

**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR**

**BEFORE  
JUSTICE SUJOY PAUL  
&  
JUSTICE AMAR NATH (KESHARWANI)**

**CRIMINAL APPEAL No. 307 of 2016**

**BETWEEN :-**

**1. ANJU ALIAS PIYARI BAI W/O LATE SHRI  
MUNNA LAL JHARIYA, AGED ABOUT 40  
YEARS, R/O DURGA NAGAR, GVARIGHAT P. S.  
GVARIGHAT (OLD GORAKHPUR) DISTRICT  
JABALPUR (M.P.)**

**2. SHIVRAJ ALIAS HAKKU ALIAS  
RAJKUMAR S/O SHRI KOMAL SINGH, AGED  
ABOUT 45 YEARS, R/O VILLAGE MACHWARA  
P. S. THEMI, DISTRICT NARSINGHPUR (M.P.)**

**3. RANJEET JHARIYA S/O LATE SHRI  
MUNNA LAL JHARIYA, AGED ABOUT 22  
YEARS, R/O DURGA NAGAR GVARIGHAT P. S.  
GVARIGHAT (OLD GORAKHPUR) DISTRICT  
JABALPUR (M.P.)**

**.....APPELLANT**

**(BY SHRI VIJAY SHRIVASTAVA - ADVOCATE )**

**AND**

**STATE OF MADHYA PRADESH, THROUGH  
POLICE STATION GORAKHPUR, DISTRICT  
JABALPUR (M.P.)**

**.....RESPONDENT**

**(BY SHRI ARVIND SINGH - GOVERNMENT ADVOCATE)**

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Reserved on : 16/03/2023

Pronounced on : 23/03/2023  
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*This Criminal Appeal having been heard and reserved for judgment, coming on for pronouncement this day, Justice Sujoy Paul pronounced the following :*

### **J U D G M E N T**

This appeal filed under Section 374(2) of Criminal Procedure Code, 1973 (Cr.P.C.) challenges the judgment dated 22/12/2015 passed in Special Case No. 45/2011 by Special Judge (NDPS Act) Jabalpur whereby learned Court below convicted and sentenced the appellants as under :-

<b>Appellant Nos.</b>	<b>Quantity recovered</b>	<b>Convicted under Sections</b>	<b>Sentenced to undergo</b>
<b>1. Anju @ Piyari Bai</b>	500 gms	8 read with 21(c) of NDPS Act	R.I. for <u>12 years</u> with fine of Rs.1,25,000/- and in default, to undergo R.I. for two years
<b>2. Shivraj @ Hakku @ Rajkumar</b>	200 gms	8 read with 21(b) of NDPS Act	R.I. for <u>10 years</u> with fine of Rs.80,000/- and in default, to undergo R.I. for one year six months.
<b>3. Ranjeet Jhariya</b>	60 gms	8 read with 21(b) of NDPS Act	R.I. for <u>10 years</u> with fine of Rs.80,000/- and in default, to undergo R.I. for one year six months.

**2.** The story of prosecution is that on 01/09/2011, the Inspector of Police Station, Gorakhpur Shri Raghvendra Singh Parmar (PW-4) received an information on telephone from Head Constable Mahesh

Sharma that he gathered an information from the informer that appellants will reach their house at the night about 1:00 O'clock with Smack powder. If a raid is made, Smack can be recovered from them. Raghvendra Singh Parmar reduced the information (*Mukhbir Suchna*) in *Rojnamcha*, prepared the relevant *panchnamas* and sent an application to City Superintendent of Police (CSP) Office, Gorakhpur. In turn, he obtained search warrant and requisitioned two independent witnesses through the Constable in the said Police Station. The independent witnesses were apprised about the information received from *Mukhbir*. Thereafter, along with said independent witnesses namely Bablu @ Virendra and Bablu @ Sarfaraz, the staff along with relevant materials reached Durga Nagar, Gwarighat, Jabalpur. The vehicles were kept at a distance from the house of Anju @ Pyari Bai. The said house was knocked and when door was opened, in the first room, a woman, a boy and two men were found sitting and discussing something. Upon enquiry, they informed their names as Anju @ Pyari Bai, Ranjeet, Shivraj alias Hakku alias Rajkumar and Ganesh. All the four persons were apprised about the *Mukhbir* information. They were informed that the raiding team is equipped with necessary permission to undertake the search. All the four accused persons were further apprised that they have a legal right to get themselves searched in presence of a Gazetted Officer or a Magistrate. The aforesaid persons gave written consent of search in the presence of the Gazetted Officer. Thus, a Gazetted Officer i.e. CSP was called. During the search of members of raiding party, no unobjectionable substance etc. were found in the possession of members of raiding party and witnesses.

