

**(2008) 07 MP CK 0031**  
**In the Madhya Pradesh High Court**

Shakil and Badrilal

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

**Date of Decision :** 01-07-2008

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 465  
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 2, 26, 29, 41

**Citation :** (2009) 120 FLR 910 : (2009) 1 MPHT 313

**Hon'ble Judges :** S.L. Kochar, J

**Bench :** Single Bench

**Final Decision :** Allowed

## Judgement

S.L. Kochar, J.—Both these appeals are arising out of impugned judgment, therefore, decided by this common judgment.

The appellants have preferred this appeal against the impugned judgment dated 22-2-2005 passed in Special Case No. 29/2001 by learned Special Judge, (NDPS Act), Neemuch, whereby convicted the appellants for the offence punishable u/s 8/15(c) or 8/29/15(c) of the Narcotic Drugs & Psychotropic Substance Act, 1985 (for short "the Act"), sentenced to RI for ten years and fine of Rs. 1,00,000/- to each appellant, in default of payment of fine additional RI for four years.

2. Briefly stated the prosecution case as unfolded before the Trial Court is that on 14-7-00, Head Constable Shri Shiv Shankar of Police Station, Singoli was going to enquire the report of Merg (death) to Village Palasiya via Village Jhatla. In Village Jhatla in the locality of Sutars on the main road Truck No. M.P. 14-G/5351 was standing and Hummal were loading Poppy Husk in it. On enquiry by Head Constable, driver disclosed his name Shakil s/o Ajij Qureshi. Driver also disclosed about having permit of contractor Bisan Singh. The appellant Badrilal the then Lambardar (Mukhiya) was loading Poppy Husk in the truck. Head Constable Shiv Shankar perused the permit and found false, it was only for transportation of Poppy Husk of the cultivators of Village Borda Dhogawa, Madijar and Sodijar.

Permit was not for Village Jhatla and Badrilal was illegally loading the Poppy Husk. The Head Constable Shiv Shankar having no power to investigate the matter under the provisions of NDPS Act took the truck and Poppy Husk with driver Shakil and appellant-Badrilal (Mukhiya) to Police Station Singoli. In Police Station, Station House Officer Shri Parihar was not present and had gone to Court. On arrival of Station House Officer, Head Constable Shiv Shankar intimated him about the events and Head Constable started proceeding. In presence of independent witnesses and with the consent of driver Shakil, search memorandum, identification of Poppy Husk, weighment of Poppy Husk found in the track were prepared and out of each bag two samples each of 250 gram in total 120 samples were separately taken and sealed by Shri S.R. Parihar. Seizure memo was prepared, because of rainy season the bags became wet. All the bags were given identifying mark. Fascimile seal was also prepared. 2658 kilogram Poppy Husk in 60bags were seized. From driver Shakil Truck and its documents and from licensee Shri Kishansingh Meghawat, permit of transportation, list of cultivators of opium were seized and seizure memo was prepared. On 13-7-00 at 11:10 A.M., the appellant-Shakil was arrested and at 11:15 A.M., the appellant-Badrilal was arrested. Their arrest memos were prepared. Station House Officer Shri Parihar recorded the FIR on 15-7-00 at 12:10 noon vide Crime No. 83/00 under Sections 8/15 and 26 of the NDPS Act and started investigation. Seized narcotic drug was handed over in safe custody of Head Constable. As per provision u/s 56, detailed memorandum was sent to Senior Police Officer, SDOP, Jawat and intimation to this effect was also sent to Special Judge under NDPS Act. With covering letter of S.P., one sample out of seized Poppy Husk was sent for chemical examination to Forensic Science Laboratory, Sagar on 29-7-00. Laboratory report (Exh. P-25) was received and according to this report in Sample A-I packet, Poppy Husk (pieces of Poppy capsule of opium) was found. On completion of investigation, charge-sheet was filed before the Trial Court against the appellants under Sections 8/15 and 8/29/15(c) of the Act.

3. Both the appellants refuted the charges, their defence was of false implication. The-appellant Shakil submitted that he was sleeping in the Lodge situated in front of Singoli Petrol Pump. On 14-7-00 in the night at 1:00 A.M., he was forcibly lifted from the room of the Lodge and fastened in a false case, he examined one witness in his defence Yushuf (D.W.1). The defence of appellant Badrilal was that he was called by the police personnel from his house and falsely implicated in the instant case. Badrilal has denied his position as Mukhiya. The learned Trial Court after recording the statements of the witnesses of both the parties and hearing them, finding the appellants guilty, convicted and sentenced them as stated hereinabove.

4. Learned Counsel for the appellants have submitted two prepositions for consideration before this Court number one is that seized property was not produced before the Trial Court to establish the identity with the sample as well as quantity, therefore, conviction is not sustainable. Learned Counsel placed reliance on Supreme Court judgment rendered in case of Jitendra and Anr. v.

