

**(2006) 02 MP CK 0085**

**In the Madhya Pradesh High Court**

**Case No :** Criminal Appeal No's. 821, 1110 of 2001 and 821 of 2004

Gangaram s/o Late Bhagchand

APPELLANT

Vs

State of M.P.

RESPONDENT

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**Date of Decision :** 14-02-2006

**Acts Referred:**

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 21, 8

**Citation :** (2006) 4 MPLJ 25

**Hon'ble Judges :** Subhash Chandra Vyas, J

**Bench :** Single Bench

**Advocate :** A. Upadhyaya, A.S. Rathore and B. Dwivedi, for the Appellant; M. Dwivedi, Government Advocate for State, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

S.C. Vyas, J.

These three abovesaid appeals have arisen from the judgment of special Judge NDPS Act, Indore passed on 28-5-2001 in Special Case No. 23/2000 convicting both the appellants for the offence punishable u/s 8 read with section 21 of the NDPS Act and sentencing with 10 years R.I. and fine of Rs. 1,00,000/- (One lac). It has also been directed that they will have to undergo 5 years additional R.I. in default of payment of fine amount. As common questions of law and facts are involved in both these appeals, therefore, they are being disposed by this common judgment.

Case of the prosecutions before learned trial Court was that on 28-2-2000 K.S. Chouhan PW-3 Sub-Inspector Police Station Chandan Nagar received information from an informer that two persons are standing on Aamwala Road Chandan Nagar, Indore with brown sugar (a contraband article), then Sub-Inspector Chouhan informed Station House Officer, Sajjan Singh Chouhan PW-5 regarding information received by him and Panchnama Ex. P-3 was drawn regarding this information. Panchnama was transmitted to the office of City Superintendent of

Police through constable Shobharam, where it was received by reader Mishra and an acknowledgment Ex. P-3 was given by him. Panch witness Raj Kumar PW-5 and Shivaji PW-7 were called by the police and were apprised with the information of the informer then K.S. Chouhan PW-3 along with members of the police force and both the Panch witnesses proceeded towards the place of incident.

On the place of incident he found the appellants were standing having same features as was described by the informer. On interrogation appellants told that their names are Sanjay Yadav and Gangaram Yadav, then Sub-Inspector Chouhan apprised them with the information received from the informer, and also apprised them that they have got a right to be searched in presence of a Gazetted Officer or a Magistrate or if they concede then they can be searched by Inspector Chouhan. Both the appellants gave their consent for being searched by Inspector Chouhan vide Exs.P-4 and P-5 Panchnama was prepared and thereafter Inspector Chouhan gave his own search to the appellants and a memo of search Ex. P-6 was drawn.

After both the appellants searched by Inspector Chouhan, they were found to be in possession of a blackish substances which was brown-sugar, as per the preliminary examination conducted by the Sub-Inspector. On weighment it was found that both the appellants were having 12-12 grams brown sugar in their possession. Search memorandum Exs.P-7 and P-8, examination memorandum Ex. P-9 and weighment memorandum Ex. P-11 and Ex. P-12 and seizer memo Ex. P-13 and P-14 were drawn, A sample of 5 gm each was drawn from the substance which was recovered from each of the accused then remaining substance and sample were separately sealed on the spot and were marked respectively as A and B. The sample of substance which was recovered from Gangaram was marked as "A" and remaining substance as "A (1)" and the sample of the substance recovered from Sanjay was marked as "B" and remaining substance was marked as "B (1)". Both the appellants were arrested on spot vide arrest memo Exs.P-6 and P-7.

Inspector Chouhan then returned back to the police station and an offence u/s 8 read with section 21 of the NDPS Act was registered as per FIR Ex. P-18. The seized article and samples were handed over to Malkhana in-charge Kamal Singh PW-1 of the Police Station who make relevant entries in the Malkhana register Ex. P-1 on 2-3-2000. Constable Manoj PW-2 went to Forensic Science Laboratory with both the sealed samples in an envelop and obtained acknowledgment Ex. P-2 from the Laboratory incharge. As per chemical examination report Ex. P-27 of the Forensic Science Laboratory the samples of articles which were recovered from both the appellants were found brown sugar (i.e. heroine) as were contained diastole Morphine.

