

**HIGH COURT OF MADHYA PRADESH: BENCH AT  
INDORE**  
**BEFORE HON.SHRI JUSTICE I.S.SHRIVASTAVA**

**CRIMINAL APPEAL NO.286/2008**

**Kishanlal s/o Sonaram Choudhary**  
**CRIMINAL APPEAL NO.290/2008**

**Budharam s/o Dugasram Vishnoi**  
**Vs.**

**State of M.P. Thro' P.S. Manasa**

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Shri AK Sarawat, advocate for the appellant.  
Shri Bhagwan Singh, P.L.for respondent-State.

**Whether the case is referred for AFR ? Yes/No**

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**J U D G M E N T**  
**(Delivered on 30.08.2010)**

These appeals have been preferred by appellants Kishanlal and Bhudharam being aggrieved by the judgment dated 4.1.2008 passed by court of Shri Dinesh Nayak, Special Judge, NDPS Act, Neemuch in Special NDPS Case No. 39/05 by which the appellants have been convicted under S.8/18 (b) of the N.D.P.S.Act (for short the Act) and sentenced to rigorous imprisonment of 10 years with fine of Rs.1,00,000/- (one lakh) to each and in default of payment of fine to further undergo R.I. for one year to each. These appeals are being decided by a common judgment as they arise out of a common judgment.

2. According to prosecution story on 4.5.05 Ajay Mishra Station Incharge of P.S. Manasa received an information from the informer on telephone that from Bhaurasa and Palsoda, smugglers, after purchasing opium by truck No. GJ-01-TT-7658 via Zarda Manasa and will be going towards Rajsthan. In this truck behind seat of driver the opium has been hidden in the cavity below the seat. Hence P.R.Patoliya ASI prepared a Panchnama about the information and informed his superior officers and reached the spot Aantri Mata Fanta with force and independent witnesses. On arrival of the truck from side of Zarda it was intercepted in which one driver and other person

were found sitting. Driver told his name as Budharam and other person told his name as Kishanlal the owner of truck. They were apprised with the information of the informer and after obtaining their due consent for their search, their person and truck were searched. On search of Budharam and Kishanlal, nothing was found. Thereafter truck was searched in which in the cabin behind the driver's seat, two plastic bags containing opium were found. One bag was containing 11 kg. and other bag was containing 10 kgs. of opium. After making opium homogenous, two samples of 30 gms. each were prepared and marked as articles A1,A2 and B1,B2. and the bulk quantity packets were marked as article A and B. They were sealed and seized on the spot along with registration book, fitness, insurance policy, permit of the truck. Truck was also seized. Appellants were arrested. On interrogation they told that they purchased the opium from Bhaurasa and Palsoda. Thereafter police party returned to Police Station Manasa where Crime No. 129/05 was registered and property was deposited in the Malkhana. According to information received from Budharam and Kishanlal, Bhagirath was also arrested. One sample articles A1, B1 were sent to FSL by the report of which the opium was confirmed. Motor cycle No. MP-44-BA-034 of Bhagirath was also seized. Letters were sent to M.P. RTO and Gujrat RTO. After completion of the investigation challan was filed and vide impugned judgment the appellants Budharam and Kishanlal have been convicted as mentioned above and Bhagirath has been acquitted.

**3.** It has been argued on behalf of the appellants that the case was not proved against appellants. The independent witnesses were hostile. Compliance of S. 52A of the Act was not proved. Only samples A2, B2 were produced at the time of evidence and other samples and bulk quantity packets were not produced before the trial court. Hence the seizure memo was not proved. There was ample evidence that Kishanlal was not owner of the truck but he was falsely implicated in this case. Hence appeal should be allowed.

4. It has been argued on behalf of the respondent that appellants have been rightly convicted on the basis of evidence produced before the trial court for heinous offence. Appeal being devoid of merits be dismissed accordingly.

5. Considered the arguments. Record of the trial court perused. .

6. Proceedings before the trial court were taken by Panchnama Ex.P.7 to Ex.P.18 before independent witnesses Raju PW.4 and Raju s/o Puranmal PW.5. These witnesses were hostile and they have not supported the prosecution case. According to statement of Raju PW.4, he does not know the accused persons. About 1-1/2 years before he went along with Raju s/o Puranmal PW.5 to purchase clothes and thereafter they were taking tea before trial court, at that time one head constable came and asked him to sign on papers and on enquiry head constable told that they have seized wine for which he is getting his signature. Therefore, he signed on papers Ex.P.7 to Ex.P.18 and slips. This witness has denied step by step proceeding taken up by seizing officer. He has also denied with police statement Ex.P.19. Raju s/o Puranmal PW.5 has deposed that he does not know the accused persons. About 4 years' back he went with Raju s/o Khemraj PW.4 to Manasa to purchase clothes. In Manasa they were taking tea at a hotel, there a police man came and asked him to sign on papers. Hence he signed on Ex.P.7 and Ex.P.18 and slips. He did not give police statement Ex.P.20. He has denied step by step proceeding taken up by police. In cross examination he has deposed that he signed on papers, slips and forms. They all were blank. In this way both the witnesses have not supported proceedings taken up by Panchnama Ex.P.7 to Ex.P.18 and the fact of seizure of opium from the appellants was not proved.

7. It has been argued that only samples articles A2,B2 were produced at the time of trial and the bulk quantity packet

and samples articles A1,B1, A3,B3, A4,B4 were not produced at the time of trial.

