

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

CrIA(S) No. 04/2023

Mohammad Shafi Lone and Ors.

...Appellant/Petitioner(s)

Through: Mr. S.T. Hussain, Senior Advocate with
Ms. Nida Nazir, Advocate

Vs.

***Union Territory of J&K Through SHO
Police Station Crime Branch (Home
Department)***

...Respondent(s)

Through: Mr. Mohsin S. Qadiri, Senior AAG with
Ms. Maha Majeed, Assisting Counsel

CORAM:

HON'BLE MR JUSTICE SANJAY PARIHAR, JUDGE

ORDER
01.10.2026

- 1)** By way of the present appeal, the appellants call in question the judgment of conviction dated 24.05.2023 and the consequential order of sentence passed by the learned Additional District and Sessions Judge, Kupwara, in case arising out of FIR No. 45/2020, whereby both the appellants have been convicted for commission of offences under Sections 8/21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "the NDPS Act") and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹1,00,000/- each, with a further sentence of rigorous imprisonment for two and a half years in default of payment of fine.
- 2)** The impugned judgment has been assailed, inter alia, on the ground that the learned trial Court failed to appreciate the alleged non-compliance with the mandatory safeguards contemplated under the NDPS Act. It is

contended that the prosecution failed to establish due compliance with Section 42 of the Act and that the very manner in which the alleged search and recovery were effected is rendered doubtful by material contradictions in the prosecution evidence.

- 3) The principal challenge, however, is founded upon the alleged non-compliance with Section 50 of the NDPS Act. According to the appellants, the prosecution case is that the contraband was recovered from their personal search, whereas the Executive Magistrate 1st Class, who was associated by the prosecution itself with the search and seizure proceedings, has stated that the recovery was effected from the vehicle. It is further contended that the prosecution has failed to prove that the appellants were duly apprised of their statutory right under Section 50 of the NDPS Act. The alleged option/consent forms do not bear the signatures of the appellants and, according to the appellants, were not duly proved and exhibited during the trial.
- 4) The appellants have also questioned the preservation of the link evidence and alleged non-compliance with Sections 55 and 57 of the NDPS Act. It has additionally been argued that the forensic report merely establishes the presence of diacetylmorphine but does not indicate its concentration or percentage. Another contention raised is that the officer who conducted the search was not duly authorised and that the prosecution has, therefore, failed to establish lawful authority for the search.
- 5) Learned counsel for the respondent has opposed the appeal and submitted that the prosecution has established the recovery beyond reasonable doubt. According to him, the case was based upon prior information which was reduced into writing and forwarded to the superior officer, thereby satisfying the requirements of Section 42 of the

NDPS Act. It is further submitted that the appellants were found in unauthorised possession of commercial quantity of heroin and that the learned trial Court, after appreciating the evidence in its correct perspective, rightly recorded their conviction. As regards the testimony of the Executive Magistrate concerning the source of recovery, learned counsel submits that the discrepancy is minor and does not go to the root of the prosecution case. It is also submitted that the appellants were duly informed of their right under Section 50 of the NDPS Act and that the search was conducted in the presence of an Executive Magistrate 1st Class. The presence of the Magistrate, according to the respondent, lends sufficient assurance to the fairness and authenticity of the proceedings.

- 6) Heard the counsel for both sides and perused the record of trial court.
- 7) The appellants were convicted by the learned trial Court vide judgment dated 24.05.2023. During pendency of the present appeal, appellant No.1, Mohammad Shafi Lone, was admitted to bail on humanitarian grounds initially for a limited period, which was extended from time to time. Appellant No.2, Bilal Ahmad Dar, continued to remain in custody. Initially, learned senior counsel appearing for the appellants pressed the application seeking suspension of sentence and grant of bail in favour of appellant No.2. Since consideration of that prayer would necessarily involve examination of the evidence recorded by the learned trial Court, learned counsel fairly submitted that the appeal itself could be taken up for final consideration. The matter has accordingly been heard finally.
- 8) The prosecution case, briefly stated, is that on 10.12.2020 Inspector Mushtaq Ahmad of the Anti-Narcotic Task Force, Kashmir, received reliable information that two persons travelling in a vehicle bearing registration No. HP22E-5622 were proceeding towards

Drugmulla/Kupwara while carrying narcotic substance intended for sale. According to the prosecution, the information was reduced into writing and, upon its receipt and verification; FIR No. 45/2020 came to be registered for offences under Sections 8/21 of the NDPS Act.