After completion of the investigation charge-sheet was filed in the Court. Appellants pleaded innocence on the charge framed against them. Learned trial Court after recording the evidence of prosecution and after giving defence an

opportunity of leading evidence and after cross-examination of the chemical examiner found appellants guilty and convicted them as stated hereinabove.

Learned Counsel for the appellants Shri Upadhyaya contended that in the present case prosecution totally failed to adduce any reliable evidence against the appellants on the basis of which they can be held, beyond all reasonable doubt, guilty for the offence punishable u/s 8 read with section 21 of the NDPS, Act. He has submitted that both the independent witnesses Raj Kumar PW-5 and Shivaji PW-7 have not supported the case of prosecution and have been declared hostile and, therefore, the entire case of the prosecution hinges on the testimony of police officers alone who were interested in conviction of the appellants and so were partisan witnesses. He has also submitted that there is no convincing evidence to show that the articles which are alleged to have been recovered from the appellants were kept in proper custody before sending the samples to Forensic Science Laboratory for examination. Learned Counsel further submitted that there is no proof that any sample of the seal was sent to the Forensic Science Laboratory for comparison with the seal which was said to have been impressed on the sample and the seized alleged contraband article it has also been submitted by Learned Counsel for the appellants that there is no entries in the Malkhana Register regarding depositing of samples also in the Malkhana and there is no entry of depositing the seized article also in the Malkhana. In absence of any entry regarding sending of seal impression also to the Forensic Science Laboratory, it has become doubtful that the sample of the same article was sent for examination which was alleged to have been recovered from the appellants. Learned Counsel for the appellants drawn attention of this Court towards the statements given by prosecution witnesses before trial Court in this regard and submitted that there are many loopholes in the case of prosecution and benefit of all the irregularities committed during investigation should be given to the appellants.

Learned Government Advocate, pen contra, submitted that the investigating officer has followed complete procedure of search and seizure of contraband article as prescribed in NDPS Act and committed no irregularity in seizing the contraband article, and drawing sample from it and sealing the samples and remaining contraband articles separately and sending sample of the seized article for examination by Forensic Science Laboratory. Learned Government Advocate supported the judgment of the trial Court and submitted that there is no scope of any interference in the judgment passed by trial Court.

I have very carefully perused the impugned judgment and examined the record of the trial Court minutely. As many as seven witnesses were examined by the prosecution before Trial Judge, out of whom Panch witnesses Raj Kumar PW-5. Shivaji PW-7 have turned hostile and deposed that no search and seizure from the appellant was conducted in their presence, however, both of them have admitted their signature in Panchnama Exs.P-4 to P-17. It happens in such type of cases which are punishable under NDPS Act that Panch witnesses turn hostile

because of the severity of the punishment prescribed by law for such offences. Learned trial Court has considered this aspect of the matter and relying on the pronouncement of Hon"ble Supreme Court in the case of Nathusingh vs. State of M.P., AIR 1973 SC page 2783, has come to the conclusion that even in absence of corroboration from independent witnesses, conviction can be based on the statements of police officers if they are reliable. Learned trial Court has also referred the case of Gyan Singh vs. State of Punjab, AIR 1974 SC page 1024 and State of Gujarat vs. Raghunath Vamanrao Bakshi, AIR 1986 SC page 1092 and on the basis of the law laid down by the Supreme Court in these cases came to the conclusion that police officers cannot be termed as partisan witnesses in such cases. The conclusions drawn by learned trial Court are perfectly correct and in the case of smuggling of contraband articles like heroine, opium etc. it normally happens that independent Panch witnesses turn hostile in order to help accused persons facing trial of such a serious offence, in which minimum punishment prescribed by law is of 10 years R.I. and fine of Rs. 1,00,000/- (One lac). In the facts of the present case also it is found that Panch witnesses have turned hostile but there is sufficient, cogent and reliable evidence available on record which can be used for recording finding of guilt of the appellants.

