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KALLU KHAN

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1605 of 2021)

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DECEMBER 11, 2021

[INDIRA BANERJEE AND J. K. MAHESHWARI, JJ.]

Narcotic Drugs and Psychotropic Substance Act – ss.8, 21, 43, 50 – Appellant convicted u/ss.8, 21 – Affirmed by High Court – On appeal, held: As recovery of the contraband from appellant’s motorcycle was a chance recovery on a public road, the provisions of s.43 would apply – Seizure of the motor cycle from appellant is proved beyond reasonable doubt, therefore, the question of ownership of vehicle is not relevant – Compliance of s.50 not attracted in the present case – Concurrent findings by courts holding the appellant guilty and directing him to undergo the prescribed sentence not perverse warranting any interference.

Dismissing the appeal, the Court

HELD : 1.1 On apprehending the accused, while making search of the motor cycle, 900 gm of smack was seized to which seizure and sample memos were prepared, as proved by the departmental witnesses. In the facts of the case at hand, where the search and seizure was made from the vehicle used, by way of chance recovery from public road, the provisions of Section 43 of the NDPS Act would apply. The recovery made by PW6 cannot be doubted in the facts of this case. [Para 11][707-B-C]

S.K. Raju vs. State of West Bengal (2018) 9 SCC 708:[2018] 10 SCR 731; S.K. Sakkar vs. State of West Bengal (2021) 4 SCC 483:2021 AIR 2870 – relied on.

1.2 The Trial Court on appraisal of the testimony of witnesses, Constable-PW1, Constable-PW2, S.I.-PW6 and Constable-PW8, who were members of the patrolling team and the witnesses of the seizure, proved beyond reasonable doubt, when they were on patrolling, the appellant came driving the seized vehicle from opposite side. On seeing the police vehicle,

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he had taken back the motor cycle which he was riding. However, the police team apprehended and intercepted the accused and made the search of vehicle, in which the seized contraband smack was found beneath the seat of the vehicle. However, while making search at public place, the contraband was seized from the motor cycle driven by the accused. Thus, recovery of the contraband from the motor cycle of the appellant was a chance recovery on a public road. As per Section 43 of NDPS Act, any officer of any of the departments, specified in Section 42, is having power of seizure and arrest of the accused from a public place, or in transit of any narcotic drug or psychotropic substance or controlled substance. The said officer may detain in search any person whom he has reason to believe that he has committed an offence punishable under the provisions of the NDPS Act, in case the possession of the narcotic drug or psychotropic substance appears to be unlawful. The seizure of the motor cycle from him is proved beyond reasonable doubt, therefore, the question of ownership of vehicle is not relevant. [Para 12][707-D-H; 708-A-B]

Rizwan Khan vs. State of Chhattisgarh (2020) 9 SCC 627 : 2020 AIR 4297; *State of Rajasthan vs. Sahi Ram* (2019) 10 SCC 649 : [2019] 14 SCR 1117 – relied on.

2.1 It is not a case in which the appellant has proved beyond reasonable doubt that while sending the samples for forensic tests, seals were not intact or the procedure has been materially not followed by protecting the seized substance or was not stored properly. The appellant has failed to show that findings recorded by two Courts suffer from any perversity or illegality on the said issue and warrant interference. No recovery of contraband from the person of the accused has been made to which compliance of the provision of Section 50 NDPS Act has to follow mandatorily. In the present case, in the search of motor cycle at public place, the seizure of contraband was made, as revealed. Therefore, compliance of Section 50 does not attract in the present case. [Paras 13-15][708-C-D, F-H]

Than Kumar vs. State of Haryana (2020) 5 SCC 260 : [2020] 3 SCR 1090; *Vijaysinh Chandubha Jadeja vs.*

A *State of Gujarat (2011) 1 SCC 609 : [2010] 13 SCR 255; Surinder Kumar vs. State of Punjab (2020) 2 SCC 563 : [2020] 1 SCR 307*— relied on.

Union of India vs. Mohanlal and another (2016) 3 SCC 379 : [2016] 1 SCR 651 – held inapplicable.

B *State of Punjab vs. Baljinder Singh (2019) 10 SCC 473 : [2019] 13 SCR 520* – referred to.

