

**IN THE COURT OF 2ND ADDITIONAL SESSIONS JUDGE JAMMU
(SPECIAL COURT UNDER NDPS ACT)**

Case No. : 01
Date of Institution: 04.01.2018

Reserved on : 24.06.2020
Pronounced on : 25.06.2020

State through Intelligence Officer, Narcotics Control Bureau Jammu Zonal
Unit 42B/B, 2nd Extension Ganghi Nagar, Jammu-180004

....Complainant....

Through: Shri Rakesh Badyal, Special Public Prosecutor.

V E R S U S

Farooq Ahmed Wagay son of Abdul Rehman Wagay resident of village
Achabal PS Achabal Tehsil and District Anantnag (J&K).

...Accused....

Through: M/S G.Q Bhat & Arun Kundroo, Advocates for the accused

Offence under sections 8,15,28 & 60 NDPS Act
Crime No.07/2017 dated 20.07.2017

CORAM: Virinder Singh Bhou

J U D G M E N T

1. Brief facts of the case are that on the basis of secret information
received from reliable source by complainant Intelligence Officer NCB, Shri

JKJM010000022018, JK00067

Deepak Kumar at 700 hrs on 20.07.2017 that a truck bearing no. JK03A4818 has come from Kashmir Valley and presently the same has been parked in Narwal Truck yard in which huge quantity of narcotics drug has been brought to Jammu and same was to be delivered to another drug trafficker in the morning of 20.07.2017. The matter was brought to the notice of Zonal Director, NCB Jammu, who directed Shri C.S. Rathore, Intelligence Officer to constitute a team and take action under law. After receiving direction C.S. Rathore received the NCB seal from Pawan Dev and arrived near Narwal Truck yard with his team at 800 hrs, where he approached two persons, namely, Bishan Chand and Babu Ram to remain as independent witnesses for the panchnama proceedings and other legal formalities. Thereafter, the team alongwith the independent witnesses arrived near the truck at around 830 hrs, where one person was seated in the truck. One being enquired said person tried to flee from the spot, however, the NCB team overpowered and detained him, who disclosed his identity as Farooq Ahmed Wagay. Said Farooq Ahmed Wagay disclosed that the above truck was being driven by Manzoor Ahmed Rah, who was not available with the truck then. I.O gave notice to Farooq Ahmed Wagay under section 50 of the NDPS Act, however, nothing was recovered from his personal search. Thereafter, the team searched the truck in-question and found 5 Jute bags, which were covered with tarpal sheet and the same bags were opened in presence of above said two independent witnesses, which were found to contain Poppy straw. Farooq Ahmed Wagay accused herein disclosed that

the consignment was being transported by him and driver Manzoor Ahmed Rah. All the green coloured polythene bags kept in the jute bags were opened and mixed homogeneously and thereafter stored in the five big plastic bags and each big plastic bag contained 40 kg poppy straw and after loting and marking, all the bags were weighed with weighing machine and total weight of the substance came out to be 200 kgs. Sample of 250:250 grams of poppy straw were drawn from each lot and placed in a small polythene pouches and heat sealed and were marked as S-1, S-2, S-3,S-4,S-5,S-6,S-7,S-8,S-9 and S-10. All the samples were further packed in yellow colour envelop and stucked with white coloured paper and seal of NARCOTICS CONTROL BUREAU JMM01 was affixed; that recovery-cum-seizure memos were prepared on spot, signatures of both the independent witnesses as well as that of accused and officers of the NCB were on the samples, remaining material i.e. LOT-A to LOT-E and packing materials LOT-P, signatures of accused as well as Shri Manoj Kumar, C.S. Rathore and the independent witnesses were taken on panchnama and peacefully concluded the investigation on spot at 1330 hrs on 20.07.2017. Thereafter, statement of accused Farooq Ahmed Wagay was recorded after issuing summons under section 67 of the Act, in which he disclosed that he is working as SPO in J&K Police since 10 years and getting salary of Rs. 6,000/- per month. He also disclosed that the truck was being driven by one Manzoor Ahmed Rah from Bijnbehara to Jammu on 20.07.2017 at about 0200 hrs and was parked in Narwal truck yard from which above mentioned

consignment of poppy straw was recovered and as such he was placed under arrest for commission of offences punishable under sections 8/15 & 60 NDPS Act. Thereafter I.O recorded the statements of independent witnesses mentioned above and after arrest and seizure sent information to higher authorities; that the seal was handed over to Pawan Dev, the seized poppy straw was deposited in the Malkhana on 21.07.2017 for safe custody and obtained receipt of the same from Malkhana Incharge, parked the seized truck in custody of police line, Jammu; samples were sent to CRCL New Delhi for chemical analysis. Thereafter the investigation was handed over to Deepak Kumar, Intelligence Officer and during the course of investigation Deepak Kumar I.O issued summons under section 67 of the Act to Manzoor Ahmed Rah, driver of the seized vehicle, however, he did not turn up till then. Further, letter was addressed to Superintendent of Police with a copy to SHO Bijbehara on 12.09.2017 despite that the accused did not turn up and was absconding till date and was not cooperating in the investigation of the case. After receiving CFSL report, which confirmed for positive result of Poppy straw, I.O Deepak issued summons under section 67 of the Act to Ghulam Nabi Ganie, owner of the truck, who also disclosed that Manzoor Ahmed Rah was the actual driver of the seized vehicle. After conclusion of the investigation I.O laid charge sheet against the accused Farooq Ahmed Wagay under section 8,15,28 & 60 NDPS Act for judicial determination with liberty to file supplementary complaint against any other person, who later on found to be involved in the crime.

