

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT JAMMU**

**CRAA No. 88/2010**

Reserved on: 13.04.2023  
Pronounced on: 26.04.2023

State of J&K ... Appellant(s)

Through: - Mr. R. S. Jamwal, AAG vice  
Mr. Amit Gupta, AAG

v.

Sham Lal ... Respondent(s)

Through: - None.

**CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE  
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE**

**JUDGMENT**

**Rajesh Sekhri-J**

1. Challenge in this appeal has been thrown to judgment dated 26.04.2010 passed by learned 2<sup>nd</sup> Additional Sessions Judge, Jammu ('trial court' for short) in file No. 121/S and FIR No. 114 of 2001 of Police Station, R. S. Pura under Sections 20/29 of Narcotic Drugs and Psychotropic Substance Act, 1985 (for short 'NDPS Act'), read with 3/25 of Arms Act, vide which, respondents have been acquitted of charges.

2. The case of the appellant/prosecution in the trial Court, in brief, is that on 01.07.2001, while SDPO (Sub Division) R. S. Pura and S.P. Border, Jammu, during investigation of FIR No. 20 of 2001, were on their way to Chakrawati R.S. Pura, they arrested accused-Yousuf Massi, who made a disclosure that he had concealed one 3.15 pistol, six live cartridges in his

house in a box and he had also concealed 09 packets of heroine in the land of respondent-accused which they had brought from Pakistan. The said accused further disclosed that other nine packets of heroine were lying with the respondent/accused-Sham Lal. The disclosure statement of accused Yousuf Massi was reduced into writing and consequent thereupon, a pistol and nine packets of heroine were recovered and aforesaid FIR came to be registered and investigation came into vogue. The heroine seized on the disclosure statement of said Yousuf Massi was found to be carrying the mark 'Samunder 8888/96 Shah Azam Factory' and out of said packets, 50 grams each were segregated and sealed as samples. Respondent was also taken into custody, who made disclosure about the remaining 09 packets of heroine lying in a bag in his house and consequent thereupon, the said 09 packets of heroine were recovered at the instance of the respondent lying underneath a heap of bricks in his house. Said 09 packets of heroine were also bearing the same mark 'Samunder 8888/96 Shah Azam Factory' and out of said packets, samples were taken, seized and sealed on the spot. All the samples were sent to FSL for chemical analysis. As per report of the chemical analyst, said samples were found to contain heroine. Accordingly, on the conclusion of investigation, a final report in terms of section 173 of Code of Criminal Procedure, 1973 (Cr.P.C. for short) was filed in the trial court for offences under Sections 20/29 of NDPS Act and 3/25 of the Arms Act. Accused were charged sheeted by the trial court on 10.01.2002 whereby they pleaded innocence and claimed trial, prompting the trial court to ask for the evidence. It is pertinent to mention that accused-Yousuf Massi absconded during trial and proceedings under Section 512 of Cr. P.C. were initiated against him on 20.04.2009.

3. Prosecution has examined as many as 16 witnesses to bring home the guilt of respondent. On conclusion of the prosecution evidence, statement of the respondent under Section 342 Cr.P.C. was recorded whereby he denied the incriminating evidence against him by pleading false implication and did not lead any evidence in defence.

4. On appreciation of the prosecution evidence, learned trial court has concluded that prosecution case in the trial court was not only replete with material contradictions and discrepant on material aspects, but mandatory provisions of the NDPS Act have been observed in breach, therefore, learned trial Court vide impugned judgment has acquitted the respondent.

5. The impugned judgment has been assailed by the appellant-State *inter alia* on the grounds that learned trial Court has failed to appreciate the prosecution evidence in the right perspective and has misconstrued the law applicable to the present case. According to the appellant, learned trial Court has fallen in grave error of law resulting in the acquittal of respondent despite the prosecution having succeeded to make out allegations against the respondent.

6. Instead of giving a detailed resume of the prosecution evidence, it is proposed to refer to the relevant depositions of the prosecution witnesses, as, when and where required.