3. The Constable Ms. Beena searched Anju @ Pyari Bai and inside her petticoat, a cloth bag was found in which substance like Smack was there. Similarly, during search of Raj Kumar, a polythene bag containing similar substance was recovered. From Ganesh, a polythene bag containing similar material and wrapped in handkerchief (*rumal*) was recovered. From the full pant of Ranjeet, a polythene containing a powder like Smack was recovered. The substance was examined and found to be like Smack by the raiding party.

4. It is relevant to mention here that in connected **CRA No.917 of 2016 (Ganesh vs. State of Madhya Pradesh)**, the sole appellant has undergone the punishment and therefore, counsel for the appellant made a statement that said appeal had rendered infructuous. It was accordingly disposed off.

5. In addition to the said Smack, some amount was also recovered from the appellants. The sample of Smack recovered from accused persons were taken and duly marked. The relevant *panchnamas* were prepared. The *Dehati Nalishi* was recorded. The seized material was handed over to *Malkhana Moharir* in the Police Station. In the *Rojnamcha*, the *wapsi* was recorded.

6. Further investigation was conducted by Shri Chandresh Kumar Mishra. He lodged FIR against aforesaid accused persons and recorded the statements of witnesses. The seized substance aforesaid which was duly marked as Annexure A-1, B-1, C-1 and D-1 were sent to Forensic Science Laboratory (FSL) Bhopal. In turn, the report was received

from FSL and the substance was found to be Heroin (Diacetylmorphine). After completion of investigation, *challan* was filed on 31.10.2011.

7. The Court below framed the charge and appellants abjured the guilt. Thus, they were subjected to a full-fledged trial. The Court below after recording the evidence of six prosecution witnesses and considering the defence of the accused persons, heard the parties and passed the impugned judgment convicting the appellants.

**Contention of appellants :-**

8. Shri Vijay Shrivastava, learned counsel for appellants Nos. 1 and 3 argued this matter at length. Shri Rajesh Yadav, learned counsel for the appellant no.2 borrowed the argument of Shri Vijay Shrivastava, learned counsel for appellant nos. 1 and 3.

9. Learned counsel for the appellants submits that the whole search and recovery is based on the authorization dated 10.12.2015 (Ex.D/1). This authorization is relating to search under the Gambling Act and there is no specific authorization under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The whole search, seizure and case of prosecution is founded upon an incorrect authorization and therefore, it cannot sustain judicial scrutiny.

10. The member of the search team, i.e. Ms. Beena Sonkar's name is not mentioned in the *Rojnamcha*, wherein names of persons proceeding for search were mentioned. Thus, her presence at the scene

of crime is highly doubtful. Ms. Beena Sonkar allegedly searched appellant no.1 and therefore, this search is highly doubtful.

**11.** Sections 42 and 50 of the NDPS Act was relied upon to contend that the appellants were required to be informed in writing that it is their constitutional right to get themselves searched either before a Gazetted Officer or before a Magistrate. Since, this written information is not given, the search and all consequential actions are polluted. Reliance is placed on a Constitution Bench judgment of Supreme Court reported in **(2011) 1 SCC 609 (Vijaysinh Chandubha Jadeja Vs. State of Gujrat)**.

**12.** Furthermore, it is submitted that there is no *iota* of material to establish that the search had taken place in the presence of a Gazetted Officer. Although, signature of Gazetted Officer (C.S.P.) is mentioned in relevant exhibit, since said Gazetted Officer did not enter the witness box, it could not be proved beyond reasonable doubt that search had taken place in his presence. In support of this submission, Shri Shrivastava also placed reliance on the judgments of the Supreme Court reported in **2011 (4) M.P.H.T. 209 (SC) (Narcotics Central Bureau Vs. Sukh Dev Raj Sodhi** and **(2009) 8 SCC 539 (Karnail Singh Vs. State of Haryana)**.

