

HIGH COURT OF JAMMU AND KASHMIR  
AT JAMMU

...  
CRA no.14/2013

*Reserved on: 09.03.2021*

*Pronounced on: 19.03.2021*

Jaspal Singh and another

.....Appellant(s)

Through: Mr R.K.Kotwal, Advocate

**Versus**

State of J&K

.....Respondent(s)

Through: Mr Aseem Sawhney, AAG

**CORAM:**

HON'BLE MR JUSTICE TASHI RABSTAN, JUDGE

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

**JUDGEMENT**

**Koul J:**

1. By virtue of this appeal the appellants herein assail their conviction awarded by learned Sessions Judge, Kathua (for short "Trial Court") for offence committed under Section 8 read with Section 15(C) of the Narcotics Drugs & Psychotropic Substance Act (hereinafter called as "NDPS Act") for recovery of 720 Kg of Bukhi from their possession. The appellants were to undergo rigorous imprisonment for 20 days and to pay a fine of Rs. One lac for the commission of offence under section 8 r/w Section 15(C) NDPS Act.
2. The case of the prosecution, as emerges from the challan, reveals that on 19.08.2010 at 11.00 AM, the appellants, namely, Jaspal Singh S/o Roshan Singh, being driver and owner of the vehicle, and the helper, Harpal Singh S/o Roshan Singh, both residents of Dharam Kot District Mogo, were found in a Truck bearing No.PB12H-7041. When appellants reported for clearance of Truck at Export yard Toll Post Nagri Kathua, they stated that the

truck is empty, but when the truck was physically checked by Excise Guard on duty, namely, Javed Iqbal, the truck was found loaded with filled gunny bags. The said Javed Iqbal, Excise Guard, immediately reported the matter to Dheeraj Kumar, Sub Inspector, Excise Toll Post, Nagri, Kathua, who in turn reported the matter to Inspector Excise, Rohit Sharma. Ultimately the matter was brought to the notice of Shri Pardeep Singh Chib, Excise and Taxation Officer, Toll Post Nagri. The vehicle was put to thorough physical examination under the supervision of Shri Pardeep Singh Chib, ETO, along with Rohit Sharma, Inspector Excise, and two Excise Guards, namely, Javed Iqbal and Fazal Hussain. It was found that 20 gunny bags were allegedly containing Poppy Straw (Bukhi) in the Truck No.PB12H-7041. Both the convicted persons were detained on the spot. The matter was reported to the Inspector Excise Sub Range, Kathua, who came on the spot along with Executive Magistrate, Kathua. The contraband was seized and weighed in presence of the Executive Magistrate and it was found to be weighing 720 Kgs. Two samples weighing 50 gms were taken from each bag and sent to FSL for chemical analysis. The FSL report reveals the sample belonging to Poppy plant (*pappaver Somniferum*) and morphine was detected from them. It was found in the investigation that the appellants were transporting, smuggling commercial quantity of poppy straw illegally. After completion of the investigation, challan was filed and the charge for the commission of offence under sections 8/15 NDPS Act was proved against both the appellants. After full dress trial, both the appellants stand convicted by the Court of Principal Sessions Judge, Kathua, vide its judgment dated 14.0.2013. On 15.01.2013, the appellants were sentenced to undergo rigorous imprisonment for a period of 20 years, with a fine of Rs.1.00 Lakh each for commission of offence under Section 8 read with Section 15 (C) of NDPS Act. In default of payment of the fine, the appellants would undergo simple imprisonment for a further period of one year.

3. Appellants have preferred the instant appeal against the judgement dated 14.01.2013 and the sentence order dated 15.01.2013 before this Court. The appellants challenge the judgement and order on the following grounds:
- (a) That appellants are innocent and have not committed any offence;
  - (b) That the entire evidence collected during investigation by the investigating officer is in violation of the law governing the search, seizure of the alleged contraband and arrest of the appellants.
  - (c) That while making the search, recovery, seizure and arrest of the appellants, the provisions of NDPS Act, in particular Section 41, 42, 43 & 50 had been completely violated.
  - (d) That the mandate of law as envisaged under Section 52 to 67 of the NDPS Act, was completely misread.
  - (e) That the trial Court has committed grave error by not appreciating the fall out of failure of the prosecution to produce the poppy straw, alleged to have been recovered from the appellants, as physical evidence of occurrence and failure to produce the same has made the recovery doubtful.
  - (f) That no independent witness has been associated during the search and recovery of the contraband from the appellants which renders the prosecution case doubtful.
  - (g) That the investigating officer has forcibly obtained the signature and confession of appellants about involvement of the Truck in illegal transportation of poppy straw, which is against Article 23 of the Constitution of India, and, therefore, the prosecution case is bound to crumble.
  - (h) That since Inspector, Arun Kumar, Excise Sub Range Kathua, is complainant as well investigating officer of the case, the investigation of the case resulting in culmination of the appellants, stood vitiated.
  - (i) That there is inordinate and un explained delay in handing over the seized samples to the FSL; furthermore, the report does not disclose the actual percentage of the morphine of the narcotic

drug in the sample. Thus, the samples taken from the recovered substance does not have a representative character, as such, creates doubt in the prosecution case.

(j) That because there is no mention of actual content of narcotic drug in the alleged recovered item, as such, in the absence of percentage of the quantity of narcotic drug it cannot be determined whether the quantity was small or commercial one.

