

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-D-862-DB-2005
Reserved on: 30.08.2024
Date of decision: 09.09.2024

JAGJIT SINGH @ KALA

...Appellant

Versus

STATE OF HARYANA

...Respondent

CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MRS. JUSTICE SUDEEPTI SHARMA

Present: Mr. Mohinder Singh Kathuria, Advocate (Legal Aid Counsel)
for the appellant.

Mr. P.P. Chahar, Sr. DAG, Haryana.

SURESHWAR THAKUR, J.

1. The instant appeal is directed against the verdict made on 19.08.2005, upon Sessions Case No. 32 of 2004, by the learned Sessions Judge, Sirsa, wherethrough he convicted the accused for a charge drawn *qua* an offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as “the Act”). Moreover, through a separate sentencing order of 22.08.2005, he proceeded to impose upon the convict sentence of rigorous imprisonment extending upto a period of 15 years, besides imposed upon him, sentence of fine of Rs.1,00,000/-, besides in default of payment of fine amount, he sentenced the convict to undergo rigorous imprisonment extending upto a period of five years.

2. The accused-convict became aggrieved from the above drawn verdict of conviction, and, also the consequent therewith sentence(s) (*supra*), as became imposed. Resultantly, he instituted thereagainst the instant appeal hearing No.CRA-D-862-DB-2005.

FACTUAL BACKGROUND

3. The genesis of the prosecution case are that, on 16.10.2003, ASI Jagdish Rai while posted as such at CIA staff, Sirsa, was present near Old Truck Union, Sirsa, in connection with patrolling and crime detection along with ASI Jai Pal Singh, EHC Karambir Singh, EHC Rajinder Singh and other police officials. The police party was in a police jeep. ASI Jagdish Rai received a secret information to the effect that a truck with fictitious No.HR-31-4157 whereas its real registration number was RJ-31G-1558 was loaded with Chooria post bags and had gone towards Dabwali from Sirsa and that the owner of the said truck was accused Jagjit Singh @ Kala son of Harjinder Singh and that the accused was himself driving the said truck. On this secret information ASI Jagdish Rai sent a written intimation Ex.PE to the Deputy Superintendent of Police (HQ) Sirsa, as required under Section 41 of the NDPS Act and thereafter he formed Dabwali a raiding party and proceeded towards Dabwali to apprehend the said truck. When the police party crossed village Panjuana and reached near a T-Point Bhangu they noticed the truck and as such the truck in question was apprehended and got stopped on the T-Point of village Bhangu. A fictitious registration number plate bearing registration No.HR-31-4157 was found affixed on the truck on the front as well as back side. The accused Jagjit Singh @ Kala was driving the said truck and hence he was apprehended. ASI Jagdish Rai then served a written notice under Section 50 the NDPS Act, Ex.PH to the accused informing him he had a suspicion that there was some contraband substance in the truck and, therefore the same was to be searched and that he had a right to get the truck searched in the presence of a Gazetted Officer or Magistrate if he so desired. The accused vide his reply Ex.PH/1 desired that the search of the truck be conducted in the presence of a Gazetted Officer. The notice Ex.PH and the reply Ex.PH/1 were signed by the accused and attested by ASI Jaipal Singh and EHC Karambir

