

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 13.02.2025
Pronounced on: 01.03.2025

CrlA(S) No.06/2024

ABDUL HAMID BHAT

...APPELLANT(S)

Through: - Mr. Zahid Hussain Dar, Advocate, with
Mr. Bhat Shafi, Advocate.

Vs.

UT OF J&K

...RESPONDENT(S)

Through: - Mr. Syed Musaib, Dy. AG.

CORAM:HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The present appeal is directed against judgment dated 18.03.2024 passed by the learned Principal Sessions Judge, Pulwama (hereinafter referred to as "the trial court"), whereby the appellant has been convicted of offence under Section 20 of NDPS Act in a case arising out of FIR No.42/2018 for offences under Section 8/20 of NDPS Act registered with Police Station, Kakapora Pulwama. Challenge has also been thrown to order 25.03.2024 passed by the learned trial court, whereby the appellant has been sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1.00 lac for having committed the aforesaid offence. In default of payment of

fine, the appellant has been directed to undergo simple imprisonment for a further period of three months.

2) As per prosecution case, on 07.08.2018, an information was received in Police Station, Kakapora, from reliable sources that the appellant/accused has concealed a large quantity of contraband substance, namely, Cannabis leaves, in his residential house located at Village Lelhar and that the appellant indulges in illicit trade of the said contraband substance, as a result of which youth of the area have fallen prey to the drug addiction and the people of the area are agitated about it.

3) On the basis of the aforesaid information, FIR No.42/2018 (EXTP-11) for offences under Section 8/20 of NDPS Act came to be registered in P/S Kakapora and the SHO, PW 11 Inspector Sarjan Ahmad, requested the Dy. SP, PW 5 Farooq Ahmad, to proceed on spot. Thereafter PW 11, Inspector Sarjan Ahmad, along with escort comprising PW1 Constable Shameem Ahmad, PW2 Constable Mushtaq Ahmad, PW3 Constable Aijaz Ahmad, PW4 Constable Abdul Hameed, PW7 ASI Nisar Ahmad and other police officials, whose belt numbers are mentioned in the FIR but they have not been cited as witnesses, proceeded on spot. Upon search of the residential house of the appellant that was carried out under the supervision of Dy.SP PW 5 Farooq

Ahmad, nine sacks containing Cannabis leaves and one sack containing powdered charas, were recovered. The recovered contraband substance was weighed on spot and the weight of nine bags containing Cannabis leaves was found to be 104.400 kgs whereas the weight of the bag containing powdered charas was found to be 1.200 kgs.

4) The recovered contraband substances were seized and sealed on spot in presence of the witnesses and on the next day, the same were produced before the Executive Magistrate, Kakapora, in whose presence 300 grams of sample from each of the nine sacks of Cannabis leaves were drawn and these were marked as A1, B1, C1, D1, E1, F1, G1, H1 and I1. 200 grams of sample was drawn from the sack containing powdered charas and the same was marked as J1. The samples were sealed and the remaining material was resealed by the Executive Magistrate and handed over to the police for safe custody. It is further case of the prosecution that the samples were sent to FSL, Srinagar, for chemical examination and upon receipt of the report of the FSL, it was found that nine samples drawn from the sacks containing Cannabis leaves were identified as Ganja plant material of cannabis whereas charas was detected in the sample drawn from the sack containing powdered charas. The appellant/accused was arrested on

21.07.2019 and upon completion of investigation of the case, he was found to have committed the offences under Section 8/20 of NDPS Act. Accordingly, the challan was laid before the learned trial court on 21.09.2019.

5) Vide order dated 14.10.2019, charge for offence under Section 8/20 of NDPS Act was framed against the appellant/accused and his plea was recorded. The appellant denied the charges and claimed to be tried. Accordingly, prosecution was directed to lead evidence in support of the charges. The prosecution, in order to prove the charges, examined all the twelve witnesses cited in the challan, whereafter statement of the appellant/accused under Section 313 of Cr. P. C was recorded. In his statement under Section 313 of Cr. P. C, the appellant has, besides taking legal pleas pinpointing the loopholes in the prosecution case, stated that he has been falsely implicated in the case. The appellant, however, did not lead any evidence in defence and, accordingly, the case was set down for hearing.