(k) That the procedure while examining the appellants in terms of S. 342 of the Cr.P.C. had not been applied properly.

4. During the course of arguments, the learned counsel for appellants has argued that since there is no physical evidence in the shape of alleged recovered contraband, as the same had not been shown to the witnesses in the Court for identification, as such, it renders the whole prosecution case doubtful. He further argues that no independent witness has been associated with investigation of the case, as such, the procedure and guidelines as regards search and seizure had been done away by investigating agency. He also argues that it is not clear as to where the alleged samples had been kept for a period of ten days before handing over the same to FSL for chemical analysis. He has also stated that Incharge of the Malkhana has not been kept as a witness and the person who had alleged to have taken the samples from Police Station to FSL expert for chemical analysis has also not been listed as a witness in the instant case.

5. Learned counsel for appellant, in support of his submissions, has relied upon the following judgments:

1. Criminal Appeal No:2104 of 2012 titled *Gorakh Nath Prasad vs State of Bihar*;
2. Cr. Appeal No: 39/2013 *Ghulam Mohd Bhat and anr. V State of J&K*;
3. 2004 SCC (Cri) 2028 titled *Jatindra and Anr vs State of M.P.*

6. From the comparative reading of the evidence in the form of statements of the witnesses and seizure memos with the challan, it is said by the Trial Court that on 19.08.2010 at 11.00 AM, when alleged Truck bearing No.PB12H-7041, reached the export yard

for clearance at Toll Post Nagri Kathua, the appellant Jaspal Singh stated to the Excise Guard on duty that the truck was empty, but on physical checking of the truck by the said Excise Guard, Javed Iqbal, the truck was found loaded with filled gunny bags. The Excise Guard reported the matter to the Sub Inspector, Dheeraj Kumar, who also checked the vehicle on the information given by the Excise Guard and himself reported the matter to Excise Inspector Rohit Sharma who ultimately brought the matter to the knowledge of Pardeep Singh Chib, Incharge Toll Post Nagri. It was found that the truck was loaded with 20 gunny bags of poppy straw (Bukhi). The vehicle with alleged poppy straw along with the appellants were detained by Toll Post authorities at Nagri Kathua. The ETO, Pardeep Singh Chib, called the complainant Inspector, Excise Sub Range, Kathua, and narrated the whole incident with a request to take further necessary action. The complainant-Inspector wrote a letter bearing No.380/ ERK dated 09.08.2021 to District Magistrate Kathua for deputing an Executive Magistrate in order to carry further proceedings on the spot. In view of that letter, Krishan Kumar Sharma, Naib Tehsildar was deputed and the complainant Inspector and Krishan Kumar Sharma along with Excise staff proceeded towards the Toll Post Nagri and reported the ETO Toll Post Nagri at 2.10 PM. The alleged contraband, i.e., gunny bags carrying the alleged poppy straw was seized and put to weight at Weigh Bridge No:8 of Toll Post Nagri under the supervision of Pardeep Singh Chib, ETO Toll Post Nagri. The bags were 20 in number and total weight was found to be 720 Kgs. On 19.08.2010, ETO Toll Post Nagri handed over the alleged complainant's letter No: 01-04/TPN dated 19.08.2010 signed by him and other seized documents. The seizure memo, the inventory and the other documents as revealed by the challan, by the statements of the prosecution witnesses, all these documents were prepared on the spot and besides this, statements of the witnesses were also recorded on the spot. Furthermore, statement of the witnesses,

reveals that two samples of alleged poppy straw (Bukhi) weighing 50 gms each were taken from each gunny bag and one set of samples was marked as B-1 to B-20 and were packed and sealed and the other set of samples were marked as C1 to C20 and they were also sealed. The rest of the alleged poppy straw in the 20 bags were marked as A-1 to A-20 and they were also sealed. The bags and the samples were sealed with brass seal in presence of Executive Magistrate, Ist Class, Kathua. Thereafter the packets and the samples bearing Mark A-1 to A-20, B-1 to B-20 and C-1 to C-20 respectively were again resealed on the spot by Executive Magistrate Kathua with his office seal and regarding this, the Executive Magistrate Ist Class also issued a certificate addressed to Director FSL, Jammu, authorizing him to break the seal of samples for chemical analysis. The samples marked as B-1 to B-20 of alleged poppy straw were sent to Director, FSL, Jammu, for chemical analysis and the samples were deposited before Director FSL Jammu, under receipt No:1418/ FSI/Legal/Jammu dated 01.09.2010. The report of FSL Jammu vide No.563/CAT/ FSL dated 03.11.2010 and covering letter No; FSL/Jammu/1046/10 dated 03.11.2010, attached to the complaint clearly reflects that the Exhibits contain poppy straw (pappaver Somniferum) and Morphine was detected from the exhibit/Sample taken out from the seized poppy straw.

7. From the statements and the exhibits, seizures and the FSL report, it is clear that the appellants have committed the offence and the Trial Court has convicted them after following all the parameters required under law.
8. Learned counsel for appellants by virtue of raising certain points argued that the prosecution story is doubtful.
9. In order to appreciate the points raised by learned counsel for appellants regarding the credibility of the prosecution story, the evidence collected during the investigation and appreciated by the Trial Courts needs to be re-appreciated in order to appreciate the

points raised by learned counsel that appellants are innocent and that the prosecution story is doubtful.

