

**(2010) 08 MP CK 0051**

**In the Madhya Pradesh High Court**

**Case No :** Criminal Appeal No"s. 253, 316 and 343 of 2006

Makhdam Khan

APPELLANT

Vs

CBN Mandsaur <BR> Rahim Khan Vs State of M.P. <BR>  
Ashraf Khan Vs R.S. Chouhan, CBN Mandsaur

RESPONDENT

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**Date of Decision :** 09-08-2010

**Acts Referred:**

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 29, 50, 55, 56

**Citation :** (2010) ILR (MP) 2633 : (2011) 2 MPJR 299

**Hon'ble Judges :** I.S. Shrivastava, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## **Judgement**

I.S. Shrivastava, J.

These four appeals are arising out of same judgment, hence they are being disposed of by a common judgment. These appeals have been preferred by the appellants being aggrieved by the judgment dated 28.12.05 passed by the Court of Shri Jaswantsingh Kshtriya, Special Judge, (NDPS), Mandsaur in Special case No. 138/96 by which the appellant Ajij has been convicted u/s 8/18/29 of the N.D.P.S. Act (for short the Act) and remaining appellants are convicted u/s 8/18 of the Act and all the appellants have been sentenced with rigorous imprisonment of 12 years along with fine of Rs. 1,50,000/- (one lakh, fifty thousand)) and in default of payment of fine, to undergo additional four years rigorous imprisonment by each appellant.

According to prosecution story on 3.8.1996 a preventive party was organized by the CBN and general checking of the vehicles was being carried out at railway crossing near Agricultural College, Mandsaur. During this checking a tempo trax No. RJ-09C-0812 was intercepted. This tempo trax was being driven by Ashraf Khan and Makhmad Khan, Rahim Khan were sitting at the back seat. The member of raiding party, gave their introduction and accused persons were

informed about the search of the vehicle and after obtaining due consent of accused persons for search, raiding party searched tempo trax in which two gunny bags were found below the seat. On enquiry, the appellants informed that the gunny bags contained opium formula for mixing in opium which they have brought from the house of Sabir Khan s/o Sikkandar Khan and it was being transported to the house of Makhmad Khan where it will be mixed with the opium and its quantity will be increased. The bags were opened and in each bag 5 polythene bags were found; weight of first gunny bag was 25 kg. 120 gms. and weight of other was 25 kg. 420 gms. In this way in both the gunny bags 50 kg. 540 gms. opium formula was recovered. From each polythene bag 2 samples of 24-24 gms. were prepared and were sealed and remaining two gunny bags were also sealed on the spot. Statement of witnesses were recorded. Appellants were arrested. The relevant Panchnama was prepared before independent witnesses.

Thereafter preventive party returned to the office and a detailed report was submitted to the Superintendent, Preventive Cell, Mandsaur and seized property was handed over to be deposited in the Malkhana. From the statement of the accused persons it was found that the above seized opium formula was brought from the house of Sabir. Hence raiding party reached to the house of Sabir but he was absconding from his house, Rs. 2,89,900/- were recovered which were sealed on the spot and deposited in Malkhana. On further investigation it was found that Ajij s/o Alam Khan is also involved in this profession. On 5.12.96 on interrogation he admitted that he was also involved in conspiracy and abetment of this business. Hence he was also arrested. Seized samples were sent to FSL. From report of FSL it was found that samples contained opium. Hence after completion of investigation, challan was filed. After trial appellants have been convicted and sentenced as mentioned above.

It has been argued on behalf of the appellants that they have been falsely implicated in this case. The independent witnesses were hostile. Articles were not marked on the seized samples and two gunny bags of bulk quantity of opium. Bulk quantity was not produced at the time of evidence. Only samples were produced. After taking little quantity from each bag, samples were prepared. At the time of deposit in the Malkhana, samples and bulk quantity packets were not re-sealed. The impression seal was not deposited in the Malkhana. The seized property was produced in the court after two years of the date of incident and there is no explanation of such late deposit. Local witnesses of the place of incident, were not joined in the proceedings. So called independent witnesses were pocket witnesses of the police party. Hence on the basis of evidence, offence was not proved. Therefore, this appeal be allowed.