2.2 Merely because independent witnesses were not examined, the conclusion could not be drawn that accused was falsely implicated. The findings concurrently recorded by the Courts holding the accused guilty for the charges and to direct him to undergo sentence as prescribed, do not suffer from any perversity, illegality, warranting interference by this Court. As the appellant has already served the sentence so awarded (10 years) and released after deposit of the amount of fine, therefore, no further directions need be issued. [Paras 16, 18 and 19] [709-B-C, G-H; 710-A-B]

E *Jarnail Singh vs. State of Punjab (2011) 3 SCC 521; [2011] 2 SCR 888; State of U.P. vs. Krishna Gopal (1988) 4 SCC 302 : [1988] 2 Suppl. SCR 391; Ganga Kumar Srivastava vs. State of Bihar (2005) 6 SCC 211 : 2005 AIR 3123* – relied on.

Case Law Reference

	[2016] 1 SCR 651	held inapplicable	Para 9
F	[2010] 13 SCR 255	relied on	Para 10
	[2019] 13 SC 520	referred to	Para 10
	[2018] 10 SCR 731	relied on	Para 10
	[2020] 1 SCR 307	relied on	Para 10
G	[2011] 2 SCR 888	relied on	Para 10
	[1988] 2 Suppl. SCR 391	relied on	Para 10
	[2019] 14 SCR 1117	relied on	Para 13
	[2020] 3 SCR 1090	relied on	Para 14

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal A
No.1605 of 2021.

From the Judgment and Order dated 25.11.2017 of the High Court of Judicature at Rajasthan, Bench at Jaipur in S.B. Criminal Appeal No.491 of 2012.

C. N. Sreekumar, Sr. Adv., Amit Sharma, T. Mahipal, Rohit K. B
Sinha, Indrajeet Singh, Advs. for the Appellant.

Pai Amit, Milind Kumar, Advs. for the Respondent.

The Judgment of the Court was delivered by

J. K. MAHESHWARI, J. C

1. Leave granted.

2. This appeal has been filed arising out of the judgment dated 25.11.2017, passed by High Court of Judicature of Rajasthan Bench at Jaipur, in Criminal Appeal No. 491 of 2012, whereby, the order dated 21.04.2012 passed by Special Judge (N.D.P.S.), Jhalawar, Rajasthan in Sessions Case No. 49 of 2011 convicting the appellant under Sections 8 & 21 of Narcotic Drugs and Psychotropic Substance Act (hereinafter referred to as “NDPS Act”) and sentenced to undergo rigorous imprisonment for 10 years along with fine of Rs. 1,00,000/- (One Lakh) has been affirmed. While confirming the conviction and sentence, the High Court reduced the default sentence from 2 years to 1 year. D E

3. The facts briefly put, as per prosecution allegations, on the date of incident i.e. 24.04.2011, S.I. Pranveer Singh (P.W. 6) Station In-charge of Bhawani Mandi Police Station alongwith constables Preetam Singh (P.W. 1), Sardar Singh (P.W. 2) and Rajendra Prasad (P.W. 8), was on routine patrolling at around 6:05 a.m. from Sulia Chowki to Sunel and reached Jhokadia. While returning from Jhokadia to Bhawani Mandi, they saw the accused Kallu Khan riding an unnumbered motorcycle and coming from opposite direction. On seeing the police patrolling vehicle, Kallu Khan turned back and tried to ran away. Suspecting his conduct, the police party apprehended and questioned him. In enquiry about his behaviour, accused Kallu Khan did not give satisfactory reply. On having doubt, S.I. Pranveer Singh (P.W. 6) ordered constable Preetam Singh (P.W. 1) to arrange independent witness for search of accused Kallu Khan and also of the motorcycle which he was riding. Constable Preetam Singh (P.W.1) submitted a report to him that independent witness could F G H

A not be found immediately for search. Thereon, looking to the conduct of accused, S.I. Pranveer Singh (P.W. 6) obtained consent from Constable Sardar Singh (P.W. 2) & Constable Rajendra Prasad (P.W. 8) and made them witness for the search of the vehicle.