10.PW Pardeep Singh Chib, examined by the prosecution on 17.3.2011, has stated, in his statement that on 19.8.2010, he was posted as ETO Toll Post Nagri. On the said day a truck bearing No.PB12H-7041 arrived at the export yard. Jaspal Singh was driving the truck and Harpal Singh was sitting in it. The appellants told the guard, namely, Javed, who was on duty in the export yard that the truck is empty. He checked the truck. He found some bags in it. He reported the matter to Sub Inspector Dheeraj Kumar, who was posted there. He too saw those bags. Dheeraj Kumar reported the matter to Rohit Sharma and Rohit Sharma reported the matter to him. He asked the appellants to produce the documents pertaining to the vehicle before him. Truck was loaded with Bukhi "Poppy straw". The Bukhi was seized at the spot. It was weighed in presence of a Magistrate. It weighed 720 Kilograms. The bags were twenty in number. He prepared a certificate regarding the weighment of Bukhi. It is attached to the file. It bears his seal and signature. In his cross examination he has stated that Rohit Sharma narrated the occurrence to him. Rohit Sharma proceeded to the place of occurrence with him. Dheeraj and Javed were near the truck. The truck was not loaded with any other material. The bags containing Bukhi had been covered by the accused. They weighed in his presence on the weigh bridge. He did not search the accused before their arrest. The certificate was prepared by Rohit Sharma in his office. His statement was recorded by the I.O on the day of occurrence itself. He knows the accused by their name but he does not know their parentage.

11.PW Rohit Sharma, examined by prosecution on 18.3.2011, has stated, in his statement, that on 19.8.2010 he was posted as Excise Inspector Toll Post Nagri. On the said day a truck bearing No:PB12H-7041 arrived at the export yard. Javed Iqbal, the guard, was on duty there. The driver of the truck, i.e., the accused,



present in the court told the guard that the truck was empty. Before the truck reached the weigh bridge the guard saw it was loaded with some bags. Dheeraj Kumar, Sub Inspector, also saw the truck loaded with some bags. He reported the matter to ETO. ETO arrived at the spot. ETO informed the matter to the Inspector Range, Kathua on telephone at about 12 noon. Inspector Range, Kathua along with others and the Magistrate reached there at about 14:20 hours. ETO asked him to get the bags weighed in the presence of the Magistrate. The bags were unloaded from the truck by the guards and the labourers who had accompanied the Inspector. These were twenty in number. They weighed 720 kilograms. ETO issued a certificate on that count. The accused and the truck were entrusted to the Inspector Sub Range, Kathua, for appropriate inquiry. Two samples weighing 50 gms each were taken from each bag for chemical analysis. The samples were wrapped with a white cloth. It was sealed. The bags containing Bhuki were also wrapped with white cloth. They were marked as A-1 to A-20 and the samples were marked as B-1 to B-20 and C1 to C20. The Inspector arrested the accused at the spot. The seizure memo vide which the Bukhi was seized contains his signatures and it is true and correct. It is marked as EXT-P2/2. He has identified the seized Bukhi in the court. In his cross examination he has stated that at the time of occurrence he was near the weigh bridge. It is incorrect that the accused Jaspal had a scuffle with Javed Iqbal Guard as a consequence of which a false case was prepared against the accused. The bags were weighed first and then the detection letter was prepared. All the proceedings were initiated after the Excise Range Inspector arrived at the spot. The accused had not stated that the bags contained fodder. The Magistrate and the Inspector arrived there at the same time. It is incorrect that he was not present at the time when the bags were unloaded from the truck. ETO issued the weighment certificate after the Bukhi was weighed. He had not issued any form at the weigh bridge. The samples were taken by



the Inspector Range, Kathua namely Arun Kumar. He had the weighing machine with him. The samples were sealed. The bags containing Bukhi were also sealed. He had stated before the I.O that the Bukhi weighed 720 kilograms but the statement does not bear so.

12.PW Javed Iqbal, examined by the prosecution on 17.8.2011, has stated, in his statement, that on 19.8.2010 he was posted as Excise Guard at Nagri Toll Post. A truck bearing No:PB12H-7041 came from Jammu. It was on way to Punjab. At about 11:15 A.M the truck was stopped. The driver said that the truck is empty. He checked the vehicle. It was loaded with some bags. He told the Incharge Sub Inspector Dheeraj Kumar that the truck is loaded with bags. Sub Inspector Dheeraj Kumar reported the matter to Inspector Rohit Sharma. He too checked the vehicle. He reported the matter to ETO. He came to the spot. The driver and the conductor were asked to stop the vehicle. They narrated their names as Jaspal Singh and Harpal Singh. The ETO informed the matter to the Range Inspector on telephone. The Range Inspector along with some personnel and the Magistrate arrived at the spot. The bags were unloaded from the truck. The bags were 20 in number. They were weighed before a Magistrate, the Range Inspector and the ETO. These weighed seven quintals. Thereafter the Range Inspector took two samples weighing 50 grams from each bag. These were enveloped. The envelopes were wrapped in a white cloth. These were sealed by the Inspector. The Magistrate also marked these samples. The seized bags were also wrapped in white cloth. A memo of seizure was accordingly prepared. It contains his signature and is true and correct. It is marked EXT-P2/2. In his cross examination he has stated that his duty, at the Toll Post, Nagri had started on 17<sup>th</sup> at 12 noon. He and the two labourers namely, Kamal and Pala unloaded the bags from the truck. The bags were weighed on the arrival of Range Inspector Arun Kumar at the spot. The ETO made an inquiry from the accused in his presence. They stated that the truck was loaded