Singh. ASI Jagdish Rai then summoned Shri Rai Singh, Deputy Superintendent of Police, Sirsa, for conducting the search of the truck in his presence. He also summoned a photographer from Sirsa. Shri Rai Singh, Deputy Supdt. of Police then reached the place of recovery within few minutes and a photographer also reached there from Police Station Sadar Sirsa. The search of the truck was then commenced in the presence of Shri Rai Singh, DSP. The photographer had also taken the photographs before and after conducting the search. On search of the truck, the same was found with 170 bags containing poppy husk. Two samples of choora post, each weighing 100 gms., were separated from each bag and the remaining choora post in each bag was found to be 39 Kgs., 800 gms. All the samples and the gunny bags with the remaining choora post were separately sealed with the seals of JR as well as of RS and were taken into possession along with the and truck vide recovery memo Ex.PF which was attested by ASI Jaipal Singh, EHC Karambir Singh and DSP Rai Singh. The seal after use was handed over to ASI Jaipal Singh. ASI Jagdish Rai then conducted the search of the cabin of the truck in the presence of the Deputy Superintendent of Police and from the cabin registration certificate Ex.P353 of the truck was recovered besides a driving licence registration Ex.P.354 and a bilty Ex.P.355. From the registration certificate Ex.P353, it was found that the correct registration number of the truck was RJ-31-G-1558. ASI Jagdish Rai also checked the engine number chassis number as mentioned in registration certificate and the same tallied with the engine number and chassis number recorded on the chassis of the truck. The documents were taken into possession vide recovery memo Ex.PG attested by the aforesaid witnesses. ASI Jagdish Rai then sent a ruqa Ex.PA the police Station Baragudha which led to the registration of the present case vide formal FIR Ex.PA/1.

4. He also recorded the statements of witnesses under Section 161 Cr.P.C., prepared rough site plan of the place of recovery Ex.PI with the correct marginal notes and arrested the accused formally in this case. On return to the police station, Baragudha, ASI Jagdish Rai produced the accused, witnesses and the case property before SI/SHO Ramesh Kumar at Police Station Baragudha who verified the facts from the witnesses and the accused and examined the case property and the samples which had already been sealed on the spot. After verification, he affixed his own seal RK on the residue parcels, sample parcels and also on the specimen sheet. ASI Jagdish Rai also produced his report Ex.PB before the SHO as required under Section 57 of the NDPS Act and the SHO made his endorsement Ex.PB/1 and directed ASI Jagdish Rai to deposit the case property with the MHC and to lodge the accused in the police lock up and ASI Jagdish Rai did accordingly. ASI Jagdish Rai also recorded the other statements of formal witnesses and completed other usual investigation. 170 sealed sample parcels, (one sample out of the two samples taken from each bag) were sent to FSL Madhuban for analysis and the report of the FSL Ex.PJ reveals that the same were of poppy straw (choora post). After completion of the necessary investigation, the case was sent up in the Court of Session for trial of the accused.

Trial Court Proceedings

5. On completion of investigations, challan was filed in the learned trial Court against the accused. On his appearance before the learned trial Court, he was charge-sheeted for the commission of an offence punishable under Section 15 of the said Act, besides for offences punishable under Section 468 and 471 of the IPC, to which he pleaded not guilty and claimed trial. Subsequently after the recordings of depositions of 7 witnesses, the learned public prosecutor closed the prosecution evidence but after tendering the report

of the FSL, to which Ex.PJ is assigned. After the closure of the prosecution case, the learned trial Judge drew proceedings under Section 313 Cr.P.C., wherein, the accused pleaded innocence, and, claimed false implication. However, he led one witness in his defence evidence.

Submissions of learned counsel for the convict-appellant

6. Learned counsel for the convict-appellant submits, before this Court that since the recovery, as become made from the offending vehicle, and, as carried in Ex.PG. Consequently, as required by Section 42 of the Act, the mandatory statutory provision, remaining uncomplied with. Therefore, it is argued that the charge drawn against the appellant rather remaining not cogently established.

Submissions of the learned State counsel

7. Learned State counsel has argued that the impugned verdict of conviction, and, consequent thereto sentence (supra), as became imposed upon the convict by the learned trial Judge concerned, is meritworthy, as the same does not suffer from any taint of any gross mis-appreciation or non-appreciation of any evidence germane to the charge. Therefore, he contends that the impugned verdict of conviction be maintained, and, affirmed by this Court.

