



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Criminal Appeal (Sb) No. 286/2024

Premchand S/o Kashiram, Aged About 47 Years, R/o Ward No.07
Bilochiya, Police Station Sri Vijaynagar, District Sriganganagar
(Raj) (Confined In Sub Jail, Raisinghnagar)

-----Appellant

Versus

State Of Rajasthan, Through Pp

-----Respondent

Connected With

S.B. Criminal Appeal (Sb) No. 571/2024

Trilok Kumar S/o Jindaram, Aged About 50 Years, R/o Ward No.
15 Near Nirmal Chakki Srivijaynagar, House No. 113 Sandesh
Colony Srivijaynagar, P.s. Srivijaynagar, Dist. Sriganganagar.
(Presently Lodged In Central Jail Sriganganagar)

-----Appellant

Versus

State Of Rajasthan, Through Pp

-----Respondent

For Appellant(s)	:	Mr. Bhagirath Ray Bishnoi Mr. Umesh Kant Vyas
For Respondent(s)	:	Mr. Prem Singh Panwar, PP

HON'BLE MR. JUSTICE BIRENDRA KUMAR

Judgment

Reportable

Judgment Reserved on	:	09.09.2024
Judgment Pronounced on	:	19.10.2024

1. Appellants Premchand and Trilokchand faced trial in Sessions
Case No. 30/2020 passed by the learned Additional Sessions
Judge, No. 1, Raisinghnagar, District Anoopgarh (Sri Ganganagar).
On 07.02.2024, judgment of conviction was passed against
appellant No.1 Premchand for offence under Section 8/22 of the



Narcotic Drugs and Psychotropic Substances Act, 1985 and against appellant No.2 Trilokchand for offence under Section 8/29 of the said Act. The learned trial Judge sentenced both the appellants with 14 years' rigorous imprisonment plus fine of Rs.1,50,000 and in default of payment of fine, 3 years' rigorous imprisonment has been ordered.

2. In brief, the prosecution case is that on 26.03.2020 at about 12:50 pm, PW-2 Nahar Singh, SHO of Sri Vijaynagar, District Ganga Nagar alongwith other constables was on patrolling duty in view of the Covid lock down. At around 7.30 pm, the police personnel reached Bilochia Village, where they saw a person exiting from a shop, carrying a white plastic bag. On seeing the police, the person started fleeing away, however, he was caught by the police. The person caught by the police was Premchand; appellant No. 1 herein. The appellant no.1 disclosed that he had purchased the same from appellant no.2, however, nothing was recovered from the person or place of appellant no.2.

3. From the said plastic bag, Tramadol Hydrochloride Tablets were found. The total weight of the tablets was 1Kg 100 Gms. The police team took samples from the seized Tablets and the rest were sealed separately. For the incident aforesaid, FIR No. 68/2020 (Exhibit P-5) for offences under Sections 8 & 22 NDPS Act was registered with police station Sri Vijaynagar, District Sri Ganga Nagar.

4. During trial prosecution examined altogether 16 witnesses and several documents were exhibited; relevant whereof would be referred hereinafter.



5. The defence version is that in fact a false case was planted against the appellants and there has been complete violation of the mandates of sec. 52 A NDPS Act.

6. Relying on the evidence of prosecution witnesses and the documents, the learned trial Judge has recorded the conviction, as above.

7. Learned counsel for the appellants contends that it is an admitted case of the prosecution that the seized material was not sealed in presence of the Magistrate nor the samples were taken out in presence of the Magistrate nor photography of the entire exercise was made. This would be evident from the FIR as well as testimony of PW-2, therefore, there is non-compliance of the mandate of Section 52A of the NDPS Act. As a result whereof the whole trial stands vitiated and the learned trial Judge has not considered this infirmity at all.

8. Learned counsel for the appellants next contends that presence of independent witnesses was not ensured at the site of search. Sub-Section(4) of Section 100 Cr. P.C., provides that before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search. Learned counsel for the appellants contends that non-compliance of the requirements of law without ensuring presence of independent witnesses, makes the prosecution case doubtful. In absence of any independent witnesses, two police personnels



party to the search and seizure, namely, Pyarelal (PW-4) and Vedprakash (PW-11) were made witness to the search, which tells upon the prosecution case.

9. Learned counsel for the appellants contends that as per the mandate of Section 102(3) Cr. P.C., every Police Officer is bound to forthwith report seizure to the Magistrate having jurisdiction. In the case on hand, no such reporting was made to the Magistrate.

10. Learned counsel for the appellants further submits that Appellant No.2 has been falsely implicated in the case merely on the basis of call details between the two vide Exhibit P-27. The call-details does not disclose real talks between the appellants to establish that it related to any deal of contraband.