with Bukhi. He did not have any personal knowledge about the dumping of Bukhi in the truck. The samples were taken by the Range Inspector Arun Kumar. These were taken at the electronic export yard on the weighing machine itself. The persons who had accompanied the Range Inspector also assisted him in the process. Samples were kept in small envelopes. These were marked by them and by the Magistrate. They marked with "OM" and the Magistrate marked with "ET". They were marked after they were sealed. The Inspector sealed them. After opening them ( bags) it was found that the bags contained Bukhi. The bags were unloaded from the truck in presence of the accused. The marks "OM" and "ET" were affixed simultaneously. No civilian was associated with the operation. The accused were not searched. It is incorrect that nothing was recovered from the accused and the entire investigation was carried in the office.

13.PW Dheeraj Kumar, examined by the prosecution on 13.9.2011, has stated in his statement that in the month of August he was posted as Sub Inspector Excise Toll Post, Nagri. On 19.08.2010, at about 11 to 11.15 a truck bearing No: PB12H-7041 came from Jammu. It was driven by the accused. The truck was on way to Punjab. On reaching the Toll Post, Nagri, the accused stated that the truck is empty. However, Javed Iqbal guard checked the vehicle and he found it loaded with some plastic bags. He too checked it. He also found it loaded with some plastic bags. He reported the matter to the concerned Inspector, namely Rohit Sharma. He informed the matter to the concerned Officer of the Toll Post, namely Pardeep Singh Chib, on telephone. He inquired from the accused about the contents of the bags. They informed the Range Officer, namely Arun Verma, who came on spot. He informed the Tehsildar Executive Magistrate and they reached the spot within an hour or an hour and a half. The guard and the labourers unloaded the Bhuki from the truck. Bukhi was packed in plastic bags. These weighed 720 kilograms. Two samples weighing 50 grams each were taken from each packet. These

were taken by the Range Officer. The Bukhi was seized vide a memo of seizure marked as EXT-P2/2. It bears his signature and is true and correct. The accused were arrested. The accused told him that the truck is empty. The rear lid of the truck was closed. It was about one and half feet in height. The bags were unloaded from the truck on the arrival of the ETO. He reached there within 4 to 5 minutes. When the bags were opened, the ETO and the Inspector identified them to be filled with the Bukhi. When the accused admitted that the bags contained Bukhi, a memo was prepared and it was signed by him. He did not see that memo on the file. The Bukhi was weighed by Arun Kumar, Inspector, Kathua Range, on the arrival of the Tehsildar. They had checked only one bag prior to that. When the Tehsildar and the Inspector arrived, at the spot, the accused were in the cabin. It was only on their arrival that the samples were taken from the Bukhi. The samples were wrapped in a cloth by the Inspector. One more person was also with him. It took him about one hour to complete the entire formality. It was completed by 5 to 5.30 P.M. The Tehsildar reached there at about 2.30 to 3 p.m. The accused were not known to him prior to the occurrence. No civilian was associated with the search. His statement was recorded on the day of occurrence itself. He had stated in his statement that the samples were taken in his presence but it does not contain so.

14.PW Fazal Hussain, examined by the prosecution on 22.2.2012, has stated in his statement that on 19.8.2010, he was posted at Nagri Toll Post. A truck bearing No: PB12H-7041 came from Jammu. Javed checked the vehicle. It was loaded with bags. The bags were 20 in number. At that moment ETO arrived there. He asked the accused what did the bags contain. The accused i.e the driver told him that it is loaded with Bukhi. The accused were kept in a glass room. They stood near the weigh bridge. The Bukhi was unloaded from the truck. It weighed 720 kilograms. Thereafter the accused were arrested by the Excise Range, Sub Inspector, Kathua. The memo of arrest marked EXPT2/1, bears

his signature. It is true and correct. In his cross examination he has stated that Javed inspected the truck. He found it loaded with bags. The rear lid of the truck was closed. Accused persons had admitted that the bags contain Bukhi. The Inspector Kathua Range reached the spot at 14 to 14:15 hours. All the documents were prepared on his arrival. It is incorrect that he (the witness) was not present at the place and he has made a false statement.

15.PW Arun Kumar, examined by the prosecution on 09.04.2012, has stated, in his statement, that on 19.8.2010 he was posted as Excise Inspector Sub Range, Kathua. The accused are known to him. On 19.08.2010 he was in his office. He received a telephone call from ETO, Pardeep Singh Chib Toll Post Nagri. He told him that a truck bearing No: PB12H-7041 had reached at the Toll Post for assessment. The driver and the conductor stated that the truck did not carry anything but they found it to be loaded with 20 bags, allegedly containing Poppy straw "Bukhi". He also told him that the driver and the conductor of the truck have been detained on spot along with the contraband. He addressed a letter to the District Magistrate, Kathua, with the request that an Executive Magistrate be deputed at the spot. The letter bears his signature and is true and correct. It is marked as EXTP-8. The District Magistrate deputed Naib Tehsildar, namely Krishan Kumar with him. He along with his staff and the Magistrate reached Toll Post, Nagri at about 14 to 14;15 hours. They found a truck and the accused there. Thereafter the Executive Magistrate and the ETO unloaded the bags from the truck. They were weighed on the weighing machine. The bags weighed 720 kilograms. The weighing certificate was issued by the ETO. It was signed by the Executive Magistrate. It is marked as EXTP-1 and is correct. The weighment slip and the detection letter along with documents of the vehicle were entrusted to him. He recorded the statements of the ETO and the other employees present on the spot. The accused were arrested. The memo of seizure vide which the Bukhi was seized contains his signature and is true and correct. It

