

Union Territory Of Jammu And Kashmir vs Farman Ali on 3 January, 2025

Author: Sanjeev Kumar

Bench: Sanjeev Kumar

1

IN HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU
CrLA (AD) No. 42/2022

Reserved on : 08.11.2024

Pronounced on: 03.01.2025

Union Territory of Jammu and Kashmir ...Appellant
through Station House Officer, Police Station
Kathua.
Through: Mr. Ravinder Gupta, AAG.

Vs.

1. Farman Ali ...Respondent(s)
S/O Bari Din
R/O Bhaideen Pattan, Tehsil and
District Kathua.
2. Johnson Alias Raki
S/O. Bodh Raj
R/O. Ward No. 10, District Kathua.
Through: Mr. Arun Dev Singh, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE MOHD YOUSUF WANI, JUDGE.

JUDGMENT

Mohd Yousuf Wani -J

01. Delay condoned and leave to file appeal granted vide Order dated 11 th October, 2022.

02. Impugned in the instant appeal filed by the Union Territory of Jammu and Kashmir is the judgment of acquittal dated 8th October, 20015, passed by the court of learned Additional Sessions Judge, Kathua, [hereinafter referred to as the "trial court" for short] while culminating trial on a criminal case bearing FIR No. 413/2013 of P/S Kathua, and titled as State vs. Farman Ali and Anr bearing File No. 31/Session instituted on 4th January, 2014.

3. The impugned judgment has been assailed by the appellant-Union Territory of J&K on the main grounds that case FIR No. 413/2013 came to be registered with the Police Station, Kathua, pursuant to the recovery of 10,000 capsules of SPM-PRX from the respondents/accused [6000 capsules from R-1 and 4000 capsules from R-2] on 5th November, 2013 at 5:30 P.M., when they came to be apprehended by a Police Patrolling Party of Police Post Industrial Estate, Kathua, who failed to account for the possession of the same. That the seizure and sampling of the recovered contraband substance was done as per the procedure and the statements of the witnesses also came to be recorded. That the commission of offences punishable under Sections 8/21/22 of Narcotic Drugs and Psychotropic Substances Act, 1985, [hereinafter referred to as "the NDPS Act" for short] came to be established against the respondents during the investigation which led to the presentation of the final report/challan before the learned trial court. That the witnesses examined by prosecution at the trial proved the recovery and seizure of the contraband substance against the respondents, but the learned trial court did not appreciate and weigh the prosecution evidence in the right perspective. That the learned trial court has given weightage to some minor contradictions and has brushed aside the evidence adduced at the trial by the prosecution. That the learned trial court has mis-appreciated the law with respect to routine search and applicability of Sections 42 and 50 of the NDPS Act and the evidence on record. That there is enough evidence on record which warrants conviction and sentence of respondents/accused for commission of the offences under Section 8/21/22 of the NDPS Act.

4. The facts of the prosecution case, which are relevant for the disposal of this appeal, are that on 5th November, 2013, at 5:30 P.M., a police party of Police Post, Industrial Estate, Kathua, comprising of Head Constable Daleep Singh No. 526, Constable Manjeeb Kumar, Constable Naseeb Chand and SPO Ajay Kumar No. 1355, while being on patrolling and upon reaching at Magger Khad witnessed two persons coming from Punjab side who were carrying bag and packet in their hands. That both the persons upon seeing the police party tried to escape under suspicious circumstances, but the police party chased and caught hold of them. That they disclosed their names as Farhan Ali S/O Bari Din R/O Bhaideen Pattan, Tehsil and District Kathua and Johnson Alias Raki S/O. Bodh Raj R/O. Ward No. 10, District Kathua (the respondents/accused). That upon search, 6000 capsules of SPM-PRX came to be recovered from the bag carried by the respondent no. 1 when 4000 of such capsules came to be recovered from the polythene packet that was carried by the respondent no. 2 in his hand. That the respondents failed to account for those capsules which they had illegally brought from Punjab for sale in the Kathua town. That a docket was prepared on the spot and sent through Constable Manjeeb Kumar to the Police Station, Kathua, for registration of the FIR. That FIR No. 413/2013 came to be registered with the Police Station, Kathua, against the respondents in respect of the incident. That the investigation in the case was entrusted to SI Rajesh Gautam, the then Officer Incharge of Police Post, Industrial Estate, Hatli. That the Investigating Officer reached on spot and prepared the site plan. That the Investigating Officer also brought into the formal seizure the contraband capsules that had been recovered from the respondents. That 20 capsules from each i.e., bag and packet were separately packed and sealed for FSL opinion with a finger ring impression. That the capsules, seized from the possession of the respondent no. 1, were marked as 'A' & 'A1', when the capsules seized from the respondent no. 2 were, accordingly, marked as 'B' and 'B1'. That the statements of witnesses in terms of Section 161 of the Jammu and Kashmir Code of Criminal Procedure SVT 1908, [already repealed and replaced but applicable in the case and