4. Thereafter, the accused Kallu Khan was given notice under
B Section 50 of NDPS Act informing that he could be searched before a Gazette Officer or Magistrate, on which, he gave his consent for search by S.H.O.. After consent, the search of his body as well as of motorcycle was conducted. During the personal search, no incriminating substance was recovered from him, whereas, in search of motorcycle, a polythene
C bag beneath the seat of motorcycle was found, containing brown substance resembling smack which was burnt on a paper and, from its smell, it was confirmed to be smack. The substance weighed 900gms, out of which, two samples were prepared, sealed and marked as 'A' & 'B' respectively. The remaining substance was put in another bag marked as 'C' and sealed, whereafter, accused Kallu Khan was taken to Police
D Station and an offence under Sections 8 & 21 was registered as Crime No. 130/2011 against him and the investigation was conducted. On completion of investigation, charge-sheet was filed against accused Kallu Khan before the Court of Special Judge, where charges under Sections 8 & 21 of NDPS Act were framed. The accused abjured his guilt and demanded trial taking defence of false implication.
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5. The Trial Court after recording the evidence, found strength in the testimony of Constable Preetam Singh (PW1), Constable Sardar Singh (PW2), S.I. Pranveer Singh (PW6) and Constable Rajendra Prasad (PW8) and held that the prosecution has proved its case beyond reasonable doubt. The Trial Court further noted that, the place of incident
F is on public road which leads from Bhawani Mandi to Sunel. It is said despite efforts, due to non-availability of independent witnesses, S.I. Pranveer Singh (P.W.6) conducted proceedings of search after consent and seizure being temporarily posted as In-charge of Bhawani Mandi Police Station and completed the same. It is observed that though the
G search appears to have been done superficially, but evidence of police personnel cannot be discarded merely because they are departmental witnesses. There was no enmity of police personnel with accused and no interest of any witness was shown in the matter. Thus, the Trial Court with those findings convicted accused Kallu Khan for the offences under Sections 8 & 21 of NDPS Act and directed to undergo rigorous
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imprisonment for ten years with fine of Rs. 1,00,000/- and in default, to undergo simple imprisonment for two years. A

6. The appellant preferred appeal before High Court and primarily rest his challenge on the grounds; firstly, S.I. Pranveer Singh (PW6) was not posted as Station In-charge of the concerned police station, as such he was not authorized to conduct search & seizure. Secondly, no independent witnesses were associated in the search and seizure proceedings, however the said recovery is vitiated. Thirdly, there are glaring contradictions in the testimonies of prosecution witnesses. B

7. Upon hearing, the High Court was unimpressed of the pleas raised by the accused/appellant and even on reappraisal of evidence, concurred with the findings of Trial Court. The High Court said, it was a case of chance recovery while the accused in transit was suspected by the police patrolling party on a public road, hence, recovery proceedings would be governed by Section 43 of NDPS Act. Nonetheless, the High Court reduced the default sentence from two years without disturbing the findings of conviction and main sentence. C D

8. On perusal of the proceedings of this case, it reveals that on 29.10.2021, looking to the surrender certificate, it was observed the appellant had already served the sentence of 10 years. As the appellant had already served the main sentence, however directed to be released on interim bail. The report further indicate that the appellant had been released on bail on 24.04.2021 on depositing the amount of fine of Rs. 1 lakh. Thus, the sentence, as awarded, by the Trial Court and confirmed by the High Court, had already been served by the appellant, depositing the amount of fine. E

9. Mr. C.N. Sriekumar, learned senior counsel representing the appellant has strenuously urged that in the present case, the search and seizure was conducted by an unauthorized officer with the help of the police witnesses without independent witnesses. He has placed reliance on the judgment of this Court in *Union of India vs. Mohanlal and another* (2016)3 SCC 379 and contends that in absence of handling and disposal of seized narcotic drags/psychotropic substances, the danger of re-circulation of seized contraband back into the system cannot be ruled out. Learned senior counsel would further argue that in the present case, the prosecution has not proved its case beyond reasonable doubt. The procedure, as contemplated under Section 50(1) of NDPS Act, has not F G

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A been followed. The ownership of the vehicle is not of the accused, however the link of the vehicle in commission of the offence qua accused is missing. The contraband article has not been produced in the court during evidence. With the said contention, it is argued that the Trial Court and High Court have committed error to prove the guilt of the appellant, and sentenced him for the charges under Sections 8 & 21 of NDPS Act.

