



**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**Criminal Appeal No.499 of 2009.**

**Judgment reserved on :19.06.2019.**

**Date of decision: 26<sup>th</sup> June, 2019.**

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**State of Himachal Pradesh .....Appellant.**

**Versus**

**Rakesh Kumar .....Respondent.**

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***Coram***

**The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.**

**The Hon'ble Mr. Justice Chander Bhusan Barowalia, Judge.**

***Whether approved for reporting?<sup>1</sup> Yes***

**For the appellant : Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Additional Advocate Generals with Mr. Bhupinder Thakur and Ms. Svaneel Jaswal, Deputy Advocate Generals.**

**For the Respondent : Mr. N.S.Chandel, Senior Advocate with Ms. Prem Lata Negi, Advocate.**

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**Tarlok Singh Chauhan, Judge**

Aggrieved by the acquittal of the respondent for an offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act (for short 'ND&PS Act'), the State has filed the instant appeal.

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<sup>1</sup>***Whether the reporters of the local papers may be allowed to see the Judgment?Yes***

2. Briefly stated the case of the prosecution is that on 16.03.1998, a police party headed by the Deputy Superintendent of Police, Shri Prem Thakur, was present at Village Bhadroa and at about 3.00 p.m., it received a secret information that 'Sharma Traders' shop at Damtal deals in contraband. Such information was reduced into writing and then passed on to the Superintendent of Police, Kangra. The police party thereafter proceeded to Damtal and also associated two witnesses namely Karnail Singh and Sandip Singh. The shutters of the shop had been pulled down and when opened it was found that there were two persons inside the shop, who disclosed their names as Subhash and Rakesh. Both the persons were apprised of the information received by the police party and also gave reasons for search and issued notice to this effect to both these persons and they opted to be searched by the police party. Their personal search was conducted and premises in question was also searched, which led to the recovery of a polythene bag containing opium, which on weighment was found to be 7kg 100 grams. Two samples of 25 grams each were taken and sealed separately with seal 'M', whereas, remaining opium was also put in six polythene bags which were also sealed and put in one parcel of cloth which too was sealed. The specimen of the seal impression was taken separately vide Ex. PR and seal after use

was handed over to Karnail Singh. The rukka was then sent to the Police Station for registration of the case pursuant to which an FIR in question came to be registered. On completion of the investigation, the respondent along with Subhash Chand was made to face trial. Since Subhash Chand did not appear, therefore, he was declared as proclaimed offender vide order dated 29.11.2000.

3. After recording evidence and evaluating the same, the learned Special Judge acquitted the respondent mainly on the ground that the prosecution has not been able to establish the guilt of the respondent and since the complainant and the person investigating the case was the same person, the same has resulted in miscarriage of justice.

4. It is vehemently contended by the learned Additional Advocate General that the learned Special Judge erred in acquitting the respondent without taking into consideration that the officials witnesses examined by the prosecution were reliable. It is further contended that the learned Court below remained completely oblivious to the quantity of the contraband that had been recovered, which by sheer volume, size and weight could not have been planted.

5. On the other hand, Shri N.S.Chandel, learned Senior Advocate assisted by Ms. Prem Lata, Advocate, for the

respondent would contend that since the prosecution has miserably failed to prove its case beyond reasonable doubt, therefore, no fault can be found with the judgment of acquittal passed by the learned Special Judge.

We have heard the learned counsel for the parties and have also gone through the records of the case.

6. It is the case of the prosecution that the contraband was recovered from the exclusive and conscious possession of the respondent in the presence of two independent witnesses namely Karnail Singh and Sandip Singh. It is not in dispute that the independent witnesses PW-1 Karnail Singh and PW-2 Sandip Singh did not support the case of the prosecution and rather claimed that nothing was recovered from the respondent in their presence.

7. Even PW-4 Satnam Singh whose shop is adjacent to the shop in question also did not support the case of the prosecution and rather stated that he had not seen the respondent in the shop at the time when the alleged contraband was recovered.

8. PW-5 Raj Kumar, who is an independent witness and President of 'Damtal Veopar Mandal' also did not support the case of the prosecution and was declared hostile.

9. As regards the official witnesses, even though they tried to prove the case of the prosecution, however, when their statements are read with other material that has come on record, then the case of the prosecution becomes doubtful because indisputably the premises belonged to respondent Rakesh Kumar and admittedly did not have any lock. The recovery has been effected from one Rakesh Kant and not Rakesh Kumar and there is nothing on record to show that Rakesh Kant and Rakesh Kumar are the one and the same person.

10. That apart, there is nothing on record to even remotely indicate where and whose custody the samples that were separately drawn and sent to FSL, Kandaghat had been kept with effect from 16.03.1998 to 22.03.1998 and thereafter from 22.03.1998 to 30.03.1998 and could therefore conveniently be tampered with.

