



2025:UHC:3273-DB

Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

JUSTICE SHRI MANOJ KUMAR TIWARI

AND

JUSTICE SHRI VIVEK BHARTI SHARMA

Delay Condonation Application No.01 of 2025

In

Special Leave to Appeal No.53 of 2025

With

Government Appeal No.19 of 2025

State Of Uttarakhand

...Applicant/appellant

Versus

Raja Tomar & Anr.

...Respondents

Present:-

Mr. K.S. Bora, learned Deputy Advocate General for the State/appellant.

JUDGMENT: (per Shri Vivek Bharti Sharma, J.)

Delay Condonation Application IA No.01/2025

This is Delay Condonation Application No.01 of 2025 filed by the applicant-State to condone the delay in filing the government appeal along with application seeking leave to appeal.

2. There is a delay of 5 days in filing the present appeal, which is sufficiently explained in the affidavit. Delay is, therefore, condoned. Delay Condonation Application stands allowed.

3. Heard.



4. Present government appeal along with special leave to appeal application is filed by the State against the judgment/order dated 26.11.2024 passed by Special Sessions Judge, (N.D.P.S.)/Sessions Judge, Uttarkashi in Special Sessions Trial No.31 of 2022, whereby the said court has acquitted the respondents from the charge of offence punishable under Section 8/20 of Narcotic Drugs and Psychotropic Substances Act (*in short, N.D.P.S. Act*).

5. The case of prosecution is that on 26.02.2022 at 06:20 pm complainant Sub-Inspector Mohan Kathait, along with Constable 351 Bishan Lal, Constable 269 CP Ajay Dutt, Constable 513 Anil Tomar, were in their private vehicle and were busy in maintaining law and order under jurisdiction of their police station; when the police party reached near Kamal Sanskrit Vidyalaya and started checking there, they saw a white car coming from Purola side; when it was signaled to stop, it tried to speed away; on this, the police personnel surrounded the vehicle and using necessary force stopped it; inside the car, one person was found sitting on driver's seat and one another person was found sitting on the seat next to the driver; when these persons were asked the reason of running away, they started getting nervous and could not give any satisfactory answer; on this, the complainant took both the persons out of the car one by one and asked their names and addresses; the person sitting on driver's seat told his name as Raja



Tomar (*respondent no.1*), son of Sulekh Chand Tomar, Resident of Sukhpura Colony, Police Station Kankhal, Haridwar and the other told his name as Vijay Kumar (*respondent no.2*), son of Krishnapal, Resident of village-Galibpur, Police Station-Khatauli, District Muzaffarnagar, Uttar Pradesh; when the driver respondent no.1 was asked for the documents of the car he could not produce any documents except the photocopy of the vehicle's RC; the complainant took search of the vehicle then some substance tied in a red polythene was found on the driver's seat and when it was opened and examined, a black stick-like substance was found inside it, which when smelled by the complainant and the accompanying employees, was believed to be *Charas*; thereafter, the complainant opened the dashboard of the vehicle and there also he found *Charas* in a green polythene; when both the persons were strictly questioned in this regard, respondent no.1 said that the *charas* in red polythene on driver's seat is mine and the *charas* in green polythene on dashboard is of respondent no.2; that, both of them jointly said that they were taking this *Charas* from an unknown person from Mori to Kankhal to sell it at higher prices for Shivratri; when these persons were asked about licenses in this regard, they failed to produce the same.

6. In the recovery memo, it was further stated that since the recovered contraband had to be weighed, therefore, C.P. 351 Bishan Lal was sent to



get electronic weighing scale after proper instructions, who brought electronic weighing scale after about 20-30 minutes and told that the person who gave the weighing scale has given it on the condition of keeping his name confidential. When the recovered contraband were weighed, the weight of the contraband recovered from respondent no.1 including foil was 605 grams whereas the weight of the substance recovered from respondent no.2 was 402 grams including the foil; that, as the respondents were found to be transporting illegal Charas in the vehicle number-HR-01-ward-0215, they were informed about their crime under Section 8/20/60 of the NDPS Act and were taken into police custody at 21:45 from near Kamal Sanskrit School, Naugaon Road, that, the recovered contraband were sealed and specimen seal was taken.

7. On the basis of recovery of 01 kg 07 grams of illegal charas and arrest of respondents, case crime number-15/2022 under Section-8/20/60 of N.D.P.S. Act was registered and the investigation started.