Analysis of the submissions of learned counsel for the convict-appellant and the reasons for accepting the same

8. Through Ex.PG recovery of contraband was made from the offending vehicle, which was being driven by the accused. Therefore, thereby there was no requirement for the investigating officer concerned, to beget compliance with the mandatory statutory provisions, as embodied in Section 50 of the Act.

9. A reading of the deposition of the investigating officer concerned, reveals that after recovery of the said contraband being made, thus thereons

becoming embossed seal impressions, carrying thereons English alphabets 'JR'. The said seals along with the seal impressions 'RS' of the DSP, thus became made on the seized contraband, rather at the crime site.

10. However, as further revealed by the deposition of the SHO, of the police station concerned, who stepped into the witness box as PW2, the latter after receiving the seized contraband, at the police station concerned, thus proceeded to emboss thereons seal impression 'RK'.

11. Furthermore, as revealed from a reading of the in-charge of the malkhana concerned, who stepped into the witness box as PW-3, the said seizure became deposited in the malkhana concerned. He has also categorically spelt in his affidavit, that so long as it remained in his custody, thereupto the case property remained untampered. Subsequently, as deposed by him, vide RC No.219 dated 23.10.2003 the case property became sent through (Constable Jai Parkash No.773) to the FSL concerned. During the course of his carrying the case property to the FSL concerned, no material emerges, thus exemplifying *qua* thereons any tampering being made.

12. A reading of the report of the FSL concerned, as becomes enclosed in Ex.PJ, contents whereof are extracted hereinafter, thus vividly reveals, that 170 sealed cloth parcels became received there, thus through Constable Jai Parkash 773. The above made narrations in the report of the FSL concerned, do completely tally with the speakings, as made by the prosecution witnesses concerned, both in respect of the numbers of the seal impressions, as became made on the seizure, besides also tally with the English alphabets, as became embossed thereons. Therefore, but obviously it has to be concluded, that the enclosed residue in cloth parcels, which became removed from the bulk, for examinations thereons being made, by the FSL concerned, becoming completely

related or being compatible, to the numbers of the seal impression, as made thereons, besides with the English alphabets, as became embossed thereon.

Xxx

Description of parcel(s)

One Hundred Seventy sealed cloth/paper parcel(s) each sealed with 3 seals of JR, 1 seal of RS & 1 seal of RK enclosing containing the exhibits 1 to 170.

xxx

Results

Qualitative Tests:- (Exbt 1 to 170)

<i>Meconic Acid:</i>	<i>Present</i>	<i>Thebaine:</i>	<i>Present</i>
<i>Morphine:</i>	<i>Present</i>	<i>Papaverine:</i>	<i>Present</i>
<i>Codeine:</i>	<i>Present</i>	<i>Narcotine:</i>	<i>Present</i>

Quantitative Tests:-

Morphine Percentage: NA

OPINION: The samples (Exbt. 1 to 170) were identified as Poppy straw (Choor post) of Papaver somniferum L.

Weight of the Sample returned: 70 gms each (Exbt. 1 to 170)

Note: After examinations, the remains of the exhibits were sealed with the seals of AD /General/FSL(H).

xxx”

13. Even no contest became raised by the learned counsel defence that the FSL report Ex.PJ, thus was not made in respect of contents enclosed in the sealed cloth parcels (supra), nor any contest became raised by the learned defence counsel, that the thereons embossed number(s) of seal impressions, besides the embossed thereons, thus English alphabets, rather not tallying either with the number(s) of the seal impressions or with the English alphabets, as became embossed thereons, and, as became depicted in the road certificate. In consequence, prima facie any argument as becomes raised before this Court by the learned counsel for the convict-appellant, that the report of FSL (supra), as made on the stuff retrieved, from the sealed cloth parcels, rather not relating to the residue enclosed therein, after separating the same from the bulk, thus after

seizure thereof being made at the crime site, rather tentatively is a pretextually raised argument before this Court. In consequence, tentatively the same warrants its rejection, and, is tentatively rejected as such.