2. The accused was charge sheeted for the commission of aforementioned offences by this Court vide order dated 23.01.2018 under section 8/15 NDPS Act, who denied the charge and complainant was directed to lead evidence. Complainant in order to bring home charge against the accused examined PWs Babu Ram, Deepak Kumar, V. Bhardwaj, Manoj Kumar, Bishan Chand, C.S. Rathore, Dr. T.C. Tanwar and Pawan Dev to prove its case. A brief and relevant resume of the statements of the complainants' witnesses is reproduced as under:

3. **PW Babu Ram** in his examination-in-chief by learned SPP deposed that neither he knows the accused present in the court nor anything was recovered from him in his presence. At this SPP declared the witness as hostile and sought permission for his cross-examination.

On cross examination by learned SPP the witness deposed that 1-1/2 years ago he was doing labour work at Gandhi Nagar Gole Market. This is incorrect that five bags were recovered in his presence. He cannot tell whether samples were taken from those bags or not. NCB had not taken his signatures on the seized material or the sample. Five packets were shown to witness in the court on which he identified his signatures, same were marked as Mark BR to mark BR-9. When his signatures were taken on the envelope, at that time nothing was written on that envelope. This is incorrect that the material was seized in his presence and today he is giving false

statement to save the accused. He identified his signatures on Notice under section 53 of the Act, however, contents of the same are not correct. Mark BR-10 was put for the signatures. He identified his signatures on the Panchnama, however, contents of the same are not correct, same is marked as BR-11 to BR-18. He identified his signatures on seizure memo, contents of the same are true and correct, same is marked as Mark BR-19. He identified his signatures on Test memo and Search memo, however, refuted the contents of the same, same are marked as Mark BR-20 and BR-21. He identified his signatures on Notice under section 67 of the Act, however, the contents of the same are not correct, same is marked as Mark-22. He identified his signatures on the statement recorded under section 67, contents of the same are not correct, same is marked as Mark BR-23 to BR-26.

PW Deepak Kumar, Intelligence Officer on his examination by learned SPP deposed that he know the accused present in the court. On 20.07.2017 he was posted in NCB, Jammu and on the same day he received source information that a truck bearing no. JK03A-4818 had come from Kashmir Valley and was parked at Narwal Truck Yard in which narcotics had been hidden and the said narcotic was to be handed over to some narcotic smuggler on the same day. After receiving this information, he immediately reduced said information into writing and conveyed to his Zonal Director. He admitted his handwriting and signatures on the

application, which was already exhibited as EXT.P-2. Thereafter, Zonal Director entrusted the investigation to Shri C.S. Rathore, Intelligence Officer and in that team besides him, were Shri C.S. Rathore, Koushal Kumar, Vijay Kumar, V. Bhardwaj, Rakesh, Raj Kumar and Ram Lal. The team proceeded from NCB office at 7.30 for Narwal Yard. At Narwal the team located the truck from which one person tried to escape, who was overpowered and, thereafter, Shri C.S. Rathore started investigation. Vide letter No. NCB/324/Rdr/2016/718-19 dated 26.07.2019 he was appointed as I.O of the case. During investigation he issued two summons, one to Manzoor Ahmed Rah and other to Ghulam Nabi Ganai. Manzoor Ahmed Rah was driver and Ghulam Nabi Ganai was owner, of the truck. During investigation Manzoor Ahmed Rah never visited NCB office, however, Ghulam Nabi came to their office and recorded his statement. Poppy straw weighing 2 quintals was seized from truck in-question on the day of occurrence i.e. 20.07.2017, which was kept in five jute bags and hidden under tirpal. After conclusion of investigation he filed complaint in the court against accused on 04.01.2018. He had seen the FSL report on the file, which he procured from laboratory.

On cross examination by learned defence counsel the witness deposed that he received information on 20.07.2017 at 7.00 am through reliable source on telephone. The source had not gone with them on raid. It has not been mentioned in the complaint that the information was received

on telephone. Source disclosed presence of narcotic drugs nor poppy straw in the truck. Number of the truck was also disclosed. He informed his Zonal Director through written communication on 20.07.2017 at 7.00 am, who gave written permission to Shri C.S. Rathore for raid. They left for Narwal from NCB office at 7.30 am in two official vehicles and the team comprised of C.S. Rathore, Koushal Kumar, Vijay Kumar, V, Bhardwaj, Rakesh, Ram Lal besides him. He does not remember the numbers of the vehicles. They reached on spot at 8.00 am. He does not know the number of the Yard, however, the vehicle was inside the Yard. It took 10-15 minutes to locate the vehicle. Vijay Kumar sepoy located the vehicle. Concerned/local police was not informed by him. When he received the information, the name of the driver was not disclosed and as per the statement of accused, Manzoor Ahmed Rah was the driver of the vehicle in-question, which was further confirmed by the owner of the vehicle. He issued summons for arresting the driver and also informed the local police. He also went to Kashmir to arrest the accused. During his investigation he had not declared accused as absconder. The accused present in the court was arrested at a distance of 15-20 ft from the truck by Shri C.S. Rathore.

