

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT JAMMU****Case: Crl A(D) No. 8/2021**

Prem Kumar,  
S/o Tek Bahadur,  
R/o Gaisi Ward No. 6, District  
Rukum, Police Station Juajasi Nepal  
at Present: Nubra,  
A/P - Lodged in District Jail Leh.

...Petitioner(s)/Appellant(s)

Through: Mr. Meharban Singh, Advocate.

V/s

UT of Ladakh through I/c SHO P/s Nubra.

.... Respondent(s)

Through:

Mr. Rohan Nanda, CGSC

**CORAM: HON'BLE MR. JUSTICE ATUL SREEDHARAN, JUDGE  
HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE****ORDER**  
**17.10.2024****(ATUL SREEDHARAN-J)**

The present appeal has been filed by the appellant who is aggrieved by the judgment of conviction dated 06.06.2016 passed in File No. 08 in case FIR no. 10 of 2014 of Police Station Nubra. He has already completed nine years of his sentence from a total of eleven years that was imposed upon him by the learned Trial Court. The appellant is aggrieved that the conviction recorded against him has been based on a wrong marshalling and appreciation of evidence adduced against him during the course of trial.

2. Brief facts of the case are as follows. On 24.09.2014, it is the case of the prosecution that the appellant who is the resident of Nepal entered via

Manali and reached Leh and that upon seeing the Police party, the appellant tried to conceal himself. It is further the case of the prosecution that the appellant was carrying *Charas* in a blue colour bag. Pw-1-Inspector Mohd. Yousf, was the first Station House Officer (SHO) during whose tenure most of the investigation had taken place. He is the complainant and also the Investigating Officer (IO) in this case. The three official witnesses besides the IO who have been examined in this case are the Personal Security Officers attached with PW-1 (the SHO).

3. The brief facts which have already been given constitute a part of his examination- in- chief. In cross examination, the witness says the personal search of the witness was not taken and he does not mention the blue coloured bag. Thereafter, the contra band that was seized from the appellant was weighed on the spot and the same was suspected to be *Charas* being 01 kilogram and 760 grams. The same was deposited in the *Malkhana* in the custody of PW-6-Thupston Wangchuk, by the Investigating Officer which, according to the prosecution, remained in the *Malkhana* till the charges sheet was prepared and in-between, the same was taken out for the purpose of being sealed by the Magistrate and after that it was brought back to the *Malkhana* and deposited there.

4. Learned counsel for the appellant submits that there are multiple contradictions in the case of the prosecution. In order to buttress his case, he has referred to the statement of PW-4-Sonam Wangdus, who is the PSO to PW-1. He says that personal search was carried out but he does not know what was recovered from the appellant. He further says that he saw the accused with the bag but did not see the accused concealing the bag. He also states that the *Lambardar* was called to the spot but before the arrival of the

*Lambardar* the bag was seized. He has added in his deposition that the Magistrate was not called and that this witness did not see the appellant/accused concealing the bag.

5. Thereafter, the Ld. Counsel for the appellant has referred to evidence of PW-5-Constable Lobzang Rigzin, who is also the PSO of PW-1. He stated that they were searching for another person who was an accused in FIR No. 8. It is relevant to mention here that FIR no. 8 was another case and the Police, while in search of the accused in FIR No. 8 chanced upon the appellant. PW-5 further says that before anyone was called, the bag was searched. The personal search of the appellant was conducted and nothing was recovered. In contradiction to the statement of PW- 4 and 5, learned counsel for the appellant has referred to the statement of PW-2 who is the independent witness and posted as *Lambardar* whose name is Tsering Motup. He says that the bag was taken out from the bushes in his presence and the search was conducted after he reached. He further says that the Policemen had taken the bag to the bushes and search the same in his presence. He further says that his statement under Section 164-A of CrPC was recorded before the Judicial Magistrate by the second SHO in this case. Learned counsel for the appellant submits that the statement of PW-2, the *Lambardar*, is in contradiction with the statement of Pw-4 and 5, who says that the search was already conducted of the bag even before anyone else arrived at the scene which includes herein the *Lambardar*, while the *Lambardar* says that the search was conducted in his presence.

6. Pw-12 has been referred to briefly by the learned counsel for the appellant who is second SHO, named Inspector Jamiang Tsepel, but nothing

relevant or of significant importance for either the prosecution or the defence is stated by this witness.

7. The next witness is Pw-8 Mohd. Shabir, who is the Tehsildar. He says that the SHO concerned produced three packets for resealing which he resealed. This according to the learned counsel for the appellant is a direct contradiction with the statement of PW-6- Thupston Wangchuk, who is *Malkhana* Incharge. In order to substantiate his argument, he has drawn attention of this Court to the statement of Thupston Wangchuk, wherein he says one packet was brought by PW-1. He further says that no documentation relating to the substance accompanied it. He further says that the material remained in the *Malkhana* till the charge sheet was prepared but was taken out in-between for resealing by the Magistrate. He further states that while one pack was taken away from the *Malkhana* by then IO, three packets were brought to the *Malkhana* after sealing. He has further placed before the learned the Trial Court, copy of the *Malkhana* register's entry which is seen by the Court and is marked as 'Mark-P1'. It is relevant to mention here that the original *Malkhana* register was never produced before the Trial court for comparison with the copy.