8. On 04.05.2022, charge-sheet was filed in the Court. On 28.06.2022, charges were framed against the respondents under Section 8/20 of N.D.P.S. Act to which they pleaded not guilty and claimed to be tried.

9. To prove its case, prosecution examined total 06 witnesses viz. PW1 Sub Inspector Mohan



Kathayat, PW2 Head Constable Vijaypal Singh, PW3 Constable Rakesh Negi, PW4 Constable Bishan, PW5 SI Rajendra Singh Pujara, First Investigating Officer of the Case and PW6 SI Girish Chandra Badoni Second Investigating Officer.

10. Thereafter, the statements of the respondents were recorded u/s 313 of Cr.P.C.

11. The Trial Court, on perusal of evidence and upon hearing the parties, by judgment and order dated 26.11.2024, acquitted the respondents on the following grounds:-

- a. PW1 the complainant of the case, in cross-examination, admitted that all the daily proceedings of the police are conducted through general diary and if any police personnel or police party leaves the police station or outpost for any work, then their departure is recorded in the general diary but there is no entry in the general diary regarding their departure on 26.02.2022 on the file. This fact was also admitted by PW4 in his cross-examination that there is no entry regarding his departure in the general diary on 26.02.2022. In this regard, PW5 the first investigating officer of the case and PW6 second Investigating Officer also admitted in their cross-examination that whenever any police personnel or police party leaves the police station for any official work, an entry is



made in the General Diary regarding the time and date of department but there is no such entry in the General Diary for the alleged departure on the relevant date and time. The Trial Court, on the basis of admissions made in the cross-examination, arrived to the conclusion that the general diary of a police station is an important piece of evidence which records the important fact of date, time and place of departure and arrival of a police personnel for any work, but this important corroborative evidence has not been brought on record and proved by the prosecution, which creates doubt on the occurrence of alleged incident on the fateful date and time.

- b.** The Trial Court recorded a finding that statement of PW1 and PW4 do not inspire confidence and their evidence is not supported by any independent witness; that, the evidence of these two witnesses shows that there was availability of independent witnesses at the spot but they did not make any effort to procure the same.
- c.** The place of recovery is not proved by the evidence led by the prosecution; that, PW1 in his cross-examination, stated in para-7 that the place of recovery would be approximately 5 km from the Purola Police Station and in



para-13 he states that the place of recovery would be approximately 01 km from Chowki Bazar whereas in Chik FIR Exhibit P-5, the distance of the place of recovery from Purola Police Station is shown as 01 km.

d. The next vital defect in the case of the prosecution which was looked into and considered by the Trial Court was non-examination of the shopkeeper from whom the weighing scale was said to have been brought for weighing the contraband. The Trial Court recorded a categorical finding that the prosecution has not brought any evidence on record regarding the fact that from which shopkeeper the scale was brought, with which the charas recovered from the accused was weighed; that, neither the name of that shopkeeper come in the prosecution evidence nor has he been questioned by the Investigating Officer during investigation nor that scales were also made a part of the investigation and nor the shopkeeper was examined in the trial court, and on the basis of this, the Trial Court arrived to the conclusion that the version put forth by the prosecution that the shopkeeper had given the scales on the condition that his name and address should not be disclosed, does not support the case of prosecution.



e. The Trial Court further observed that as per statement of PW4 Constable Bishan alleged incident was photographed by Constable Anil and photographs were brought on record as paper no. 5-A/41 to 5-A/43 but in para 25 of cross-examination, this witness admitted that in these photographs, the respondents are not seen holding *charas* in their hands and neither *charas* is shown to have been taken out from the car; that, this photography has not been duly proved by the prosecution, neither constable Anil who allegedly did the photography has been examined nor any certificate under Section 65B Indian Evidence Act has been brought on file and proved and neither any prosecution witness has told when, who and from where these photographs were developed. Thus, the Trial Court held that the prosecution does not get any benefit from these photographs.

f. Lastly, the Trial Court observed that there is no evidence on record to show that compliance of Section 52-A, Section 55 and Section 57 of the NDPS Act was made during the course of investigation.

12. Learned State Counsel would submit that the judgment and order passed by the Trial Court is against the evidence on record and is against the



provisions of law. He would further submit that the Trial Court has erred in acquitting the respondents on the ground of non-compliance of Section 50, 52(A), 55 and 57 of N.D.P.S. Act.