**13.** The next limb of argument of Shri Shrivastava is that as per the prosecution story, the commercial quantity of Heroin (Diacetylmorphine) was recovered from appellant no. 1 whereas from other appellants, the quantity between 'small quantity' and 'commercial quantity' of Heroin (Diacetylmorphine) was recovered.

Thus, in the light of Section 21(b) of the NDPS Act, the appellant nos. 2 and 3 deserve imposition of lesser sentence. They have already undergone sentence of more than eight years and they are the first offenders. Thus, their sentences may be reduced.

14. In support of this submission, Shri Shrivastava placed reliance on the cases reported in **Narcotics Control Bureau Vs. Lokesh Chadha** delivered in **Criminal Appeal No.257 of 2021**, in **E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau** delivered in **Appeal (Crl.) 1250 of 2005, dated 11.3.2008, Yunus Vs. State of Madhya Pradesh** reported in **2022 SCC Online MP 1865** and on the case of this High Court reported in **2011 (4) M.P.H.T. 211 (Anil Kumar Vs. Afzal Anees)**. Lastly, learned counsel for the appellants submits that neighbour of appellants were made witnesses for the purpose of seizure. Thus, in the teeth of Section 100 Cr.P.C., the prosecution story deserves to be disbelieved.

**Stand of prosecution :-**

15. Per *contra*, Shri Arvind Singh, learned Government Advocate for the State of M.P. supported the impugned judgment. He submits that each of the contentions raised by the appellants was considered by the Court below and a detailed judgment was passed. In absence of any infirmity, perversity or illegality, no interference by this Court is warranted.

16. To elaborate, it is submitted that Ex.D/1 although talks about Gambling Act, the Court below has considered this aspect in sufficient detail in Para- 27 and 28 of the impugned judgment.

17. The statement of Raghvendra Singh Parmar, S.H.O. (PW-4) is relied upon who identified and certified the signatures of Gazetted Officer (C.S.P.) in the relevant document. The appellants were informed about their right to be searched before the Gazetted Officer/Magistrate. They duly authorized the search in presence of Gazetted Officer through Ex.P/11. Thus, Section 50 of the NDPS Act is not breached.

18. Shri Vijay Shrivastava in his rejoinder submission again prayed for reducing the sentence and importantly made such prayer for all the appellants including the appellant no. 1. Lastly, he placed reliance on **(2020) 9 SCC 202 (Gangadhar v. State of M.P.)**. It was faintly argued that since no neighbour of appellant No.1 was made witness to search procedures, section 100 of Cr.P.C. is violated.

19. Learned counsel for the parties confined their arguments to the extent indicated above.

20. We have heard learned counsel for the parties at length and perused the record.

**Findings :**

21. As per the prosecution story, after having received the information from the informer, the raiding party obtained requisite permission of search, gathered two independent witnesses and proceeded towards the house of appellant No.1 Anju @ Piyari Bai. The statement of Raghvendra Singh Parmar (P.W.4) shows that certain



members of raiding party proceeded on a four wheeler whereas few joined on their own vehicles. The vehicles were kept at some distance from the house of Anju. In this view of the matter, merely because name of one of the member of search party i.e. Bina Sonkar is not mentioned in *Rawangi Rojnamcha*, will not vitiate such process or cause any dent on the prosecution story. Moreso, when Raghvendra Singh Parmar (P.W.4) with necessary clarity deposed in para-7 of his statement that Anju was searched by a woman constable Bina Sonkar. No amount of cross-examination could create any doubt on this statement. Thus, argument in this regard advanced by appellants deserves to be discarded.

**Authorization letter :**

22. Learned counsel for the appellants have taken pains to submit that search and recovery is based on the authorization dated 10.12.2015 which relates to 'Gambling Act' and not to 'NDPS Act'. It is seen that Court below considered this aspect in sufficient detail in para-27 and 28 of the impugned judgment. The Court below opined that Raghvendra Singh Parmar (P.W.4) in his cross-examination admitted that the authorization letter Ex.D/1 does not talk about search of 'Smack' and talks about Gambling Act. After a close scrutiny of Ex.D/1, the Court below opined that it is in printed form in which relevant entries were made in handwriting. CSP in the authorization letter, gave permission to search Anju @ Pyari Bai's house on 02.9.2011 for a period between 24 O'clock to 6 O'clock. There is no iota of material to show that any information was furnished by

members of raiding party to CSP regarding activity related to Gambling Act. The information so given to the competent officer was regarding *Mukhbir* information regarding availability of Smack. Thus, Court below opined that the authorization letter is the outcome of information given to him and permission prayed for. Thus, error pointed out by the appellants is a technical one. We find substance in the findings given in the impugned judgment and find no reason to disturb the same. Thus, this argument fades into insignificance.