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10. On the other hand, learned counsel representing the State contends that it is not a case based on recovery of contraband from personal search of the accused, in fact, recovery is from the motor cycle i.e. the vehicle used in commission of offence. Therefore, the mandatory compliance of Section 50 of NDPS Act do not attract in the case. Reliance is placed on a Constitutional Bench judgment of this Court in *Vijaysinh Chandubha Jadeja vs. State of Gujarat* (2011) 1 SCC 609. Reliance has further been placed on the case of *State of Punjab vs. Baljinder Singh* (2019) 10 SCC 473. It is urged that the recovery is a chance recovery from the motor cycle, used in the commission of offence, therefore, the provisions of Section 43 of NDPS Act would attract. Reliance is placed on the judgment of this Court in *S.K. Raju vs. State of West Bengal* (2018) 9 SCC 708. As per Section 43 of NDPS Act, Pranveer Singh-PW6 is competent for the search and seizure and the High Court has rightly recorded the findings on this issue. It is also contended that in case, the search and seizure is otherwise proved, production of contraband article in court is not required. It is urged that conviction based on the police witnesses without having an independent witness is not always fatal. In support of the said contention, reliance is placed on the judgment of this Court in *Surinder Kumar vs. State of Punjab* (2020) 2 SCC 563 to urge that merely because the prosecution did not examine any independent witness would not necessarily lead to conclusion that accused was falsely implicated. In the said judgment, law laid down in the case of *Jarnail Singh vs. State of Punjab* (2011) 3 SCC 521 has been re-affirmed. It is lastly urged that the concurrent findings are not normally required to be interfered with unless there is a perversity. Reliance is placed on the judgments of this Court in *State of U.P. vs. Krishna Gopal* (1988) 4 SCC 302, *Ganga Kumar Srivastava vs. State of Bihar* (2005) 6 SCC 211, *Jarnail Singh* (supra) and *S.K. Sakkar vs. State of West Bengal* (2021) 4 SCC 483. In reply to the contention of the appellant regarding not having any connection of the vehicle with the accused to prove his guilt, reliance is placed on a judgment

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of this Court in *Rizwan Khan vs. State of Chhattisgarh* (2020) 9 SCC 627, however prayed for dismissal of appeal. A

11. After hearing and on perusal of record and the evidence brought, it is apparent that on apprehending the accused, while making search of the motor cycle, 900 gm of smack was seized to which seizure and sample memos were prepared, as proved by the departmental witnesses. In the facts of the case at hand, where the search and seizure was made from the vehicle used, by way of chance recovery from public road, the provisions of Section 43 of the NDPS Act would apply. In this regard, the guidance may be taken from the judgments of this Court in *S. K. Raju* (supra) and *S.K. Sakkar* (supra). However, the recovery made by Pranveer Singh (PW6) cannot be doubted in the facts of this case. B C

12. Now reverting to the contention that the motor cycle seized in commission of offence does not belong to accused, however seizure of the contraband from the motor cycle cannot be connected to prove the guilt of accused. The Trial Court on appraisal of the testimony of witnesses, Constable Preetam Singh (PW1), Constable Sardar Singh (PW2), S.I. Pranveer Singh (PW6) and Constable Rajendra Prasad (PW8), who were members of the patrolling team and the witnesses of the seizure, proved beyond reasonable doubt, when they were on patrolling, the appellant came driving the seized vehicle from opposite side. On seeing the police vehicle, he had taken back the motor cycle which he was riding. However, the police team apprehended and intercepted the accused and made the search of vehicle, in which the seized contraband smack was found beneath the seat of the vehicle. However, while making search at public place, the contraband was seized from the motor cycle driven by the accused. Thus, recovery of the contraband from the motor cycle of the appellant was a chance recovery on a public road. As per Section 43 of NDPS Act, any officer of any of the departments, specified in Section 42, is having power of seizure and arrest of the accused from a public place, or in transit of any narcotic drug or psychotropic substance or controlled substance. The said officer may detain in search any person whom he has reason to believe that he has committed an offence punishable under the provisions of the NDPS Act, in case the possession of the narcotic drug or psychotropic substance appears to be unlawful. Learned senior counsel representing the appellant is unable to show any deficiency in following the procedure or perversity D E F G H

- A to the findings recorded by the Trial Court, affirmed by the High Court. The seizure of the motor cycle from him is proved beyond reasonable doubt, therefore, the question of ownership of vehicle is not relevant. In the similar set of facts, in the case of *Rizwan Khan* (supra), this Court observed the ownership of the vehicle is immaterial. Therefore, the argument as advanced by learned senior counsel is of no substance and
- B meritless.

