

**HIGH COURT OF MADHYA PRADESH**  
**BENCH AT GWALIOR**  
**SINGLE BENCH**  
**PRESENT:**  
**HON'BLE MR. JUSTICE G.S. AHLUWALIA**

**Criminal Appeal No. 282 OF 2004**

**Manjoor Ahmad**

**-Vs-**

**State of M. P.**

---

Shri Rajmani Bansal, counsel for the appellant.

Shri Prakhar Dhengula, Panel Lawyer for the respondent/State.

---

**J U D G M E N T**  
**(13/04/2017)**

This Criminal Appeal under Section 374 of CrPC has been filed against the judgment dated 31.03.2004 passed by Special Judge, Bhind in S.T.No.23/2002 by which the appellant has been convicted under Section 8/21 (B) of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and has been sentenced to undergo the rigorous imprisonment of five years and a fine of Rs.20,000/- with default imprisonment.

The prosecution case necessary for the disposal of the present appeal in short are that on 29.10.2002, the SHO Police Station Daboh, District Bhind received an information from the informant that one person is standing along with his two wheeler bearing registration No.UP92-A-2946 near Galla Mandi, Daboh and is having smack in his illegal possession. Dilip Singh Yadav, SHO, Police Station Daboh went to the spot along with the police force and they found one person was standing who disclosed his name as

Manzoor Ahmed Son of Mansoor Ali, Resident of Jalaun (UP). On search, 41 grams of smack was found from his possession. A sample of 5 grams of smack was separately seized and sealed whereas 36 grams of smack was seized and sealed in different packet. The appellant was arrested. The two wheeler along with the documents of registration were seized. A crime No.129/2002 for offence under Section 8/18 of NDPS Act was registered in Police Station Daboh, District Bhind. The seized sample of heroin was sent for chemical examination to FSL Sagar who on its chemical examination found that it was containing heroin. After completing the investigation, the police filed the charge-sheet.

The Trial Court by order dated 06.01.2003 framed charge under Section 8/21 of NDPS Act.

The appellant abjured his guilt and pleaded not guilty.

The prosecution in order to prove its case examined Ashok Vishwakarma (P.W.1), Bhagwat Narayan (P.W.2), Suresh Singh Chauhan (P.W.3), Ram Sharan Singh (P.W.4), D.S. Yadav (P.W.5), Mukesh (P.W.6) and Krishna Veer Singh (P.W.7). The appellant examined Jafer Khan (D.W.1) in his defence.

Ashok Vishwakarma (P.W.1) has not supported the prosecution case and was declared hostile. This witness was cross-examined by the Public Prosecutor. In cross-examination, this witness denied that the panchnama of the information received from the informant Exhibit P-1 was prepared by the SHO but he admitted his signature on the panchnama Exhibit P-1. This witness further denied that he had gone along with the SHO to Mandi Gate, Daboh. He also denied that he had seen the appellant at the spot along with two wheeler bearing registration No.UP92-A-2946. He

further denied that any query was made by the SHO. He further denied that any search panchnama Exhibit P-2 of the appellant was prepared but he admitted his signature on the panchnama Exhibit P-2. He further denied that the police had given their search to the appellant and also denied that the panchnama Exhibit P-3 was prepared in his presence but admitted his signature on the panchnama Exhibit P-3. He further denied that the search of the appellant was carried out by the SHO and also denied the preparation of search panchnama but admitted his signature on Exhibit P-4. He further denied that on search 41 grams of smack was found wrapped in a polythene of green colour. He further denied that a sample of 5 grams of smack was separately seized and sealed. He further denied the seizure of two wheeler but admitted his signature on Exhibit P-5. He further denied that the appellant was arrested and also denied that the arrest memo Exhibit P-6 was prepared in his presence. He further denied that the SHO by smelling the seized contraband had identified the same as smack and also denied the preparation of Exhibit P-7 but he admitted his signature on Exhibit P-7. He further denied that the weight and scale was brought and was physically verified and also denied the preparation of Exhibit P-8 but admitted his signature on Exhibit P-8. He further denied that the seized contraband was weighed in his presence but admitted his signature on the weight panchnama Exhibit P-9. Nothing could be elicited from the cross-examination of this witness which may support the prosecution case.