6) The learned trial court, after hearing the parties and upon appreciation of evidence on record, came to the conclusion that the charge against the appellant/accused stands proved beyond reasonable doubt and, accordingly,

vide the impugned judgment, he has been convicted of offence under Section 20 of the NDPS Act.

7) The appellant has challenged the impugned judgment of conviction and the order of sentence on the grounds that the learned trial court has not appreciated the evidence on record in its correct perspective. It has been contended that in the instant case, there has been breach of mandatory provisions of Section 42 of the NDPS Act, inasmuch as PW 11, Inspector Sarjan Ahmad, has neither recorded information in writing nor did he forward the said information to his superior officer. It has been further contended that there are serious contradictions in the statements of the prosecution witnesses as regards the place of sealing of the recovered contraband and besides this, there are other material contradictions in the statements of the prosecution witnesses. It has also been contended that there is no evidence on record to show that the samples have remained in safe custody during the period between their sealing and their receipt by the FSL where they have reached after 21 days of the sealing. It has been contended that independent witnesses were not associated in the process of raid though as per the evidence on record, they were available on spot. It has been contended that the complainant and the Investigating

Officer is one and the same person and it has cast a doubt on the fairness of investigation. It has also been contended that none of the prosecution witnesses was able to identify the seized contraband that was produced before the court during the trial of the case.

8) I have heard learned counsel for the appellant and learned Dy.AG appearing for the respondents. I have also gone through the grounds of challenge, the trial court record and the evidence produced before the trial court.

9) As already noted, the charge against the appellant/accused is that on 07.10.2018, the police party, upon receipt of information, reached his house located at Village Lelhar and recovered nine sacks contained 104.400 kgs of Cannabis leaves and one sack containing 1.200 kgs of powdered charas. The first contention that has been raised by the appellant for impugning the judgment of conviction is that the requirements of Section 42 of the NDPS Act have not been adhered to by PW 11 Sarjan Ahmad as he has neither recorded any information in writing nor did he forward the information to his superior officer.

10) Before determining the merits of the aforesaid contention of the appellant with reference to the facts that

have been proved from the evidence on record, it would be apt to understand as to what is the purport of Section 42 of the NDPS Act. For the said purpose, the provisions contained in Sections 41 and 42 of the NDPS Act are required to be noticed. The same read as under:

41. Power to issue warrant and authorization.—(1) A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under this Act, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe 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:

(2) Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the para-military forces or the armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer 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 in writing that any person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence 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 place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting under section 42.

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.

11) From a perusal of the provisions contained in Section 41 of the Act, it comes to the fore that under sub-section (1), a Magistrate of the first class or a Magistrate of second class specially empowered by the Government in that behalf is vested with power to issue a warrant for arrest of any person whom he has reason to believe to have committed any offence punishable under NDPS Act or for the search of any building etc. in which he has reason to believe that any narcotic drug or psychotropic substance or

controlled substance in respect of which an offence punishable under the Act has been committed is kept or concealed. Sub-section (2) provides that any officer authorized by the Central Government or by the State Government by general or special order, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under NDPS Act or that any narcotic drug or psychotropic substance etc. in respect of which any offence has been committed under NDPS Act is kept or concealed in any building etc. such specially authorized officer may authorize any officer subordinate to him but superior in rank to a constable, to arrest such person or search the building, conveyance etc. As per sub-section (3) of Section 41, any officer to whom a warrant has been addressed in terms of sub-section (1) or any officer who has been authorized under sub-section (2) is vested with powers of an officer acting under Section 42 of the Act. Thus, a police officer authorized by a general or special order in terms of sub-section (2) of Section 41 of the Act has all the powers of arrest, seizure and search as provided under Section 42 of the Act.