hereinafter referred to as "the Code"] came to be recorded. That the separately packed and sealed 20 number of capsules from each of the bag and the packet were got resealed through Executive Magistrate 1st Class. That the samples were then deposited under the authority letter of the Executive Magistrate with FSL, Jammu, against the receipt dated 9th November, 2013 for opinion. That during investigation of the case, the Investigating Officer, having regard to the recovery and seizure of contraband capsules and the statements of witnesses recorded, was satisfied that the respondents had brought the contraband capsules from Punjab for sale thereof to the young generation in Kathua town. That the total weight of the recovered capsules was found 6 Kg and 70 Gms, thus, falling within the commercial quantity. That the investigation of the case was concluded in the form of challan/final report that came to be presented before the learned trial court.

5. The perusal of the record of the file reveals that the learned trial court vide its order dated 15th January, 2014 framed formal charges against the respondents under Sections 8/21/22 of NDPS Act, who pleaded not guilty and, accordingly, the prosecution was directed to lead evidence in support of its case. The prosecution at the trial produced and examined eight witnesses i.e., PWs' 1 to 7 and 9. After closure of the prosecution evidence, the statements of the respondents under Section 342 of the Code came to be recorded by the learned trial court on 2 nd February, 2015. The learned trial court after finding that a case of "No Evidence" is not made out in the circumstances of the case, directed the respondents to produce witnesses in their defense, if they so choose. The accused persons placed on record some Newspaper cuttings by way of documentary evidence, but did not opt to lead any direct evidence in their defense.

6. We have heard learned counsel for both the parties.

7. The learned counsel appearing for the Union Territory submitted that a prima facie case is made out for setting aside of judgment of acquittal and for conviction and sentence of the respondents as the recovery and seizure of 10000 capsules of spasmo proxyvon containing tramadol - a psychotropic substances as a constituent was fully proved at the trial through the cogent evidence of PWs' 1 to 7 and 9 examined at the trial. He argued that the learned trial court has not appreciated the prosecution evidence in the correct perspective and has rather given undue weightage to some minor contradictions. That the respondents/accused failed to account for the possession of seized quantity of the spasmo proxyvon capsules containing tramadol and, as such, the provisions of Sections 35 and 54 of NDPS Act which respectively impute the presumption of culpable mental state and the commission of offences against the accused, are attracted fully in the case.

The learned counsel for the appellant very vehemently contended that the respondents failed to account for the huge quantity of the spasmo proxyvon capsules and did not lead any evidence in their defence despite being offered by the learned trial court to rebut the presumption. He further contended that all the material particulars of the prosecution case especially the recovery, seizure and sampling of the contraband substances were fully established at the trial through the evidence of PWs' 1 to 7 and 9.