11. What is more surprising is that the NCB forms had not been filled up at the time when the search of the premises was carried out and the contraband as is alleged to have been recovered, which in itself casts a serious doubt on the prosecution case, more particularly, when there is no reason forthcoming as to why the NCB forms were not filled up.

12. A detailed procedure for drawal, storage, testing and disposal of samples from seized drugs have been issued vide Standing Orders No. 1/88 and the same was thereafter followed by Standing Orders No. 1/89, dated 13<sup>th</sup> June, 1989. The relevant portion whereof reads as under:-

*2.1 All drugs shall be properly classified, carefully, weighed and samples on the spot of seizure.*

*2.2 All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.*

*2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in Duplicate) is drawn.*

*2.4 In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.*

*2.5 However, when the packages/containers seized together are of identical size and weight, bearing*

identical markings and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicated that the packages are identical in all respects the packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40. Such packages/containers, one sample (in duplicate) may be drawn.

2.6 Whereafter making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7 If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder/container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that sample are in equal quantity is taken from each quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9 The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the S. No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be eligible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked

*'secret-drug' sample/test memo', to be sent to the chemical laboratory concerned.*

*3.0 The seizing officers of the Central Government Departments, viz., Customs, Directorate of Revenue Intelligence, etc. should dispatch samples of the seized drugs to one of the Laboratories of the Central Revenues Control Laboratory nearest to their offices depending upon the availability of test facilities. The other Central Agencies like BSF, CBI and other Central Director, Central Forensic Laboratory, New Delhi. All State Enforcement Agencies may send samples of seized drugs to the Director/ Deputy Director, Assistant Director of their respective State Forensic Science Laboratory.*

*3.1 After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the panchnama. Original wrappers shall also be preserved for evidentiary purposes.*

### **Section-III Receipt of Drugs in Godown and Procedure**

*3.2 All the drugs invariably be stored in safes and vaults provided with double-locking system. Agencies of the Central and State Governments, may specifically designate their godowns for storage purposes. The godowns should be selected keeping in view their security angle, juxtaposition to courts, etc.*

*3.3 Such godowns, as a matter of rule, shall be placed under the over-all supervision and charge of a Gazetted Officer of the respective enforcement agency, who shall exercise utmost care, circumspection and personal supervision as far as possible. Each seizing officer shall deposit the drugs fully packed and sealed in the godown within 48 hours of such seizure, with a forwarding memo indicating NDPE Crime No. as per Crime and Prosecution (C & P register) under the new law, name of the accused,*

reference of test memo, description of the drugs, total no. of packages/containers, etc.

3.4 The seizing officer, after obtaining an acknowledgement for such deposit in the format (Annexure-I), shall hand over such to the Investigating Officer of the case alongwith the case dossiers for further proceedings.

3.5 The Officer-in-Charge of the godown, before accepting the deposit of drugs, shall ensure that the same are properly packed and sealed. He shall also arrange the packages/containers (case-wise and lot-wise) for quick retrieval, etc.

3.6 The godown-in-charge is required to maintain a register wherein entries of receipt should be made as per format at Annexure-II.

3.7 It shall be incumbent upon the Inspecting Officers of the various Departments mentioned at Annexure-II to make frequent visits to the godowns for ensuring adequate security and safety and for taking measures for timely disposal of drug. The Inspecting Officers should record their remarks/observations against Col. 15 of the Format at Annexure-II.

3.8 the Heads of the respective enforcement agencies (both Central and State Governments) may prescribe such periodical reports and returns, as they may deem fit, to monitor the safe receipt, deposit, storage, accounting and disposal of seized drugs.

3.9 Since the early disposal of drugs assumes utmost consideration and importance, the enforcement agencies may obtain orders for pre-trial disposal of drugs and other articles (including conveyance, if any) by having recourse to the provisions of sub-section (2) of section 52A of the Act.

13. What is the effect of non-filing of the NCB forms or for that matter as had been directed by the Standing Orders has been considered by the Hon'ble Supreme Court in ***Khet Singh versus Union of India, (2002) 4 SCC 380***, wherein it was held that the instructions issued by the Narcotics Control Bureau, New Delhi, are to be followed by the officer-in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer-in-charge of the investigation. It is apposite to refer to the relevant observations as contained in paragraphs 5 and 10 of the report which read as under:-

*"5. It is true that the search and seizure of contraband article is a serious aspect in the matter of investigation related to offences under the NDPS Act. The NDPS Act and the rules framed thereunder have laid down a detailed procedure and guidelines as to the manner in which search and seizure are to be effected. If there is any violation of these guidelines, Courts would take a serious view and the benefit would be extended to the accused. The offences under NDPS Act are grave in nature and minimum punishment prescribed under the Statute is incarceration for a long period. As the possession of any narcotic drugs or psychotropic substance by itself is made punishable under the act, the seizure of the article from the appellant is of vital importance.*

10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in-charge of the investigation of the crimes coming within the purview of the [NDPS Act](#), even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the investigation. It is true that when a contraband article is seized during investigation or search, a seizure mahazar should be prepared at the spot in accordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking, the officer can prepare the seizure mahazar at a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In that event, where the seizure mahazar is prepared at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody."