14. In addition, whatsoever argument is raised before this Court, by the learned counsel for the convict-appellant, that the report, as became made by the FSL concerned, on the sealed cloth parcels, thus is not related to the stuff inside them, and, as became purportedly separated from the bulk, at the crime site, but necessarily tentatively is also a pretextual argument.

15. Importantly, the result of the apposite examinations, as becomes extracted hereinabove, makes vivid echoing that after examinations of the stuff, as was enveloped in the sealed cloth parcels, thus such examinations unfolding, that thereins became enclosed remains of contraband. Conspicuously, when the report of the FSL concerned, also recites that after examination of the stuff inside the sealed cloth parcels, the said examined stuff, became re-enclosed in sealed cloth parcels, and, thereons became affixed seals of the FSL concerned.

16. Though the said above recitals, as occur in the report of the FSL concerned, also do not become contested by the learned counsel. Though, the sequel of no contest being raised to the above recitals, though is that, the learned defence counsel, neither asking nor was required to be given any opportunity, thus for production of the cloth parcel enclosing therein, the stuff examined by the FSL concerned, and, in respect whereof an affirmative opinion was made.

17. Though the effect of the above opportunity neither being asked nor being granted to the learned defence counsel, during the course of cross-examination, of the prosecution witnesses concerned, is *prima facie* naturally that, the above opportunity has been waived or abandoned by the learned defence counsel. In consequence, the further effect thereof, is that, the presumption of

truth as attachable through attracting theretos, the mandate existing in Section 292 of the Cr.P.C., does thereby rather *prima facie* acquire conclusivity. Therefore, though for non-production of the parcel containing the residue, as became separated from the bulk, at the crime site, rather before the learned trial Court concerned, does not yet *prima facie* snap the link, *inter se* the residue becoming separated from the bulk, at the time of recovery of the contraband, being made at the crime site, vis-à-vis, the production of the said residue, which after its examination became re-enclosed in a cloth parcel by the FSL concerned.

18. However, learned counsel for the convict-appellant has also submitted, that since it was a prior information recovery, and, thereby the investigating officer concerned, was required to, obtain search warrant or authorization, in terms of Section 42 of the Act, provisions whereof become extracted hereinafter, whereas, since the said search warrant or authorization from the jurisdictional Magistrate concerned, has not been obtained, thereby the mandatory statutory provisions as contained under Section 42 of the Act, on becoming evidently not complied, as such, the appellant is entitled to a verdict of acquittal.

“[42. Power of entry, search, seizure and arrest without warrant or authorisation.-- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in

respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the

proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]”

19. Moreover, since in the interregnum *inter se* sunset and sunrise the search or raid of the conveyance (supra), became made, therebys reiteratedly unless the raiding party possessed the search warrant or authorization, thereupon the search of the offending conveyance by the raiding party but was vitiated, the same breaching the statutory provisions embodied in Section 42 of the Act.

Reasons for accepting the said argument

20. Be that as it may, since the rigor of the said statutory provision would become relaxed only when in terms of the second proviso to Section 42 of the Act, the police officer has recorded reasons to believe, that given the evident consumption of time rather for obtaining the search warrant or authorizations, therebys but affording an opportunity for the concealment of evidence or facility for the escape of an offender. However, when evidently no document, in terms of the exception to the statutory proviso, thus exists on record. Contrarily, when in the presence of the DSP, the search of the conveyance was carried out. Therefore, the fact that the search of the conveyance was carried out in the presence of the DSP, but cannot relieve the statutory necessity (supra), thus ordaining that the search warrant or authorization is but required to be obtained, thus obviously from the jurisdictional Magistrate concerned. The reason being that the issuance of a search warrant or authorization, rather is an empowerment which is vested in the jurisdictional Magistrate concerned, as the provisions embodied in Section 100 of the Cr.P.C., provisions whereof becomes extracted hereinafter, do vest the said apposite empowerment rather only in the jurisdictional Magistrate and not in the DSP concerned.