12) Section 42(1) of the NDPS Act, makes it clear that an officer authorized in terms of Section 41(2) of the NDPS Act

has to record information received from any person regarding an offence under the NDPS Act or to record grounds of his belief as per proviso to Section 42(1) of the NDPS Act in case such an officer proceeds on his personal knowledge. It further mandates that such officer has to convey the said information to his immediate superior officer prior to conducting the search. However, Sub-section (2) of Section 42 of the NDPS Act provides that when an officer takes down any information in writing or records grounds for his belief, he has to send a copy thereof to his immediate superior officer within seventy-two hours.

13) In the light of aforesaid legal position, let us now advert to the facts that have been established from the evidence on record in this case. It is an admitted case of the prosecution that the information relating to concealment of contraband by the appellant/accused in his residential house was received in Police Station, Kakapora. This is clearly reflected in FIR, EXTP-11. The said information was recorded in the Police Station by PW 11, Sarjan Ahmad in the form of first information report. As per the provisions contained in Sections 41 and 42 of the NDPS Act, before proceeding to conduct search of the residential house of the appellant/accused, it was incumbent upon PW11 Sarjan

Ahamd, to inform, in writing, his superior officer who happens to be PW 5 Dy. SP Farooq Ahmad.

14) There is nothing on record to show that PW Farooq Ahmad has been informed by PW Sarjan Ahmad in writing about the information which was recorded in the police station. PW Sarjan Ahmad, when cross examined in this regard, has stated that because it was a Sunday, he did not make any correspondence either with the Magistrate or with Dy.SP, however, he requested the Dy. SP to proceed on spot. PW Farooq Ahmad has, in his cross-examination, stated that the SHO did not disclose the name of the accused to him and that he came to know that the house belonged to the accused on reaching the spot. Thus, from the statements of PW Sarjan Ahmad and PW Farooq Ahmad, it appears that the superior officer, Farooq Ahmad, was only requested by PW Sarjan Ahmad to reach the spot and he was not given the full information, even verbally, by PW Sarjan Ahmad.

15) The learned trial court, while dealing with the aforesaid aspect of the matter, has presumed that when the SHO requested the Dy. SP to proceed on spot, he must have informed him about the commission of offence. It has also been observed in the impugned judgment that now a days information/communications are being transmitted

through electronic mode of communication including Whatsapp and wireless messages etc. and that strict compliance of reducing the information in writing and sending the hard copy to the superior officer can be relaxed. While supporting its aforesaid view, the learned trial court has relied upon the judgment of the Supreme Court in the case of **Karnail Singh vs. State of Haryana**, (2009) 8 SCC 539.

16) As has been already indicated, SHO Sarjan Ahmad was specifically cross-examined on the aforesaid aspect of the matter and he has stated that he had only requested the Dy. SP to proceed on spot and the Dy. SP in turn confirmed the fact that he did not even know the name of the accused when he reached the spot. PW Sarjan Ahmad has nowhere stated that he had forwarded copy of the FIR, either through Whatsapp, email or any other electronic mode. In the face of this situation, it was not open to the learned trial court to presume that such a course was adopted by the SHO in the instant case.

17) In the above context, it would be apt to refer to the legal position laid down by the Supreme Court in **Karnail Singh's** case (supra), which has been relied upon by the learned trial court. The relevant observations of the Supreme Court are reproduced as under:-

35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows :

(a) The officer on receiving the information of the nature referred to in Sub-section (1) of section 42 from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with

sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.

18) Thus, from the above, it is clear that non-compliance of the provisions of sub-sections (1) and (2) of Section 42 of the NDPS Act is impermissible, but delayed compliance with satisfactory explanation about the delay can be countenanced. It has been further laid down in the aforesaid judgment that in a case where the information was received when the officer was not in the police station but while he was on the move and the information calls for immediate action, it would not be feasible or practical to take down in writing the information given to him. In such a situation, the information can be recorded after taking of action, whereafter the same has to be sent to the superior officer.