It has been argued on behalf of the respondent State that case was proved on the basis of evidence produced before the trial court. From the FSL report, presence of opium was found in the seized substance. The appeal should be dismissed being devoid of merits accordingly.

Considered the arguments. Record of trial Court perused.

The proceeding was conducted by seizing officer Shri Ramsingh Detha (PW.5) vide Panchnama Ex.P.3 to Ex.P.10. Ex.P.3 is the Panchnama seizure of the opium formula. In this Panchnama this fact has been mentioned that 4 samples were prepared and they were sealed on the spot. Remaining quantity was sealed in the two gunny bags but it has not been mentioned that articles were marked on all these six packets. Normally at the time of seizure, samples are marked as articles and remaining bulk quantity is also sealed and marked as article. But Panchnama Ex.P.3 and other Panchnama and statement recorded by the Investigation Officer do not reveal that the articles were marked on the samples and bulk quantity. In this way it can not be said that each sample was sent for analysis in the FSL. Hence procedure adopted by the Seizing Officer Shri Ramsingh Detha (PW.5) was defective.

The independent witnesses of the seizure memo Ex.P.3 were Manohar (PW.2) and Prakashchandra (PW.3) Both these witnesses were hostile. They have not supported the proceedings taken up by the seizing officer by Panchnama Ex.P.3 to Ex.P.10. According to Manohar PW.2 he does not know accused persons. On 3.8.1996 no proceedings were taken up before him near Sitamau Phatak and tempo trax was not intercepted before him. He has not supported step by step proceeding taken up by seizing officer. He accepts his signature on Ex.P.3 to Ex.P.10 and said that he has signed on these papers in the office. He is electrician and working in the office of Narcotics. Prakashchandra PW.3 has also deposed that he does not know accused persons. On 3.8.96 he did not go to Sitamau Phatak with officers of narcotics department. Tempo Trax was not intercepted near agricultural college and no proceedings were taken up before him. He has denied step by step proceeding taken up by seizing officer. On specific question being asked, he has denied the fact that before him temp trax was intercepted by the narcotics department officers and the opium formula was seized from the accused persons before him. Both these independent witnesses have denied with their police statement Ex.P.14 and Ex.P.15 respectively.

Ram Singh Detha PW.5 has admitted that Manohar is an electrician and working in his office. Prachashchandra PW.3 runs a hotel at the gate of his office. Ravindra Singh Chouhan PW.6 has deposed that Manohar was employed as contingency employee in his office as electrician and Prakash runs a tea hotel out side his office. In this way both these witnesses are not independent witnesses but they are pocket witnesses of the raiding party. The incident took place at railway crossing near agricultural college.

As regards calling of independent witnesses, Ramsingh Detha PW.5 has deposed that it is correct that on the spot there are so many shops and houses but he did not call any local person. These witnesses were known to them hence he called them urgently with the idea that they will support in their work. This shows that independent witnesses of the local area were not called at the time of seizure of the opium formula.

It has been argued by appellants" counsel that Panchnama seizure memo

Ex.P.3 , Notice u/s 50 of the Act, Ex.P.4 seizure memo of tempo trax, Ex.P.5 and Panchnama Ex.P.10 for the impression of seal, were prepared at 12.30 p.m. and seizure memo Ex.P.6, Ex.P.7, and Ex.P.8 were prepared at 1.30 p.m. At the same time it is not possible to prepare all these Panchnamas. This shows that Panchnamas were prepared at the office of CBN at the convenience of the officers. Otherwise naturally they would have been prepared on the spot. The time of preparation of Panchnamas would have been naturally different. Considered the circumstances. From the Panchnama Ex.P.3 about the seizure of opium formula Ex.P.4, notice u/s 50 of the Act, seizure of memo of tempo trax Ex.P.5 and Panchnama about the seal impression, Ex.P.10 it reveals that they were prepared at 12.30 p.m. Seizing Officer Ramsingh Detha PW.5 has not noted the time below his signatures while it was necessary. Similarly at the arrest memo Ex.P.6, Ex.P.7 and Ex.P.8 time of arrest has been mentioned as 1.30 p.m. This shows that all the Panchnamas of the proceedings were prepared at 12.30 p.m. and 1.30 p.m. on the spot. It is not possible. Their preparation is doubtful. Hence statement of Ramsingh Detha PW.5 is not reliable in this respect.