“100. Persons in charge of closed place to allow search.—(1)

Whenever any place liable to search or inspection under this Chapter

is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by sub-section (2) of section 47.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

(7) When any person is searched under sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code”

21. Resultantly, when since neither search warrant nor authorization(s) became obtained by the raiding party rather before the making(s) of search of the offending vehicle, thus from the jurisdictional Magistrate concerned, nor when any document become scribed thus echoing therein the reason to believe that in case time is consumed on obtaining such a search warrant or authorization, thereupons an opportunity would become afforded for concealment of evidence or for the fleeing of the offender. Therefore, the search as made of the offending vehicle, even if it was made in the presence of a Gazetted Officer, is a statutorily vitiated search. Resultantly, the non obtaining of search warrant or authorization by the raiding party, thus before theirs making search of the offending vehicle, naturally comprise a deep pervasive breach being made to the relevant statutory provisions. Therefore, the prosecution case staggers.

Arguments of the learned State counsel and the reasons for rejecting

22. Nonetheless, the learned State counsel submits that since in terms of Section 293 and 294 of the Cr.P.C., provisions whereof becomes extracted hereinafter, thus a rebuttable presumption of truth becomes assigned to the reports prepared by the Experts, as become detailed in sub Section 4 of Section 293 of the Cr.P.C. Resultantly, he submits that since therebys the Court has a discretion to summon and examine any such expert, as to the subject matter of his report. Moreover, since therebys an opportunity is assigned to the accused rather to bely the results of the examination made over the subject examined by the Expert concerned. Therefore, he submits that since the said opportunity is waived by the accused, through the learned defence counsel permitting the making of exhibition marks on the report of the FSL concerned. Resultantly the results of the incriminatory examination (supra), as made by the FSL concerned, over the subject concerned, is admissible in evidence but irrespective of the fact, that after examination of the stuff at the FSL, the same remaining unenclosed in

cloth parcels, nor the seal impressions of the FSL concerned, becoming embossed thereons, besides the cloth parcels remaining unproduced in Court for the same being then shown to the prosecution witnesses concerned.

293. Reports of certain Government scientific experts.—(1)

Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court, and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:—

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

[(b) the Chief Controller of Explosives;]

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director [, Deputy Director or Assistant Director] of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government;

[(g) any other Government scientific expert specified, by notification, by the Central Government for this purpose.]

294. No formal proof of certain documents.—(1) *Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for*

the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.

23. Be that as it may, he yet further reiteratedly submits that in terms of Section 294 of the Cr.P.C., provisions whereof becomes extracted hereinabove, since the said report became included in a list and when upon its/their production in Court, at the instance of the learned Public Prosecutor concerned, there was an opportunity vis-a-vis the accused to either admit or deny the genuineness of the said report. Therefore, reiteratedly he submits that since the said opportunity remained unavailed. Contrarily with the learned defence counsel rather permitting the making of an exhibition mark thereons, thereupon in terms of Section 293(4) of the Cr.P.C., the report of the FSL was *per se* readable in evidence.

24. He further reiteratedly submits that thereby yet the link commencing from the date of preparation of recovery memo and upto the drawing of the report remains fully established, thereby the charge drawn against the accused becomes cogently proven, irrespective of existence of the above infirmity relating to the non production of the examined stuff before the Court concerned, for the same then being shown to the prosecution witness or to the expert concerned.

However, for the reasons to be assigned hereinafter the said made argument before this Court by the learned State counsel is not acceptable.

25. Firstly for the reason that though in terms of the Section 293(3) of the Cr.P.C., rather the experts concerned, when proceed to make a report in respect of the subject matter concerned, thereupon the said report is usable as evidence. However, the usability of such report rather is not conclusive proof vis-a-vis the results of the examinations as disclosed therein. The reason for making the said conclusion becomes sparked from the factum, that the coinages “*may be used as evidence in any inquiry, trial or other proceeding under this Code*”, do garner an inference that the said report, but acquires only a presumption of truth, thus is not conclusive proof in respect of the results of the examination, as become echoed thereins.