9) Acting upon the said information, a police party laid a Naka at Bramri Chowk, Drugmulla, near the private clinic of Dr. Wani, and intercepted the vehicle in question. The vehicle was occupied by the two appellants. Appellant No.2 was driving the vehicle, whereas appellant No.1 was travelling therein. The prosecution case specifically is that nothing incriminating was recovered from the search of the vehicle. Thereafter, for conducting the personal search of the appellants, recourse was allegedly had to Section 50 of the NDPS Act. It is alleged that the appellants expressed their desire to be searched in the presence of a Gazetted Officer or a Magistrate. An Executive Magistrate 1st Class was called to the spot and the personal search of the appellants was thereafter conducted.

10) According to the prosecution, two polythene pouches containing a substance suspected to be heroin were recovered during such personal search. A quantity of 435 grams was allegedly recovered from appellant No.1, whereas 372 grams was allegedly recovered from appellant No.2. The recovered substance was stated to have been weighed and sealed in packets marked A and B. Samples weighing 5 grams each were allegedly drawn from the respective consignments and marked Q-1 and Q-2, whereas the residue was marked X-1 and X-2. The samples were thereafter forwarded for forensic examination. The forensic examination revealed that the samples contained diacetylmorphine (heroin). On

completion of investigation, the appellants were put to trial for commission of offences under Sections 8/21 of the NDPS Act.

11) The Id. trial Court concluded that the prosecution had established the recovery and that there was due compliance with Section 50 of the NDPS Act. The challenge concerning preservation of link evidence was also rejected. It noticed that independent civilian witnesses had not been associated with the search and seizure proceedings, but was of the view that the presence of the Executive Magistrate 1st Class provided sufficient assurance regarding the credibility of the proceedings. The trial Court further held that the testimony of police witnesses could not be discarded merely on account of their official status. It consequently invoked the statutory presumption under Section 54 of the NDPS Act and concluded that the appellants had failed to rebut the same. Both appellants were accordingly convicted and sentenced in the manner noticed hereinabove.

12) Since the principal controversy concerns the manner of search and recovery, it is necessary to notice the material evidence bearing upon that question. PW-1, SGCT Gulzar Ahmad, stated that vehicle No. HP22E-5622 was intercepted on 10.12.2020 at Drugmulla and that the search of the persons travelling therein resulted in recovery of contraband weighing 435 grams and 372 grams respectively. He also claimed that the appellants had been apprised of their right under Section 50 of the NDPS Act. In cross-examination, however, PW-1 stated that till 12:15 p.m. the ANTF had no information regarding transit of the contraband. He was also unable to state whether the Executive Magistrate present at the spot was the Tehsildar or some other officer.

- 13)** PW-2, SGCT Javaid Ahmad Dar, stated that the appellants expressed their desire to be searched in the presence of a Magistrate and that the search was accordingly conducted. He stated that he himself searched one of the appellants but could not remember which one. He was also unable to state the time of search and expressed ignorance regarding material aspects of the sampling and sealing proceedings. PW-3, SGCT Mushtaq Ahmad Bhat, stated that the ANTF had received information that persons travelling in a vehicle from Sopore towards Drugmulla were carrying narcotic substance. He claimed to be a witness to the notices under Section 50 and stated that the recovery and sealing took place in the presence of the Magistrate.
- 14)** PW-4, Abdul Majeed Sheikh, Judicial Clerk, stated that he accompanied the concerned revenue officer to the spot and reached there at about 3:30 p.m. According to him, the vehicle had already been intercepted. He stated that the recovered substance was thereafter taken to the police chowki, where sampling and seizure proceedings were recorded. He further stated that neither the appellants made any enquiry from the Magistrate nor did the Magistrate make any enquiry from them. PW-5, Aijaz Ahmad Khan, who was vested with the powers of Executive Magistrate 1st Class, is a material witness. He stated that on 10.12.2020 he was informed by the ANTF personnel about a raid in connection with information concerning the appellants. Significantly, PW-5 stated that two polythene pouches were recovered from the vehicle. He further stated that the consignment was weighed and thereafter seized and sealed.
- 15)** In cross-examination, PW-5 stated that he reached the place of occurrence between 3:30 and 4:00 p.m. and was merely asked to affix