PW V. Bhardwaj in his examination in chief by SPP deposed that on 20th July 2017 he was posted at NCB office, Jammu and knows the accused present in the court. On 20th at 7.00 am he was called in office and they left for Narwal from office at 7.30 and the team comprised of Shri

Rathore, Deepak Kumar, Koushal Kumar, Vijay Kumar, Raj Kumar, Rakesh Kumar and Ram Lal. They reached in the Yard at 8.00 am. Shri C.S. Rathore had already called two witnesses. He was told that drug had been kept in truck no. 4818. They searched the truck and found it parked in Yard. He stood up behind the truck. Thereafter, accused was brought after a while. He had seen five bags. Thereafter, I.O conducted investigation on spot till 1.30 and they returned at 1.40 and reached in the office at 2.15. On 22.07.2017 Zonal Director, namely, Manoj Kumar called him in his office and asked him that he had to go to Delhi to deliver the samples. He had seen that authority letter, which bear his signatures, contents whereof are correct, same is exhibited as EXT.P-5. He took samples marked S-1, S-3, S-5, S-7 & S-9 to Delhi and after delivery obtained receipt, which he had seen on the file.

On Cross examination by learned defence counsel the witness deposed that he is posted as constable in NCB. He received call on 20th at 7.10 am from Control Room and he reached within five minutes. It takes 20/25 minutes to reach Narwla from his office. There are three investigating officers in their office and all had gone to Narwal. I.O Rathore had asked two persons, who were already standing there to remain as witness. Since he was standing at a distance, as such, he cannot tell what conversation was held in between I.O and those two witnesses. He does not know those witnesses. He does not know whether truck was N.P or L.P. or Ford, however, the number of the truck was JK03A-4818. They were searching

the truck, but the truck was found by second team. I.O Rathore directed him to cover the truck from behind. Constable Vijay Kumar and Rakesh Kumar were with him. He had no knowledge from where the accused was arrested. He had no knowledge whether accused was arrested from inside the truck or outside. He went alone to Delhi on 23.07.2017 in train with five samples, which were entrusted by Zonal Officer and the sample was of about 250 grams. He cannot tell the weight of the five samples, which were in the bag. He handed over samples to A.S.S.H Chemical examiner. He does not remember the timing of the train. He reached his office on 26.07.2017.

PW Manoj Kumar Zonal Director in his examination in chief deposed that he know the accused present in the court. He is posted in Jammu Zone since 09.05.2014 as Zonal Director. On 20.07.2017 I.O Deepak presented a written information regarding drugs and as per information contraband was brought at Narwal in a truck. On this information he directed C.S. Rathore I.O to further investigate the matter. He had written remarks on the report submitted by I.O Deepak Kumar and he identified his signature on the report, same is exhibited as EXT.P-2. Thereafter, team went to Narwal and seized 200 kgs Bhukki from Narwal from inside the truck and arrested the accused present in the court. All the investigation was conducted by I.O C.S. Rathore. Panchnama was prepared in his presence and accused had signed on each page, contents of which are correct. He identified his signatures; same is exhibited as EXT.P-2/I. After completion of all the

formality, I.O deposited the contraband in the godown and he issued receipt. He had seen the receipt of the Malkhana, contents whereof are true and correct. He identified his signatures on the same. It is exhibited as EXT.P-2/II. He identified his signatures on information given by I.O C.S. Rathore under section 57 Cr.P.C, contents whereof are correct. It is exhibited as EXT.P-2/III. Written information was given to SSP, Jammu on 21.07.2017 for parking the truck in question. He identified his signatures on the same, contents whereof are true and correct, same is exhibited as EXT.P-2/IV. The five packets of samples taken out from the seized contraband were sent to FSL through Constable V. Bhardwaj, regarding which he had written letter. He identified his signatures on the same, contents whereof are correct, same is exhibited as EXT.P-2/V. On 26.07.2017 a notice was issued and the investigation of the case was entrusted to I.O Deepak Kumar. He had seen that notice and identified his signatures on the same, contents whereof are correct. Same is exhibited as EXT.P-2/VI. On 25.09.2017 the investigation of the case was temporarily withdrawn from I.O Deepak Kumar and entrusted to C.S. Rathore. He identified his signatures on the said notice, contents whereof are correct. Same is exhibited as EXT.P-2/VII.

On cross examination by learned defence counsel the witness deposed that this is incorrect that the case projected is false and fabricated. I.O Deepak Kumar gave written information to him on 20.07.2017 at 7.00. He formed a team and C.S. Rathore was appointed as I.O, further stated

seizing officer. He went on spot with team. He reached Narwal at 8.00 am. However, he cannot tell as to in which Yard he had gone. His duty is to give physical direction to the team. The number of the truck was informed by informer. He himself had gone near the truck. They have covered all the exit points. Truck was stopped and the accused who was present inside the truck was asked for frisking by seizing Officer Rathore. Accused was given option for search in presence of Magistrate or Gazetted officer, however, he replied for his frisking from him. C.S. Rathore had searched the accused and one Adhaar Card, Identity Card, ATM card, one purse and some other articles were recovered during his personal search. No objectionable item was recovered during his personal search. Thereafter, team searched the truck and recovered five bags and in each bag packets of 2:2 kgs in which Bhukki like substance was filled and on weighing the weight of the Bhukki was noted as 200 kgs. On 26.07.2017 the case file was taken from I.O C.S Rathore and handed over to I.O Deepak Kumar. He does not remember as to which of the I.O had recorded the statement of the accused as well as witnesses.

PW Shiban Chand in his examination in chief by learned SPP deposed that he used to do labour work and one year ago one person came to him on motorcycle and took him to a store at Nanak Nagar where he got something filled from him in the bags and asked him to sign on some paper and he signed the paper and, thereafter, he came back. The statement attributed to him is not correct as he has not made such statement. At this

SPP declared the witness as hostile and sought permission for his cross examination.