19) In the instant case, the information as per the prosecution case was received in the Police Station itself and it was also recorded in writing. Therefore, there was no reason for the SHO not to forward a copy of the same to the

Dy. SP. There is, in fact, no evidence on record to show that even after taking the action, the copy of the written information was forwarded by the SHO to the Dy. SP. The observation of the trial court that no question was put by the defence to PW 11 Sarjan Ahmad on this aspect of the matter during his cross examination and, therefore, it can be inferred that the accused/appellant was not aggrieved of non-compliance of Section 42 of the NDPS Act is contrary to the evidence on record. As already stated, SHO Sarjan Ahmad has been specifically cross -examined by the defence on this aspect and his answer to the said question was that because it being a Sunday, he could not make any correspondence, either with the Magistrate or with the Dy. SP. Thus, it cannot be stated that the defence has condoned the non-adherence to Section 42 of the NDPS Act on the part of the investigating agency. From the evidence on record, it is established that there has been a clear violation of Section 42 of the NDPS Act in the instant case and it gives rise to a grave suspicion about the manner in which raid was conducted by the investigating officer, which has an adverse impact upon the veracity of the prosecution case.

20) The next contention that has been urged by the appellant is with regard to contradictory nature of the

evidence on record. In this regard, learned counsel appearing for the appellant has particularly referred to the statements of panch witnesses, who, according to him, have given contradictory versions about the place of sealing of the recovered contraband substance and the presence of accused/appellant on spot.

21) As per the seizure memo, EXTP-1, Constable Mushtaq Ahmad, Constable Shameem Ahmad and Constable Rafiq Raja happen to be its marginal witnesses which has been prepared by PW 11 Sarjan Ahmad.

22) According to PW Shameem Ahmad, he along with PW Mushtaq Ahmad, Rafiq, Jameel and Nisar, went inside the house of the accused/appellant along with SHO for conducting the search. He further stated that after recovery of the sacks, the same were brought to the compound and produced before the Dy. SP whereafter the same were weighed. He went on to state that the bags were stitched and thereafter the same were straightway brought to the police station and whatever proceedings took place in the police station thereafter, he has no knowledge about the same. He further stated that he signed the documents in the police station. The witness clarified that the seal was not affixed on the recovered substance in his presence.

23) PW Constable Mushtaq Ahmad has stated that the Investigating Officer brought the seized material along with sacks to the police station for undertaking further proceedings. He also stated that the recovered Cannabis leaves and charas was weighed with the aid of a digital weighing machine on spot. He further stated that the documents with regard to seized Cannabis leaves and charas were prepared on spot which he signed.

24) The third marginal witness to the memo of recovery and seizure EXTP-1, is Constable Rafiq Raja. He has neither been cited as a witness in the challan nor has he been examined during the trial of the case. The other witnesses to the seizure are PWs Constable Aijaz Ahmad, Constable Abdul Hameed, Dy. SP Farooq Ahmad and Inspector Sarjan Ahmad.

25) According to PW Constable Aijaz Ahmad, the appellant/accused was arrested on spot on the date on which the recovery was effected from his house. He further stated that the appellant/accused was brought to the police station along with the seized contraband. He has no knowledge about the sealing of the recovered contraband as the said process did not take place in his presence. He has stated that sealing was done in the police station.

26) Constable Abdul Hameed has stated that the accused was present in his house at the time of recovery. He has stated that after recovery of the contraband, the same was seized by the SHO, whereafter it was brought by him to police station for conducting further proceedings. He has also stated that the recovered substance was weighed on spot.

27) According to PW Dy. SP Farooq Ahmad and PW Sarjan Ahmad (Investigating Officer), the recovery of contraband as also its sealing took place on spot and the appellant/accused was not present on spot at the relevant time. Both of them have stated that the recovered contraband was weighed on spot.