is marked as EXTP-8/2. He took two samples weighing 50 grams each from each bag. These were sealed in presence of the Executive Magistrate. These were resealed by the Executive Magistrate. Forty samples were prepared and on an authority letter of the Executive Magistrate, they were sent to FSL for chemical analysis. The seal was entrusted to sub Inspector, Sub Range, Kathua. He prepared the site plan. The memo pertaining to the search of the truck and the other documents were prepared by him. During the investigation it was found that the Bukhi recovered, from the accused, was in their illegal possession. He entered into correspondence with the authorities of FSL for procuring the report. On obtaining the report it was placed on the file. The complaint is in his hand writing. The seized bags are lying in his custody and he identifies them. The seized samples that they received from the FSL are the same that have been shown to him in the court. In his cross examination he has stated that he himself went to the District Magistrate along with the letter. He received the telephone call of the ETO, Toll Post, Nagri, at about 11.30 P.M. he told him that the bags allegedly contained Poppy straw. He accompanied the Executive Magistrate to the spot. The bags had been counted before his arrival. They had not been opened. However, some bags had been checked. When he reached the spot the accused were in a cabin situated just near the truck. The accused did not name the place from where they had loaded these bags containing Poppy Straw. The bags were weighed after taking the samples. Razi Ahmed to whom the seal, with which the bags were sealed, was entrusted, has not been cited as a witness in the case. The seal cannot be produced in the court. The bags were weighed on his arrival at the Toll Post. The detection letter was issued thereafter by Rohit Sharma Sub Inspector, Toll Post, Nagri. It was signed by the ETO. The certificate of resealing was prepared by the Executive Magistrate from a computer at the Excise Toll Post Nagri. It was resealed on 19.8.2010 and was sent for chemical analysis on

23.8.2010. It was raining heavily on the 20<sup>th</sup> and they were busy in some other work. That is why the samples were sent for chemical analysis on 23.8.2010. The samples were received by the authorities of FSL on 1.9.2010. No cause for the delay in sending the samples to the authorities of FSL is stated in the complaint. The person who carried the samples to the FSL, has not been cited as a witness in the case. The documents, whatever that were prepared in the case, are not in his hand writing. They bear his signature and were prepared under his dictation by Sub Inspector Raiz Ahmed. He is not a witness in the case. He is the complainant as well as the Investigating Officer in the case. The memo of confession could not be prepared because the accused refused to sign it. The statement of Dheeraj has been recorded by him. It is incorrect that a false case has been prepared against the accused. The seized bags were made of jute.

16.PW Rohit Koul, examined by the prosecution on 8.3.2012, has stated in his statement that on 1.9.2010, he was posted at FSL, Jammu. A case was forwarded, for chemical analysis report, in the matter of State through Excise Department vs. Yash Paul Singh and Harpal Singh. The description of the packets is given in the report No:563/C & T FSL dated 3.11.2010. These were marked as exhibit Nos. B1 to B20 which were further marked as K-992/10 to K1011/10 respectively. All these packets weighed 50 gms each and contained some yellow coloured powdered material. The exhibits were subjected to various chemical and chromatographic examination and it revealed as under:

1. Exhibit marked K-992/10 to K-1011/10 belongs to Poppy plant(Pappaber Somneferum).
2. Morphine was detected in the exhibitNo:992/10 to K-1011/10.

17.The contents of the report No: 563/C&T/FSL attached to the court file are true and correct. It bears his seal and signature and is exhibited as EXT-P7. On cross examination by the defence counsel, he has deposed that the letter from the Inspector Excise



Sub Range Kathua bears No: 385/ERK dated 23.8.2010 and the same was received by their office on 1.9.2010. The total number of seals on each packet were two, one of the Excise Department and the other one of the Executive Magistrate Ist Class Kathua. Only one certificate along with the specimen seal of the Executive Magistrate is on the court file. There is no mention of Excise seal in the authorization letter of the Ist Class Magistrate. The copy of which is in the court file. The percentage of Morphine has not been mentioned by him in his report.

18. PW Krishan Kumar, examined by the prosecution on 20.4.2012, has stated, in his statement, that on 19.8.2010, he was posted as Naib Tehsildar Kathua. On the said day, Arun Kumar Inspector, came to his office. He said that some Bukhi is lying at Toll Post, Nagri. He accompanied him to the Toll Post, Nagri. Some other employees were also there. A truck bearing No: PB12H-7041 was standing there. The accused too were present there. The Bukhi comprising twenty bags was weighed in his presence. It weighed 720 kilograms. Weighment certificate was issued by the Excise Inspector in his view and presence. He attested it. He has identified his seal and signature on the certificate. It is true and correct. Forty samples of Bukhi weighing 50 gms each were produced before him by the Excise Inspector for resealing. These were marked as B-1 to B-20 and C-1 to C-20. He resealed them and issued a certificate for their chemical analysis. The seal was affixed on the samples also. In his cross examination he has stated that when he reached at the spot, the Bukhi was lying in the Truck. The accused were near the truck. They were not in custody. Some other officials of the department of Excise were also there. A number of civilians and 1 to 2 truck were there. At first the truck was weighed along with the Bukhi. The truck was again weighed after unloading the Bukhi. When he reached at the spot the truck was stationed at a distance of 20 feet from the weighing device. The bags containing Bukhi were made of jute. The certificate makes the mention of twenty gunny bags. It does