8. Per contra, the learned counsel for the respondents submitted that the prosecution has miserably failed at the trial to prove the guilt of the respondents at all and not to speak of beyond any shadow

of doubt. He submitted that the respondents were falsely and frivolously implicated in case FIR by the police concerned who had previously in the late September seized some contraband substance in the area of its jurisdiction and had to account for the arrest of the persons involved in the same before the public. He submitted that there are fatal contradictions in the prosecution case as regards the material particulars which give lie to the prosecution case. The learned counsel submitted that the prosecution witnesses themselves have brought on record fatal contradictions as regards the time of occurrence, the sending of the docket from the spot for registration of FIR and the author of recording of statements and other memos on spot. He contended that the manner, in which, the case was dealt with in the name of investigation, presents an astonishing situation. The learned counsel further contended that the police concerned had some days before the alleged incident, stacked to have seized a huge quantity of narcotic drugs from some place within its jurisdiction and to justify its success in nabbing the guilty persons, conceived a drama in the form of the prosecution case. He contended that the police concerned had got the photos of the respondents published in the Newspaper as the guilty persons. He contended that the respondents were arrested on the incident day from their homes and nothing was recovered from them as alleged.

The learned defense counsel further contended that the appellant cannot avail the advantage of presumptions under Sections 35 and 54 of the NDPS Act because of the failure of the prosecution to prove the foundational facts of its case at the trial. He further contended that NDPS Act provides for severe punishment for the offences under the Act and, as such, at the same time has provided for the necessary safeguards in the shape of mandatory procedural requirements to be followed during the investigation of the case. The proof needed in the cases under NDPS Act should be of high standard. Accordingly, the learned counsel for the respondents prayed for dismissal of the appeal.

9. We have perused the record of the instant appeal especially the impugned judgment. We have also accorded an in-depth consideration to the rival arguments advanced on both the sides.

10. Keeping in view the aforementioned perusal and consideration in the light of law on the subject, we are of the considered opinion that the impugned judgment of acquittal does not suffer from any illegality or perversity.

11. It is an accepted principle of Criminal Jurisprudence that an accused person is presumed to be innocent till he is proved guilty and the burden of proving everything essential to establish of his/her guilt lies on the prosecution/State. There must be a clear and unequivocal proof of, 'corpus delicti'. The prosecution should stand or fall on its own legs and it cannot derive any benefit from the weaknesses of the defense. Suspicion however, strong cannot take the place of legal proof. There lies a long mental distance between "may be true" and "must be true". The vital distinction between conjectures and sure conclusions needs to be maintained in criminal trials.

12. The prosecution at the trial of the case examined eight witnesses i.e., PWs' 1 to 7 and 9. There appear fatal discrepancies and contradictions in the statements of the prosecution witnesses examined at the trial in respect of material particulars of the case especially with regard to time of occurrence, recovery and seizure of contraband substance, manner of investigation, resealing, sampling and recording of statements of the witnesses during the investigation. The investigation in

the case appears to have been conducted in a casual and cavalier manner while observing the mandatory provisions of the NDPS Act in breach.

13. The first and foremost flaw and contradiction in the prosecution case is as regards the time of occurrence. Head constable, Daleep Singh, who happens to be the Incharge of the Patrolling Party, as per the prosecution case, has deposed at the trial that the occurrence took place at 5:30 A.M. He has further, inter alia, deposed in his statement at the trial that it was a morning time and movement of people was less. This Court is conscious of the fact that sometimes there can be an inadvertent mistake in suffixing A.M. instead of P.M. to a particular hour of the day. The PW-1 Daleep Singh being a very important witness from prosecution pointed view as being the head of the Patrolling party and the complainant in the case, by further deposing in his statement at the trial that "it was a morning time and movement of the people was less" has clearly mentioned that the occurrence took place at 5:30 A.M. (Morning). The further witnesses, however, deposed at the trial during their statements that occurrence took place at 5:30 P.M. The case of the prosecution is that incident took place in the evening hour at 5 :30 P.M. The statement of PW Head constable Daleep Singh to the effect that the occurrence took place at 5:30 A.M. with further clear explanation by referring to morning time, makes the prosecution story highly doubtful and justifies probability of the prosecution case being fabricated as alleged by the defense.