28) From the foregoing evidence on record, it is clear that there are contradictory versions about the place of sealing, the presence of appellant/accused on spot at the time of recovery and the place where the recovered substance was weighed. As per the memo of recovery/sealing, EXTP-1, all the proceedings had taken place on spot, but the marginal witnesses to the said memo have unequivocally stated that the process of sealing did not take place on spot and that the same was done inside the police station. While PW Constable Shameem Ahmad has stated that the sealing did not take place at all in his presence, PW Constable Mushtaq

Ahmad has stated that after the seizure, the recovered contraband was brought to the Police Station where the SHO conducted the remaining proceedings. He has not stated anything about sealing of the recovered contraband on spot. PW Constable Aijaz Ahmad has also stated that the sealing took place inside the Police Station. However, the version of PW Dy.SP Farooq Ahmad and PW Sarjan Ahmad is that all the proceeding including sealing took place on spot. There is, thus, contradiction in the statements of the prosecution witnesses *inter se* as regards the place of sealing of the contraband substance.

29) Another contradiction is with regard to the place of weighing of the contraband. According to the Investigating Officer, PW Sarjan Ahmad and PW Farooq Ahmad the recovered contraband was weighed on spot with the aid of a digital scale. However, PW Constable Mushtaq Ahmad, who is marginal witness to memo EXTP-2/2, which relates to the weighing of the contraband substance, the recovered substance was weighed in the Police Station. Even from the statement of the Investigating Officer PW Sarjan Ahmad it appears that the recovered substance was weighed in the Police Station because the said witness has specifically stated that the memo EXTP-2/2 has been drafted by Munshi PW Sajad Ahmad and he has further admitted that

the said witness was not present on spot but he was in Police Station, meaning thereby that the recovered substance was weighed in the Police Station. Thus, there are two versions coming forth from the evidence of prosecution witnesses; one that the recovered substance was weighed on spot and the other that the said exercise was undertaken inside the Police Station.

30) Another contradiction is with regard to the presence of appellant/accused on spot. According to two witnesses to the search and seizure, namely, Constable Aijaz Ahmad and Constable Abdul Hameed, the accused was present on spot at the time of recovery and he was arrested from there but other witnesses including Investigating Officer PW Sarjan Ahmad and also as per memo of arrest, EXTP-2, the appellant/accused was arrested on 21.07.2019 i.e. more than ten months after search and seizure.

31) The learned trial court while dealing with the aforesaid contradictions has termed the same as insignificant and observed that merely because some of the witnesses have stated that the accused was present on spot at the time of search operations will not affect the prosecution case as the said witnesses are not witnesses to the arrest memo of the appellant/accused.

32) The observations made by the learned trial court with regard to the significance of the contradictions in the prosecution evidence is unacceptable. The contradictions as narrated hereinbefore go to the root of the prosecution case. The fact that two witnesses, who as per the prosecution case were present on spot at the time of the search operation, have stated that the accused was present on spot and he was arrested from there, goes on to show that these two witnesses may not have been present on spot at all and they might have been planted by the investigating agency. This causes a grave suspicion about the fairness of investigation and the manner in which the whole proceedings have been approached by the Investigating Officer. When seen in the light of the fact that there has been non-compliance with the provisions contained in Section 42 of the NDPS Act and the Investigating Officer also happens to be the complainant of the instant case, it assumes great significance having a serious impact on the fairness of the investigation.

33) The other contradiction with regard to sealing of the contraband substance is also of great significance. As per para 2.2 of Standing Order No.1 of 1989 issued by the Central Government, which prescribes the procedure to be followed while conducting seizure of the contraband, the

samples from the narcotic drugs seized have to be drawn on the spot of recovery in presence of the search witnesses. In the present case, as per statements of the search witnesses, PWs Constable Mushtaq Ahmad and Shameem Ahmad, even the sealing of the recovered contraband substance has not taken place on spot. The sampling has, admittedly, taken place on the next day in presence of the Executive Magistrate. It is not the case of the prosecution that due to disturbances on spot or due to any other reason, the sealing of the contraband could not take place on spot. Therefore, there is a clear violation of Standing Order of 1989.