not mention jute or plastic bags. The weight of the Bukhi was derived after deducting the weight of the truck loaded by them from the weight of the truck after unloading them. It is incorrect that the certificate regarding the weight of the Bukhi was prepared before his arrival. The bags were unloaded from the truck by the employees. Thereafter, samples were taken out of them. On the same day the packets were resealed. The entire process was completed within 3 to 4 hours. The certificate was prepared by him at the spot on the computer. He himself enquired from the accused about their names. The employees of the Excise department also told him their names. The bags B1 to B20 were marked by the department of Excise. After resealing them he did not affix any mark on them, however, he affixed one seal on each packet. In the certificate EXTP-6 he has mentioned about the resealing of the packets and not resealing them. In the certificate he has authorised the authorities of FSL to open the packets of B1 to B20 for chemical test whereas no such authority had been given to them in respect of the packets marked as C1 to C20.

19. Learned counsel for appellants has argued that the Trial Court has committed grave error by not appreciating the fall out of the failure of the prosecution to produce poppy straw in the court, alleged to have been recovered from the appellants.

20. In order to address this argument the statements of the prosecution witnesses, particularly, statements of prosecution witnesses Javed Iqbal, Fazal Hussain, Dheeraj Kumar, Rohit Sharma, Arun Kumar and Krishan Kumar stands recorded in the Court and all of them had stated that 20 gunny bags containing poppy straw (Bukhi) were found in the Truck and after checking the weight, the alleged Bukhi was found to be 720 Kgs and out of which 50 gms of two samples were taken from each gunny bags containing poppy straw. Thereafter the gunny bags were sealed. The samples were also sealed with brass seal and again re-sealed by the Excise Inspector. The packets and samples were marked as A-1 to A-20 and C-1 to C-20 respectively. PW Rohit Sharma in

examination-in-chief stated that he had seen the seized material in the court and it was the same which was recovered from the accused persons on the date of occurrence. PW Javed has stated in his examination in chief that seized material produced in the court is seen and identified by him and same was recovered from the accused persons/appellants on the day of occurrence. PW Dheeraj Kumar in his examination in chief stated that the material which was recovered, is seen by him today in the court and is the same which was recovered on the day of occurrence. PW Arun Kumar has identified the samples, one sent to FSL (residue after test) and the other sample with the police, in the court.

21. Apart from that statements under section 342 Cr.P.C. of both the appellants were also recorded and questions were put to the appellants that during search from the vehicle the gunny bags were weighed in presence of Executive Magistrate and the total weight was found to be 720 Kgs. The seizure memo, Ext P2/2, was prepared on the spot have also been proved and exhibited in the Court and furthermore, no cogent reply had been given by the appellants about recovery of the alleged poppy straw weighing about 720 Kgs from them. It is also seen that in cross-examination none of the prosecution witnesses were asked whether the recovered item/ material was shown to them. In fact, the defence Counsel, it seems had deliberately avoided to put questions regarding the showing of the seized material. It is important to note that the arguments of the learned counsel for the appellants stands belied by the statements of PWs Javed, Dheeraj, Rohit and Arun. Furthermore, that showing of the alleged contraband in the Court to the prosecution witnesses is not mandatory, particularly, in the cases of NDPS Act, because ultimately the fact of recovery of alleged contraband can also be established and proved by way of proving the documents of seizure.
22. Section 66 of the NDPS Act raises presumption with regard to the documents in certain cases:

“66. Presumption as to documents in certain cases;-Where any document---Is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law; or

(i) Has been received from any place outside India(duly authenticated by the such authority or person and in such manner as may be prescribed by the Central Government) in the course of investigation of any offence under this Act alleged to have been committed by a person;

and such document is tendered in any prosecution under this Act in evidence against him, or against him and any other person who is tried jointly with him, the court shall----

(a) Presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by; or to be in the handwriting of, any particular person, is in that person`s handwriting; and in the case of a document executed or attested that it was executed or attested by the person by whom it purports to have been executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document.”

23.Perusal of the seizure memo reveals that PW Rohit Sharma, PW Dheeraj, PW Javed Iqbal had established and proved the document EXTP2/2, EXTP-2/3, EXTP2/21, which clearly reflects that the documents of seizure have been proved in the Court. Even if for the sake of arguments, it is presumed for a while that alleged contraband was not shown to the witnesses in the court; was not the defence counsel under obligation to put relevant questions to the witnesses as to whether the contraband was shown to them in the Court or not. No such question has been put to any of the witness as regards showing of contraband in the Court as alleged to be not produced in the Court by the learned counsel for the appellants. Since in the instant case the documentary evidence is proved, whether the Poppy Straw has been shown to the witnesses in the Court for identification or not, in the opinion of the Court same does not prove fatal to the prosecution case, which has been proved by the documentary evidence i.e the alleged possession of the contraband have been proved by the witnesses by virtue of documents exhibited in the

Court and the statements of PWs Dheeraj, Javed, Arun and Rohit makes it clear that the seized items have been shown to them in the court.