14. The statement of PW-1, Head Constable Daleep Singh has also given rise to a fatal contradiction in respect of author of the docket which is alleged to have been written and sent from the spot through Constable Manjeeb Kumar. The said Head Constable Daleep Singh in his statement at the trial, inter alia, deposed that he prepared a docket and sent the same to the Police Station Kathua through Constable Majeed Kumar for registration of FIR. The same important witness in another breath in his statement says that ASI Sher Ali wrote the docket who reached on spot after he informed the Incharge Police Post telephonically. The said witness also deposed that seizure memo and other documents were also prepared by the said Sher Ali, who was the Munshi of the Police Post concerned and not the Investigating Officer. He further deposed that it is true that all the papers have been written by Sher Ali.

15. PW-Naseeb Chand gave a contradictory statement by, inter alia, deposing at the trial that the ASI Sher Ali was posted at Police Post but he was not seen on the spot. He further deposed that it is not known to him that all the seizure memos were prepared by Sher Ali. He deposed that seizure memo was prepared by Rajesh Gautam, ASI.

16. PW-Kuldeep Kumar in his statement at the trail , inter alia, deposed that Officer Incharge of the Police Post, Hartli, namely, Rajesh Gautam handed over to him two packets containing samples of SPM-PRX bearing Mark 'A' and 'B' along with a letter for taking the same to FSL Jammu, who, accordingly, deposited the packets at FSL Jammu against the receipt.

17. PW-6, Baldev Singh, inter alia, deposed in his cross examination, at the trial that he was posted as Moharer at Police Post, Industrial Estate, Hatli Morh, Kathua, under Sh Rajesh Gautam as Officer Incharge of the Police Post. That the Officer Incharge of the Police Post handed over four sealed packets to him on 5th November, 2013 at 8:30 P.M. and, accordingly, the entry was made in the

Register. That the same was kept for safe custody in the Malkahana on 7th November, 2013, on the instructions of the Officer Incharge of the post. He further deposed that the sealed packets were handed over to Head Constable Mohd Saleem No. 642 for purpose of resealing, who was deputed to the office of Tehsildar Executive Magistrate 1st Class. The said HC Mohd Saleem informed on the same day that the packets were not resealed on the said day. The witness further deposed at the trial that on 8th November, 2013, those packets were handed over to Mohinder Singh Head Constable for the purpose of resealing through Executive Magistrate 1st Class which were got resealed and a letter was sent to FSL along with the sample through Kuldeeps Kumar ASI.

18. PW- Jai Singh also examined at the trial by the prosecution, inter alia, deposed that he was posted as Naib Tehsildar, Kathua, and SI Rajesh Kotwal of Police Post, Hatli brought two packets bearing Mark 'A' and 'B' and he sealed both the packets by putting two seals on the said marked packets besides keeping a seal impression on a separate paper under his attestation. He further deposed that he does not know what was inside the sealed packets.

PW-Baldev Singh and the Jai Singh have given lie to the prosecution version of the case to the effect that sampling was done as per the procedure. PW-6, Baldev Singh says at the trial that firstly Mohd Saleem was handed over the sealed sample packets for taking the same to the Executive Magistrate Office i.e. PW-7 who brings back the samples on the same day and thereafter Head Constable Mohinder Singh, takes the said sample packets on 8th November, 2013 to the office of the PW-7 and gets the same sealed.

19. PW-7, Executive Magistrate has himself deposed at the trial that he impressed his seal on the sample packet without knowing as to what was inside them.

Thus, it is clear from the prosecution case that the sampling of the seized psychotropic substances i.e., spasma proxyvon tablets was not done as per the procedure. The same is a fatal flaw in the prosecution version of the case.

It is an admitted case of the prosecution that 20 numbers of capsules were taken from each the bag and packet and sealed in separate plandas bearing Mark 'A' and 'B'. It was none of the job of even the Investigating Officer to separately seize and pack some of the recovered quantity for sampling purpose. As per the procedure, the seized material, as a whole, was to be taken before a Magistrate and it was his affair to reopen the seized material and take the sample from the same and then to reseat the packets separately.