7. An overview of the prosecution case is that accused-Yousuf Massi (since absconding) was apprehended by SDPO, R.S.Pura in FIR No. 20/2001, who made a disclosure with respect to a pistol, 06 live cartridges in his house as also concealment of 09 packets of heroine in the land of the respondent brought from Pakistan. As per the prosecution, information was

received from Directorate Revenue Intelligence by **PW-1 R.R. Swain** that accused were involved in transborder smuggling. Accordingly, **PW-1** directed S.P. Border **PW M. K. Sinah** to apprehend persons involved in the transborder smuggling. It is further case of the prosecution that at the time when accused Yousuf Massi was apprehended, respondent-Sham Lal was in the custody of Crime and Railways. This version of the prosecution case has been corroborated by **PW-1 R.R. Swain** and pertinently said witness has also stated that custody of respondent-Sham Lal was handed over to S.P. Border, during which, he made disclosure with respect to the contraband i.e. heroine in question. As per the disclosure made by the respondent, he had concealed a bag containing 09 packets of heroine underneath a heap of bricks lying in the compound of his house. It is pertinent to mention that this disclosure has been made by the respondent to SDPO, R. S. Pura in the presence of **PWs-Munish Kishore and Kushwant Singh**.

**8.** The pristine question, which falls for consideration of this Court, is that when respondent was admittedly in the custody of Crime and Railways, whether his custody was handed over to the investigating agency in the present case or not.

**9.** **PW-Munish Sinah** has stated that as per information received from Directorate Revenue Intelligence by PW-1 that accused were involved in the transborder smuggling of heroine and charas, he was directed to investigate the matter. He further states that two teams were constituted for arrest of both accused persons. Accused-Yousuf Massi was arrested by SDPO R.S.Pura, on whose disclosure, 09 packets of heroine from a field belonging to respondent and one pistol (Katta) lying in his house were recovered. The

witness goes on to state that respondent was brought by SSP, Jammu who disclosed that he had concealed 09 packets of heroine underneath the bricks near his house and consequent recovery was effected on the basis of said disclosure and at the instance of the respondent.

**10. PW R. R. Swain** has stated that respondent was in the custody of Crime and Railways in a narcotic case and his custody was handed over to S.P. Border and SDPO, R.S. Pura, during which, respondent made a disclosure that he had concealed 09 packets of heroine in the compound of his house under a heap of bricks. This witness has also stated that on the receipt of information from the Directorate of Revenue intelligence, both the accused persons came to be arrested. It is pertinent to mention that according to **PW-R. R. Swain**, respondent was in the custody of Crime and Railways and **PW-Munish Sinah** has deposed that respondent-Sham Lal was brought by SSP, Jammu, however, there is nothing on the record to suggest about the custody of the respondent with Crime and Railways as also to indicate that when his custody was handed over to the Investigating Officer in the present case. The prosecution case is absolutely silent about the fact that when respondent was in the custody of Crime and Railways and in which FIR and for the commission of which offence(s). Neither there is anything on the record nor any evidence led by the prosecution in the trial court to establish custody of the respondent with the Crime and Railways as also with respect to shifting of his custody in the present case. It needs a specific mention that it is none of the prosecution case that respondent was apprehended by the Police team, rather it is positive case of the prosecution that custody of the respondent was obtained from the Crime and Railways. But there is no proof

adduced by the appellant/prosecution in the trial court in this respect. It is a serious lapse on the part of the investigating agency as also the prosecution.