13. He would further submit that the Trial Court has erred in not appreciating the fact it was a case of chance recovery and the contraband was recovered from the car, therefore, compliance of Section 50 and other sections of N.D.P.S. Act was not necessary.

14. He would further submit that failure to produce an independent public witness during the recovery of the contraband as well as the non-examination of person, who had provided the electronic weighing machine, is not fatal to the prosecution's case. It is evident from the record that sincere efforts were made to secure their presence, but such efforts remained unsuccessful. He would submit that mere non-availability of these witnesses, when the prosecution's case is otherwise supported by credible and consistent evidence, cannot be held as fatal. Therefore, the judgment of the Learned Trial Court is unsustainable in law and deserves to be set aside, and the respondents ought to be convicted accordingly.

15. Perused the impugned judgment and record of appeal.

16. We are of the considered view that the



question of compliance with Section 50 of the N.D.P.S. Act along with other statutory provisions arises only if it is proved that the police party was present at the spot of recovery of alleged contraband from the respondents.

However, as observed above in the impugned judgment, the prosecution witnesses and even the Investigating Officer have unequivocally admitted that the departure and arrival of the police party from police station that allegedly recovered the contraband from the respondents were neither recorded in the general diary maintained at the police station nor reflected elsewhere in the official records.

17. It is a well-settled principle that whenever any police personnel or a police party departs from the police station for any specific purpose, such as conducting an operation or on patrolling duty to maintain law and order, an entry to that effect is mandatorily made in the General Diary maintained at the police station. Similarly, upon their return, a corresponding arrival entry is also required to be recorded in the General Diary. In the absence of any such departure or arrival entry in the General Diary, the only plausible conclusion that may be drawn is that the concerned police personnel did not leave or return to the police station during the relevant period.

18. Therefore, in the present case, the absence of any entry of departure of the police personnel, who



as per the prosecution, formed part of the raiding party that allegedly recovered the contraband from the respondents, leads to only one inescapable conclusion that the police personnel had not left the police station during the relevant time for the spot of alleged recovery, and consequently, no such recovery could have taken place in their absence from the spot.

19. Furthermore, the photographs allegedly taken at the time of recovery do not depict the contraband in the possession of the respondents. Even if such photographs shows the alleged contraband that cannot be treated as conclusive proof of recovery, particularly in the absence of a certificate under Section 65B of the Information Technology Act, which is mandatory for the admissibility of electronic evidence.

20. We are also of the considered view that the prosecution has completely failed to prove the link evidence to establish that the case property was safely deposited in Malkhana. There is no credible oral testimony from the concerned witnesses to prove the entries related to the deposit of the alleged contraband in the Malkhana, its subsequent retrieval for production before the Trial Court for sampling, and its re-deposit thereafter. Such lapses cast serious doubt on the originality of the case property and sample taken therefrom.

21. As regards the first limb of argument of the



learned State Counsel that the non-inclusion of independent persons in the list of witnesses and their non-examination is fatal to the case of prosecution, there seems some force in this submission in view of judgment of *Hon'ble Apex Court in re "Ambika Prasad and another vs. State (Delhi Administration) & connected matter" (2000) 2 SCC 646*, wherein the Hon'ble Apex Court observed that *"It is a known fact that the independent persons are reluctant to be witnesses or to assist the investigation. Reasons are not far to seek. Firstly, in cases where injured witnesses or the close relative of the deceased are under constant threat they dare not depose the truth before the court, independent witnesses believe that their safety is not guaranteed. That belief cannot be said to be without any substance. Another reason may be the delay in recording the evidence of independent witnesses and repeated adjournments in the court. In any case, if independent persons are not willing to cooperate with the investigation, the prosecution cannot be blamed and it cannot be a ground for rejecting the evidence of injured witnesses"*.

However, there are glaring lapses, inconsistencies, contradictions and improbabilities as stated above, in the prosecution case in view of which the prosecution case becomes unreliable, therefore, acquittal of respondents is nothing but a legal consequence.



22. In view of the reasons recorded above, we concur with the judgment of acquittal rendered by the Trial Court. No interference is, therefore, called for.

23. Accordingly, leave is refused. Leave to appeal application is rejected and the government appeal stands dismissed *in limine*.

(Vivek Bharti Sharma, J.)
28.04.2025

(Manoj Kumar Tiwari, J.)
28.04.2025