Bhagwat Narayan (P.W.2) has also not supported the prosecution case and was declared hostile. In cross-examination by the Public Prosecutor, this witness although admitted his signatures on Exhibits P-1, P-2, P-3, P-4, P-5,

P-6, P-7 & P-9 but denied that these documents were prepared by the police in his presence. This witness on his own explained that the police had obtained his signatures in the police station. He further denied that the police had prepared the spot map Exhibit P-11 in his presence. He further stated that the case diary statement Exhibit P-12 which was recorded by the police was not given by this witness. Thus, nothing could be elicited from the cross-examination of this witness which may support the prosecution case.

Suresh Singh Chauhan, ASI (P.W.3) has stated that on 29.10.2002 he was posted on the post of ASI in Police Station Daboh, District Bhind and SHO had informed him in the police station itself that he has received an information from an informant that one person is standing in Daboh Mandi along with smack. The panchnama was prepared by the SHO. This witness along with the SHO went to the gate of grain mandi, Daboh, where they found that one boy was standing along with two wheeler. The SHO informed that they had received an information that he is having smack and therefore his search is required. The consent panchnama was prepared. This witness and the SHO gave their personal search to the appellant. Thereafter, the appellant was searched and one polythene packet was found in the right pocket of his pant which was containing a brown coloured material which was identified as smack and the identification panchnama was prepared. Weight and scale was called and its panchnama was also prepared. The seized contraband was weighed and the weight panchnama and the seizure panchnama were prepared. The appellant was asked about the licence to keep the smack but he could not produce the same. The smack was seized on the spot and it

was sealed and the appellant was arrested and brought to the police station. This witness has further identified the appellant as the same person from whom the smack was seized. In cross-examination, this witness has admitted that his case diary statement was recorded on 06.12.2002 but in the case diary statement Exhibit D-1, the fact that the SHO had informed this witness about the information given by the informant is not mentioned and this witness could not explain as to why this statement was not mentioned in the case diary statement Exhibit D-1. It was further stated by this witness that they left the police station at 06:30 in the morning and total 11 persons including the witnesses had gone to the place of incident which was at a distance of 400-500 meter from the police station and they had gone to the spot on the police vehicle. This witness could not state the colour of the pant which the appellant was wearing on the date of incident. This witness clarified in his cross-examination that the SHO had informed the appellant that he could give his search to a Gazetted Officer or to a Magistrate. He further stated that the weight and scale was made up of copper and was kept inside the glass box which is used by the jewelers. The sample of 5 grams of smack was prepared and after keeping the same in the packet of cigarette, the same was sealed. The entire written work was done on the spot itself. He denied that the written proceedings were done in the police station. He also could not explain as to why the independent witnesses Ashok and Bhagwat Narayan had come to the police station.

Ram Sharan Singh (P.W.4) was posted as Constable in the Police Station Daboh. On 29.10.2002 an information was given to the SHO by an informant that one person is standing near the gate of mandi Daboh with an intention to

sell smack. Thereafter, he along with the police force and the SHO reached on the spot where they found that the appellant was standing along with his two wheeler M-80. The appellant was searched by the SHO and one packet was recovered from the right pocket of his pant which was seized and after completing the written work, he was arrested and brought to the police station. In cross-examination, this witness has admitted that the informant had not given the information in the presence of this witness. The moment the information was received, they left for the spot. He further stated that the entire police force had gone by walking and they reached on the spot within five minutes whereas the spot is at a distance of about ½ km from the police station. This witness has further stated that the SHO has not informed the appellant about his right to be searched. After arresting the appellant, they came back to the police station and in the police station itself, the SHO had completed the written work.