**11.** Now coming to the disclosure statement attributed to the respondent and consequent recovery of the contraband, it is trite that in terms of legislative mandate ingrained in the Evidence Act, no confession made to a police officer, whether in custody or not, can be proved against the accused. Section 27 in a way is a proviso to these provisions, inasmuch as, a statement made even by way of confession is admissible, as evidence under Section 27 distinctly relates to fact discovered. (See AIR 1972 SC 3)

**12.** In the aforesaid backdrop, we find ourselves in agreement with the observation of learned trial court that disclosure made while in custody, in consequence of which, the fact is discovered, is an incriminating evidence, which when established beyond doubt, is to be explained by the accused. In order to avail the benefit of section 27 of the Evidence Act, two conditions are required to be satisfied: (i) information must be such as has caused discovery of the fact and (ii) information must be distinct to the fact discovered.

**13.** Section 27 of the Evidence Act cannot be invoked, but for the co-existence of aforesaid two conditions. It is evident, as such, that prosecution is obliged to establish that accused was in custody and while in custody he made the disclosure. It is only after said disclosure made by the accused, while in the custody of the police that prosecution is obliged to prove that subsequent recovery is effected in the present case. As already stated, appellant/prosecution in the trial court has failed to prove custody of the

respondent in the present case from Crime and Railways, therefore, the recovery and seizures of the contraband, pales into insignificance.

**14.** Be that as it may, the disclosure and recovery, in the present case, is otherwise discrepant in character. **PW-3 Gian Chand** has stated that on 30.07.2001, he was called by Senior Superintendent of Police (SSP) to his residence and was directed to hand over a letter to SDPO, R. S. Pura. He handed over the said letter to SDPO, R.S. Pura, who constituted two teams; one under the supervision of the S. P. Border and the second under the supervision of SDPO R. S. Pura. Accused Yousuf Massi was arrested, who made a disclosure in Police Station, R.S. Pura that he had concealed 09 packets of heroine under a dump of sand and had concealed one pistol (katta) in his house and consequently, the recoveries and seizures were effected at his instance. However, independent witnesses to the disclosure of **PWs-Janak Raj** and **Choudhary Sham Lal** have not supported the prosecution version in this respect. Consequent recovery is stated to have been effected in the presence of **PWs-Bhushan Lal** and **Rajinder Kumar** who are independent witnesses and both these witnesses have also turned hostile, though other two witnesses, namely, Khuswant Singh & Munish Kishore, who are police officials, have admitted the recovery memo. Therefore, all the independent witnesses i.e. PWs 4, 5, 6, 7 and 9, having turned hostile, have not supported the prosecution case.

**15.** Another vital aspect of the case is with respect to placement of the seized contraband in the safe custody of Malkhana, re-sealing and forwarding of same to FSL for chemical analysis.

16. The prosecution has failed to prove that contraband recovered in the present case was kept in the safe custody and forwarded to FSL in accordance with law and without any delay. It is pertinent to note that in view of stringent provisions regarding punishment and grant of bail, the legislature in its wisdom enacted section 55 of the NDPS Act to ensure that officer Incharge of Police Station shall immediately take charge and keep the alleged contraband in safe custody, in order to rule out any possibility of tampering with the contraband. Prosecution is obliged to prove that the contraband after its recovery and seizure from the accused was kept in safe custody, in the Malkhana of the concerned Police Station under proper entry in the Malkhana register. The prosecution is also obliged to prove that said sample of the contraband was forwarded to FSL without any delay.

17. Chhattisgarh High Court in **Ganga Bhai v. State of M.P** reported as **2012 (4) Crimes (HC) 687** in a similar legal situation has made following observation:

“30. After having considered the evidence led by the prosecution in its entirety, I am of the considered opinion that there is non compliance of the provisions of Sections 52 and 55 of the Act, 1985. Neither delay in delivering the sample at FSL has been explained nor the Malkhana Register was produced in evidence. The prosecution did not examine the officer-in-charge of Malkhana, Station House Officer and Constable 302 Shyam Sunder Chandrakar. Therefore, the report of FSI (Ex. P8) cannot form basis of conviction of the appellant under Section 20B of the Act, 1985. In view of teh above, the impugned judgment deserves to be set aside”

18. Similarly, in **Prem Shahi v. State of Uttrakhand** reported as (2013) **Supreme (UK) 162**, Uttrakhand High Court has also held as below:

“Having perused the contents of Section 55 of the NDPS Act, I have no hesitation to hold that contraband, so recovered from the accused, shall be forwarded to the officer Incharge of the police station; who shall put the contraband and sample seal in a safe custody and shall affix his seal to such articles before



keeping them in the Malkhana. Section 55 further authorizes Incharge of the police station to permit the Investigating Officer or any other officer to take sample of the contraband in the presence of Incharge of the police station and affix his own seal on the sample, so drawn as well as on the packet, wherein rest of the contraband, is kept, after taking the sample.”