his seal. He stated that he did not enquire as to what was contained in the polythene. He further stated that he had asked the police officers to search the accused but could not remember whether anything was recovered from their personal search. PW-7, Inspector Mushtaq Bakshi, stated that on 10.12.2020 he received information that two persons travelling in a Chevrolet vehicle were in unauthorised possession of contraband. He reduced the information into writing and forwarded it to the SSP, Crime Branch. He identified the written information as EXT-P7 and stated that FIR No. 45/2020 was registered at 12:10 p.m. PW-8, Hamidullah Sheikh, Assistant Scientific Officer, proved the forensic report and stated that samples Q-1 and Q-2 contained diacetylmorphine. The report, however, did not indicate the concentration or percentage thereof. In cross-examination, he admitted that the samples had not been weighed by him upon receipt, though such weighing was required.

16) Constable Sharief-u-Din stated that the appellants were checked and green polythene bags containing contraband were recovered from their possession. Significantly, he stated that no option was given to the appellants regarding the manner in which their search was to be conducted. PW-12, Head Constable Mohammad Ashraf, stated that a team from Srinagar had come to Drugmulla and that he escorted the team to the place of occurrence. According to him, the recovery was effected at about 3:30 p.m.

17) PW-13, Inspector Nisar Ahmad, stated that before the appellants were searched, they were informed of their right under Section 50 of the NDPS Act and thereafter agreed to be searched. According to him, the two constables accompanying the police party separately conducted their personal search in the presence of the Executive Magistrate. PW-13

further stated that after the alleged recovery the consignment was weighed and samples were drawn and sealed on the spot. He maintained that the recovery was from the personal search of the appellants and not from the vehicle. Significantly, however, PW-13 admitted that when the appellants were allegedly offered the option concerning their search, no civilian witness was associated and the signatures of the appellants were not obtained on the consent memo.

18) On the basis of the rival submissions and the evidence on record, the following principal questions arise for determination:

- i.** Whether the prosecution has established beyond reasonable doubt that the contraband was recovered from the personal search of the appellants in the manner alleged;
- ii.** Whether, in the event of the prosecution relying upon personal recovery, due compliance with Section 50 of the NDPS Act has been established;
- iii.** Whether the contradictions appearing in the prosecution evidence are merely peripheral or affect the foundation of the prosecution case; and
- iv.** Whether, on an overall appreciation of the evidence, the conviction recorded by the learned trial Court can safely be sustained.

19) NEXT-P7 is the written information relied upon by the prosecution.

According to PW-7, the source information was reduced into writing and thereafter forwarded to the SSP Crime Branch. It is also established that FIR No. 45/2020 was registered at 12:10 p.m. on 10.12.2020. The appellants have questioned the genuineness and legal effect of EXT-P7, inter alia, on the ground that the document does not disclose the precise time at which the information was received and that the superior officer to whom it was allegedly forwarded was not examined.

20) It is not necessary, however, to rest the decision of the present appeal exclusively upon the challenge under Section 42. Even if, for purposes of the present appeal, the prosecution is given the benefit of assuming due compliance with Section 42 on the strength of EXT-P7, a more

fundamental difficulty remains regarding the very source and manner of recovery and the alleged compliance with Section 50.

21) Learned counsel for the appellants has also argued that the officer who conducted the search was not competent or separately authorised to do so. The said contention, by itself, does not merit acceptance. According to the prosecution case, Inspector Nisar Ahmad was serving as an Inspector in the Anti-Narcotic Task Force, stated to be a constituent of the Crime Branch, Kashmir. No material has been brought to the notice of this Court from which it can be concluded that the said officer was legally incompetent merely because a separate order of authorisation in his individual name has not been proved.

22) The challenge to the prosecution case must, therefore, be examined on the more substantial question concerning the alleged personal search, recovery and compliance with Section 50 of the NDPS Act. Said provision embodies an important statutory safeguard in cases involving personal search. Where an authorised officer is about to search a person under the relevant provisions of the Act and such person requires, he is to be taken, without unnecessary delay, to the nearest Gazetted Officer of the departments specified in the Act or to the nearest Magistrate. The safeguard assumes particular significance where the prosecution itself attributes recovery of the narcotic substance to the personal search of an accused. The prosecution must, therefore, establish through clear and reliable evidence that the statutory right was duly communicated and that the search was thereafter carried out in conformity with law.