24. Coming to another point of the L/C for the appellant that no independent person has been kept as a witness in order to give authenticity to the prosecution case. He has further argued that it was broad day light and the concerned investigating agency should have kept independent persons as witnesses to the search, seizure and recovery of the contraband in order to give authenticity to the prosecution case.

25. At the very threshold, it is to be noticed that merely because prosecution has not kept any civilian or independent person as a witness, same would not necessarily lead to the conclusion that the prosecution case is doubtful and the appellants have been falsely implicated in this case. The guiding judgment with respect to this argument raised by the learned counsel for appellants in the case of **Jarnail Singh vs State of Punjab Manu/SC/0480/2011: (2011)3 SCC 521**, relied on by the counsel for the respondent State, also supports the case of the prosecution. In the aforesaid judgment, the Supreme Court has held that merely because prosecution did not examine any independent witness would not necessarily lead to conclusion that the accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status.

26. In the case of State, Government of NCT of Delhi v Sunil and Anr. MANU/SC/0735/2000: (2001)1 SCC 652, it was held as under:

“ It is an archaic notion that actions of the police officer should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate the Courts cannot start with the presumption that the police records are untrustworthy. As a presumption of law, the presumption would be the other way round. The official acts of the police have been regularly performed is the wise principle of presumption and recognized even by the legislature.”

27. In the present case, no question has been put to any of the witness, particularly, Arun Kumar that is why no civilian has been associated with the search, seizure and recovery of the alleged contraband on the spot. The said Arun Kumar was the main architect and he is the only person to whom this question can be put but no question has been put regarding the listing or calling of any civilian as witness in the case. Even otherwise also it has been noticed that people generally resist and refrain themselves to be kept as witness in criminal cases for the reasons best known to them. The statements of the police or Excise witnesses cannot be regarded as doubtful merely they are the official witnesses. Something more than that needs to be projected by the defence so as to create doubt in the statement of these witnesses.
28. Another argument raised by the learned counsel for appellants is that on 19.8.2010 the alleged recovery was made from the truck of the appellants by the investigating agency and after a gap of 10 days the samples had been sent to FSL and it is not cleared by the prosecution as to where the samples have been kept. Furthermore, a query has been raised by the counsel for the appellants that the person of Riaz Ahmed, to whom the ring for sealing had been handed over and the person who had taken the samples to FSL has not been deliberately kept as witness so as to deprive the appellants to raise and ask the question regarding tampering of the samples during the lodgement period. He has further contended that since the person who handed over the samples to FSL from Malkhana was not kept as a witness thus, an important link of evidence is missing and the chain is incomplete.
29. As per the prosecution case and the statement of the investigating officer Arun Kumar, after preparing the seizure memo EXTP-8/2, two samples weighing 50 grams each were taken from each bag and the bags were sealed in presence of the Executive Magistrate. These bags were resealed by the Executive Magistrate; forty samples were prepared and on authority letter of the Executive Magistrate they were sent to FSL for chemical analysis. The seal

was entrusted to Sub Inspector Sub Range Kathua. He further stated that the complaint is in his handwriting and the seized bags are lying in his custody and he identifies them. Furthermore, PW Krishan Kumar had stated that forty samples of Bukhi weighing 50 grams each were produced before him by the Executive Magistrate for resealing; these were marked as B1 to B20 and C1 to C20 and resealed them and issued certificate for chemical analysis. The seals were affixed on the samples. He further stated in his examination that 20 bags of gunny bag were weighed in his presence and it weighed about 720 kilograms containing Bukhi. Thus, it is proved that by virtue of the statement of PW Krishan Kumar and Arun Kumar that the 20 bags, after taking samples were stitched and samples were also taken and sealed and resealed on the spot on 19.8.2010 and sent for chemical analysis on 23.8.2010.

30. Learned counsel for the appellants has raised a question as to why the samples were sent to FSL on 23.8.2010 and where the samples have been kept during this interval and who had taken the samples to FSL. It is important to note that in the cross examination a question was put to PW Arun Kumar as to why the samples has been sent to FSL on 23.8.2010; he fairly replied that it was raining heavily on 20<sup>th</sup> and they were busy in some other work, therefore, the samples were sent to FSL on 23.8.2010. A further question was put to the witness Arun Kumar as to why the person who had taken the samples, has not been cited as a witness in the case. We think that it is not important as to who had taken the samples from custody of police or the Malkhana to FSL, what is more important is whether the seals are intact or not in order to complete the chain. PW Rohit Koul, in his examination-in-chief stated that a case was forwarded for chemical analysis in the matter titled State through Excise Department vs Yash Pal and Harpal Singh. The description of packets is given in the report No.563/ CAT / FSL dated 3.11.2010. These were marked as exhibit B1 to B20, which were further marked as K-992/10 to K-

1011/10 respectively. All these packets weighed 50 grams each. It is to be seen that as per the PW Arun Kumar and PW Krishan Kumar, 40 exhibits weighing 50 grams were sealed/resealed on the spot and one set was marked as B1 to B20 whereas the other set was marked as C1 to C20. The mark B1 to B20 were sent to FSL with a letter of authorisation to open the packets B1 to B20 for chemical analysis. This means that the samples, sealed and resealed on spot by the Executive Magistrate bear the testimony to it. Furthermore, PW Rohit Kumar, FSL expert, has received the samples in an intact position and had not reported that the seals were any way tampered or damaged. The fact that neither PW Arun Kumar nor PW Krishan Kumar were in possession of the seals but the same were kept with Riaz Ahmed, Sub Inspector, as such the question of tampering with the case property by the investigating officer or by the PW Krishan Kumar does not arise at all. The samples, sent to the FSL, were found to be intact with seals, so non-listing of the said Riaz Ahmed as a witness in the prosecution case does not in any way affect the case of the prosecution.