On Cross examination by learned SPP the witness deposed that he has studied up to 10th and used to sign in English. He identified his signature on statement recorded under section 67 Cr.P.C, which consists of five leaves. He had seen photocopy of his I-Card on the file. This is incorrect that recovery and seizure was made in his presence and today he is making statement to save the accused. The signature is marked as Mark-A

PW C.S. Rathore in his examination in chief deposed that he is posted as Intelligence Officer in NCB office. On 20.07.2017 he was appointed as team member in the instant case. He was accompanying with Deepak Kumar, Koushal Kumar, Vijay Kumar, V. Bhardwaj, Rakesh, Raj Kumar and Ram Lal. He obtained NCB seal and some important documents from office before proceeding for operation and left NCB office at 7.30 am. After receiving seal, receipt of the same was handed over to concerned officer. Receipt on the file bear his signatures, same is exhibited as EXT.P/CS1. His team reached on spot at 8.00 am and gave notice to independent witnesses under section 53 NDPS Act and kept them witnesses in the case. Notices on the file bear his signatures, same are exhibited as EXTP.CS/2 and EXTP.CS/3. Thereafter, after locating the truck bearing no. JK03D-4818, same was cordoned by the team members and accused present

in the court, namely, Farooq Ahmed Wagay tried to escape from the spot after alighting from the truck, but was overpowered. Notice under section 50 NDPS Act was given to accused and he opted to be searched by the NCB team, which he had given in writing. Notice on the file bear his signatures, it is exhibited as EXTP.CS/4. On search of the accused no contraband was recovered from him. However, during search of the truck, five jute bags in which poppy straw weighing 200 kg was kept, were recovered. Recovery memos were prepared on spot. On enquiry from accused regarding contraband, he disclosed that Manzoor Ahmed Dar, who is driver of the truck in-question had brought the same from Bijbehara. After opening the jute bags, 20:20 green coloured polythene bags weighing 20 kgs each, in which poppy straw was kept, were recovered. Seizure memo/recovery memo was prepared, contents whereof are correct. It is exhibited as EXTP.CS/5. All the poppy straw was mixed and a sample of 2:2 kgs were taken out and sealed on the spot. Panchnama and Test memo were prepared. Panchnama on the file bear his signature, contents whereof are true and correct, same is already exhibited as EXT.P/1. Test memo on the file bear his signature, same is exhibited as EXTP-CS/6. Thereafter, notice under section 67 NDPS Act was served upon accused. The notice on the file bear his signatures, contents whereof are true and correct, same is exhibited as EXTP.CS/7. Statement of the accused was recorded under section 67 of the NDPS Act. Statement on the file also bear his signatures, contents are true and correct. It is exhibited as EXTP.CS/8 and as per his statement, he was

kept under detention and Arrest memo was prepared. He identified his signatures on the same. It is exhibited as EXTP.CS/9. During personal search of the accused, some articles were recovered and Jama Talashi in this regard was prepared. He identified his signatures on the Jama Talashi, same is exhibited as EXTP.CS/10. Relatives of the accused were informed regarding arrest of the accused. Notice to witnesses was given under section 67 of the NDPS Act and the statements of the witnesses were recorded. He identified his signatures on the notice and statements and same are exhibited as EXT.P-CS/11/I, EXT.P-CS/11/II, EXT.P-CS/11/III and EXT.P-CS/11/IV. After doing needful, the seal of the NCB was deposited and receipt was obtained and also the contraband was deposited in the Malkhana and receipt was obtained from Malkhana Incharge. The receipt is already exhibited as EXT.P2/II. Thereafter, he informed his superior officer as per section 57 of the Act. The information given to superior officer bear his signature, contents whereof are true and correct, same is already exhibited as EXT.P2/III. He also gave information to concerned SHO regarding occurrence.

On Cross examination by learned defence counsel the witness deposed that source information was received by him in the office on 20.07.2017 at 7.30 from Deepak Kumar. Thereafter, he received directions from Zonal Director regarding seizing of the drugs kept in truck no. JK03A-4818, which was parked in Narwal Truck Yard. It took half an hour to reach

Narwal. He went Narwal in his official vehicle, where two independent witnesses were arranged for statements. He was not knowing the actual place of occurrence. The names of the team members, which proceeded on spot were Koushal Kumar, Vijay Kumar, V. Bhardwaj, Rakesh, Raj Kumar and Ram Lal. None other than the witnesses were present in the team. They had weighing machine, paper and seal with them. Deepak Kumar had not disclosed him about the source. Accused Farooq Ahmed Wagay was arrested by V. Bhardwaj at a distance of 10 steps away from the vehicle. He had not taken signatures of the members of raiding team. Vehicle in-question was driven from Srinagar to Jammu by Manzoor Ahmed. He had not arrayed Manzoor Ahmed Rah as accused in this case, however, notices were issued upon him from Jammu office. Manzoor Ahmed Rah was also not declared proclaimed offender. Panchnama of the seized material was prepared on spot. Zonal Director of that time was with the team. Seizure/recovery memos were prepared on spot and Zonal Director signed on the same. The contraband seized was poppy straw. Many people were present on spot when the accused was arrested. 40/50 trucks were parked on the spot, however, none of them was kept as witness. The weight of the contraband was conducted in the Truck Yard with electronic weighing machine. Information regarding case was not conveyed to Narwal police. There was one gazetted officer in their team, namely, Manoj Kumar, however, Magistrate was not accompanying. He reached in the office at 2.30 after completing the formalities on spot. Statement of accused Farooq Ahmed