PW-7, Jai Singh, Executive Magistrate, Kathua has deposed that SI, Rajesh Kotwal of Police Post, Hatli brought two packets bearing Mark 'A' & 'B' before him for sampling purpose. However, his statement to that effect is nullified by the PW-6 Baldev Singh, who deposed that the sample packets A&B were first handed over to HC Mohd Saleem and then to HC Mohinder Singh for being taken before the PW-7, Jai Singh.

Any way it has been proved at the trial that the Investigating Officer PW-9 Rajesh Gotam SI did not personally take the packets A & B before the PW-7 Jai Singh for sampling purpose. It is equally

astonishing that PW-7 Jai Singh deposed at the trial that two packets bearing Mark 'A' and 'B' were brought before him, who without opening the same impressed his seal thereon and also impressed the same seal on a separate paper under his attestation. This destroys the whole prosecution case.

20. Sampling and resealing of the seized narcotic drugs or psychotropic substances or of some manufacture drug containing the aforesaid drug/substances in mixture is an important step/phase in the investigation process in NDPS cases. It is not appropriate even for the Investigating Officer to separately seize some quantity of the recovered drug/substances as sample but the proper procedure is that the Investigating Officer has to seize the recovered drug/substances or the manufactured drug containing the aforesaid substances in one pack/palanda or more packs/palandas having regard to the quantity of the recovered contraband and to produce the same before a competent officer especially an Executive Magistrate for sampling purpose who shall break the packets /palandas in comparison of the relevant memos and then to take the sample there from and thereafter reseal back all the packets under his seal and signature. As per the provisions of Section 52 and 52-A of the NDPS Act, once any contraband is seized, it shall be immediately produced before the competent Magistrate for disposal and sampling. There cannot be two provisions for drawing of samples, one, whether the Investigating Officer draws the samples on spot and the other one taken in presence of the Magistrate.

21. The law relating to the seizure and sampling of the narcotic drugs and psychotropic substances is provided under Section 52 A of the NDPS Act. It is profitable to reproduce the Section 52-A of the NDPS Act for ready reference.

"Section 52A. Disposal of seized narcotic drugs and psychotropic substances.-- (1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances] or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled

substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

22. The Hon'ble Supreme Court in Union of India vs. Mohan Lal and Anr (2016) 3 Supreme Court Cases 379, inter alia, discussed the law as regards the seizure and sampling of the narcotic drugs and psychotropic substances.

It is felt appropriate to reproduce the paras 15, 16, 17 and 18 of the Judgment for the sake of convenience.

"15. It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the

correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

The Hon'ble Apex Court has followed the law laid down in Mohan Lal's case supra in Mangilal Vs. the State of Madhya Pradesh (2023 Live Law (SC) 549 and Yusuf @ Asif vs. State 2023 Live Law (SC) 890.

23. In the case in hand, what appears to have been done in the name of sampling, is that firstly, 20 capsules taken from each of the bag and packet recovered from the respondents, were seized in two packets marked as 'A' & 'B' as being samples. Secondly, the said packets bearing Mark A & B are reported to have been presented before the Executive Magistrate by some police personnel not being the Investigating Officer of the case and the concerned Magistrate, as per the prosecution case itself simply affixed his seal on the said marked packets without reopening the same, enlisting the samples and certifying the correctness of the same. The said procedure appears to have been adopted in violation of the provisions of Section 52- A of the NDPS Act.

24. PW-9, Rajesh Gautam, SI, inter alia, deposed at the trial that site plan and search memo were got prepared through his Munshi. He also deposed that firstly he sent HC Mohd Saleem then HC Mohinder Singh for sampling of the seized material and then letter was obtained from the DSP on 9 th November, 2013. No memo or any letter of the Executive Magistrate concerned was either referred to or proved at the trial of the case in respect of sampling.