31. It is evident from the evidence that the samples B1 to B20 were sealed and resealed on spot and PW Krishan Kumar vide his certificate EXTP-6 had mentioned about resealing of the packets with further authorisation to the FSL to open the packet B1 to B20 for chemical analysis and the FSL expert Rohit Sharma found the seals intact and the seals on the samples tallied with the sample seals. In that view of the matter the chain of evidence was complete.
32. Another limb of argument of learned counsel for appellants is that PW Arun Kumar is the complainant in the instant case and he is also the investigating officer of the case, as such the whole investigation done by him, is biased and the investigation which culminated into the conviction of the appellants, be set aside on this ground also.



33. A five Judge Bench of the Supreme Court in *Mukesh Singh vs State*, decided on 31.8.2020, at paragraph 12 clause II, has held as under:

“In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. The contrary decision of this Court in the case of *Mohan Lal v State of Punjab* (2018) 17 SCC 627 and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overrules.”

34. In view of above law laid down by the Supreme Court, the argument raised by learned counsel for appellants is not tenable and is rejected.

35. Now coming to the Judgments referred by the learned counsel for the appellants.

36. In relation to the judgment in *Ghulam Mohd Bhat* case supra, it is clear that the samples had been kept at the Airport for three days and had not been deposited in the Malkhana. The samples have been produced in the Court whereas the fact of the matter in the case in hand, the samples had not been produced in the Court and identified by PW Arun Kumar. Besides, no question was put to witnesses as to where the contraband had been kept. In fact, PW Arun Kumar has stated that the contraband was lying with him. In the judgment referred to by the learned counsel for appellants it has been held that besides the question of taking care of the sample and proper safety in the Malkhana, the High Court also reported that there are insertions and contradictions and same has escaped the attention of the trial Court, whereas in the case in hand, the L/C for the appellants has not reported or brought any inconsistency or contradiction viz-a-viz statements of the prosecution witnesses to the notice of this Court. The judgments

furnished are not applicable to the facts and circumstances of this case.

37. In case titled *Gorakh Nath Prasad Vs State of Bihar*, the independent witnesses with regard to the search and seizure, turned hostile, deposing that their signatures were obtained on blank paper, whereas in the case in hand though no independent person had been listed as witness to the search and seizure, but only officials have been kept as the witness to the search and seizure and none turned hostile. Infact the defence counsel could not project any objection except that they are the official witnesses. Thus, the judgement referred to is also not applicable to the facts and circumstances of this case.
38. After considering the Judgment of the Ld Trial Court, hearing the submissions of the rival sides, this court is of the opinion that prosecution has successfully proved its case beyond any reasonable doubt and the Trial Court have very rightly recorded the conviction of the appellants .
39. This court is not oblivious of the fact that appellants are convicted in a very serious offence affecting the society at large. Considering the nature of the offence, so also the seriousness of the crime, there is no reason to reduce the punishment awarded to the appellants/ accused persons. Considering the age of the appellants, their poor background and the fact that appellants are behind the bars since their arrest in this case. Furthermore, in case of *Balwinder Singh Vs Asst. Commissioner, Customs and Central Excise (2005) 4 SCC 146*, The Honble Supreme Court has narrated the relevant factors to be considered for reduction of sentence for the offence under NDPS Act. In the said Case, the accused was convicted under the NDPS Act for the first time and therefore, the sentence was reduced from RI for 14 years to RI for 10 years.
40. Coming to the case in hand, there is no report from the prosecution side that the appellants are the repeaters of the offence, this suggest that they are the first timers. So, in view of

law laid down by the Supreme court in the case of **Balwinder Singh** (supra) coupled with facts and circumstances of the case in hand and the fact that there is no record to show that accused persons/appellant had previously committed such offences, the instant case is also considered on the lines of above cited judgement and as a corollary thereof, the sentence of appellants is reduced from RI for 20 years to RI 15 years, However, the penalty imposed by the Trial Court shall remain the same.

41.For the foregoing reasons, the appeal is partly allowed. The impugned judgement and order of conviction passed on File no.74/Challan, by the court of Sessions Judge, Kathua, is modified. The sentence to undergo rigorous imprisonment for 20 years is reduced to 15 years. And insofar as the penalty of Rs.1.00 Lakh is concerned, that shall remain same.

42.The Trial Court record, if summoned/received, be sent down along with copy of this judgement.

(Vinod Chatterji Koul)  
Judge

( Tashi Rabstan )  
Judge

Srinagar  
19.03.2021  
Rakesh

*Whether the order is reportable: Yes/No.*

I pronounce this judgement in terms of Section 138(4) of the J&K High Court Rules, 1999.

( Tashi Rabstan )  
Judge

Jammu  
19.03.2021