Wagay was recorded under section 67 NDPS Act in NCB Office. Name of the accused is written in column 5 of recovery and seizure memos. Signatures of the team members were not taken on the same. Site plan of the place of occurrence was not prepared. Statements of all the witnesses were recorded in NCB office. Statement of Babu Ram was recorded by Deepak Kumar. It has come in the statement of accused that Manzoor Ahmed was knowing as to from where the contraband was brought. There must be tea stall near the place of occurrence. He obtained NCB seal from Pawan Kumar PA of the Zonal Director on 20.07.2017 at 7.30 am, which remains in the custody of Divisional Director. The seal was returned to Pawan Kumar on 21.07.2017 and the number of the seal was 01. Different seals are used in every case(s). He had not made entry in the register about the source information. He has not taken search warrant with him. Had had prior information about the presence of narcotics in the truck in-question. He asked accused about his search to be conducted by a gazetted officer or a Magistrate, however, accused opted to be searched by NCB team. This statement was given by accused in his presence and nor in the presence of any gazetted officer. Seized material is lying in NCB Malkhana, however, he has not brought the material with him. He has brought seal in-question with him. Samples were sent to CRCL through V. Bhardwaj. Signatures of the team members were not taken on the statements. As per CRCL report poppy straw was found in the samples, however, percentage was not mentioned in the report. He had no knowledge what efforts were made by searching

officer to arrest Manzoor Ahmed Rah. The statement of the accused was written in Hindi, however, accused did not know Hindi, but said statement was read over to him. He had no knowledge about standing order no. 1/88. Bhukki was recovered from truck in-question, however, nothing was recovered from personal search of the accused. He had not made party to Manzoor Ahmed in his complaint.

PW Dr. T.C. Tanwar in his examination in chief by SPP deposed that on 24th July 2017 he was posted in CRCL New Delhi and on that day he has received five packets marked as S1, S3, S5, S7 and S9 in sealed condition and the seal were intact, which was sent by NCN, Jammu through Sepoy Vasdev Bhardwaj. Sample was registered and allotted to Shri Sunil Bagotia, Assistant Chemical Examiner and samples were kept in strong room. On 16th August 2017 sample analysis were started and was completed on 28th August 2017, In each case sample is in the form of light brown colour broken and crushed, dried vegetative fibrous material. On the basis of chemical and chromatographer examination it was concluded that the samples under reference answers positive tests for poppy straw. At the time of picking out samples from strong room for analysis the sample packets marked above were in sealed and intact condition. Impression of each seal affixed on sample packets tallied with the facsimile of seals as given on the test memo. After completion of analysis samples were sealed by CRCL seal and sample report was issued. The report on the file bears his

seal and signatures and contents are true. The certificate is exhibited as EXT.P-6. The sample alongwith intact seals were shown to the witness he identified to be the same.

On Cross examination by learned defence counsel the witness deposed that every sample of narcotic is to be tested chemically. Qualitative test mean identification of the drugs, whereas, quantitatively test mean percentage, purity of content present in that sample. The main ingredient in the poppy straw is morphine. Though number of tests prescribed for detection of poppy straw but Chromatographic test is better to identify. Approximately two days are required for completing the examination. Analysis was analyzed by Sunil Bagotia under his supervision. Sample was received by him personally. The sample was opened by him in presence of Sunil Bagotia. He has received the samples alongwith test memos but not separate form 95. Weight of each sample packet was recorded before starting the analysis. Approximately 250 gram was recorded as the weight of the sample and the same is mentioned in his official record. Today he has not brought said record. This is wrong to say that he has intentionally given a positive report in the case, but the report is on the basis of tests conducted by him. The whole sample is poppy straw. The percentage of Morphine in each sample examined by him has not been mentioned in his report. Sunil Bagotia has resealed the remnants of the samples under his supervision. Today he has not brought that seal in the court. Only one seal is being used in his office in NDPS Cases.

PW Pawan Dev in his examination in chief by SPP deposed that on 20.07.2017 at 7.00 am I.O C.S. Rathore received one seal JM01 from him and gave receipt with signature, which is mentioned in NCB Seal Movement register at S.No. 51 dated 20.07.2017. On 21.07.2017 I.O returned the seal at 5.30 and the same is also mentioned at S.No.51.

On Cross examination by learned defence counsel the witness deposed that seals always remain with him as he is custodian of the seal and on the direction of Zonal Director he hand over/take over the seal. In this case he got written permission on 20.07.2017 at 7.00 am for handing over the seal, copy of the same is not on the file. He handed over seal at 7.30 am. He had never produced seal in the case, however, he does not know whether I.O had produced the same or not. His statement was neither recorded by I.O, nor before Gazetted officer or Magistrate. He does not remember whether his statement was recorded in the case regarding handing/taking over of the seal.

4. This is the nutshell evidence on record. The evidence of the complainant was closed vide order dated 18.10.2019 and the accused was examined in terms of section 342 Cr.P.C vide order dated 05.11.2019 and the incriminating circumstances emerging from the prosecution evidence were put to accused and his explanation was sought. Accused refuted allegations.

Since, the accused was not acquitted in terms of section 273 Cr.P.C, as such, he was enjoined upon to lead defense, but he did not lead defense, so case was fixed for arguments.

5. Heard Ld. Spl.PP for the NCB and Learned Counsel for the accused and perused the evidence on record and relevant provisions of the law minutely.