34) Further the contradictions in the prosecution evidence on the aspect of sealing of the contraband throws suspicion over the whole process of sealing of the recovered contraband substance. The contradiction between the statements of marginal witnesses to the memo, EXTP-1 and the statements of the Investigating Officer and the superior officer goes to the root of the case as it relates to the question of maintenance of integrity of the recovery contraband and its samples. These contradictions cannot be brushed aside lightly. Contradiction in the statements of the prosecution witnesses as regards the place where the recovered contraband was weighed is also significant in

nature. All these contradictions throw a considerable doubt about the manner in which search and seizure of contraband has been undertaken in the present case.

35) Another contention that has been raised by the appellant is with regard to the safe custody of the sample drawn from the recovered contraband. As per the statement of Malkhana Incharge/Munshi, PW Sajad Ahmad Khan, the SHO collected digital scale and NDPS kit from him in the morning and in the evening when he came back, he handed over to him nine nylon sacks in which eight sacks were containing Cannabis leaves weighing 104.400 kgs and one sack was containing powdered charas weighing 1.200 kgs. NDPS kit and the digital scale were also handed over to him. In his cross-examination he has stated that the samples remained in his custody for 12 hours and on the next day, the same were sent to the FSL.

36) PW Nisar Ahmad Bhat has stated that on 30th October, 2018, he delivered sealed samples to FSL, Srinagar, under the directions of Dy. SP, Pulwama, and obtained a receipt in this regard. In his cross-examination, he has stated that he delivered the samples to FSL, Srinagar, on the same day on which he received the same from the Munshi of the Police Station and the name of Munshi was Sajad Ahmad.

37) What is deduced from the statements of PW Sajad Ahmad and PW Nisar Ahmad is that on 07.10.2018, the date on which the search operation was conducted by PW Sarjan Ahmad and his team of officials in the house of the appellant/accused, the sealed sacks were handed over to Munshi PW Sajad Ahmad Khan and on next day, the samples were handed over to him. Within 12 hours thereafter, he handed over these samples for being delivered to FSL, meaning thereby that on 9th October, 2018, he handed over the samples to PW Nisar Ahmad, the police official, who delivered these samples to FSL, Srinagar. However, as per statement of PW Nisar Ahmad, he delivered these samples on 30th October, 2018. He has clarified that he took these samples from Munshi Sajad Ahmad on 30th October, 2018 itself. This contradicts the version of PW Sajad Ahmad that the samples remained in his custody only for twelve hours. It is pertinent to mention here that as per prosecution case, the samples were sealed by the Executive Magistrate, PW 10 Ghulam Mohammad on 08.10.2018. Thus, there is no explanation coming forth from the prosecution evidence on record as to where the samples were lying between 9th October, 2018 to 30th October, 2018.

38) The learned trial court while dealing with the aforesaid aspect of the matter has observed that the defence has been unable to convince the Court that these samples were not in safe custody till these were deposited in FSL, Srinagar. I am afraid the observation of the learned trial court in this regard is contrary to the rules of evidence. The burden is upon the prosecution to prove the safe custody of the samples and to establish that there was no possibility of tampering of the samples. It is not for the accused to prove that the samples were not in safe custody. By placing the reverse burden of proof upon the appellant/accused, the learned trial court has gone contrary to the rules and principles of evidence. The absence of explanation from the prosecution with regard to whereabouts of the samples from 9th October, 2018 to 30th October, 2018, assumes great significance in the instant case and creates a serious dent in the case of the prosecution.