26. In sequel, the makings of a close analyses of the provisions as embodied in Section 293(2) of the Cr.P.C., leads to the sequel that thereby the learned trial Court becoming empowered to summon and examine the expert concerned, whereupon, the said vested empowerment in the trial Judge concerned, is to be read to be thus bestowing also a leverage vis-a-vis the defence to cross-examine the expert concerned.

27. Moreover, though in terms of Section 293(3) of the Cr.P.C., the expert concerned, may be with the leave of the Court, choose not to make his personal appearance before the learned trial Judge concerned, whereby the learned trial Judge concerned, may permit the responsible officer concerned, so deployed by the author of the report for proving the said apposite report but who is also well conversant with the facts of the case besides can satisfactorily depose in Court on behalf of the expert, who prepared the report.

28. However, yet the recourse to Section 293(3) of the Cr.P.C., but cannot whittle down the conferment of an indefeasible right upon the accused to seek a personal cross-examination being made vis-a-vis the author of the report

concerned, as thereby a full opportunity of fair trial, as envisaged under Article 21 of the Constitution of India, thus would become well preserved vis-a-vis the accused.

29. Necessarily therebys the statutory discretion (supra) as becomes conferred upon the learned trial Judge concerned, thus to summon and examine any such expert as to the subject matter of his report, rather has to be read to be not conferring an idle discretion upon the learned trial Judge concerned. Contrarily, it has to be construed to be injuncting the learned trial Judge concerned, to ensure that he summons the expert, especially when this Court after assigning the directory signification (supra), to the directory coinages “*may be used as evidence in any inquiry, trial or other proceeding under this Code*”, as occur in Section 293 of the Cr.P.C., rather has therebys inferred that the report of an expert only enjoys a presumption of truth. If so, especially when this Court has also made the above inference, that for fully awakening the innate purpose of Article 21 of the Constitution of India, as appertains to the fullest opportunity of fair trial becoming assigned to the accused. Therefore, for facilitating the assigning of the fullest opportunity of fair trial to the accused, therebys the personal appearance of the author of the report, after his being summoned, is but imperative, as only thereafter he can be cross-examined by the defence. Therefore too, the import of the provisions (supra), thus is to forward the mandate of fair trial as enshrined in Article 21 of the Constitution of India, therebys the summoning of the accused is imperative for his being not only examined-in-chief rather for proving the incriminatory report as become drawn by the expert concerned, but also for his being subsequently cross-examined.

30. Be that as it may, though Section 294 of the Cr.P.C., provisions whereof becoming extracted hereinabove, appear to make an injunction upon the learned trial Judge concerned, to vis-a-vis any document which is filed by the

prosecution or by the accused, particulars whereof are included in the list, thus permit respectively the prosecution or the accused, either to admit or deny the genuineness of every such document. Moreover, in the event of the genuineness of any document rather remaining undisputed, thereupon the said document being permissible to be read in evidence in any enquiry, trial of other proceeding as drawn under the Code, but without proof of the signature of the person to whom it purports to be signed. The proviso appended under Section 294(3) of the Cr.P.C., also well empowers the Court to in its discretion require proof of signatures.