6. Ld. Spl. PP while addressing arguments has submitted that on the basis of the evidence on the record prosecution has been successful to establish the ingredients for the alleged offence against the accused and there is strict compliance of statutory provisions of “ Section 42(2), 50, 53, 54 and 67 of NDPS Act and recovery of Contraband has been proved from possession of accused and no evidence is on record to discredit the same”, so, accused be dealt under law. Minor contradictions have no relevance, and if any are immaterial and needs to be ignored. Learned Special PP has produced following judgments in support of his argument:

- I. Mohammad Akhtar vs. State of M.P Criminal appeal 1474 of 1995 decided on 14.05.1999.
- II. Surinder Singh @Sinder vs. state of Haryana decided on 08.01.2016.
- III. Dharampal Singh vs. state of Punjab, Criminal Appeal No. 1479 of 2008 decided on 09.09.2010.

- IV. Lawrence John Dowser vs. Union of India Cri. Misc. Appeal No. 765 of 1994 decided on 20.08.1997.
- V. Prabha Shankar Dubey vs. State of Madhya Pradesh Case No. 634 of 2003 (with criminal appeal no. 1122 of 200) decided on 02.12.2003.
- VI. Piara and etc. vs. State of Punjab 2008 DGLS (P&H) 963.
- VII. 2008 Legal Eagle 675 Ram Kumar vs. central Bureau of Narcotics.
- VIII. Namdi Francis Nwazor vs. Narcotics Control Bureau, Criminal Appeal no. 122 of 1991 decided on 15.12.1993
- IX. Kanhaiyalal vs. Union of India 2008 Legal Eagle 33

7. Ld. SPL. PP for NCB has also filled written submissions which are taken on record. On the other hand LC for the accused have controverted and contradicted the submissions advanced by the learned SPP for the NCB and has submitted that the prosecution case suffers from inherent infirmities and there is non-compliance of the statutory provisions of the Act, which goes to the root of the prosecution case and even if evidence of recovery on record connects the accused with the commission of the offence, but non-compliance of the statutory provisions of the Act has caused a serious dent in the prosecution case; that the independent witnesses cited by the

prosecution have not supported the prosecution story and only the statements rendered by the police officials, who are interested witnesses cannot be taken into consideration and on this count only accused deserves acquittal. He has further submitted that there are material contradictions in evidence on material aspects of the case and on the basis of the evidence on the record accused cannot be held guilty.

8. Now let us scrutinize the evidence to see whether the ingredients for the alleged offence are established against the accused on the basis of the evidence on record or not.

9. Complaint has been lodged against the accused for commission of offences under section 8/15/28/60 NDPS Act and he has been charged for the said offences accordingly. Now it is, imperative for the complainant to prove the following relevant facts to prove the ingredients of alleged offences beyond reasonable shadow of doubt.

I. That on 20.07.2017 accused had brought poppy straw 200 kgs contained in 5 Jute bags in truck no. JK03A-4818 with the assistance of driver of the truck, namely, Manzoor Ahmed Rah and the said contraband

was recovered by team of officers/officials of NCB on the same day and at the time of recovery and seizure of the contraband accused Farooq Ahmed Wagay was seated in the truck. However, driver of the truck, namely, Manzoor Ahmed Rah was not found at the relevant time.

II. That the statement of the accused was recorded pursuant to summon issued under section 67 of the Act wherein he admitted the fact of consignment belonging to him;

III. That investigating officer observed all the statutory provisions during the course of investigation and there was no breach of any of the mandatory statutory provisions of NDPS Act.

10. At the very outset firstly the case of the prosecution is to be tested on the basis of the legal provisions, whether there is strict compliance of the

statutory provisions or not. It is apparent from the evidence on record and material that there is non-compliance of the sections **42, 50, 52, 55 and 57** of the NDPS Act, which has rendered the prosecution case ineffective and liable for dismissal. The Ld. Counsel for the accused had argued that as the offences mentioned in the NDPS Act are heinous in nature and provide severe punishment and, as such, certain safeguards have been provided in the Act and there are certain mandatory provisions of the law, which are required to be followed strictly by the investigating agency.

11. At the very outset, it is, visible that the complainant has failed to get the permission from this Court for dispensation of examination of the complainant and also dispensation of enquiry under section 200 and 202 of Cr. PC as prayed in para no. 2 of complaint. It is the admitted case of the complainant is that vehicle was being driven by Manzoor Ahmad Rah admitted in para no. 16 and 22 of the complaint, who has not been arrested nor any supplementary charge sheet has been filed.

12. Further, it is not revealed from recovery and seizure memo from whose conscious possession contraband was seized and Recovery as well as seizure of contraband has been affected by C.S Rathore, who is also I.O and gazetted officer therefore, provisions under section 50, 57, 53 have been violated.

13. The informant and investigator i.e. PW-7 Deepak Kumar are

one and the same person, so, vitiates the investigation and in this regard, reliance is placed on a judgment of Apex Court titled Mohan Lal Versus State of Punjab reported in 2018 SC (Online Supreme Court 974 of 2018 Volume III JKJ 3 SC Para no. 9 and 11.

14. That the very basis of the prosecution case i.e. I.O, the alleged information received by the intelligence officer, namely, Deepak Kumar, PW-7 and reduced into writing does not disclose the commission of any offence under law and also does not disclose the name of the informer, which itself shows that the entire prosecution story against the accused is false.

15. That some of the members of alleged team constituted for the purpose of raid have not been arrayed as witness nor the statement of any such member has been recorded which clearly amounts to the separation of material facts thereby reflects without any doubt that no such team was ever constituted nor any such raid was conducted and present accused has been falsely implicated and the actual driver namely Manzoor Ahmad rah has not been arrested nor any steps in this regard have been taken nor supplementary challan has been produced in order to establish this ground office order contains eight members of team constituted for an operation Shri Koshal Kumar, Shri Vijay Kumar (Sepoy cum driver), Shri Rakesh Sepoy, Shri Raj Kumar Sepoy, Shri Ram Lal (driver) have not been sighted as witnesses in

prosecution case nor their statement has been recorded.