8. Learned counsel for the Union Territory while opposing the appeal has stated that the judgment of conviction passed by the learned Trial Court is well considered and the marshalling of evidence has been appropriate and meaningful. As regards the contradiction between the statements of Mohd. Shabir, the Tehsildar and that of Thupston Wangchuk, who is the *Malkhana* In-charge, learned counsel for the respondent- UT submits that with reference to exhibit PW8, which is a Letter dated 13.09.2014 allegedly prepared by the Tehsildar himself and which Tehsildar has admitted has

been prepared and signed by him. In that letter one packet of the contraband was produced before the Magistrate which the Magistrate records was weighed and thereafter split into three separate packets. Learned counsel for the UT submits that the defence has never cross-examined PW-8 on this aspect in order to put before him the contradiction in his deposition on oath before the Trial Court and the contents of the letter which is exhibit PW-8. Under the circumstances, learned counsel for the UT submits that the learned Trial Court rightly relied upon the exhibit PW-8 to arrive at the conclusion that the statement that he made that three separate packets were brought by the IO which were weighed mixed together into one homogenous mass and, thereafter, split into three separate packets once again, may have been on account of loss of memory or confusion. Therefore, the learned Trial Court has answered this contradiction in the aforesaid terms.

9. Heard the learned counsels for the parties and perused the record of the Trial Court. The date of the incident is undisputed which is 24.09.2014. It is also the undisputed case that the apprehension of the appellant herein was by way of a chance apprehension and on that date, the Police personnel were searching for another accused in another case being FIR No. 8. There is definitely a contradiction in the manner in which the search was conducted as is reflected from the statements of PW-4 and 5 who have stated that personal search was carried out of the accused, but they do not know what was recovered from him which is in contradiction to what PW-1 states that the personal search of the accused was never carried out. Besides, PW-4 and PW-5 have stated that the search was already carried out when no one was there besides the first SHO and PW-4 and 5. While the *Lambardar* who is PW-2 specifically states that the search was conducted in his presence after

he arrived. There is a contradiction in the narrative of the prosecution herein in the manner in which search and seizure was carried out.

**10.** The most crucial part in this case is the safe custody of the article and also what was sent to the FSL. As far as the safe custody is concerned, PW6 clearly states that a packet was brought before him by the SHO and without any accompanying documentation which he kept in his *Malkhana*. He further states that the sample continued to remain in the *Malkhana* till the charge sheet was prepared, but for the period that it was taken for resealing by the Magistrate. He further states that three packets were brought back to the *Malkhana* from the Magistrate's Office by the SHO and deposited again in the *Malkhana*. Firstly, there seems to be the controversy with regard to what went from the *Malkhana* and what was returned to it. This when seen along with the statement of PW-8 Mohd. Shabir who categorically states that three packets were brought before him which were weighed and then mixed together to form one homogenous mass which was again separated into three packets. The account given by this witness in his deposition before the Trial Court is graphic. It cannot be said that there was loss of memory. Besides, if the document which is exhibit PW-8, which is the letter dated 30.09.2014, was to be relied upon by the Trial Court, then clarification ought to have been sought by the prosecutor by placing the same before Pw-8 to explain the discrepancy. However, this was never done. Therefore, in view of the contradiction between PW-8's statement in court and the contents of the letter proved by PW-8, which is exhibit PW8, the benefit of the same must go to the accused.

11. Out of the three packets that were brought back to the Malkhana, sample was sent from only one packet. The FSL report shows that one packet was sent to the FSL which was found to be *Charas*. However, the contents of other two packets are not known. And the fact that the safe custody has not been proved on account of 'Mark-P-1' which is a photocopy of the *Malkhana* Register could not have been relied upon at all for the reason that the original documents was very much in the custody of Police was never produced before the Trial Court. It is the only original document could have been seen and marked as exhibit. In such a cases, the procedure that the Trial Court ought to have adopted is to see the original *Malkhana* register, compare the copy and mark the copy as exhibit PX/c, being the copy after giving an endorsement in the copy saying that the original has been seen and compared with copy and the same were identical. However, that was never done. Therefore, the question of safe custody in the Malkhana is also under cloud of doubt.

12. Thus, on the basis of what has been argued, considered and appreciated by this Court. We hold that the prosecution has not been able to prove the case against the appellant beyond reasonable doubt. The appeal is allowed. The impugned order is set aside. The appellant is acquitted and shall be released forthwith if not required in any other case.

Disposed of accordingly.

(SANJAY DHAR)  
JUDGE

(ATUL SREEDHARAN)  
JUDGE

Jammu  
17.10.2024  
Sunita/PS

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|----------------------------------|-----|
| Whether the order is speaking.   | Yes |
| Whether the order is reportable. | No  |