23) In the present case, the prosecution specifically asserts that nothing incriminating was recovered from the vehicle and that the contraband was subsequently recovered from the personal search of the appellants.

This version is, however, directly contradicted by PW-5, the Executive Magistrate 1st Class, whose presence was procured by the prosecution itself for the search and seizure proceedings. PW-5 has categorically stated that the two polythene bags were recovered from the vehicle. In cross-examination, he further stated that although he asked the police officers to search the accused, he could not remember whether anything was recovered from their personal search.

24) The contradiction is not related to some incidental or collateral detail. It concerns the very source of the alleged recovery. If the prosecution version is accepted, the contraband was recovered from the persons of the appellants after compliance with Section 50. If the testimony of the Executive Magistrate is accepted, the recovery was from the vehicle. These are materially different versions of the occurrence and cannot simultaneously constitute the factual basis of the conviction. The importance of PW-5's testimony is enhanced by the fact that he was associated with the proceedings by the prosecution as an independent official witness. The trial Court itself treated his presence as a circumstance lending assurance to the search and seizure.

25) Once the prosecution relies upon the presence of the Executive Magistrate to lend authenticity to the proceedings, his substantive testimony concerning the very source of recovery cannot be ignored merely because it does not support the prosecution version on that material aspect. It is also significant that the prosecution did not have PW-5 declared hostile in relation to his assertion that the contraband was recovered from the vehicle. His evidence, therefore, continues to form part of the prosecution evidence and must be assessed along with the testimony of the remaining witnesses. The respondent's contention that

the discrepancy is minor cannot be accepted. Whether the contraband was recovered from the vehicle or from the personal search of the appellants goes to the root of the prosecution case, particularly because the applicability and alleged compliance with Section 50 are founded upon the prosecution's assertion of personal recovery.

26) The prosecution relies upon option/consent forms allegedly prepared before conducting the personal search of the appellants. The record, however, discloses material infirmities in this regard. The documents relied upon for proving the alleged option were not duly exhibited as substantive evidence and remained marked documents. More importantly, the signatures of the appellants do not appear on the alleged consent forms. PW-13, Inspector Nisar Ahmad, has himself admitted that no civilian witness was called when the alleged option was offered and that the signatures of the appellants were not obtained on the consent memo. The prosecution has not furnished any satisfactory explanation as to why, if the appellants had consciously exercised an option to be searched in the presence of a Magistrate or Gazetted Officer, their signatures were not obtained upon the document allegedly recording such exercise.

27) A document merely marked during trial does not, by that circumstance alone, acquire the status of substantive evidence. Where the prosecution relies upon such a document to establish compliance with an important statutory safeguard, its execution and contents must be proved in accordance with law. The oral evidence also does not remove the doubt. While some police witnesses claim that the appellants were duly informed of their right, Constable Sharief-u-Din categorically stated that no option was given to them concerning the manner in which their

search was to be conducted. PW-4, who accompanied the revenue officer, stated that neither the appellants made any enquiry from the Magistrate nor did the Magistrate make any enquiry from them. These circumstances assume significance when read with the admission of PW-13 that the appellants' signatures were not obtained upon the consent memo and the testimony of PW-5 concerning recovery from the vehicle. The mere physical presence of an Executive Magistrate at the spot cannot, by itself, substitute proof that the appellants were made aware of the statutory right available to them and that the alleged option was thereafter consciously exercised.

28) The trial Court, therefore, fell in error in treating the presence of the Executive Magistrate substantially as sufficient assurance of compliance without adequately addressing the material contradictions emerging from his own testimony and the deficiencies surrounding the alleged option forms. It is well settled that every discrepancy in the testimony of witnesses does not necessarily undermine a criminal prosecution. Minor variations which are natural in human recollection may be ignored where the core of the prosecution case remains intact. The position is materially different where contradictions relate to a foundational fact forming the basis of the charge.