19. Reverting to the present case, **PW-11 Sardari Lal** posted in Police Station, R. S. Pura has deposited packets along with papers in the Malkhana and entry to that effect was made in the concerned Register. **PW-12 Madan Lal** is the incharge, Malkhana, who has stated that he received 09 packets and one pistol on 01.07.2001, i.e. on the date of occurrence itself at 12:40 at night and an entry was made in the relevant Register and on the next day, i.e. on 02.07.2001 he also received 09 packets of heroine from SDPO R.S.Pura regarding which he made entries in Register No. 19 and deposited the same in the Malkhana. Now, as per the prosecution story, accused-Sham Lal made disclosure regarding heroine on 01.07.2001, the contraband was recovered and sealed on the same date and were sent to the Executive Magistrate for re-sealing on 02.07.2001, same were re-sealed on the said date, as evident from EXPW-SP. Now, it is pertinent to mention that said samples were again produced before the Executive Magistrate on 23.07.2007 as same were required to be sent to FSL Chandigarh. The samples were received by CFSL, Chandigarh on 25.07.2001. The question which arises from this chronology of events is that when samples were re-deposited in the Malkhana after same were obtained by the investigating agency for re-sealing and when they were taken back by the investigating agency for forwarding to CFSL, Chandigarh. The prosecution case is absolutely silent about the same and it vitiates the whole trial.

20. It may also be noted that as per EXPW-NK the seal with which the heroine in question was sealed was kept on the superdnama of **PW Rajinder**

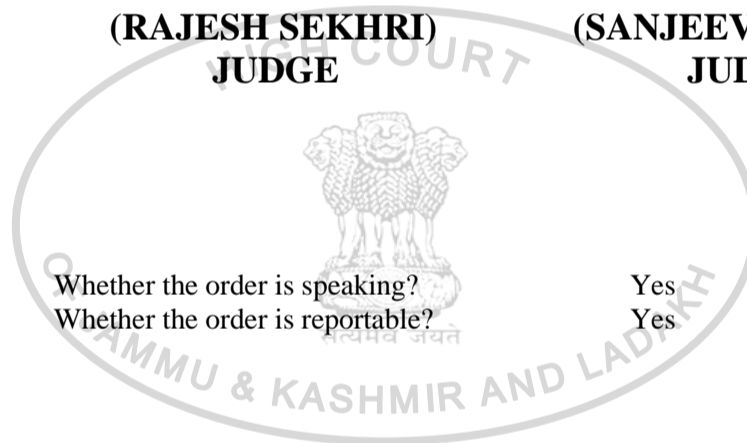
**Kumar**, but **PW-Rajinder Kumar** has denied this fact, therefore, superdnama of the seal having not been established, the link evidence is also missing.

**21.** Having regard to what has been observed and discussed above, we do not find any illegality much less impropriety in the well reasoned impugned judgment of acquittal. Viewed thus, we have not been persuaded to take a view different from the one taken by learned trial court. Hence present appeal is dismissed and the impugned judgment is upheld. Respondent is discharged of his bail bonds. Record of the trial court, if any, shall be returned.

**(RAJESH SEKHRI)**  
**JUDGE**

**(SANJEEV KUMAR)**  
**JUDGE**

Jammu  
26.04.2023  
Paramjeet



Whether the order is speaking?  
Whether the order is reportable?

Yes  
Yes