25. It was established at the trial that undue and unexplained delay has been occasioned in sending the samples to the laboratory for expert opinion. It is a settled legal position that undue and

unexplained delay in sending the samples to the FSL doubts the genuineness of the prosecution case. As per the standing instructions issued under No. 1/88 dated 15 th March, 1988, by the Narcotic Control Bureau New Delhi, the sample is needed to be sent to the FSL either through insured post or through a special messenger at an earliest and latest within 72 hours of the seizure.

26. No independent civilian witness has been associated with the occurrence. The mandatory provisions under Sections 52 and 57 of the NDPS Act which were applicable to the case have been observed in breach. As per the mandatory provisions of Section 52 (1) read with Section 43 of the Act, the respondents/accused were needed to be informed of the grounds of their arrest which has not been done. The report regarding the arrest of the respondents and the seizure of the alleged psychotropic substance from them which was needed to be sent to the immediate superior officer by the SHO, Rajouri within 48 hours as per the Section 57 of the Act, has also not been so sent in the case. The non-compliance of the mandatory requirements as per the provisions of Sections 52 and 57 of the Act, in the facts and circumstances of the case doubts the genuineness of the prosecution version of the case. The provisions which stand incorporated under sections 52 (1) and 57 of the Act to be followed after search and arrest of the accused are mandatory in character. The reason is that the right to be informed about the grounds of arrest guaranteed by section 52 (1) and the requirement regarding making of full report regarding arrest and seizure to the immediate superior officer within 48 hours under section 57 of the Act confer a valuable right on the accused. When informed about the grounds of arrest at the earliest, the accused becomes aware at the very outset about the probable charge against him, so as to allow him to prepare his defense. Similarly the provisions requiring the person making arrest and seizure to make a full report to his immediate superior within 48 hours, brings into existence a document which can be used for the purpose of cross-examination in defense. The making of reports within 72 hours as per the provisions of section 42 (2) and within 48 hours as per section 57 respectively will also bring to an end the possibility of antedating or improving the prosecution case/version. The non-compliance of the mandatory provisions of Sections 52 and 57 of the Act would be an infirmity bound to reflect on the credibility of the prosecution.

27. It is very needful to mention that PW-9 Rajesh Gautam deposed in his examination at the trial that on 5th November, 2013, he received the copy of FIR from Police Station Kathuaat 7: 00 P.M., whereafter he left for the spot. The other witness have also given the account of the proceedings in terms of the time prior to 7:00 P.M. which leads to an inference that the investigation in the case was started prior to the registration of the FIR.

28. In the light of the total failure of the prosecution to prove the seizure of the alleged drug containing tramadol a psychotropic substance, as a constituent through cogent, uncontradictory, and trustworthy evidence, the presumptions under Sections 35 and 45 of the Act loose significance.

The presumption under Sections 35 and 54 of the Act is never absolute but rebuttable presumption. The initial burden is always on the prosecution to establish a prima facie case against the accused, only where after burden will shift to the accused.

Admittedly section 54 of the Act provides for a reversal burden of proof upon accused, contrary to normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This however, does not dispense with the requirement of the prosecution to establish a prima facie case in the backdrop of sufficient, cogent and clear evidence with observance of mandatory provisions under sections 42, 50, 52 and 57 of the Act, where after the accused has to be called to account for his possession. The provisions of sections 35 and 54 of the Act are in the form of an additional advantage to the prosecution and the factum of alleged possession does not ipso facto make the accused liable.

The Investigating agency can take the benefit of presumptions under sections 35 and 54 of the Act, for finalization of the investigation process, and even for purposes of bail, the prosecution can rely upon the said presumptive provisions. But for the purposes of the trial, the accused can be called to account for his alleged possession of the narcotic drugs as being, "not conscious" only after the prosecution proves the foundational facts of its case beyond any doubt.