16. That the prosecution has miserably failed to prove the existence of place of occurrence and no site plan or any other document of any kind whatsoever have been annexed along with the complaint which could even prove the existence of alleged place of occurrence. Even the Intelligence Officer PW-7, PW-1 in their statements have narrated that they have not prepared any site plan where the alleged occurrence occurred, which clearly shows that the entire story of place of occurrence and recovery there from is false and fabricated Reliance is placed on a judgment reported in JKJ 2019 Vol I 216 High Court titled Mohd Maqbool Raina V/s Intelligence Officer NCB Jammu, Zonal Unit Jammu Para 32.

17. That all the two independent witnesses, namely, PW-3 Shibban Chand and PW-4 Babu Ram have given entire different versions of the place of occurrence and also have stated that they did not know the accused, nothing was recovered in their presence and have categorically said that they have not signed the panch-nama, recovery cum seizure- memo and test memo, in the absence of alleged place of occurrence as alleged in the complaint and their denial to the complaint, seizure memo, test memo and place of occurrence. Further complainant has failed to prove the statement of independent witnesses recorded under section 67 of NDPS Act, therefore, their statements recorded under section 67 cannot be relied upon. In this

regard, reliance is placed on a judgment of the Hon'ble High Court of J&K Reported in 2019 Vol I JKJ 216 High Court which is based on seven Supreme Court Judgments.

18. That the complaint has been filed by Intelligence Officer (PW-7) Deepak Kumar but the complaint has not been proved during trial.

19. That no FSL form was prepared on spot, which is mandatory under law, which clearly shows that no recovery of contraband has been affected from the accused. Non preparation of FSL form on the spot causes serious prejudice to the accused and the said omission on the part of complainant cannot be ignored by the Court.

20. That the fact that the two independent witnesses have categorically denied the recovery cum seizure, panch-nama and preparation of test memo on spot, which has caused serious dent to the complainant's case because recovery and seizure of contraband becomes doubtful.

21. That the recovery cum seizure memo prepared is defective as the same reflects the format prepared by the NCB without indicating from whom and from whose possession same was recovered.

22. That the case property or seal has not been produced before this Court at the time of the institution of complaint or during the trial, which is again a serious lapse on part of the complainant.

23. Section 50 of NDPS Act 1985 has not been fully complied in the present case as accused was apprised of his right to be searched in presence of either a Magistrate or a gazetted officer, despite this, he gave his consent in writing to be searched by C.S. Rathore one of the investigating officer/member of raiding party. The accused was to be produced before any magistrate or gazetted officer other than C.S. Rathore. The search and recovery of the contraband was not made from the accused in presence of any magistrate or gazetted officer. The presence of gazetted officer/magistrate/C.S. Rathore on spot is denied by two independent witnesses/panchs. Further the evidence adduced by the prosecution neither suggests nor proves that the search and recovery were made in presence of magistrate or gazetted officer. In this regard, reliance is placed on a judgment Reported in 2018 SAR (CrLJ) 564 SC titled Arif Khan (alias Aga Khan Versus State of Uttrakhand) para 23, 25, 26, 28 and 29.

24. That merely on the basis of secret information without the informant being named and produced as a witness, the foundation of a case/complaint under the provisions of NDPS Act cannot be laid. In this regard, reliance is placed on a judgment Reported 2006 Vol III Crimes Page

467 Delhi High Court titled Karan Singh V/s State (NCB of Delhi). In the present case there is omission on the part of prosecution to produce the bulk quantity of seized poppy straw/bukhi and there is no place of destruction of the contraband under the orders of competent authority which suggest violation of section 52 (A) of NDPS Act. In this regard, reliance is placed on a judgment Reported in 2018 SAR (CrLJ) 689 SC titled Union of India V/s Jarooparam Para no. 10-12. There are material contradictions in the statements about the arrest of the accused, as Deepak Kumar (PW-7) has stated in chief examination that Koshal Kumar, Vijay Kumar, Rakesh Raj Kumar, Ram Lal were present on spot but have not been sighted as a witness and in cross examination, he has said that the location of the vehicle was disclosed by sepoy Vijay Kumar, who has not been sighted as a witness and also stated that Manzoor Ahmad Rah was the driver of the vehicle and according to statements of owner of the vehicle Manzoor Ahmad Rah alone was a driver and he was not declared as absconder offender under section 512 of Cr.P.C and the accused was arrested 15-20 feet away from the vehicle and C.S. Rathore has arrested him while the witness no. 5 has stated that he does not know where from the accused had been arrested and the witness no. 2 has stated that the truck was running and was stopped, which is contradictory to the complaint and the evidence of other witnesses. From the bare perusal of the above mentioned statement of witness, there are large number of discrepancies of official version, the fact of recovery is not proved beyond all reasonable doubt, which is required to be established

before the doctrine of reverse burden. The investigation is not fair in this regard. Reliance is placed on two judgments of Supreme Court Reported in 2008 Drugs Cases (Narcotics 352 and 2018 Vol I JKJ 138 SC) titled Noor Aga V/s State of Punjab and others. It is beaten principle of law that the material contradictions, which go to the root of the case, warrant acquittal of the accused.

25. That the pre-search requirements of recording information received and sending to superior officer demands exact and definite compliance, so, is required of section 50 of NDPS Act. The compliance of Section 57 of NDPS Act does not dispense compliance with requirement of section 41 and 42 of NDPS Act. In the present case, the sending of information and recording of reasons under section 42 and compliance of section 50 is done amongst and in between the raiding party witness no. 1, 2 and 7. Therefore there is no strict compliance of section 41, 42, 50, 57 of NDPS Act., which vitiates the prosecution case.