D.S. Yadav (P.W.5) had stated that on 29.10.2002, he was posted as SHO, Police Station Daboh, District Bhind and stated that an information was given by the informant that near the gate of grain mandi, one person is standing along with his two wheeler and this information was recorded in the Rojnamcha Sanha at S.No.1231 and the panchnama was prepared in the presence of independent witnesses Ashok and Pappu which is Exhibit P-1. After preparation of the panchnama, they left for the place of incident, which was mentioned at Sl.No.1232 of the Rojnamcha Sanha. When they reached on the spot, they found one person who disclosed his name as Manzoor Ahmed. Before taking search of the appellant, he was informed about his right that if he so wishes, he could give his search to the Magistrate or the

Gazetted Officer, but he gave his consent for his search by this witness. The consent panchnama Exhibit P-2 was prepared. Before taking the search of the appellant, this witness along with the independent witnesses and other persons gave their personal search to the appellant and the search panchnama Exhibit P-3 was prepared. The appellant was searched and a green coloured polythene packet was found in the right pocket of his pant which was containing smack. The search panchnama Exhibit P-4 was prepared. The pant along with two wheeler with the documents of registration were seized vide Exhibit P-5. This witness had identified the contraband by smelling and on the basis of his experience, he found the same to be smack and the identification panchnama Exhibit P-7 was prepared. The seized smack was weighed on the spot itself and the weight panchnama Exhibit P-9 was prepared. The contraband was weighed by Mukesh Son of Braj Bihari. Before weighing the seized contraband, the physical verification of the weight and scale was done and panchnama was prepared which is Exhibit P-8. The spot map Exhibit P-11 was prepared and the appellant was arrested vide arrest memo Exhibit P-6. Total 41 grams of smack was found in the possession of the appellant and a separate sample of 5 grams of smack was prepared which was sealed on the spot and the remaining 36 grams of smack was also sealed in the presence of the witnesses. The appellant was arrested and brought to the police station. The FIR Exhibit P-13 was lodged. The information of the crime was sent to the superior officer which is Exhibit P-14 and under the orders of superior officer, the case diary of the case for the purposes of further investigation was handed over to the SHO, Alampur. On returning back to the police station, their arrival was

mentioned in Rojnamcha Sanha at Sl.No.1236 and the seized smack was handed over to HCM for keeping the same in the malkhana. In cross-examination, this witness has stated that he had informed the SDO (P) of Lahar about the information given by the informant. The information as contained in Exhibit P-14 was sent to the SDO (P) after the contraband was seized. The said letter Exhibit P-14 was sent directly from the spot and, therefore, it was not containing any dispatch number. The information Exhibit P-14 was sent through Constable Ram Saran. The counter report of the FIR was given to the Court of competent jurisdiction. Although, this witness admitted that no acknowledgment of the counter report of the FIR is either annexed in the case diary or in the charge-sheet. This witness has further stated that the spot is situated at a distance of about 500 meter from the police station and on either side of the place of incident, shops and houses are situated but none of the independent witnesses came forward to depose.

Mukesh (P.W.6) has turned hostile and has not supported the prosecution case.

Krishna Veer Singh, Head Constable (P.W.7) had brought the malkhana register as well as Rojnamchana dated 29.10.2002 of Police Station Daboh. According to Sl.No.1231 dated 29.10.2002, the fact of receipt of an information from the informant was mentioned. The Rojnamcha Sanha No.1231 is Exhibit P-16 and its photocopy is Exhibit P-16C. The departure of the police at 4.25 in the evening from the police station is mentioned at Sl.No.1232 in Rojnamcha Sanha which is Exhibit P-17 and its photocopy is Exhibit P-17C and the arrival of the police party is mentioned at Sl.No.1236 of Rojnamcha Sanha which is Exhibit P-18 and its photocopy is Exhibit P-18C. This witness



has also brought the malkhana register of Police Station Daboh. According to this witness at Sl.No.59/2002, the fact of deposit of sealed packet containing 36 grams of smack and a sample containing 5 grams of smack is mentioned. The relevant entry is Exhibit P-19 and the photocopy of the same is Exhibit P-19C. It was further stated by this witness that in the entry Exhibit P-19, the fact of sending the samples to FSL Sagar is also mentioned. The receipt given by the FSL Sagar is Exhibit P-20 and its photocopy is Exhibit P-20C which is affixed in the malkhana register. This witness further admitted that on 29.10.2002, he was not posted in Police Station Daboh.