The extent of the applicability and the relevance of the presumptions under sections 35 and 54 of the Act came for consideration before the Hon'ble Supreme Court in "Noor Aga vs. State of Punjab and anr (2008) 16 SCC 417" decided on 9th July, 2008. It is appropriate to reproduce the relevant extracts from the judgment as under:-

"18.The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., 'proof beyond all reasonable doubt' would be more onerous.

Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt..."

The law laid down in Noor Aga case (supra) was again followed by the Hon'ble Apex Court in "Mohan Lal v. State of Rajasthan (2015) 6 Supreme Court Cases 222 and Bawindar Singh (Binda), appellant vs. Narcotics Control Bureau, respondent with Satnam Singh, appellant vs. Narcotics Control Bureau, 2023 SCC online SC 1213.

Balwinder Singh (Binda) vs. Narcotics Control Bureau" cited (supra) was decided by a three-judge bench of the Hon'ble Apex Court. It is also felt appropriate to reproduce the relevant paras of the judgment for "30. We may first test on the anvil of certain law, the plea taken by learned counsel for the appellant-Satnam Singh that the prosecution has failed to establish a prima facie case against the accused and therefore, the burden of proving his innocence did not shift back to him. In the case of Noor Aga 38 (supra), a two- Judges Bench of this Court was required to decide several questions, including the constitutional validity of the NDPS Act and the standard and extent of burden of proof on the prosecution vis-à-vis the accused. After an extensive discussion, this Court upheld the constitutional validity of the provisions 10 of Sections 35 and 54 of the NDPS Act 43 , but went on to hold that since the provisions of the NDPS Act and the punishments prescribed therein are stringent, the extent of burden to prove the foundational facts cast on the prosecution, would have to be more onerous. The view taken was that courts would have to undertake a heightened scrutiny test and satisfy itself of "proof beyond all reasonable doubt". Emphasis was laid on the well-settled principle of criminal jurisprudence that more serious the offence, the stricter would be the degree of proof and a higher degree of assurance would be necessary to convict an accused. [Also refer:

State of Punjab v. Baldev Singh 44, Ritesh Chakarvarti v. State of M.P.45 and Bhola Singh39 (supra)].

31. Thus, it can be seen that the initial burden is cast on the prosecution to establish the essential factors on which its case is premised. After the prosecution discharges the said burden, the onus shifts to the accused to prove his innocence. However, the standard of proof required for the accused to prove his innocence, is not pegged as high as expected of the prosecution.

In the words of Justice Sinha, who speaking for the Bench in Noor Aga38 (supra), had observed that:

58.....Whereas the standard of proof required proving the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established."

32. The essence of the discussion in the captioned case was that for attracting the provisions of Section 54 of the NDPS Act, it is essential for the prosecution to establish the element of possession of contraband by the accused for the burden to shift to the accused to prove his innocence. This aspect of possession of the contraband has to be proved by the prosecution beyond reasonable doubt."

29. In the backdrop, we are of the considered view that the learned trial court has rightly appreciated the law as also the evidence while passing the impugned judgment. The opinion of the learned trial court to the effect that prosecution has failed at the trial to establish the guilt of the accused i.e., respondents beyond any shadow of doubt, does not call for any interference. There accordingly, does not appear to be any illegality with the impugned judgment. The instant appeal, as such, is dismissed as meritless.

30. Before parting, we with deep concern feel it inevitable to point out that "illicit traffic" in relation to Narcotic Drugs and Psychotropic Substances is on the alarming increase, which has led to drug addiction among a sizable section of the public, particularly the adolescents and students of both the sexes. The menace has assumed serious and alarming dimensions in the recent years. Drug addiction has been eating vitals of the society.