39) Another aspect which requires to be noticed in this case is that the seized contraband, as per prosecution case, was sealed with a nut bolt. Impression of the said nut bolt is appearing on the seizure memo, EXTP-1. As per prosecution case, the said nut bolt was kept on supradnama of PW Sajad Ahamd. During their examination, neither PW Sajad Ahmad could produce the

said nut bolt nor the Investigating Officer, PW Sarjan Ahmad could give any clue about the said nut bolt. The Executive Magistrate, PW Ghulam Mohammad, has also sealed the samples drawn from the recovered contraband with a nut bolt and not by his official seal. A comparison of the impression of the nut bolt on memo, EXTP-1 and letter of the Executive Magistrate, marked AMK/1, reveals that there is somewhat similarity between the impressions of two nut bolts. Therefore, the tampering of sealed samples in the instant case cannot be ruled out, particularly when the nut bolt, with which the contraband substance was sealed, has not been produced before the Court during the trial of the case.

40) In cases under NDPS Act, the proof of integrity of the samples is absolutely imperative for success of prosecution case. In the instant case, the prosecution has failed to prove the safe custody of the samples, inasmuch as the whereabouts of the samples from 9th October, 2018 to 30th October, 2018 have remained a mystery. The Malkhana Register has not been produced to unravel this mystery. It would be unsafe to rely upon the report of the FSL in the facts and circumstances of the case as it has not been established that the samples which were examined by the FSL are the same that were drawn from the substance

recovered from the search of house of the appellant/accused. The prosecution, in the instant case, has clearly failed to establish the integrity of the samples.

41) There is yet another aspect of the matter which is required to be noticed and which has assumed significance in the facts and circumstances of the present case. In the instant case, PW Sarjan Ahmad is also the complainant as well as Investigating Officer of the case. I am conscious of the legal position that merely because a complainant happens to be the Investigating Officer of the case would not ipso facto lead to discarding of prosecution case if otherwise the evidence on record establishes charges against an accused. But in the instant case the Investigating Officer despite availability of independent witnesses on spot has not associated any of these witnesses in the search proceedings. The availability of independent witnesses on spot has been deposed to by PW Constable Mushtaq Ahmad, who has stated that a number of persons had gathered on spot and that no one amongst them was called on spot. PW Constable Abdul Hameed Bhat has also stated that neither any civilian nor Numberdar or Chowkidar were called on spot. PW Aijaz Ahmad Bhat has also stated that some civilians were also present on spot. The Investigating Officer PW Sarjan Ahmad, when cross-

examined on this aspect, has stated that he has not recorded in his Case Diary that any civilian had refused to associate in the proceedings.

42) It is correct that merely because civil witnesses are not associated in the recovery proceedings, the prosecution case cannot be thrown out if it is supported by the police witnesses whose statements stand the test of cross-examination but in the instant case, as already stated, the statements of police witnesses are contradictory on essential aspects of the case. Besides this, the Investigating Officer, despite presence of civil witnesses on spot, has not associated them in the proceedings and has not even recorded reasons therefor in his Case Diary. This circumstance, when considered in the light of the fact that the Investigating Officer happens to be the complainant as well, casts a serious doubt about the fairness of the investigation conducted by him, thereby making the case of the prosecution unreliable.

43) From what has been discussed hereinbefore, it is clear that in the instant case, the Investigating Agency has violated the mandate of Section 42 of the NDPS Act. Besides this, the evidence as regards the search, seizure and sealing of the contraband is contradictory in nature. The prosecution has also failed to establish safe custody of the

samples. These circumstances along with the circumstance that the complainant in this case happens to be the Investigating Officer of the case as well and no independent witness despite availability of such witnesses on spot, has been associated in the process, makes the case of the prosecution unreliable. The impugned judgment of conviction passed by the learned trial court in these circumstances cannot be sustained and is liable to be set aside.

44) Accordingly, the appeal is allowed and the impugned judgment of conviction and the order of sentence are set aside. The appellant is directed to be released from the custody. His bail and surety bonds are discharged.

45) The trial court record along with a copy of this judgment be sent back.

(Sanjay Dhar)
Judge

Srinagar

01.03.2025

“Bhat Altaf-Secy”

Whether the order is reportable: Yes/No