State of Madhya Pradesh 2004 SCC (Criminal) 2028. The second proposition is that against the appellants at the most offence u/s 8/26 of the Act would be made out, i.e., for commission of breach of conditions of the licence, permit or authorisation, which is punishable only up to the jail sentence of three years or with fine or with both. Per contra, learned Counsel for the State has supported the judgment and finding arrived at by the learned Trial Court.

5. Having heard the learned Counsel for the parties and after perusing the entire record, this Court is of the opinion that there is much substance in the argument of learned Counsel for the appellants on the question of non-production of the seized property of the case during the course of trial before the Court. This question was argued before the Trial Court and learned Trial Court in Paragraphs 98 and 99 has considered this aspect and held that looking to the nature of offence if out of 120 samples only one sample was sent, no illegality was committed by the Investigating Agency and argument regarding manipulation in sample advanced by the learned Counsel for the appellants was baseless. Learned Trial Court has also held that defence of the appellants was that they were transporting the Poppy Husk owned by licensee under the transportation permit. In view of this defence, it was admitted position by the appellants that they were transporting the Poppy Husk and if this property was not produced, same would not cause any dent to the prosecution case.

This Court has perused the accused statements of both the appellants. Defence of appellant-Shakil was that he was sleeping in the Lodge of Singoli Village and he was taken forcibly from the Lodge. He has nowhere admitted about seizure of Poppy Husk from the seized Truck nor stated about transportation of Poppy Husk under valid licence and permit. He denied the entire prosecution case. Appellant-Badrilal has also denied the seizure of Poppy Husk and specifically stated in answer to question No. 66 that he was not the Lumberdar and he had no concern with Poppy Husk as well as he was taken by the police from his house and locked inside the police station forcibly. Nowhere he has admitted regarding transportation of seized Poppy Husk alongwith the Truck. In answer to question No. 40, he has stated that he was having valid permit for Poppy Husk, but he has nowhere admitted that under this permit he had got loaded the seized Poppy Husk in the Truck and same was going to be transported from Village Jhatla. In view of this factual position, the facts mentioned in Paragraph 98 of the impugned judgment by learned Trial Court are wholly incorrect, at the face of record.

6. In Paragraph 99, the learned Trial Court has described that only two samples were produced in the Court, which were deposited with Naib Nazir. Because of some reasons, samples packets could not be produced in the Court during the course of recording of evidence. The learned Trial Court assigned reason of his own that either the case property was reached late in time from Mandsaur Court or Nazir (Incharge of Property) might be on leave, because of which sample could not be produced in the Court, but afterwards sample was received from

Mandsaur Court to his Court and same were deposited with Naib Nazir. The deposit slip of case property is available in the record. These reasoning for non-production of the case property in the Court at the time of examination of the prosecution witnesses, regarding search and seizure, do not appear just, legal, proper and reasonable, specially when prosecution has not offered any explanation for non-production of the case property (seized property Poppy Husk).

7. It would be apposite to mention here that Sub- Inspector, Shri S.R. Parihar (P.W. 6) was examined by the prosecution on 11-7-03 and prosecutor sought time during the course of recording of statement of this witness for production of case property/seized drug or substance, i.e., Poppy Husk and in Paragraph 12 of the deposition of this witness the Court has put a note to this effect, reserving right of the prosecution to produce and further examine this witness in Court, but after examination of this witness on 11-7-03 neither property was produced nor this witness was called for further examination by the prosecution. In total 60 bags were seized and from each bag two samples each of 250 grams were taken separately and in total 120 samples were taken, these were representative sample of each individual bag, but only one sample sent to Forensic Science Laboratory for examination, which is clear from Forensic Science Laboratory report (Exh. P-25) as well as the statement of Head Constable, Shri Mangilal (P.W. 5), Malkhana Incharge. The sample was sent with Constable Sunil Kumar, who has not been examined. On the basis of only one sample, how it could be said that in whole 60 bags Poppy Husk was packed and available. The purpose of taking two sample from each bag was to send one sample of each bag to the Forensic Science Laboratory and preserve one sample in safe custody and sent the same immediately alongwith the report to the Officer Incharge of the nearest police station or the officers empowers u/s 53 of the Act for the purposes for taking such measures as may be necessary for disposal, according to law, of such article as per provision u/s 52 of the Act. Supreme Court in case of Jitendra (supra), has considered the question of non-production of seized drugs and observed in Paragraphs 5 and 6 as under:

5. 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 (P.W. 7), Angadsingh (P.W. 8) and Sub-Inspector, D.J. Rai (P.W. 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 Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were, taken from the drugs seized from the possession of the accused. Although, the High Court noticed the fact that the charas and ganja

alleged to have been seized from the custody of the accused had neither been produced in the Court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, "non-production of these commodities before the Court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced". The High Court relied on Section 465 of the Cr.PC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. 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 the 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 a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchanama is nothing but a document written by the concerned police officer. The suggestion made by the defence in cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the Investigating Officer was also not examined. Against this background, to say that, despite the pancha witnesses having turned hostile, the non-examination of the Investigating Officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched.