As regards statement of Vyasji Shukla PW.4 is concerned, it has been argued that he was not member of checking party. But he has pretended himself to be member of checking party. Considering circumstances Ramsingh Detha PW.5 seizing officer has deposed that in the checking party Gopalsingh, R.S. Chouhan, S.S.Yadav, he and other persons were included. He has not mentioned presence of Vyasji Shukla PW.4. Vyasji Shukla PW.4 has in this respect deposed that the whole proceedings were taken up before him and he was included in the party. Those documents which are signed by him, were prepared in his presence. Other papers on which he has not signed, were not prepared before him. In this respect Ex.P.4 prepared u/s 50 of the Act and Ex.P.5 seizure memo of tempo trax do not bear his signatures. But Ex.P.3 about seizure of opium formula, bears signatures of Vyasji Shukla PW.4 but on this Panchnama his name has not been included as a witness. By simply signing on this Panchnama, it can not be said that he was present at that time. Since Ex.P.3, Ex.P.4, Ex.P.5 were prepared at the same time at 12.30 p.m. Hence if Ex.P.3 bears his signature then naturally Ex.P.5 would bear his signature if he was present there. Specifically Ramsingh Detha PW.5 has not named him as member of the checking party and no such Rojnamcha has been produced in support of it. Under the circumstances, presence of Vyasji Shukla P.W.4 on the spot is doubtful. Other members of raiding party Gopalsingh, R.S. Chouhan and S.S. Yadav have not been examined in this respect.

As regards compliance of Section 55 of the Act is concerned, R.S. Chouhan PW.6 has deposed that he deposited the samples in the Malkhana Ex.P.22 which bears his signatures A-A and B-B of the superintendent. He made entries on the direction of superintendent. In the cross examination he has admitted the fact that he did not resealed the property before deposition in the Malkhana because there is no procedure of resealing of the property in his department. The impression of seal was not given to him for deposition in the Malkhana. In this

way it is clear that property was not resealed by the incharge of Malkhana at the time of deposit and Panchnana of seal impression was also not deposited in Malkhana nor the seal was deposited in the Malkhana. In this respect, Incharge of Malkhana Gopal Singh has not been examined. Therefore, it is clear that property was not deposited in the Malkhana in compliance of Section 55 of the Act. In the the case of Valsala Vs. State of Kerala, it has been held that that "no evidence to show that article was sealed and kept in proper custody in Police Station; delay of more than 3 months in production of seized article in Court, conviction can not be sustained." Similar view has been adopted in Rembul v. State of M.P. 2003 (1) EFR 220.

As regards the fact stated by R.S. Chouhan (PW.6) that procedure of resealing of the sample is not prevailing in his department this explanation is not reliable.

In Ramji Duda Makwana Vs. The State of Maharashtra, it has been held that "We do not need to observe here that the provisions of Section 56 (Sic Section 55-ED.) necessarily imply, and for good reason, that at the earliest point of time, all mterial seized in an action under this Act must be deposited with the Officer in charge of a local Police Station because he is an authority of sufficient rank and he is also invested with the requisite facilities and the records to ensure that all the material is kept in safe custody and that there is no scope of its being lost or tampered with. This provision is a reasonable and necessary one in so far as since the consequences of a prosecution under this Act are serious, it is equally incumbent that safeguards be taken to ensure that there is no scope for any accident or for that matter negligence or even tampering. It does not however mean that where a specialised authority condusts a raid such as the Narcotics Control Bureau or for that matter the Customs, Central Excise etc. that they would be precluded from retaining the contraband in safe custody at their own headquarters."

It means that within the local area of the police station of the articles seized under the Act shall be handed over to police and be kept by police in safe custody, if any of the authorities seizing property under the provisions of this Act, do not have facility of Malkhana in their office, then they have to deposit the property in the local police station for safe custody and the incharge of the P.S. or any officer deputed for this purpose, shall affix the seal articles with seal of the officer incharge of the P.S.

If an officer has facility of Malkhana in his office like CBN, then in compliance of Section 55 of the Act, he should hand over the property to the Officer Incharge of the Malkhana of that office who shall affix his seal to such articles and shall seal the samples with the seal of the officer incharge of their office. The idea of reseal of the property with the seal of the officer incharge of Malkhana is that the possibility of loss or tampering of the property and sample should be nullified.