14. It is thereafter that the Hon'ble Supreme Court after examining the issue of violation of such procedural guidelines ruled as under:

*"16. Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the Court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence."*

15. Subsequently, the issue came up before the Hon'ble Supreme Court in **State of Punjab versus Makhan Chand, (2004) 3 SCC 453**, wherein it was observed as under:-

*"9. Learned counsel for the respondent-accused relied on certain standing orders and standing instructions issued by the Central Government under [Section 52A\(1\)](#) which require a particular procedure to be followed for drawing of samples and contended that since this procedure had not been followed the entire trial was vitiated.*

*10. This contention too has no substance for two reasons. Firstly, [Section 52A](#), as the marginal note indicates, deals with "disposal of seized narcotic drugs and psychotropic substances". Under Sub-section (1), the Central*

Government, by a notification in the Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substance's having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in Sub-sections (2) & (3). If the procedure prescribed in Sub-sections (2) & (3) of [Section 52A](#) is complied with and upon an application, the Magistrate issues the certificate contemplated by Sub-section (2), then Sub-section (4) provides that, notwithstanding anything to the contrary contained in the [Indian Evidence Act, 1872](#) or the [Code of Criminal Procedure, 1973](#), such inventory, photographs of narcotic drugs or substances and any list of samples drawn under Sub-section (2) of [Section 52A](#) as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, [Section 52A\(1\)](#) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances.

11. Secondly, when the very same Standing Orders came up for considerations in [Khet Singh v. Union of India, \(2002\) 4 SCC 380](#) this Court took the view that they are merely intended to guide the officers to see that a fair procedure is adopted by the Officer-in-Charge of the investigation. It was also held that they were not inexorable rules as there could be circumstances in which it may not be possible for the seizing officer to prepare the mahazar at the spot, if it is a chance recovery, where the officer may not have the facility to prepare the

*seizure mahazar at the spot itself. Hence, we do not find any substance in this contention."*

16. However, it would be noticed that subsequent to the aforesaid judgment which had been rendered by the two Hon'ble Judges, a Bench of three Hon'ble Judges of the Hon'ble Supreme Court of India in **Union of India versus Balmukund and others, (2009) 12 SCC 161**, held that the Standing Instruction 1/88 (as was involved in that case) is a requirement of law, as would be evident from paragraphs 7 and 36 of the judgment which read as under:-

*"7. The manner in which a sample of narcotic is required to be taken has been laid down by the Standing Instruction 1/88, the relevant portion whereof reads as under:*

*"e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot."*

*36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW-7 had taken samples of 25 grams each from all the five bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement in law."*

17. As observed above, in the present case, the evidence of the prosecution is totally lacking to the effect that the NCB

forms at the first instance were filled up, rather, it is admitted that the NCB forms were not even filled up and thereafter even when the same were filled up, there is nothing on record to suggest where the samples of 25 grams each that were drawn apart for the purpose of analysis had been kept. This assumes importance, especially, when the prosecution had brought 'Malkhana' register, but did not bother to exhibit the same calling for an adverse inference under Section 114(g) of the Evidence Act.

18. The object of filling up of the forms suggests of its preparation at the time of seizure of a contraband article and separation of its representative sample and the affixing of the seal impressions is that the specimen seal impressions used at the time are affixed on the forms, so that it can be deposited with the case property in the 'Malkhana' and another copy thereof can be forwarded to FSL along with sample parcel, so that the seal impressions affixed on the sample parcel are duly compared with seal impressions on the NCB forms. The idea behind taking such precautions is to complete a material link in the prosecution evidence by eliminating the possibility of the sample being tampered with.

19. The sentence provided under the Act is very severe and, therefore, naturally the Courts insist for the standard of

proof beyond shadow of all reasonable doubt against the accused. Suspicion, however strong, cannot take the place of positive proof.

20. In view of the aforesaid discussion, we are of the considered view that the prosecution has not been able to prove conclusively the guilt of the respondent and has, therefore, rightly been acquitted by the learned Special Judge. The appeal sans merit and is dismissed as such. Bail bonds, if any, furnished by the respondent are discharged.

**(Tarlok Singh Chauhan)**  
**Judge**

**(Chander Bhusan Barowalia)**  
**Judge**

**26<sup>th</sup> June, 2019.**  
**(krt/sanjeev)**