

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

CRA No. 68/2012
CrlM Nos. 356/2020, 1183/2022,
297/2019[1/2019],
542/2019[2/2019] & 743/2019
IA No. 95/2012

Reserved on: -11.09.2025
Pronounced on: - 30.09.2025

Jarnail Masih Age 45 years
S/o Sh. Nayamat Masih,
R/o Uchi Bassi, Tehsil Dasva,
District Hoshiarpur, Punjab

.... Appellant(s)

Through: - Mr.Nitin Verma, Advocate

V/s

State
Through Sh. Sanjeev Khajuria,
Inspector Excise Range Kathua,
Department of Excise, J&K Govt.

.... Respondent(s)

Through: - Mr. Ravinder Gupta, AAG

CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE SANJAY PARIHAR, JUDGE

JUDGMENT

Per: -Sanjay Parihar, J

1. By way of the present appeal, the conviction and sentence awarded to the appellant, arising out of Challan Special no. 2 titled "*State through Inspector Excise Range, Kathua vs. Jarnail Masih*", in Report No. 104 ERK dated 01.04.2006 under Section 8(c)/15(c), NDPS Act, by Sessions Judge, Kathua (the 'trial court'), is assailed. The appellant has been held guilty of illegal possession of a commercial quantity of contraband, namely poppy straw, and

sentenced to undergo rigorous imprisonment of twenty years with fine of ₹2,00,000/-, and in default of payment of fine, to further undergo imprisonment for five years.

2. The appellant, in his grounds of challenge, asserts that he is innocent and has been falsely implicated. It is urged that there is no evidence to establish that the appellant was in conscious possession of the 14 jute bags allegedly containing poppy straw weighing 385 kilograms. It is further contended that the trial court failed to appreciate that the procedural safeguards, mandatory under law, were disregarded by the prosecution, and the findings recorded suffer from grave infirmities. The principal contention raised is that the prosecution has not proved that the alleged contraband was within the conscious knowledge and possession of the appellant.
3. Briefly stated, the case of the prosecution is that on 01.04.2006, the appellant, while driving truck No. PB12G-7866, loaded with 311 bundles of popular veneer belonging to M/S Sky Line Industries, Ranzipora, Pulwama, arrived at Lakhanpur Toll Post for assessment. Upon checking, it was found that beneath the aforesaid veneer bundles, 14 jute bags containing poppy straw powder (bhukki) had been concealed in such a manner that they were not visible to anyone. When confronted, the appellant failed to offer any justification for the illegal possession; thereafter, the contraband was seized, and a Panchanama of seizure was prepared in the presence of witnesses from the Excise Department. The Inspector Excise immediately informed his superior officer about the

recovery. Thereafter, in the presence of the Executive Magistrate 1st Class, samples weighing 50 grams each were drawn from every jute bag, which were duly numbered as S-1 to S-14. The residue in each bag was separately sealed, and both the samples and residue were resealed by the Executive Magistrate.

4. Upon completion of the investigation by the authorised officer (Inspector Excise Range, Kathua), it was concluded that the appellant had committed offences punishable under Sections 8(c)/15(c) NDPS Act, read with Section 48-A of the J&K Excise Act. Consequently, a complaint was laid before the trial court, which, vide judgment of conviction dated 18.05.2011 and order of sentence dated 21.05.2011, held the appellant guilty and sentenced him accordingly.
5. Learned Counsel for the appellant argued that the appellant was not aware of the presence of jute bags in the vehicle. It was urged that after loading the consignment of Veneer Core from a factory at Ranzipora, Pulwama, for delivery at Jalandhar, the truck, upon reaching Sangam Petrol Pump at Qazi Gund, was taken away by the owner, Raju, along with one Nishi, both residents of Punjab, to an unknown destination, while the appellant was left behind at the spot. The appellant had even apprised the complainant/Excise Department regarding the said taking away of the vehicle by its owner and his associate. However, instead of proceeding against the said persons, the appellant was implicated merely on account of being the driver of the truck. It was, therefore, contended that the

appellant was not in *conscious possession* of the contraband. Once the prosecution failed to establish foundational facts to prove conscious possession, no presumption under the law could have been drawn against him.

6. *Per contra*, learned counsel for the respondent argued that the submissions advanced are without legal or factual foundation, as the appellant never raised such a defence before the trial court, and any such plea presented at the appellate stage is nothing but an afterthought. It was further submitted that the complainant and prosecution witnesses have fully corroborated the allegations contained in the complaint, and the recovery of the contraband stands proved. The prosecution has also successfully established the chain of evidence linking the appellant with the possession of a commercial quantity of contraband/poppy straw.
7. Counsel for the appellant, in rebuttal, argued that the recovery in this case is stated to have been effected on 01.04.2006 and as per the evidence of Executive Magistrate 1st Class, even the resealing has taken place on that very day, however it is not shown as to where the sample remained because as per the forensic witness, samples were received by the FSL, Jammu only on 07.04.2006, so the delay in depositing the sample goes on to show that the sample has remained with the complainant party and there is every likelihood that the sample may have been tampered with. Learned counsel for the appellant further contended that the appellant has already served more than 13 years of incarceration, and given the

nature of the evidence collected and relied on by the trial court, the interest of justice would be served if the appellant is set free.

