant further submits that the evidence collected by the prosecution was obtained through illegal methods and should not have been relied upon by the trial court.

18. Learned counsel for the appellant further submits that the prosecution failed to follow the proper procedures for sealing the contraband, preparing the test memo, and sending the sample to the FSL, leading to prejudice against the appellant.

19. Learned counsel for the appellant further submits that the test memo prepared by C.O. Mohanlalganj dated 27.04.2001, while the contraband was deposited on 26.04.2001, indicating foul play. No explanation was provided by the Investigating Officer (P.W.4).

20. Learned counsel for the appellant further submits that the Investigating Officer (P.W.4) admitted that the appellant denied giving consent for the search, yet the search was conducted, violating the appellant's rights.

21. Learned counsel for the appellant further submits that the prosecution's evidence is riddled with doubts, contradictions, and inconsistencies, making it unreliable for sustaining a conviction.

22. Learned counsel for the appellant further submits that the prosecution has failed to discharge its burden of proving the case beyond reasonable doubt. The conviction is illegal, arbitrary, and based on insufficient and unreliable evidence.

23. On the other hand, learned A.G.A. submits that the government advocate argues that the conviction of the appellant is fully justified based on the evidence presented. The recovery of 10 packets of smack from the appellant was made pursuant to reliable information and in accordance with the procedure established by law. The prosecution has fulfilled its burden of proof beyond reasonable doubt.

24. Learned AGA further submits that it is undisputed that the appellant was found in possession of 10 packets of smack on 24.04.2001. The recovery was based on specific prior information, and the seized contraband was confirmed as heroin upon analysis by the Forensic Science Laboratory (FSL), Mahanagar, Lucknow. The quantity of the contraband, though small, is immaterial as the mere possession of a narcotic substance is sufficient to establish an offense under the Narcotic Drugs and Psychotropic Substances (NDPS) Act.

25. Learned AGA further submits that the prosecution witnesses, P.W.2 Sundar Lal Gupta and P.W.3 Bans Raj Bhatti, are police officers who were present during the recovery and testified about the seizure of contraband. Their statements have been consistent in material aspects, and minor contradictions, if any, do not affect the core of the prosecution's case. The defense's attempt to challenge their credibility is unfounded.

26. Learned AGA further submits that any minor discrepancies in the statements of witnesses or procedural details are not sufficient to overturn the conviction. The overall evidence presented by the prosecution is coherent, credible, and sufficient to establish the appellant's guilt.

27. I have heard learned Counsel for the parties and perused the material placed on record, and after reviewing the evidence on record, the Court finds that the conviction of the appellant is not sustainable for the following reasons and several key factors .

The testimonies of the key prosecution witnesses (P.W. 2, P.W. 3, and P.W. 4) are contradictory in nature, the P.W. 2 Sundar Lal Gupta and P.W. 3 Bans Raj Bhatti, who are police officers and recovery witnesses, made inconsistent statements regarding the recovery and handling of the contraband.

28. Further, P.W. 2, during cross-examination, stated that only one sample was drawn at the scene, but this fact was not mentioned in the recovery memo. Additionally, P.W. 3 denied that any sample was drawn at the spot. Such contradictions significantly undermine the reliability of their testimony, making it unfit for establishing the appellant's guilt beyond a reasonable doubt.

29. Further, the alleged recovery took place in the middle of the town (Mau Bazaar), a public place. However, no independent public witnesses were called to corroborate the recovery. The absence of neutral, public witnesses raises concerns about the authenticity of the recovery and suggests that the prosecution's evidence was not robust.

30. The prosecution failed to comply with the mandatory provisions of Section 50 of the NDPS Act, which requires that the accused be informed of his right to be searched in the presence of a magistrate or a gazetted officer. Although P.W. 3 claimed that the

appellant was given such an option, his statement was inconsistent and contradicted by other evidence on record.

31. Learned counsel for the appellant argued that Section 50 of the N.D.P.S. Act is a mandatory provision. The arresting officer has not complied with that provision. As such, the recovery is illegal which vitiates the trial. Learned counsel further submitted that the alleged place of recovery is public place but no effort to invite the public witness at the time of recovery was made by the police party. Learned trial Court without proper appreciation of the evidence available on record has illegally convicted the appellant vide impugned judgment and order which is liable to be set aside as the prosecution has miserably failed to prove its case beyond reasonable doubt. In support of his argument learned counsel for the appellant has placed reliance on law laid down by Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2010 (2) EFR 755* and *State of Rajasthan Vs. Parmanand and another, (2014) 2 SCC (Cri) 563*.

32. Severe punishment has been provided in the N.D.P.S. Act to check the misuse of this Act by the police personnel or officers and certain safeguards particularly Section 50 of N.D.P.S. Act has been incorporated in this Act that search of the suspected person must be done before the Magistrate or Gazetted Officer. Similarly Section 55 and 57 of N.D.P.S. Act provides that seized contraband article be kept by Station House Officer in safe custody and report of arrest and seizure be sent immediately to immediate Superior Officer within 48 hours.