K.S. Chouhan PW-3 is the police officer who received information from the informer, which was recorded by him by way of Panchnama Ex. P-3. This witness deposed before learned Trial Court that after receiving this information that two persons having brown sugar were standing on Aamwala Road Chandan Nagar, he recorded the information in writing, by way of Panchnama, and send that Panchnama to his superior officers i.e. CSP, and then called Panch witnesses, apprised them regarding information and proceeded towards the place of incident. He has further stated that on the place of incident both the appellants were found standing who were apprised with the information and regarding their rights to get searched in presence of a Magistrate or a Gazetted Officer and when they gave consent to him to search them, thereafter, permitting them to search this police officer, this witness conducted search of both the appellants and recovered 12 gm of brown sugar i.e. heroine from the possession of each of them. He has also deposed that samples of 5 gm each were drawn from the recovered contraband article and samples and original articles were sealed separately and marked separately so that it can be identified as to which article was seized from whom and which sample was drawn from which article.

The statement given by this witness is convincing and he appears to be a wholly reliable witness, therefore, learned trial Court has committed no mistake in placing reliance upon the statement given by this witness for the purpose of convicting the appellants.

Learned Counsel for the appellants drawn attention of this Court toward Paragraph 37 of the cross-examination of this witness wherein it was stated by him that the informer came directly to him and gave information directly to him though that person was informer of the police and on the basis of this statement

Learned Counsel for the appellants tried to argue that in fact there was no prior information to this witness, it is difficult to agree with this argument because looking to the statement given by witnesses K.S. Chouhan PW-3 if someone had directly come to him and informed him regarding a commission of an offence punishable under the NDPS Act then there is nothing wrong in it and after receiving this information this witness K.S. Chouhan PW-3 started observing all necessary formalities which are prescribed in the NDPS Act.

Learned Counsel for the appellants has drawn attention of this Court towards paragraphs 42 and 43 of the cross examination of this witness and towards seizer memo and argued that as per the statement given by this witness, he registered the offence after coming back to the police station, but in search memo of the police officer Ex. P-6 Crime No. 144/2000 has been mentioned by this witness, whereas no offence was registered at that time.

Witness K.S. Chouhan PW-3 has given explanation of mentioning crime number in Panchnama Ex. P-6, he has stated that in Ex. P-6 crime number was written later on as per the practice of the police, it usually happens that at the time of filing of the Challan they write crime numbers on each and every page. This explanation appears convincing because though crime number has been mentioned in search Panchnama Ex. P-6, but the same is not finding place anywhere in Panchnama Ex. P-4. Search Panchnama of accused Gangaram Ex. P-7, search Panchnama of accused Sanjay Yadav Ex. P-8, identification Panchnama Ex. P-9 witness Panchnama Ex. P-10 and on all other documents. If all these documents would have been prepared later on after registration of the offence then crime number would have been there on these Panchnamas also, so there appears no substance in the argument that these documents were prepared after registration of the case and are forged documents.

Learned Counsel for the appellant further submitted that information from the informer was received by witness K.S. Chouhan PW-3 at 5 :35 pm as per information memo Ex. P-3 and he immediately proceeded towards the place of incident and recovered the contraband article as per prosecution story. Thereafter the FIR Ex. P-18 was recorded at 9 :40 pm in the night i.e. after four hours from the time of receiving of the information, so there appears unusual delay in conducting the search and in preparing all these documents which makes the whole story doubtful.

I have carefully examined all the Panchnamas prepared by Inspector K.S. Chouhan at the spot. It is apparent that these Panchnamas are handwritten documents and there is about 5 to 10 minutes gap between each document. This time must have been spend in writing Panchnama and performing the formalities as described in that Panchnama so there appears no unusual delay in completing the entire formalities.

Learned Counsel for the appellant very vehemently argued that there is nothing to show that those sealed samples was deposited in the Malkhana of police

station. There is also nothing to show that samples of such seal which was used at the time of recovery and drawing sample was also sent to Forensic Science Laboratory and in absence of any such evidence the conviction of appellants is bad in law because there was every possibility of reopening of the samples of the article which were alleged to have been recovered from the appellants and there was also a possibility of switching those samples with some other article.