**Compliance of Section 50 of NDPS Act :**

23. Learned counsel for the appellants placed reliance on various judgments of Supreme Court mentioned hereinabove to bolster his submission that a written information needs to be given to accused persons that it is their constitutional right to be searched before a Gazetted Officer or a Magistrate. This point is ponderable. The Constitution Bench in the case of **Vijaysinh Chandubha Jadeja (supra)** considered the previous Constitution Bench judgment in **State of Punjab vs. Baldev Singh (1999) 6 SCC 172** and opined that :-

“24. ....The Court also noted that **it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions.** Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.”

**(Emphasis Supplied)**

24. The other judgments cited by Shri Shrivastava are either based on this Constitution Bench judgment or in the line of reasoning given in **Vijaysinh Chandubha Jadeja (supra)**. In the instant case, a plain reading of Ex.P/9 shows that the accused persons were apprised about the *Mukhbir* information received by the raiding team. In addition they were clearly told that they can get themselves searched before a Gazetted Officer or a Magistrate and this is their constitutional right. The accused persons in writing gave the right to search by Raghvendra Singh Parmar (P.W.4) in the presence of Gazetted Officer. Through Ex.P/11, Ex.P/12, Ex.P/13, Ex.P/14 and Ex.P/15, the accused persons opted to be searched before the Gazetted Officer. In turn, a Gazetted Officer/CSP was requisitioned who reached the scene of crime. In turn, the search was made in the presence of Gazetted Officer whose signatures are duly mentioned in the search documents. Raghvendra Singh Parmar (P.W.4) in his testimony proved the same and this statement could not be demolished. Thus, we are unable to hold that the search was not conducted in the presence of Gazetted Officer. The *ratio decidendi* of **Vijaysinh Chandubha Jadeja (supra)** was consistently followed. In **State of Rajasthan vs. Parmanand (2014) 5 SCC 345** it was opined that “it is not necessary to inform the accused persons, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him”. As noticed above, in the instant case, a written information was duly given to the accused persons about their aforesaid right and they appended their signatures on the said information. The Apex Court in **Raju vs. State of W.B.**

**(2018) 9 SCC 708** held that according to Section 50(1), an empowered officer should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a Magistrate. In **Mukesh Singh vs. State (NCT of Delhi) (2020) 10 SCC 120** the said principle was followed. In the light of this discussion, we do not see any merit in the contention of the appellants that search was not made in consonance with Section 50 of NDPS Act.

**Non-production of Gazetted Officer :**

**25.** We will be failing in our duty if argument of appellant relating to the effect of non-examination of Shri Rajesh Tiwari, C.S.P. / Gazetted Officer is not considered. Inspector Raghvendra Singh Parmar (PW/4) proved (Ex.P-15) which is pregnant with signature of the said Gazetted Officer. He identified his signature. We find no reason to disbelieve his testimony. Mere non-production of Gazetted Officer will not cause any dent to the story of prosecution. Moreso, when such non-production has not caused any prejudice to the accused persons. We find support in our view from the following judgments of the Apex Court.

**26.** In **Tamma Durga Vs. State** reported in **2011 SCC Online AP 1012** the Apex Court held as under :

“**3.** In any event, Section 50 of the Act contemplates search of person of the accused in the presence of Magistrate or gazetted Officer and does not further contemplate that the said Magistrate or gazetted Officer should be examined in Court during trial. **Therefore, assuming for a moment for the sake of argument that Section 50 of the Act has application to this case, non-examination**

**of N. Kishore, gazetted Inspector of Excise is not fatal to the prosecution.”**

**(Emphasis Supplied)**

27. Similarly, in **Senthil Kumar Vs. Assistant Commissioner of Customs** reported in **2019 SCC Online Mad 34390** also the Apex Court opined as under:-

“16. Therefore, mere non-examination of any independent public as a witness is not fatal to the case of the prosecution and **the non-examination of the Gazetted Officer in the presence of whom, the appellant was searched is not not fatal to the case of the prosecution.”**

**(Emphasis Supplied)**

**Section 100 of Cr.P.C :**

28. So far argument based on Section 100 Cr.P.C. is concerned wherein it was argued that in absence of making neighbours as independent witnesses during search, the search procedure was vitiated. Suffice it to say that learned Court below has considered this aspect in detail. In para-43 and 44 of the impugned judgment, the Court below considered various Supreme Court judgments and opined that in absence of establishing prejudice, accused persons cannot reap any benefit from not introducing neighbours as witnesses. The said finding of Court below is in consonance with law and deserves stamp of approval.

