



IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on : 03.02.2025

+ **CRL.L.P. 283/2019**

UNION OF INDIA

.....Petitioner

versus

KARAN SHARMA

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. A.K. Dahiya, Assistant Commissioner
of Customs I.G.I Airport, New Delhi. Deptt.
of Customs

For the Respondent :

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HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present petition is filed seeking leave to appeal against the judgment dated 04.10.2018 (hereafter '**impugned judgment**'), passed by the learned Trial Court in Sessions Case No. 146/17.

2. By the impugned judgment, the learned Trial Court acquitted the respondent of the offences under Sections 21(c)/ 23(c)/ 28 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ('**NDPS Act**').

3. The case against the respondent originated from information provided by the Duty Manager, Air India through a letter dated



15.09.2016, alleging suspicious activities.

4. Acting on this information, the respondent was subjected to a search in the Customs Preventive Room in the presence of independent witnesses. During the search, the respondent allegedly admitted to carrying Phensedyl Cough Syrup.

5. Subsequently, 300 bottles of Phensedyl Cough Syrup were recovered from the respondent's possession, with no accompanying invoice or purchase bill. Each bottle contained codeine phosphate, a manufactured narcotic drug, as listed in the NDPS Act.

6. Following the investigation, a complaint was filed, and charges under Sections 21/23 read with Section 28 of the NDPS Act were framed. The learned Trial Court took cognizance of the offence and proceeded with the trial.

7. The learned Trial Court, by the impugned judgment, acquitted the respondent, concluding that the prosecution had failed to establish its case beyond reasonable doubt. The operative part is reproduced hereunder :

“49. On examination the facts of the case as well as evidence of prosecution witnesses and the documents, this court is of the opinion that there are many reasons to discredit the inconsistent testimony of prosecution witnesses.

50. The custom was to lead evidence to connect the accused with the drug so recovered and further show that all the procedure as mandatory under NDPS Act were diligently followed. However, from above discussion of testimonies of PW, it is clear that custom has desperately failed to prove that any drug was recovered from the accused. It is also not believe worthy that a suitcase was found at level-IV where only the bottles were found and no garments or personal effects of accused were found in same. It has come on record that bag in question was lying open at Level-IV with



contraband. The bag also remained unattended and alof in airline office and subsequently in custom official room. Further the bag though claimed b witnesses before seeing, it is locked whereas on looking at the bag the witnesses could not show any lock on the same which means the so called checked in bag was always accessible to everyone. Panch witnesses have also demolished the case of Custom Department by saying that they did not know anything and nis signatures were obtained on blank paper. No photography and videography of the proceedings conducted by customs and of the bag in question when it was intercepted for the first time has been placed on record to substantiate the case of custom. Most of the witnesses have stated that they were not explained about any of the provisions of NDPS and Custom Act and specifically Section 67 and Section 108 of Custom Act which is mandatory. It is observed that investigation has not been carried out in the present matter in fair and just manner.

51. In view of the documents available on record, testimonies of the prosecution witnesses and the aforesaid discussion, this court holds that prosecution has not proved its case beyond shadow of doubt. He is given benefit of doubt qua the charged sections. Hence, accused Karan Sharma is acquitted for the offence U/s 21 (c), 23 (c) and 28 of NDPS Act. Bail bonds U/s 437 A Cr. P. C. in sum of Rs.25,000/- has been furnished and accepted.”

8. The learned counsel for the Union of India submits that the impugned judgment is erroneous as the learned Trial Court, while acquitting the respondent, failed to appreciate the evidentiary value of statement of the accused under section 67 of NDPS Act.

9. The prosecution emphasized the evidentiary value of the respondent's statement recorded under Section 67 of the NDPS Act by a competent officer, PW-2, a Superintendent of Customs. The statement was neither retracted nor challenged by the respondent. It was argued that this uncontroverted statement, coupled with the recovery of narcotics, was sufficient to establish the respondent's guilt.



10. He submits that the respondent failed to lead any defence evidence to disprove the veracity of the statement. Consequently, the unchallenged statement should have sufficed for a conviction under the NDPS Act.

11. The prosecution further argued that the Trial Court erred in failing to invoke the statutory presumptions under Sections 35 and 54 of the NDPS Act, which operate in favour of the prosecution unless rebutted by the accused.