The appellant examined Jafar Khan (D.W.1) in his defence. This witness has stated that his wife is the aunt of the appellant. This witness has stated that the appellant had come to his house on 29.10.2002 because the wife of this witness was not good and he had come to see the wife of this witness. His wife had suffered heart attack. After having his meals when the appellant was about to go towards the market, at that time, the police came and took the appellant from the house itself.

It is submitted by the counsel for the appellant that the prosecution has failed to prove the compliance of mandatory provisions of Sections 42 & 50 of NDPS Act. He further submitted that since the prosecution did not produce the seized contraband before the Trial Court and, therefore, it cannot be said that the contraband was seized from the possession of the appellant. It was further submitted by the counsel for the appellant that there is nothing on record to show that the sample which was allegedly seized from the possession of the appellant was sent to FSL Sagar and, therefore, the FSL report submitted by the prosecution

cannot be relied upon. It was further submitted that the appellant has been falsely implicated.

Per contra, it is submitted by the State counsel that Section 42 of NDPS Act would not apply and Section 50 of NDPS Act was complied.

Heard the learned counsel for the parties.

So far as the compliance of Section 42 of NDPS Act is concerned, it is clear that the contraband was seized on a public place.

The Supreme Court in the case of **Karnail Singh v. State of Haryana** reported in **(2009) 8 SCC 539** has held as under:-

“12) The material difference between the provisions of Sections 42 and 43 of the NDPS Act is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.”

Thus, in the present case as the contraband was seized from the appellant in a public place, therefore, it cannot be said that Section 42 of NDPS Act would apply in the present case and under such circumstances, the provisions of Section 43 of NDPS Act would apply.

So far as non-compliance of Section 50 of NDPS Act is concerned, referring to the evidence of Ram Sharan Singh (P.W.4), it was submitted by the counsel for the appellant that as this witness has specifically admitted in his cross-examination that no information with regard to the right of being searched by a Gazetted Officer or by the Magistrate

was given to the appellant and since this witness was not declared hostile by the prosecution, therefore, his evidence is binding on the prosecution and thus, it is clear that the mandatory provision of Section 50 of NDPS Act has not been complied with.

It is further submitted that as according to the prosecution case, the personal search of the appellant was carried out and the seized contraband was found in the right pocket of pant of the appellant, therefore, the compliance of Section 50 of NDPS Act was mandatory.

The submission made by the counsel for the appellant does not appear to be convincing and, therefore, is rejected.

D.S. Yadav (P.W.5) has specifically stated in his evidence that before taking search of the appellant, he had informed him about his right to be searched either by the Investigating Officer or by the Magistrate or by the Gazetted Officer and since the appellant had given his consent for his search by the SHO himself, therefore, his consent panchnama Exhibit P-2 was prepared. This witness was cross-examined in detail and except by giving a suggestion that before carrying out the search of the appellant, he was not informed about his statutory right about the search, no other suggestion was given to this witness. Even the constable Bhagwat Narayan (P.W.2) was not challenged in the cross-examination.

As the consent panchnama Exhibit P-2 has not been challenged and considering the evidence of Suresh Singh Chauhan (P.W.3) and D.S. Yadav (P.W.5), it is held that the appellant was informed about his statutory right to be searched either by the SHO himself or by the Gazetted Officer or by the Magistrate and, therefore, the mandatory provision of Section 50 of NDPS Act was complied with.

It is next contended by the counsel for the appellant that the seized contraband was not produced in the Court and in fact, no evidence has been led by the prosecution to show that where the contraband is lying and also there is nothing on record to show the movement of sample of 5 grams of smack from the malkhana to the FSL Sagar.

So far as the production of the seized contraband before the Trial Court is concerned, it is clear from the record that 36 grams of smack which was seized from the appellant was not produced before the Court. There is nothing on record to suggest that this contraband was destroyed after following the due procedure as provided under the NDPS Act. In short, the prosecution has not brought anything on record to show that as to where the contraband which was seized from the possession of the appellant is lying. Further, the prosecution has filed the copy of malkhana register to show that on 29.10.2002 one sealed packet of 36 grams of smack and one sealed packet of sample of 5 grams of smack was deposited in the malkhana register, which was mentioned at No.59/2002 Exhibit P-19 and the photocopy of the same is Exhibit P-19C. However, there is nothing on record to show that when the sample of 5 grams of smack was taken out from the malkhana for the purposes of sending the same for chemical examination to FSL Sagar. The prosecution has relied upon the acknowledgment receipt given by the FSL Sagar dated 02.11.2002 to show that the sealed article which was marked as Article A-1 was received by FSL Sagar through Constable No.618 Hajari Singh. The crime No.129/2002 under Section 8/18 of NDPS Act, P.S. Daboh is also mentioned in the receipt and reference memo No.SP/FSL/652/2002 dated 31.10.2002 is also mentioned in