No doubt the entry of Malkhana Ex. P-1 (c) does not reveal that any sample of sealed article was deposited in the Malkhana. Malkhana in-charge Kamal Singh PW-1 has been examined by prosecution during trial. He testified that inspector K.S. Chohan had handed over him four sealed packets, out of which two packets of big size and two packets were of small size for keeping these packets in the custody of Malkhana. Then he made relevant entries in the Malkhana register i.e. Ex. P-1 and deposited the articles in the Malkhana of the police station. Such articles were deposited on 28-2-2000 and on 2-3-2000 i.e. on after one date two sealed packets were sent through constable to Forensic Science Laboratory for chemical examination. He has clarified during his cross-examination that in the register Ex. P-1 in column No. 5 there was a description of sealed article its weight, quantity etc. which was written on the basis of seizure memos. This witness has admitted in paragraphs 8 and 9 of his statement that there is no entry in the Malkhana register to the effect that he received those articles in sealed condition and send samples in the sealed condition, but even in absence of such entries in the register the statement of K.S. Chouhan PW-3 is sufficient to prove that articles were sealed on the spot itself and thereafter articles and their samples in sealed condition were handed over to the Malkhana in-charge of the police station. Constable Manoj PW-2 has also deposed that he received two sealed packets in an envelop for transmitting to Forensic Science Laboratory for chemical examination. He went to the laboratory and deposited samples and then obtained acknowledgment Ex. P-2. The report of Forensic Science Laboratory Ex. P-27 clearly reveals that samples were received in that laboratory in sealed condition and seals on the samples was tallying with the samples of the seal which was sent separately. Letter Ex. P-26 which was sent along with samples to the laboratory also shows that samples were sent to the laboratory in the sealed condition and the seal of the police station was used for sealing those samples. There is a specific mention in this letter that a sample of seal was also being sent along with these packets, so there is no room of any doubt that the samples were not properly sealed or sample of the seal was not separately sent to the Forensic Science Laboratory for comparison.

Learned Counsel for the appellant drawn attention of this Court towards the judgment of Hon'ble Supreme Court passed in the case of State of Rajasthan vs. Gurmail Singh, 2005 SCC (Cri) 641. That was an appeal against the judgment of acquittal passed by High Court of Rajasthan in a case in which respondent of that case was convicted by trial Court u/s 8 read with section 15 of the NDPS Act and on appeal High Court acquitted him then State went in appeal before Supreme Court. Supreme Court found that "as Malkhana register was not produced to

prove that the seized articles were kept in the Malkhana from 20-5-1995 to 5-6-1995 and there was no proof that sample of the seal was sent along with sample to Excise Laboratory Jodhpur for the purpose of comparison of the seal appearing on sample bottles and, therefore, it was found that there is no evidence to prove satisfactorily that the seals found were the same as were put on the sample bottles immediately after seizure of the contraband". Clearly the facts of that case were different, in the present case Malkhana register have been produced and the letter written by Superintendent of Police to Forensic Science Laboratory and the report of the Forensic Science Laboratory clearly shows that samples were deposited in the Malkhana of the police station were sent for examination to the Forensic Science Laboratory along with separate samples of seal. Further/the statement of Inspector Sajjan Singh Chouhan PW-5 and constable Manoj PW-2 also head constable Kamal Singh PW-1 also clearly proves that the samples drawn from the articles recovered from the appellants were kept in safe custody separately and in sealed condition and were sent to Forensic Science Laboratory in the same condition along with separate sample of seal used for that purpose. So the prosecution evidence is wholly reliable and proves beyond all reasonable doubts that appellants have committed offence punishable u/s 8 read with section 21 of the NDPS Act.

In view of the aforesaid discussion learned trial Court has committed no mistake in convicting appellant for the offence punishable u/s 8 read with section 21 of the NDPS Act and in sentencing them, therefore, these appeals preferred by the appellants are devoid of any merit and are liable to be dismissed.

Consequently, these appeals fail and are dismissed.