Analysis

12. It is trite law that the Appellate Court must exercise caution and should only interfere in an appeal against acquittal where there are substantial and compelling reasons to do so. At the stage of grant of leave to appeal, the High Court has to see whether a *prima facie* case is made out in favour of the appellant or if such arguable points have been raised which would merit interference. The Hon'ble Apex Court in the case of *Maharashtra v. Sujay Mangesh Poyarekar: (2008) 9 SCC 475* held as under:

“19. Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal “shall be entertained except with the leave of the High Court”. It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.

20. In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether a prima facie case has



been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.

21. It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial court must be allowed by the appellate court and every appeal must be admitted and decided on merits. But it also cannot be overlooked that at that stage, the court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded by the trial court could not be said to be “perverse” and, hence, no leave should be granted.”

(emphasis supplied)

13. Suffice it to say that leave to appeal can be granted only if there is any perversity in the order of the learned trial court or a substantial error in the view taken by the trial court. Hence, an order of acquittal can only be set aside if the approach of the lower court is vitiated with the manifest illegality or the decision is perverse and the trial court has committed a manifest error of law and ignored material evidence on record.

14. After a detailed examination of the case, the evidence presented, and the legal principles governing the NDPS Act, it is evident that the impugned judgment acquitting the respondent is well-founded and does not warrant interference. The prosecution’s case is fraught with procedural lapses, contradictions in witness testimonies, and failure to adhere to the mandatory safeguards enshrined in the NDPS Act, which are essential to ensure a fair trial and prevent abuse of power.

15. The appellant primarily relies on the alleged failure of the learned Trial Court to consider the confessional statement of the accused under Section 67 of the NDPS Act and its misinterpretation of



the presumption under Sections 35 and 54 of the NDPS Act.

16. The Hon'ble Apex Court in ***Tofan Singh v. State of Tamil Nadu : (2021) 4 SCC 1*** held that a disclosure statement made under Section 67 of the NDPS Act is impermissible as evidence without corroboration. The relevant paragraphs of the said judgment is set out below:

“155. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under Section 42 or Section 53 can be the basis to convict a person under the NDPS Act, without any non obstante clause doing away with Section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India.

156. The judgment in Kanhaiyalal then goes on to follow Raj Kumar Karwal in paras 44 and 45. For the reasons stated by us hereinabove, both these judgments do not state the law correctly, and are thus overruled by us. Other judgments that expressly refer to and rely upon these judgments, or upon the principles laid down by these judgments, also stand overruled for the reasons given by us.

157. On the other hand, for the reasons given by us in this judgment, the judgments in Noor Aga and Nirmal Singh Pehlwan v. Inspector, Customs are correct in law.

158. We answer the reference by stating:

158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

(emphasis supplied)

17. The learned Trial Court, therefore, correctly disregarded the



statement under Section 67 of the NDPS Act, as no corroborative evidence was presented linking the respondent to the recovered contraband. Furthermore, the burden of proof in NDPS cases requires strict compliance with procedural safeguards, which the prosecution failed to satisfy.

18. The prosecution invoked the presumption under Sections 35 and 54 of the NDPS Act, arguing that the accused was required to prove that he had no knowledge of the narcotic substance. However, this presumption is not absolute but rebuttable. The respondent successfully rebutted the presumption by showing that he had no control over the baggage from which the contraband was allegedly recovered. The trial court correctly ruled that the prosecution failed to establish the essential element of “conscious possession,” which is a prerequisite for conviction under the NDPS Act.

19. Furthermore, the learned Trial Court specifically relied on *State of Punjab v. Baldev Singh : (1999) 6 SCC 172*, which mandate strict compliance with procedural safeguards in NDPS cases.

20. In the present case, the learned Trial Court found lapses in the chain of custody of the seized narcotics and inconsistencies in the testimonies of key witnesses. The prosecution failed to maintain a consistent and unbroken chain of custody, leading to questions about possible tampering. The case property (seized narcotics) was not deposited in the designated warehouse (*malkhana*) immediately after seizure. The prosecution failed to explain why no official *roznamcha* (daily diary) entry was made regarding the movement of the seized



property.