Every day we hear about the seizure of Narcotic Drugs and Psychotropic Substances especially from the youth. It is shocking that most factual and genuine cases in relation to offences under NDPS Act end in acquittals mainly on account of casual, cavalier, unfair, faulty and non-scientific investigations. The mandatory provisions under NDPS Act are being taken casual and observed in breach. Casual, unfair and non-scientific investigations in NDPS cases is uncalled for. A larger Bench of the Hon'ble Apex Court in case Hira Singh and Anr. Vs. Union of India and Anr., AIR 2020 SC 3255, decided on 12.04.2020 inter-alia observed:-

" 8.5. The problem of drug addicts is international and the mafia is working throughout the world. It is a crime against the society and it has to be dealt with iron hands. Use of drugs by the young people in India has increased. The drugs are being used for weakening of the nation. During the British regime control was kept on the traffic of dangerous drugs by enforcing the Opium Act, 1857, the Opium Act, 1875 and the Dangerous Drugs Act, 1930. However, with the passage of time and the development in the field of illicit drug traffic and during abuse at national and international level, many deficiencies in the existing laws have come to notice. Therefore, in order to remove such deficiencies and difficulties, there was urgent need for the enactment of a comprehensive legislation on Narcotic Drugs and Psychotropic Substances, which led to enactment of NDPS Act. As observed herein above, the Act is a special law and has a laudable purpose to serve and is intended to combat the menace otherwise bent upon destroying the public health and national health. The guilty must be in and the innocent ones must be out. The punishment part in drug trafficking is an important one but its preventive part is more important.

Therefore, prevention of illicit traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 came to be introduced. The aim was to prevent illicit traffic rather than punish after the offence was committed. Therefore, the Courts will have to safeguard the life and liberty of the innocent persons. The provisions of NDPS Act are required to be interpreted keeping in mind the object and purpose of NDPS Act; impact on the society as a whole and the Act is required to be interpreted literally and not liberally which may ultimately frustrate the object, purpose and preamble of the Act. Therefore, the interpretation of the relevant provisions of the statute canvassed on behalf of the accused and the intervener that quantity of neutral substance (s) is not to be taken into consideration and it is only actual content of the weight of the offending drug, which is relevant for the purpose of determining whether it would constitute "small quantity or commercial quantity", cannot be accepted".

31.All the concerned agencies viz Central Excise, Narcotics, Customs, Revenue Intelligence and Police are expected to rise to the occasion and investigate the Narcotic cases with utmost responsibility and fairness. In Union of India Vs. Ram Samujh and Ors., 1999 (9) SC 429, it was inter- alia observed by the Hon'ble Apex Court:-

"it should be borne in mind that in a murder case, the accused commits murder of one or two persons while those persons who are dealing in Narcotic Drugs are instrumental in causing death or in inflicting death blow to a number of innocent young victims who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are hazard to the society even if they are released, temporarily in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved".

It is equally surprising that investigations in NDPS cases are most often being entrusted to incompetent officers. As per the provisions of the Section 175 of BNSS read with Section 53 of the NDPS Act, an officer In- charge of a Police Station can investigate the offences under the NDPS Act. So a case under the NDPS Act cannot be investigated by a police officer below the rank of a Sub Inspector. A Division Bench of this Court has already in PIL No. 05/2013 titled as "Court on its Own Motion" Vs. State of J&K and Others (Jammu Wing) passed a series of directions to ensure that, in NDPS cases, the investigation is conducted in a proper and professional manner by adhering to the mandatory provisions of the Act. The Central and State/UT Governments, as such, need to authorize the experienced and competent officers of Central Excise, Narcotics, Customs, Revenue Intelligence, Police etc to exercise powers under Sections 41, 42 and 43 etc of the NDPS Act. A casual approach of the Investigating agencies in the matter of the investigation in NDPS cases creates a sense of insecurity and undermines the faith of the common man in the administration of the criminal justice.

32.We, however, appreciate the efforts of the Government of Jammu and Kashmir Home Department, Civil Secretariat, Srinagar, in issuing the Circular No. 02-Home of 2017 dated 25.09.2017 prescribing the Standard Operating Procedure(s) to be followed in NDPS cases and

expect that same shall be pressed into service.

33. Disposed of.

(Mohd. Yousuf Wani)
Judge

(Sanjeev)

JAMMU:
03.01.2025
"Shamim Dar"

Whether the Judgment is reportable? Yes/No