29. In view of foregoing analysis, we are unable to hold that search procedure was violated and consequently had caused dent on the entire

story of the prosecution. In our opinion, prosecution could establish its case beyond reasonable doubt.

**Sentence :**

**30.** So far question of adequate sentence is concerned, it is noteworthy that from appellant No.1 Anju @ Piyari Bai 500 gms, from appellant No.2 Shivraj @ Hakku @ Rajkumar 200 gms and from appellant No.3 Ranjeet Jhariya 60 gms of Heroin was recovered. As per Notification No. S.O. 1055(E) dated 19.10.2001 (Article 56), the small quantity of Smack is 5 gm and commercial quantity is 250 gm. As noticed above, the contraband substance so recovered from appellants shows that double the commercial quantity is recovered from appellant No.1 whereas the quantity recovered from remaining appellants is above small quantity and below the commercial quantity. Thus, case of appellant No.1 is covered under Section 21(c) and for other appellants clause (b) of same section is attracted.

**31.** In this backdrop, it is to be seen whether any interference in quantum of sentence is required. In our considered opinion, so far appellant No.1 is concerned, double the commercial quantity was recovered and therefore, we are unable to persuade ourselves with the line of argument that sentence imposed on this appellant is disproportionate. The maximum sentence as per Clause (c) of Section 21 is 20 years. The Court below has imposed the sentence of 12 years to appellant No.1. We do not see any infirmity or illegality so far sentence on appellant No.1 is concerned. However, in absence of

showing any criminal record, we deem it proper to reduce the fine amount from Rs.01,25,000/- to Rs.01,00,000/- for appellant No.1.

**32.** So far appellant Nos.2 and 3 are concerned, considering the quantity of contraband recovered from them coupled with the fact that they have no criminal record and it was not established that they were kingpins, we deem it proper to reduce their sentence. In the case of **E. Micheal Raj (supra)**, the Apex Court opined as under :-

“17. In the present case, the narcotic drug which was found in possession of the appellant as per the Analyst’s report is 60 gms. Which is more than 5 gms., i.e. small quantity, but less than 250 gms., i.e. commercial quantity. The quantity of 60 gms. Is lesser than the commercial quantity, but greater than the small quantity and, thus, the appellant would be punishable under Section 21(b) of the NDPS Act. Further, it is evident that the appellant is merely a carrier and is not a kingpin.

**18.** In these circumstances, the ends of justice would be subserved if we reduce the sentence of the accused-appellant to 6 years rigorous imprisonment with fine of Rs.20,000/- and in default of payment of fine rigorous imprisonment for six months. We order accordingly.”

**(Emphasis Supplied)**

**33.** In the light of this judgment, we deem it proper to modify the sentence of appellant Nos.2 and 3 from 10 years to 08 years (R.I.) and 06 years respectively with fine amount of Rs.50,000/- on appellant No.2-Shivraj and Rs.20,000 on appellant No.3-Ranjeet considering the quantity of substance recovered. Non-payment of fine by appellants will

result into additional sentence as directed by Court below in para-60 of impugned judgment.

**34.** Resultantly, the impugned judgment to the extent indicated above stands modified. The sentence of appellant No.1 is confirmed. The fine amount of appellant No.1 is reduced from Rs.01,25,000/- to Rs.01,00,000/-. The sentence of appellant Nos.2 and 3 is reduced from 10 years to 08 years (R.I.) and 06 years (R.I.) respectively and the fine amount of appellant No.2 is reduced from Rs.80,000/- to Rs.50,000/- and the fine amount of appellant No.3 is reduced Rs.80,000/- to Rs.20,000/-.

**35.** The appeal is **partly allowed** to the extent indicated above.

**(SUJOY PAUL)**  
**JUDGE**

**(AMAR NATH (KESHARWANI))**  
**JUDGE**

PK