13. At this state, the argument advanced by the appellant regarding non-production of contraband in the court due to which benefit of doubt ought to be given to accused, is required to be adverted to. In the case of *State of Rajasthan vs. Sahi Ram* (2019) 10 SCC 649, this Court held
- C that when the seizure of material is proved on record and is not even disputed, the entire contraband material need not be placed on record. It is not a case in which the appellant has proved beyond reasonable doubt that while sending the samples for forensic tests, seals were not intact or the procedure has been materially not followed by protecting the seized substance or was not stored properly, as specified in the case of *Mohan Lal* (supra) in which case the directions were given to be followed on
- D administrative side. However, in the facts of the case, the said judgment is not of any help to appellant.

14. Similarly, in the case of *Than Kumar vs. State of Haryana* (2020) 5 SCC 260, this Court observed that if seizure is otherwise proved and the samples taken from and out of contraband material were kept intact; the report of forensic expert shows potency, nature and quality of contraband material, essential ingredients constituting offence are made out and the non-production of contraband in the Court is not fatal. As discussed above, the appellant has failed to show that findings recorded
- E by two Courts suffer from any perversity or illegality on the said issue and warrant interference
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15. Simultaneously, the arguments advanced by the appellant regarding non-compliance of Section 50 of NDPS Act is bereft of any merit because no recovery of contraband from the person of the accused has been made to which compliance of the provision of Section 50 NDPS
- G Act has to follow mandatorily. In the present case, in the search of motor cycle at public place, the seizure of contraband was made, as revealed. Therefore, compliance of Section 50 does not attract in the present case. It is settled in the case of *Vijaysinh* (supra) that in the case of personal search only, the provisions of Section 50 of the Act is

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required to be complied with but not in the case of vehicle as in the present case, following the judgments of *Surinder Kumar* (supra) and *Baljinder Singh* (supra). Considering the facts of this Court, the argument of non-compliance of Section 50 of NDPS Act advanced by the counsel is hereby repelled. A

16. The issue raised regarding conviction solely relying upon the testimony of police witnesses, without procuring any independent witness, recorded by the two courts, has also been dealt with by this Court in the case of *Surinder Kumar* (supra) holding that merely because independent witnesses were not examined, the conclusion could not be drawn that accused was falsely implicated. Therefore, the said issue is also well-settled and in particular, looking to the facts of the present case, when the conduct of the accused was found suspicious and a chance recovery from the vehicle used by him is made from public place and proved beyond reasonable doubt, the appellant cannot avail any benefit on this issue. . In our view, the concurrent findings of the courts does not call for interference. B C D

17. It is to observe that as per the judgment of *Krishna Gopal* (supra), it is held that interference in exercise of the power under Article 136 of the Constitution of India can only be called for when the judgment of the lower court is vitiated by gross error. This Court is having an occasion to reconsider the said issue in the case of *Ganga Kumar Srivastava* (supra), whereby it is settled that interference can be made when a question of law of general public importance arises or a decision shocks the conscience of the Court. It is held that in case, the finding is vitiated by any error of law or procedure or found contrary to the principles of natural justice, and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record, interference under Article 136 can be called for. The said principle has again been reiterated in the case of *Jarnail Singh* (supra), reaffirming the law as laid down in *Ganga Kumar Srivastava* (supra). Recently also, in the case of *S.K. Sakkar* (supra), this Court has reaffirmed the issue of scope of interference in exercise of power by this Court under Article 136 of the Constitution of India . E F G

18. In view of the foregoing discussion, looking to the facts of the present case, in our considered opinion, the findings concurrently recorded by the Courts holding the accused guilty for the charges and to direct him to undergo sentence as prescribed, do not suffer from any perversity, illegality, warranting interference by this Court. H

A 19. Accordingly, we do not find any merit in this appeal. Hence, it is dismissed. As the appellant has already served the sentence so awarded and released after deposit of the amount of fine, therefore, no further directions need be issued.

Divya Pandey

Appeal dismissed.