8. In the case at hand, independent Panch witnesses Ramsukh (P.W. 1), Mahesh (P.W. 2), Ramlal (P.W. 7) have turned hostile. The entire prosecution case is based on the statement of police officials Shri S.R. Parihar (P.W. 6), Head Constable, Shivshankar (P.W. 9), the member of raiding party, Assistant Sub-Inspector Shri Pawan Sharma (P.W. 8) and Assistant Sub-Inspector Shri R.P. Yadav (P.W. 10) regarding further investigation. In the light of these facts, it cannot be held only on the basis of seizure memo and oral statement of police witnesses, that 2658 kilogram Poppy Husk was seized from the exclusive possession of the appellants found loaded in 60 bags in a truck.

9. It is pertinent to mention here that legislation has taken care of various contingency, which may arise regarding keeping in safe custody the seized narcotic drug till the final disposal of the trial and provided provision under Sections 52 and 52-A for disposal of persons arrested and article seized as well as disposal of seized narcotic drug and psychotropic substance, which reads

asunder:

52. Disposal of persons arrested and articles seized.:

(1) Any officer arresting a person u/s 41, Section 42, Section 43 or Section 44 shall, as soon as may be, inform him of the grounds of such arrest.

(2) Every person arrested and article seized under warrant issued under Sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under Sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to:

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered u/s 53.

(4) The authority or officer to whom any person or article is forwarded under Sub-section (2) or Sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article.

52-A. Disposal of seized narcotic drugs and psychotropic substances.:

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or Psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered u/s 53, the officer referred to in Sub-section (1) shall prepare an inventory, of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in Sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of -

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under Sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under Sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offences.

10. The Central Government in exercise of powers conferred by Sub-section (1) of Section 52-A having regard to the hazardous nature, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, issued a notification No. 381 (E), dated 29-5-89 specifying the following narcotic drug and psychotropic substances namely:

(1) Narcotic Drug : (i) Opium; (ii) Morphine; (iii) Heroin; (iv) Ganja; (v) Hashish; (vi) Codein; (vii) Thebaine; (viii) Cocaine; (ix) Poppy straw and any other manufactured drug as defined under Clause (xi) of Section 2 of the Act. Morphine, heroin, ganja, cocaine, poppy straw and any other manufactured drug as defined under Clause XI of Section 2 of the Act.

(2) Psychotropic Substances : (i) Methaqualone; (ii) T.H.C.; (iii) Amphetamine; and (iv) any other psychotropic substances as defined under Clause (xxiii) of Section 2 of the said Act.

11. The above mentioned seized narcotic and psychotropic substances can be disposed of immediately after following the procedure prescribed in Sub-sections (2) to (4) of Section 52-A. The Investigating Agency as well as the prosecution should have taken recourse of these provisions so that seized drug could have been disposed of immediately and evidence could have also been preserved for the purposes of establishing the identity and quantity of the contraband article without keeping the same in custody for long period and without running a risk of its theft, change or damage because of any reason, but the Investigating Agency as well as the prosecution has not taken care of these provisions to preserve the proper specific and strong evidence against the accused persons and also failed to assign any cogent and reliable reason for non-production of seized drug though prosecution itself prayed for time to produce seized drug as clear from the statement of Sub-Inspector, S.R. Parihar (P.W. 6) in Paragraph 12 recorded on 11-7-03 by the learned Trial Court.

12. The learned Trial Court in Para 136 of the impugned judgment given direction for disposal of the seized Poppy Husk as per provision u/s 52-A, which is of no use at least for present case, after conclusion of trial. The seizure was effected

on 14-7-00 and impugned judgment was passed on 22-2-2005 wherein directions as per provision u/s 52-A of the Act was issued by the learned Special Judge, after more than four and half years, and there is no positive material available in the record of the case where the whole quantity of seized Poppy Husk was kept. The learned Trial Court used the provision u/s 52-A of the Act for disposal of the seized drug after conclusion of the trial whereas these provisions are made normally for use of immediately after seizure of drugs. The learned Trial Court also suo motu could have taken steps for disposal of the seized narcotic drug as per provision u/s 52-A of the Act.

13. In view of the aforesaid discussion, this Court is of the view that non-production of the seized drug before the Court is proved fatal to the prosecution case and prosecution has failed to establish identity of the seized drug and its quantity before the Trial Court, therefore, conviction and sentence of the appellants are not sustainable on this ground alone.

14. Consequently, this appeal is allowed, impugned judgment and findings of the Trial Court are hereby set aside. The learned Trial Court is directed to release the appellants forthwith, if not wanted in any other criminal case.

15. Original judgment is retained in Criminal Appeal No. 318/05 and a copy whereof be placed in the record of connected Criminal Appeal No. 451/05.

Office is directed to send a copy of this judgment alongwith the record of the Trial Court to the Trial Court for its compliance.