31. Since as stated (*supra*), the corner stone of Section 293 of the Cr.P.C., is that, therebys only a rebuttable presumption of truth becoming assigned to a report prepared by the experts detailed in Section 293(4) of the Cr.P.C. Therebys reiteratedly when an opportunity to the accused to lead evidence in rebuttal to the said prepared report, through making cross-examination upon the author concerned, is in consonance with the ordainment occurring in Article 21 of the Constitution of India, thereupons irrespective of no denial being made by the defence counsel at the time of production of the report of the FSL by the Public Prosecutor concerned, but would not relieve the learned trial Judge concerned, vis-a-vis the statutory obligation as enclosed in Section 294 Cr.P.C. Importantly, when the said statutory obligation is cast in a mandatory tone, besides when the said assigning of an overload of mandatoriness to the provisions carried in Section 294 Cr.P.C., becomes well grooved in the mandatory statutory coinage “*shall be called upon to admit or deny the genuineness of each such document*”, as exist in Section 294 Cr.P.C.

32. Though, the learned State counsel has vigorously argued that since the report of the FSL concerned, enclosed in Ex.PJ, thus makes an incriminatory pronouncement vis-a-vis the accused, whereafter he has further submitted that

since the said report was tendered into evidence by the learned Public Prosecutor concerned. Therefore since at the said stage, there was an opportunity to the accused to admit or deny the genuineness of the said report, whereas, the said opportunity remaining unavailed, thereupon when within the domain of Section 294(3) of the Cr.P.C., the FSL report has earlier remain undisputed, as such it was *per se* readable in evidence.

33. In nutshell he argues that the mere tendering into evidence vis-a-vis the report, without the stuff examined being produced in Court, rather is sufficient and clinching proof, in respect of the incriminatory results drawn against the accused, especially when after the tendering of the report by the Public Prosecutor concerned, the accused rather waived for reason (*supra*) or had forgone the opportunity to deny the results of the examination as made.

34. Even the said submission (*supra*), is rudderless, thus on the ground that it has sprung from the learned trial Judge concerned, remaining unawakened in entirety vis-a-vis the innate nuance (*supra*) as become assigned to the above extracted provisions.

35. Since as stated (*supra*), the fine rubric ingraining the provisions comprised in Section 294 Cr.P.C., is to ensure the furtherance of fair trial as envisaged under Article 21 of the Constitution of India, in respect of the charges drawn against the accused. Moreover, if the said would yet happen only after the expert stepping into the witness box, thus for enabling the defence to cross-examine him, qua the processes' engaged by him for making examinations of the stuff enclosed in the sealed cloth parcels, thereby the mere tendering of the report by the Public Prosecution concerned, but would not *ipso facto* prove the charge drawn against the accused. In addition, even if at that stage the defence counsel, did not refute the makings of an exhibit mark thereon, but yet to the

objective insightful mind of this Court, the said purported waiver did not thus, empower the learned trial Judge concerned, to omit to obey the statutory obligation cast upon him, thus contemplated within the domain of the significations as assigned, vis-a-vis the mandatory statutory coinages “*shall be called upon to admit or deny the genuineness of each such document*”. The said statutory coinages do cast a peremptory diktat upon the Court to irrespective of no refutation being made vis-a-vis the apposite report rather by the defence counsel, yet to rather call upon the accused to also either admit or deny the genuineness of the documents.

36. In other words, the said was a solemn duty cast upon the Court. Moreover, the said duty could be said to be well exercised only when the accused was peremptorily called upon to admit or deny the genuineness of the said document. Moreover, the said right is personal to the accused, and, is to be both ensured to be availed as also to be well exercised only by him, unless of course the defence counsel makes a statement that he has instructions to permit the making of an exhibition mark in the instant case.

37. Since at the time of the tendering into evidence of the report of the FSL, to which Ex.PJ is assigned, the learned defence counsel, did make a statement, that he has instructions from the accused to not oppose, the making of an exhibition mark upon the report of the FSL concerned, thereby the learned trial Judge concerned, appears to have derogated from the mandatory statutory obligation cast upon him rather to ensure *qua* the accused appearing before him, thus for admitting or denying the genuineness of apposite report. The said avoidance of performance of duty by the learned trial Judge concerned, has resulted in the accused becoming denied the fullest opportunity to admit or deny the report, and, to also subsequently ask that the expert concerned, be summoned, so that he can then cross-examine him, about the correctness of the

report or vis-a-vis the correctness of the processes engaged into by him for his making an examination of the stuff inside the sealed cloth parcel.