26. That according to the statements recorded in the Court, signatures of all members of raiding party mentioned in recovery cum seizure-memo, panch-nama, test memo, statements under section 67 were must and mandatory and writing of secret information on a loose paper and not on official register is fatal for the prosecution complaint. In this regard, reliance is placed on a judgment of Delhi High Court bearing no. Criminal

Law-A 1150 of 14 titled Jagroop Singh alias Secta V/s Director of Revenue decided on 21-07-2016 para no. 10, 12 and 13.

27. That the test memo, the samples of seized drugs or substances should be dispatched to the respective laboratories under the cover of test memo which shall be prepared in triplicate in proforma NCB-1 Form no. 95. The test memo will be serially numbered for each unit affecting the seizure, the seizing officer will carefully fill up column 1-8 of test memo and put his signatures with official seal. The original and duplicate of test memo should be sent to laboratory concerned along with samples, the triplicate should be retained in the case file of seizing officer. In the present case, original test memo is missing and there is no serial number given in the test memo which is in clear violation of notifications empowering the officers of various departments like customs, central excise, narcotics, D.R.I.N.C.B, etc. notification no. 6/85-R no. 664/51/85 OPM dated 14-11-1985.

28. That the actual chemical examiner/analyst, who has analyzed the samples namely Sunil Bagotia who has not been sighted as witness but Dr. T.S. Tanvar, (PW-6) was recorded under whose supervision analyst Sunil Bagotia has analyzed the samples. No separate form of 95 was accompanying the samples. The percentage of morphine in each sample has not been mentioned. It is further revealed that Sunil Bagotia has resealed the remnants of the samples and the seal has not been brought in the court and

only seal of NCB is used in all cases. There are no reasons of tests on the basis of which chemical examination of opinion is based which is total contravention of judgment of Apex Court Titled as Nariyan V/s State of Maharastra Criminal Appeal 708/2016 decided on 09-01-2018 and 203 CrLJ 4656 Madras Para 8. Investigating officer/complainant are the same persons, FSL form not prepared on spot, no site plan prepared in the present case. These are all legal defects, which go to the root of the case. Reliance is placed on a judgment Reported in 2019 Vol I JKJ 216 High Court Titled Mohd Maqbool Raina V/s Intelligence Officer Para 18.

29. That non examination of informant in the present case is fatal for prosecution (2009 Vol 16 SCC 496 Para 17). Investigating Officer, gazetted officer, complainant are one and the same persons. So there is no fair investigation and is fatal for complainant (Mohal Lal V/s State of U.P). That the investigating officer (PW-7) and PW-1 did not reduce the secret information on the official register or official paper but on a loose paper and was not sent to higher authorities other than the raiding party officers or to police station for registration of the case. The non support of independent witnesses PW-3 and PW-4 clearly doubts the prosecution story and prosecution has completely failed to prove the case against the accused, there is definite and total non compliance of section 42 of NDPS Act in the present case. In this regard, reliance is placed on a judgment Reported in 2013 (Vol I) Drugs Cases (Narcotics) 36 SC of India titled as Kishan Singh

V/s State of Haryana.

30. That the report of Dr. T.C. Tanvar containing bare opinion and assertion that the samples under reference, answers, positive for poppy straw. Absence of any full and complete data disclosing tests or experiments performed by him such a report cannot be attached any probative evidenciary value to be used against the accused. In this regard, EXT-P-6 is bare opinion and assertion that the samples under reference, answers, positive tests for poppy straw. Indeed there is nothing on the basis of which the court can independently test and access the truthfulness and genuineness of the said public analysis report EXTP-6. In these serious cases under the NDPS Act where the legislature has prescribed stringent punishment, if on one hand bald assertions of the complaint and thereafter the FSL report which indicates jumping to the conclusion rather than any analysis is to be mechanically accepted without testing the same and without producing the actual analyst namely Sunil Bagotia. In this regard, reliance is placed on a judgment Reported in 1995 Vol I Crimes Page 274 titled as Mohd Haneef Sheikh Ibrahim V/s State of Gujarat and another. Second judgment 2018 Vol I JKJ 230 HC Titled Jamal-Din V/s State of J&K though P/S Banihal, 2018 Vol I Acquittal ET (J&K) Titled State of J&K V/s Fareed Ahmad and others.

31. That I have critically examined the case law submitted by learned Special PP for the NCB and I have no hesitation to say that the ratio of the judgments is clearly distinguishable and cannot be justifiably applied

to the fact situation of this case because mere recovery of contraband in presence of non-compliance of statutory provisions and contradictory evidence, no conviction can be entailed to the accused.

32. Keeping in view my above discussion, evidence on record, legal provisions touching the matter in controversy, I have no hesitation to hold that there is sheer violation of the provisions of section 42, 50, 52, 55 and 57 of the NDPS Act besides the evidence on record is contradictory and on the basis of the contradictory evidence, which is so weak and fragile, accused cannot be convicted. The benefit of the doubt goes to the accused, complaint fails and is accordingly dismissed. Seized Contraband shall be destroyed and the truck in-question stands finally released in favour of its registered owner, after the period of appeal is over in accordance with the law. The accused is in custody and shall be set free if not involved in any other case.

33. File be duly compiled and consigned to records.

Announced
25.06.2019

(Virinder Singh Bhou)
2nd Addl. Sessions Judge
Jammu

(Ajaz Sr. PA)