11. Learned counsel for the respondent contends that the learned trial Judge has taken note of requirements of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 as well as the other requirements while passing the impugned judgment. No motive is alleged on the part of police for false implication of the appellants. Only for non-joining of independent witnesses at the time of search, that too due to Covid pandemic, the entire prosecution case cannot be brushed aside.

12. There is no dispute that the mandate of Section 52A of NDPS Act was not complied with in this case. On several occasions the requirement of compliance of the mandate of Section 52A of NDPS Act was considered by Hon'ble Supreme Court in the past. Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 reads as follows :-



**“52A. Disposal of seized narcotic drugs and psychotropic substances. —**

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, 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 drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in subsection (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances 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, psychotropic substances, controlled substances or conveyances 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, substances or conveyances 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, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

13. The aforesaid provision was considered by Hon’ble Supreme Court in **Mangilal Vs. The State of Madhya Pradesh reported in 2023 INSC 634**. Para-4, 5 & 6 of the judgment are being reproduced below :-

“4. Sub-section (1) of Section 52A of the NDPS Act facilitates the Central Government a mode to be prescribed to dispose of the seized narcotic substance. The idea is to create a clear mechanism for such disposal both for the purpose of dealing with the particular case and to safeguard the contraband being used for any illegal purpose thereafter.

5. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The



objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.

6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn”.

14. Prior to that in **Union of India Vs. Mohanlal & Anr., reported in AIROnline 2016 SC 770** on consideration of the requirement of Section 52A of NDPS Act, the Hon’ble Supreme Court observed in para 15, 16 & 17 as follows :-

“15. It is manifest from Section 52– A(2)include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer–in–charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate Criminal Appeal No.451 of 2011 and certifying the correctness of the list of samples so drawn.

16. Sub–section (3) of Section 52–A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure



is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act Criminal Appeal No.451 of 2011 that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.” (emphasis added).

Thus, the act of PW-2 of drawing samples from all the packets at the time of seizure is not in conformity with what is held by this Court in the case of Mohanlal². This creates a serious doubt about the prosecution’s case that the substance recovered was contraband.”

15. Yet in **Bothilal Vs. Intelligence Officer Narcotics Control Bureau reported in AIROnline 2023 SC 339**, the Hon’ble Supreme Court accepted submission of the appellant in para-15 of the judgment, which is being reproduced below :-

“15. Admittedly, PW-2 drew two samples from each of the packets of the contraband found in the hotel room and kept them in two separate plastic





covers. These covers were sealed and the remaining contraband was also sealed. Thus, the prosecution claims that the samples were prepared even before the packets were sent to the Station House Officer. The submission of the learned senior counsel appearing for the appellant in Criminal Appeal 451 of 2011 was that a grave suspicion is created about the prosecution's case as this action by the PW-2, was contrary to Section 52-A of NDPS Act."



16. In the case on hand, there is flagrant violation of the mandate of the aforesaid provision. The entire exercise of search, seizure and taking out of samples were made at the spot at the time of search and without ensuring presence of the Magistrate while allowing to draw representative samples. The prosecution case is fit to be discarded for this lapse alone.

17. None of the prosecution witnesses, who are party to the Raiding Team have disclosed the names of the persons who did not agree to be a witness of the search. Only the police officials who are party to the search are witnesses of search and seizure.

18. If any independent witness would have been taken as witness of seizure, then it would have been consistent with the requirements of law and would have been in favour of trustworthiness of the prosecution case. The law is well settled that plurality of witness is not the requirement, however, the prosecution is expected to prove each and every detail to dispel any doubt appearing in the trustworthiness of the case.



19. The learned trial Judge has failed to consider that the prosecution failed to prove compliance of the mandate of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 or the mandate of law under the Code of Criminal Procedure, 1973 as referred above.

20. Sealed packet of the tablets was sent to FSL Lab on 9.4.20 (Exb.P-21). Though, the samples ought to have been dispatched to the Laboratory within 72 hours of seizure as per guideline 13 of Notification dated 15-3-88. Evidently, there is delay in sending of samples of the recovered contraband for FSL. It creates doubt that there may be tampering of the recovered contraband. The prosecution case is fit to be discarded for this lapse along with the other lapses aforesaid.

21. In the result, conviction of the appellants is hereby set aside. The appellants have already remained in jail for 4.5 years. Let the appellants be set free at once on execution of bond by the appellants that in the event of challenge of this order they shall appear before the appellate court.

22. These appeals stand allowed accordingly.

(BIRENDRA KUMAR),J

Sanjay/-