21. PW-1 (a customs official) admitted that while he had seen the bag in question, he could not confirm whether the bag produced in court was the same that was allegedly seized. Another prosecution witness, PW-7, initially stated that the bag had a number lock and was made by Samsonite, but later changed his statement, saying it had no number lock and was a VIP brand bag.

22. The learned counsel for the respondent in defense had contended that according to the prosecution witnesses screening images of the bag were preserved in the system for a minimum period of 15 days however, the same were neither retrieved and placed on record by the prosecution nor any CCTV/video recording was produced to show that the respondent carried the bag. He submitted that the same was taken into consideration by the learned Trial Court to come to a just decision.

23. It is further submitted that the witnesses produced by the prosecution were self-contradictory and did not support the case of prosecution. PW-11, Sh. Dina Nath Pal who was working as a sweeper, during examination deposed that *“the signatures on EXPW 10/D at point D bears my signature on each page. I do not know what is written in the same. My signatures were obtained forcibly on blank papers. It was told to me that if I would not sign, my pass would have been snatch and my entry in the airport would be banned ..”*

24. Further, PW-13, Sh. Sheel Kumar during his examination stated that he cannot say that the bag in question was of the respondent or



not. The depositions of the independent witnesses *qua* the alleged seized bag raises serious doubts in the reliability of the witnesses and is fatal to the case of the prosecution.

25. The absence of CCTV footage from the airport, where the seizure took place, was a major oversight. Given that airports are high-security zones under constant surveillance, the failure to provide CCTV evidence created serious doubts about the authenticity of the seizure process.

26. These shortcomings raised reasonable doubts about the legitimacy of the recovery process and the respondent's alleged involvement.

27. This Court, in the case of ***Ram Prakash v. State : 2014 SCC OnLine Del 6936***, while acquitting the accused person therein, had taken into account the shoddy investigation conducted by the prosecution on account of lack of videography and found the prosecution case to be unbelievable. The Court had observed as under:

“22.The Court can only observe that with so many technological advances where satellite imagery to the smallest degree of precision of any location in the world is available, the Delhi police can no longer be excused for not improving its methods of gathering and presenting evidence. Considering that the raid was going to take place in a busy place like the Old Delhi Railway Station parking lot, and in broad daylight, it should have been possible for the police to arrange for a videograph of the place or perhaps of the raid itself, if not photographs.

23. Also clearly there are CCTV cameras all over the place outside the Old Delhi Railway Station including its parking lot. There was no effort made to collect the CCTV footage of the relevant time. Not only



would it have showed how the Appellant reached the spot with the three bags but also it could have been placed on record to show the raid placed on record to shown the raid as it took place.”

(Emphasis supplied)

28. The Hon’ble Apex Court in the case of ***Shafhi Mohd. v. State of H.P. : (2018) 5 SCC 311*** underscored the importance of videography in police investigation in line with the best practices around the world given the advancement of technology. The Hon’ble Apex Court had directed the implementation of a Plan of Action proposed by the Committee of the Ministry of Home Affairs and further directed for setting up of a Central Oversight Body to plan and implement the use of videography. The relevant portion of the said judgment is reproduced hereunder:

“3. In order dated 30-1-2018 [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] it was observed: (Shafhi Mohammad case [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] , SCC pp. 808-09, paras 21-23)

“21. We have been taken through certain decisions which may be referred to. In Ram Singh v. Ram Singh [Ram Singh v. Ram Singh, 1985 Supp SCC 611] , a three-Judge Bench considered the said issue. English judgments in R. v. Maqsd Ali [R. v. Maqsd Ali, (1966) 1 QB 688 : (1965) 3 WLR 229 : (1965) 2 All ER 464 (CCA)] and R. v. Robson [R. v. Robson, (1972) 1 WLR 651 : (1972) 2 All ER 699 (CCC)] , and American Law as noted in American Jurisprudence, 2d (Vol. 29) p. 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same. In the case of tape-recording it was observed that voice of the speaker must be duly identified,



accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.

22. In *Tukaram S. Dighole v. Manikrao Shivaji Kokate* [*Tukaram S. Dighole v. Manikrao Shivaji Kokate*, (2010) 4 SCC 329 : (2010) 2 SCC (Civ) 112 : (2010) 2 SCC (Cri) 826], the same principle was reiterated. This Court observed that new techniques and devices are order of the day. Though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.