This incident took place on 3.8.1996 and according to copy of Malkhana register Ex.P.21(C), property was sent to Court on 23.1.98 after 1 year and 5 months.

There is no explanation of such a delay for deposition in the court.

As regards production of bulk quantity of seized opium formula at the time of evidence in the court is concerned, there is no evidence that both the packets of bulk quantity of Opium formula was produced at the time of evidence. Only samples A, B, C, D were produced at the time of evidence while the bulk quantity of seized opium formula ought to have been produced in the court. Reason has not been explained for non-production. From the Panchnama seizure memo Ex.P.3 it is clear that samples were not marked as articles. Also it is not mentioned in Ex.P.3 that bulk quantity packets were marked as article. Ramsingh Detha PW.5 and Vyasji Shukla PW.4 have deposed that samples are ABCD which bear their signatures. When articles were not marked on samples and bulk quantity packet, then how samples A, B, C, D were marked on samples which were produced before the court, it is not explained. This shows that Articles A, B, C, D, were marked on the samples by tampering after preparation of Panchnama. This makes Panchnama Ex.P.3 doubtful.

In this way in this case independent witnesses of the seizure memo have not supported the fact of seizure. The witnesses are pocket witnesses of the prosecution. Hence according to law laid down in *Ritesh Chakrawarti v. State of M.P.* II (2006) ACR 362 and *Bholaram Kushwaha v. State of M.P.* 2001 (1) EFR 160 the seizure Panchnama has not been proved.

In the case of *Jitendra and Anr. v. State of M.P.* reported in 2004 (1) SCC 562, it has been held by the Apex Court that:

the evidence to prove that charas and ganja were recovered from the possession of accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak PW-7, Angad Singh PW-8 and sub-inspector D.J. Raj PW-6, there is no independent witness as to the recovery of the drugs from the possession of accused. The Charas and Ganja alleged to have been seized from the possession of the accused, were not even produced before the Trial Court, so as to connect it with the samples sent to the FSL. There is no material produced in the Trial apart from the interested testimony of police officers, to show that the Ganja and Charas were seized from the possession of the accused or that the samples sent to FSL which were taken from drugs seized from the possession of the accused.

In the Trial, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of Charas and Ganja were seized from the possession of accused. The best evidence would have been the seized materials, which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden, which lies on the prosecution, particularly where the offence is punishable with stringent sentence as under the NDPS Act.

The same view has been adopted in *Noor Aga v. State of Punjab* 2008 (iv) AD 337 as well as in *Laxminarayan v. State of M.P.* 2009 JLJ 148.

Under the circumstances on the basis of above discussion I conclude that at the time of trial, independent witnesses were hostile. Bulk quantity of seized opium formula was not produced at the time of evidence. At the time of seizure of opium formula Articles A, B, C, D were not marked on the samples. Similarly, on both bulk quantity packets no articles were marked. At the time of deposit of seized property in the Malkhana in the office of CBN, it was not resealed with the seal of Officer Incharge of Malkhana. Impression of seal and seal were not deposited in the Malkhana at the time of seizure. Local witnesses were not collected but the pocket witnesses were called on the spot by the raiding party. Samples were deposited in the Court after 1 year and 5 months with unexplained delay. Malkhana Incharge has not been examined. Preparation of the Panchnamas was doubtful. Ex.P.3, Ex.P.4 and Ex.P.5 and Ex.P.10 bear same time 12.30 p.m. and Ex.P.6, Ex.P.7 and Ex.P.8 bear same time 1.30 p.m. Hence they were not reliable. As a cumulative effect of all these facts, appellants were not liable to be convicted on the basis of evidence produced before trial court. Hence this appeal deserves to be allowed.

Therefore, on the basis of above discussion, all these appeals are allowed. The conviction of appellant Ajij Khan u/s 8/18/29 of the Act and conviction of the appellants Makhmad, Ashraf Khan and Rahim Khan u/s 8/18 of the Act are hereby set aside. They are acquitted of the charges levelled against them. They be released, if not required in any other offence. Fine if deposited be returned to them.