33. Further, Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2010 (2) EFR 755*, while discussing the importance and relevancy of section 50 of N.D.P.S. Act, in para-22, has opined as under:-

"22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in *Re Presidential Poll* (1974) 2 SCC 33, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in *Joseph Fernandez* (supra) and *Prabha Shankar Dubey* (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *Baldev Singh's case* (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the

suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

34. Further, Hon'ble Supreme Court in ***State of Rajasthan Vs. Parmanand and another, (2014) 2 SCC (Cri) 563***, again in paragraph-17, has opined as under:-

*"In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in *Paramjit Singh* and the Bombay High Court in *Dharamveer Lekhram Sharma* meets with our approval."*

35. Admittedly, the prosecution has not produced other independent eye-witnesses of the alleged recovery and even no explanation has been offered by the prosecution for their non-production. All the witnesses are police personnel. Non-production

of independent eye witness is serious lacuna which has made the prosecution case very doubtful.

The defense has raised strong doubts about whether the appellant was properly informed of his right under Section 50. The failure to comply with this mandatory provision vitiates the search and seizure, rendering the recovery of contraband illegal and inadmissible in evidence.

36. The Forensic Science Laboratory (FSL) report confirming the substance as heroin was relied upon without the personal testimony of the officer who prepared it. This violates the provisions of Section 293 of the Criminal Procedure Code (Cr.P.C.), which mandates that such reports must be testified by the officer in court unless notified under the said section.

37. The defense has argued that the officer who conducted the analysis was not notified under Section 293 Cr.P.C., and thus his report is inadmissible. The trial court, however, erroneously based its judgment on this inadmissible evidence.

38. Further, the total quantity of contraband recovered was 2.05 grams, which is an extremely small quantity. The defense has argued that this amount was insufficient for proper analysis, especially in determining the percentage of morphine in the substance. that insufficient quantity can lead to inconclusive results, raising doubt about the prosecution's claim that the substance was indeed heroin.

39. It is further observed here that the arresting officer did not record the information about the alleged recovery under Section 42(1) of the NDPS Act, nor was this information communicated to a superior officer. This is a direct violation of the mandatory provisions of the Act, which requires such information to be documented and communicated prior to conducting a search.

40. Further, the failure to comply with Section 42 of the NDPS Act renders the entire recovery process questionable and illegal. No conviction can be sustained based on an illegal search and recovery and there are discrepancies in the prosecution's version regarding the manner in which the contraband was sealed and handled. P.W. 2 stated that the contraband was sealed in a matchbox, but P.W. 3 denied this fact. Additionally, the contraband produced in court was found in a different container (ETO SAL Dibba), which casts serious doubt on whether the seized substance was the same as the one allegedly recovered from the appellant.

41. Further, the improper handling and tampering of the contraband raise substantial doubts about the integrity of the evidence. The trial court should not have relied on such compromised evidence to convict the appellant.

42. Admittedly, the prosecution has failed to discharge its burden of proving the case beyond reasonable doubt. The contradictions in witness statements, procedural lapses, and violations of mandatory provisions under the NDPS Act cumulatively raise serious doubt about the appellant's involvement in the alleged offense.

43. Based on a comprehensive analysis of the evidence presented in this case, it becomes apparent that the prosecution has failed to prove the appellant's guilt beyond a reasonable doubt. Key witness testimonies are riddled with contradictions, statutory provisions under the NDPS Act have been violated, and procedural lapses undermine the integrity of the prosecution's case. The non-compliance with mandatory provisions such as Section 50 and 42 of the NDPS Act, the absence of independent witnesses, and the improper handling of evidence raise significant doubts. Given these circumstances, it is evident that the appellant's conviction is not sustainable.

44. Thus this Court is of the view that prosecution has miserably failed to prove its case beyond reasonable doubt against the appellant. The trial Court has not properly discussed the evidence produced by the prosecution and has passed the impugned judgment and order against the settled principle of law including provisions of N.D.P.S. Act. This Court, therefore, unable to uphold the conviction and sentence of the appellant. The appellant is entitled to be acquitted. The impugned judgment and order is liable to be set aside and accordingly, appeal is liable to be allowed.

45. In view of the above, impugned judgment and order dated dated judgment and order dated 25.08.2007, passed by learned Additional Sessions Judge, Fast Track Court-I, Lucknow, in Criminal Case No. 18/2001 (Crime No. 97/01), under Sections 8/21/22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), Police Station Mohanlalganj, Lucknow, is **set aside** and **reversed** and accused/appellant, namely, Prem Narayan Pandey is **acquitted** of the charges leveled against him. Consequently, the appeal is **allowed** his personal bond and surety bond, if any, are canceled and sureties are discharged.

46. Let a copy of this judgment alongwith the trial court record be sent immediately to the Trial Court concerned for necessary compliance.

47. No order as to the costs.

(Shamim Ahmed, J.)

Order Date :- 13.09.2024

Piyush/-