23. In *Tomaso Bruno v. State of U.P.* [*Tomaso Bruno v. State of U.P.*, (2015) 7 SCC 178 : (2015) 3 SCC (Cri) 54], a three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency. Reference was made to the decisions of this Court in *Mohd. Ajmal Amir Kasab v. State of Maharashtra* [*Mohd. Ajmal Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481] and *State (NCT of Delhi) v. Navjot Sandhu* [*State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715].”

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5.An affidavit dated 21-3-2018 has been filed by the Director, Ministry of Home Affairs (MHA) annexing thereto report of the Committee constituted by the MHA about use of videography in police investigation dated 22-11-2017. The Committee considered various issues including the present infrastructure and usage, concerns/problems raised by various States for use of videography during investigations, admissibility of electronic evidence in absence of a certificate under Section 65-B(4) of the Evidence Act, operational difficulties, lack of training, funding, forensic facilities. The Committee observed that though crime scene videography was a “desirable and acceptable best practice”, the mandatory videography required major issues being addressed. Videography may be done on “best effort” basis. The timeline should be different for different States and the Central Investigating Agencies....



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*9. We are in agreement with the Report of the Committee of Experts that videography of crime scene during investigation is of immense value in improving administration of criminal justice. A Constitution Bench of this Court in Karnail Singh v. State of Haryana [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887], SCC para 34 noted that technology is an important part in the system of police administration. It has also been noted in the decisions quoted in the earlier part of this order that new techniques and devices have evidentiary advantages, subject to the safeguards to be adopted. Such techniques and devices are the order of the day. **Technology is a great tool in investigation** [Ram Singh v. Ram Singh, 1985 Supp SCC 611; R. v. Maqsood Ali, (1966) 1 QB 688 : (1965) 3 WLR 229 : (1965) 2 All ER 464 (CCA); R. v. Robson, (1972) 1 WLR 651 : (1972) 2 All ER 699 (CCC); Tukaram S. Dighole v. Manikrao Shivaji Kokate, (2010) 4 SCC 329 : (2010) 2 SCC (Civ) 112 : (2010) 2 SCC (Cri) 826; Tomaso Bruno v. State of U.P., (2015) 7 SCC 178 : (2015) 3 SCC (Cri) 54; Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481; State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715]. **By the videography, crucial evidence can be captured and presented in a credible manner.***

10. Thus, we are of the considered view that notwithstanding the fact that as of now investigating agencies in India are not fully equipped and prepared for the use of videography, the time is ripe that steps are taken to introduce videography in investigation, particularly for crime scene as desirable and acceptable best practice as suggested by the Committee of the MHA to strengthen the Rule of Law. We approve the Centrally Driven Plan of Action prepared by the Committee and the timeline as mentioned above. Let the consequential steps for implementation thereof be taken at the earliest.”

(emphasis supplied)

29. Photography and videography are universally accepted as the best practices for better erudition and appreciation of the evidence. The same ensures that the prosecution is able to better document the recovery during the investigation.



30. It is a settled principle of law that an appellate court should be slow to interfere with an acquittal unless the findings of the Trial Court are perverse or contrary to the evidence on record. In the present case, the Trial Court's findings are neither arbitrary nor unreasonable; instead, they are based on a meticulous evaluation of evidence and adherence to established legal principles. The Trial Court's judgment is consistent with the principle that in cases under the NDPS Act, strict compliance with procedural safeguards is mandatory to prevent miscarriage of justice.

31. For the foregoing reasons, it is evident that the learned Trial Court's decision to acquit the respondent is sound, reasoned, and based on a correct appreciation of both the facts and the law. The procedural safeguards under the NDPS Act were not followed, creating significant doubt about the legality of the search and seizure. Additionally, the contradictions in the testimonies of the prosecution witnesses and the lack of independent corroboration further weaken the case.

32. In the absence of any compelling reason, this Court finds no reasons to interfere with the impugned judgment and grant leave to appeal in the present case.

33. The leave petition is dismissed in the aforesaid terms.

AMIT MAHAJAN, J

FEBRUARY 03, 2025