the acknowledgment receipt but for the reasons best known to the prosecution, they have neither examined Hajari Singh nor they have filed the copy of memo No.SP/FSL/652/2002 dated 31.10.2002. In absence of any entry in the malkhana register as to when the seized sample of contraband of 5 grams of smack was taken out from the malkhana and in absence of the evidence of Hajari Singh, the person who had taken the sample to the FSL Sagar and coupled with the fact that the prosecution did not file the memo dated 31.10.02 by which the sample of contraband was sent to FSL Sagar, this Court is of the considered opinion that the prosecution has failed to prove that the sample of 5 grams of smack which was seized from the possession of the appellant was in fact sent to FSL Sagar. When the important and major link is missing then merely because the report of the FSL Sagar which is Exhibit P-22 has been received, according to which the sample was found to be carrying 15.33 Diacetylmorphine (heroin) would be of no assistance to the prosecution.

It is also not out of place to mention here that the prosecution has also not examined the Investigating Officer. Thus, neither Hajari Singh was examined nor the Investigating Officer was examined by the prosecution. Similarly, neither the seized contraband was produced before the Court nor any evidence was led by the prosecution to prove that the sample of 5 grams of smack was in fact sent to FSL Sagar which was received by the FSL Sagar on 02.11.2002.

The Supreme Court in the case of **Jitendra and Another v. State of M.P.**, reported in **2004 SCC (Cri) 2028** has held as under:-

“6. In our view, the view taken by the High Court is

unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchanama is nothing but a document written by the police officer concerned. The suggestion made by the defence in cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the Investigating Officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the Investigating Officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far fetched.

7. The learned counsel for the appellants brought to our notice two more facts. The High Court seems to have relied on a copy of the letter dated 14-8-1999 written by the Superintendent of Police, Datia to the Director, State Forensic Laboratory, Sagar and placed reliance thereupon, although this was not a document produced during the trial and proved according to law. The High Court commented that the prosecution had failed to exhibit the letter during the trial and that the trial court was not vigilant in this respect. In the absence of anyone affirming the correctness of the contents of the letter, the High Court has placed reliance on the contents of the letter merely on the ground that the said document was mentioned at serial No. 9 in the charge sheet, and presumably its copy must have been supplied to the accused. This is another lacuna, noticeable in the judgment of the High Court."

The Supreme Court in the case of **Ashok @ Dangra Jaiswal Vs. State of M.P.** reported in **(2011) 5 SCC 123** has held as under:-

“12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.”

Thus, in a case punishable under Section 20 (b) of NDPS Act, the best evidence is the seized material which ought to have been produced before the Trial Court and should have been marked as material object. Mere oral evidence of Suresh Singh Chauhan (P.W.3), Ram Sharan Singh (P.W.4) and D.S. Yadav (P.W.5) to the effect that the contraband which was seized from the possession of the appellant was smack is not sufficient to held that 41 grams of smack was seized from the possession of the appellant.

Thus, under the facts and circumstances of the case, this Court is of the considered opinion that there is no evidence to connect the forensic report with the contraband which was allegedly seized from the possession of the appellant. Accordingly, it is held that the prosecution has failed to prove the guilt of the appellant beyond reasonable doubt and accordingly the appellant is acquitted of the charge punishable under Section 8/21 of NDPS Act.

The judgment and sentence passed by the Trial Court dated 31.03.2004 is set-aside. The personal bonds and surety bonds stands discharged. The appellant is already on bail. He is no more required in this case.

Accordingly, the appeal succeeds and is hereby **allowed.**

**(G.S. AHLUWALIA)**  
**Judge**

(ra)