29) In the present case, the prosecution witnesses do not present a clear and consistent account regarding the crucial stages of the occurrence. The prosecution case is one of personal recovery. The Executive Magistrate speaks of recovery from the vehicle. One prosecution witness states that no option regarding search was given to the appellants. The alleged option documents do not bear the appellants' signatures. The evidence also contains variations regarding the colour of the polythene pouches

and the manner and place in which the subsequent proceedings were undertaken. Some of these discrepancies, considered in isolation, might have been capable of being treated as inconsequential. The Court, however, cannot examine each circumstance in isolation when assessing whether the prosecution has established guilt beyond reasonable doubt. The evidence has to be evaluated cumulatively. When the categorical testimony of the Executive Magistrate-PW 5, regarding recovery from the vehicle is considered together with the deficiencies concerning the alleged exercise of the Section 50 option, the absence of the appellants' signatures on the alleged consent documents and the conflicting oral testimony, the prosecution version regarding personal recovery becomes unsafe to accept beyond reasonable doubt.

- 30)** The learned trial Court was correct to the extent that testimony of police personnel cannot be discarded merely because the witnesses are members of the police force. There is no inflexible rule of law requiring rejection of otherwise trustworthy official testimony solely on that ground. The difficulty in the present case is of a different nature. The evidence of the police witnesses is required to be assessed against the testimony of an independent official witness associated by the prosecution itself and against the other circumstances appearing on record. The prosecution cannot derive additional assurance merely from the presence of the Executive Magistrate while simultaneously disregarding his evidence when that evidence contradicts the prosecution on the central question of recovery. Thus, the absence of civilian witnesses is not being treated as an independent ground for discarding the prosecution case. It assumes relevance only while evaluating the

overall reliability of a prosecution case already affected by material inconsistencies concerning the alleged search and recovery.

31) The trial Court also relied upon the statutory presumption under Section 54 of the NDPS Act. Such statutory presumption does not dispense with the prosecution's obligation to first establish the foundational facts necessary for its invocation. The factum of possession and recovery must first be established through legally admissible and reliable evidence. Where the very manner and source of the alleged recovery are rendered doubtful by the prosecution evidence itself, the deficiency cannot be supplied by invoking the statutory presumption. The burden upon an accused arising from a statutory presumption cannot precede proof by the prosecution of the foundational circumstances upon which that presumption is intended to operate.

32) The forensic evidence establishes that the samples Q-1 and Q-2 examined by the laboratory contained diacetylmorphine. The forensic result is relevant and important as regards the nature of the substance forwarded for examination. It does not, however, by itself prove that the substance so examined was recovered from the appellants in the precise manner alleged by the prosecution. Where the factum and manner of recovery itself become doubtful, proof of the chemical composition of the sample cannot cure the foundational defect concerning possession and recovery. In view of the conclusion reached on the question of recovery and Section 50, it is unnecessary for the disposal of the present appeal to enter into a definitive adjudication upon the separate contention concerning the absence of determination of the percentage or concentration of diacetylmorphine.

- 33)** Learned counsel for the appellants has also raised objections concerning Sections 55 and 57 of the NDPS Act and preservation of the link evidence, including the manner in which the seized substance was weighed, sampled, sealed, kept in the Malkhana and thereafter transmitted for forensic examination. These questions would ordinarily require examination of the entire chain commencing from seizure and sampling and ending with receipt of the samples by the forensic laboratory.
- 34)** In the present case, however, the appeal can be determined without recording a conclusive finding upon each of these additional objections. Even assuming, in favour of the prosecution, that the subsequent custody and transmission of the samples were satisfactorily established, the prosecution must first prove that the original recovery from the appellants occurred in the manner alleged. Once the prosecution fails to establish beyond reasonable doubt the foundational circumstance of personal recovery and due compliance with the safeguard governing such search, proof relating to the subsequent handling of the substance cannot retrospectively establish the disputed recovery.
- 35)** The offences under the NDPS Act carry stringent punishment. The seriousness of the offence and the deleterious consequences of narcotic substances upon society cannot be understated. At the same time, the gravity of an accusation cannot reduce the standard of proof required in a criminal trial. A conviction, particularly one carrying severe penal consequences, must rest upon evidence which establishes guilt beyond reasonable doubt. The procedural safeguards incorporated in the NDPS Act are intended to ensure fairness and reliability in the exercise of the extensive powers of search and seizure conferred upon investigating

agencies. Where the prosecution invokes a personal search and relies upon the result thereof, compliance with the safeguard applicable to such search assumes corresponding importance. Courts are equally required to avoid both extremes: legitimate prosecutions cannot be defeated on account of insignificant irregularities, but material safeguards cannot be diluted merely because the allegation concerns a serious narcotic offence.