38. Moreover, Section 294(3) of the Cr.P.C., declares that when the genuineness of any document is not disputed, thereupon the said document being readable in evidence but without proof of the signatures of the person to whom it purports to be signed, but with a proviso that the Court may, in its discretion, require such signature to be proved.

39. In aftermath, the statutory right of admission or denial as bestowed in Section 294 of the Cr.P.C., though *prima facie* relates only to the apposite admission/denial covering the genuineness of the signatures of the author of the document concerned, which may be even a report made in terms of Section Section 293(4) of the Cr.P.C., but it does not yet relieve the learned trial Judge concerned, to yet in terms of Section 293(2) of the Cr.P.C., though the coinages therein, are in a directory language, but further ensure the conducting of a fair trial vis-a-vis the accused. The said would occur only if the expert concerned, becoming summoned, as therebys the accused would be permitted to cross-examine the expert concerned, wherebys the right of fair trial would become fully preserved vis-a-vis the accused, the same being a Constitutional right.

40. Emphatically also there is no evidence on record which forthrightly speaks that the said examined contents enclosed in the apposite cloth parcels became returned to the FSL concerned, nor obviously qua the said examined sealed cloth parcels became deposited in the police malkhana concerned. Moreover, the apposite sealed cloth parcels never became produced in Court, for theirs becoming shown to the prosecution witnesses concerned, thus for ensuring the makings of speakings by them, vis-a-vis, the apposite sealed cloth parcels becoming received in the police malkhana and subsequently in Court, thus in an

untampered and unspoiled condition. Since the above did not happen therebys, it appears that the prosecution has withheld a vital incriminatory link comprised in the production in Court of the apposite cloth parcels in respect of whose contents, an incriminatory report comprised, thus in Ex.PJ, thus was made. The suppression or withholding of the above vital link, thus snaps the link *inter se* the recovery being made at the crime site, vis-a-vis the apposite incriminatory opinion being made thereons by the FSL concerned.

41. If so, it appears that the apposite sealed cloth parcels did disappear, wherefrom an inference arises that the incriminatory report made on the stuff inside the cloth parcels concerned, may not be related to the stuff which as a matter of fact, became examined at the FSL concerned, irrespective of the factum, that the residue enclosed in sealed cloth parcels may have travelled in an unspoiled or untampered condition to the FSL concerned. Conspicuously, when the apposite returns of the apposite cloth parcel rather in an unspoiled or untampered condition but was imperative. Consequently, if grave skepticism makes it enrodes vis-a-vis the prosecution case, therebys the vital incriminatory link (*supra*) becomes snapped. Therefore, benefit of doubt is to be given to the accused.

Final Order

42. The result of the above discussion, is that, this Court finds merit in the appeal, and, is constrained to allow it. Consequently, the appeal is allowed. The impugned judgment convicting, and, sentencing the appellant, and, as become recorded by the learned trial Judge concerned, is quashed, and, set aside. The appellant is acquitted of the charge framed against him. The fine amount, if any, deposited by him, be, in accordance with law, refunded to him. The personal, and, surety bonds of the accused shall stand forthwith cancelled, and,

discharged. The case property be dealt with, in accordance with law, but after the expiry of the period of limitation for the filing of an appeal. The appellant, if in custody, and, if not required in any other case, be forthwith set at liberty. Release warrants be prepared accordingly.

43. Case property, if any, be dealt with in accordance with law, but only after the expiry of the period of limitation for the filing of an appeal.
44. Records be sent down forthwith.

(SURESHWAR THAKUR)
JUDGE

09.09.2024

(SUDEEPTI SHARMA)
JUDGE

Ithlesh

Whether speaking/reasoned:-	Yes/No
Whether reportable:	Yes/No