8. We have heard counsel for the parties and perused the record.
9. The conscious possession of the contraband is *sine qua non* for drawing presumption under Section 35 of the NDPS Act because this provision speaks of existence of culpable mental state and once the prosecution lays foundational facts about unauthorized possession of a particular quantity of contraband, the burden shifts to the accused to dispel that presumption and to explain satisfactorily that he was not having conscious possession of the contraband in question. The Supreme Court in “**Madan Lal & anr. vs. State of Himachal Pradesh**” 2003 (4) RCR (Cr) 100, has held that *once the possession of the contraband is established, the presumption under Section 35 and 54 of the Act arises against the accused, and the person who claims to dispel such presumption has to establish it because how he came to be in possession is within his special knowledge.*
10. On perusal of the record, we find a three-page disclosure statement recorded by the complainant immediately after the respondent was taken into custody. In this statement, the respondent disclosed that one *Raju @ Raj Kumar S/o Shamsher Singh R/o Uchhi Bassi* is the registered owner of the vehicle and that he, along with another person, was present at Ranzipora, Pulwama, when the vehicle was loaded with a consignment of veneer core. Thereafter, the owner and his associate took the vehicle to some unknown village at

Qazigund, while the respondent was dropped at Sangam Petrol Pump. The tenor of the disclosure indicates that the respondent sought to convey that he did not know the subsequent loading of 14 jute bags containing poppy straw. However, such a plea, if intended to constitute a defence, ought to have been put forth by confronting the complainant or other prosecution witnesses during trial to rebut the statutory presumption. On examining the evidence on record, we find that no such effort was made by the respondent to project his defence of lack of conscious possession of the contraband. At the same time, once during the investigation, the respondent had named the owner and his accomplice, it was incumbent upon the seizing authority to have investigated the forward and backward linkages of the contraband, to ascertain its source and intended destination. Be that as it may, the respondent having failed to set up the aforesaid plea in defence during trial, and in the absence of any contrary evidence, we are unable to appreciate the line of defence now projected before us in this appeal.

11. The defence which the appellant had projected before us, had it been rightly pleaded and extracted during the cross-examination of the prosecution witnesses and from the complainant, may be the result of the charge-sheet, would have been otherwise. On scanning the record of the trial court, we do not find any perversity in the finding recorded by it against the appellant. The disclosure made by the appellant, unless it leads to discovery of any fact for which the evidence may be led, such disclosure has no evidentiary value and

failure on the part of the appellant to extract any contradiction from the prosecution evidence could not provide him any ground to claim that the finding is perverse. We are conscious of the fact that in criminal trials right of cross-examination is the only weapon in the armoury of the defence, by which it can dislodge the prosecution case or get the witnesses discredited. It is not the case of the appellant that he was not provided fair opportunity of cross-examining the witnesses and whereas he has been duly defended by the counsel and we do not see any kind of prejudice having been caused to the appellant in his trial before the court below. In that view of the matter, we see no infirmity in the finding of conviction recorded against the appellant.

12. The trial court has rightly relied upon the testimony of the complainant and the seizure witnesses, who have categorically deposed that 14 jute bags containing poppy straw, concealed beneath veneer bundles, were recovered from the truck. Even otherwise, the possession of the contraband stands proved and has not been specifically disputed. The only issue that remains for our consideration is whether the respondent, who has already undergone more than thirteen years of incarceration both during the trial and on account of the pendency of the present appeal, deserves any sentence modification. It is pertinent to note that learned counsel for the appellant has fairly submitted that he is not pressing for reversal of the conviction recorded by the trial court and has confined his challenge solely to the quantum of sentence.

13. Taking into account the mitigating circumstances brought to our notice and without disturbing the finding of conviction recorded against the appellant, we are of the considered view that the ends of justice would be served, if the sentence awarded by the trial court is reduced to the period already undergone. Consequently, while upholding the conviction, we modify the sentence to the period already undergone and direct that the appellant be relieved of further proceedings. The trial court shall take consequential steps in this regard by intimating the jail authorities forthwith.
14. The appeal, along with connected applications, is ***disposed of***.

JAMMU
30.09.2025
Pawan Angotra

(Sanjay Parihar)
Judge

(Sanjeev Kumar)
Judge

Whether the order is speaking? : Yes/No
Whether the order is reportable? : Yes/No