36) In *State of Rajasthan v. Parmanand and Anr.*, (2014) 5 SCC 345, dwelling upon Section 50 of the NDPS Act, it was held that:

Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 Surajmal is stated to have signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand did not sign.

37) In *Arif Khan @ Agha Khan v. State of Uttarakhand*, (2018) 18 SCC it was held that:

Their Lordships have held in Vijay Sinh Chandubha Jadeja (supra) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to

make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so, required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also Ashok Kumar Sharma vs. State of Rajasthan, 2013 (2) SCC 67 and Narcotics Control Bureau vs. Sukh Dev Raj Sodhi, 2011 (6) SCC 392)

Keeping in view the aforementioned principle of law laid down by this Court, we have to examine the question arising in this case as to whether the prosecution followed the mandatory procedure prescribed under Section 50 of the NDPS Act while making search and recovery of the contraband Charas from the appellant and, if so, whether it was done in the presence of a Magistrate or a Gazetted Officer so as to make the search and recovery of contraband Charas from the appellant in conformity with the requirements of Section 50.

In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer.

38) Tested on the aforesaid case law, this Court finds that the prosecution evidence does not establish a clear, consistent and legally reliable account of the alleged recovery. The contradiction between the prosecution case of personal recovery and the testimony of the Executive Magistrate that the contraband was recovered from the vehicle is fundamental. The said contradiction assumes still greater significance because the prosecution relies upon personal recovery to invoke compliance with Section 50 of the NDPS Act.

39) The evidence concerning compliance with Section 50 is itself unsatisfactory. The alleged option forms do not bear the signatures of the appellants; the Investigating Officer admits that their signatures were not obtained on the consent memo; no civilian witness was associated at that stage; the documents relied upon were not duly proved and exhibited as substantive evidence; and one prosecution witness has categorically

stated that no option was given to the appellants. The cumulative effect of these circumstances creates a reasonable doubt concerning both the manner of recovery and the alleged compliance with the statutory safeguard governing personal search.

40) The learned trial Court appears to have attached considerable importance to the presence of the Executive Magistrate while failing to accord due weight to the fact that the testimony of that very witness contradicts the prosecution case regarding the source of recovery. Such an approach cannot be sustained. The presence of an independent witness cannot be relied upon as corroboration while the material portion of his substantive testimony is simultaneously disregarded without adequate reason. The finding of the learned trial Court regarding the reliability of the alleged personal recovery and compliance with Section 50 is, therefore, not borne out from a proper cumulative appreciation of the evidence.

41) Once the foundational fact of recovery becomes doubtful, the statutory presumption cannot be pressed into service to sustain the conviction. Nor can the forensic report, notwithstanding its proof of the presence of diacetylmorphine in the samples examined, independently establish possession by the appellants. A criminal Court cannot choose between two materially inconsistent versions appearing from the prosecution evidence and sustain a conviction merely because one of those versions supports the charge. Where a reasonable doubt arises from the prosecution evidence itself on a foundational circumstance, the benefit thereof must necessarily enure to the accused. This Court is, therefore, of the considered view that the prosecution has failed to establish the charge against the appellants beyond reasonable doubt. The conviction

recorded by the learned trial Court is consequently unsafe and cannot be sustained. For the foregoing reasons, the appeal is **allowed**.

- 42)** The judgment of conviction dated 24.05.2023 and the consequential order of sentence passed by the Id. Additional District and Sessions Judge, Kupwara, in the case arising out of FIR No. 45/2020, insofar as the appellants have been convicted for offences under Sections 8/21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, are hereby **set aside**. The appellants, Mohammad Shafi Lone and Bilal Ahmad Dar, are acquitted of the charges framed against them by extending to them the benefit of doubt. Appellant No.2, Bilal Ahmad Dar, who is stated to be presently in custody, shall be released forthwith, provided his detention is not required in connection with any other case or under any other lawful order. Appellant No.1, Mohammad Shafi Lone, who is stated to be on bail, shall stand discharged from his bail bonds.
- 43)** The Registry shall transmit the record of the learned trial Court, along with a copy of this judgment, to the Court concerned forthwith for information and compliance.
- 44)** All pending applications, if any, shall stand **disposed of**. The appeal is **disposed of** in the above terms.

(SANJAY PARIHAR)
JUDGE

SRINAGAR
01.10.2026
Shabroz

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