**8.** Considered the arguments. From the statement of Raju PW.4 and Raju s/o Puranmal PW.5 it reveals that only samples articles A2, B2 were produced at the time of their evidence. At the time of statement of P.R. Patoliya PW.8 samples articles A2, B2 were produced before him on which he admitted his signature and signatures of witnesses. The remnant samples articles A1, B1 and bulk quantity packet articles A and B and samples prepared by Tahsildar articles A3, A4 and B3,B4 were not produced at the time of evidence.

**9.** Proceedings under S. 52A of the Act were taken up before Tahsildar Manasa and he prepared samples articles A3, A4, B3,B4 from bulk quantity packets articles A and B and handed over all this property to ML Choudhary, ASI with the note that original order sheet sent to the Special Judge, Mansa but Tahsildar has not put any seal on his signature and hence it can not be said that these proceedings were taken up before Tahsildar and Executive Magistrate. In this respect relevant order sheet has not been exhibited and produced in evidence. The concerning police officer ML Choudhary ASI and constable Chenram and Tahsildar have not been examined in evidence. From the order sheet taken up by Tahsildar in this respect it reveals that there was no pre-trial disposal of the seized property. Hence it ought to have been produced before the court at the time of evidence.

**10.** On the basis of above discussion, it is proved that at the time of evidence only samples articles A2, B2 were produced before trial court and the remaining bulk quantity packets of opium articles A and B and samples prepared by Tahsildar articles A3, A4 and B3, B4 and remnant samples A1, B1 were not produced in evidence. Therefore, in the absence of bulk quantity packets of opium articles A and B, it can not be said that the samples A1-B1, A2,B2, A3,B3 and A4,B4 were prepared from articles A and B.. The independent witnesses have not supported

the fact of seizure; therefore, seizure memo Ex.P.16 was not proved.

**11.** In the case of **Ritesh Chakrawarti Vs. State of M.P. - ACR II (2006) 362**, and **Bholaram Kushwaha Vs. State of M.P. 2001(1) EFR 160** it has been held that “the independent witness of the seizure memo has not supported the fact of seizure hence the seizure Panchnama has not been proved.”

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

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

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

**13.** Same view has been adopted in the case of **Abdul Gani Vs. State of M.P [ 2005 (2) JLI 363]**, **Noor Aga Vs. State**

***of Punjab AIR 2009 SC (suppl) 852 ] and Laxminarayan Vs. State of M.P. - 2009 (2) J LJ -148.*** Hence the seizure memo was not proved.

**14.** On the basis of above discussion on the basis of the evidence produced before trial court, Panchnama Ex.P.16 was not proved and it was not proved that the opium was seized from the possession of the appellants.

**15.** It has been argued on behalf of appellants that the I.O. Ajay Mishra PW.11 has not investigated the case properly. From the seizure memo Ex.P.16, registration of truck was seized and owner of truck was Hariram, resident of Ahmadabad but he has not been impleaded as accused in this case and baselessly the Kishanlal has been impleaded as the accused in this case as owner of the truck; while there was no evidence that Kishanlal was the owner of the truck. In this way he has been falsely implicated in this case and investigation was perfunctory.

**16.** Considered arguments. Letter Ex.P.30 was sent by Police to RTO Ahmadabad to enquire about ownership of truck GJ-01-TT-7658 and it was replied by RTO Ahmadabad that Hariram s/o Ramaram was the owner of truck. From the seizure memo Ex.P.16 it reveals that as per registration book Hariram s/o Ramaram was owner of truck. P.R. Patoliya PW.8 in para 28 has admitted in cross examination that in seizure memo Ex.P.16 Hariram s/o Ramaram is the owner of truck. But in this case Hariram has not been impleaded as witness or accused. He has further admitted that he did not get any paper on the spot or provided by Kishanlal that Kishanlal was the owner of truck. He was not having any paper at the time of seizure that Kishanlal was the owner of the truck. Ajay Mishra PW.11 in this respect has admitted that during the investigation there was no documentary evidence on the basis of which it can be said that Kishanlal was the owner of seized truck. N.S. Thakur PW.12 has deposed that he sent letter Ex.P.31 to RTO Ahmadabad to get information about truck GJ-01-TT-7658 and RTO gave the information on the same

letter. According to this information name of owner of truck was Hariram s/o Ramaram Kheleri. The information was given on 8.10.2005. In this way this fact that Hariram was the owner of the truck was in the knowledge of the I.O. since 8.10.2005 before the filing of the challan. In cross examination NS Thakur PW.12 has admitted that it is correct that accused Kishanlal is not owner of truck GJ-01-TT-7658. He has further admitted that owner of truck is Hariram s/o Ramaram resident of Ahmedabad and how many times he went to truck owner Hariram, he has not produced any documents in this respect; and what action was taken by him; no record has been produced by him with the challan. Further he has deposed that during investigation he was having sufficient information that accused Kishanlal is not truck owner. But he has said that truck and opium were seized from his possession. There is no memo of information given by Kishanlal that he was owner of truck then there is no explanation that how, after receipt of record about the ownership of the truck No. GJ-01-TT-7658, Kishanlal was made an accused in this case. He was simply found sitting in the truck and opium was seized from the cavity in the back side of the driver's seat. Therefore, there was no material before the I.O. to implead the accused Kishanlal as the owner of the truck. No information memo of Kishanlal was prepared and his statement u/s 67 of the Act was not recorded in this respect. There are other sections in the NDPS Act due to which action could have been taken against Kishanlal but there was no ground to implead him as an accused as the owner of truck. If Kishanlal has wrongly informed that he is owner of the truck then from the record it was proved that he was not owner of the truck then how his oral information, if any, was believed in this respect. In this way Kishanlal was wrongly impleaded as owner of the truck in this case.

**17.** In this way on the basis of above discussion there was no evidence in this case that Kishanlal was involved with the seized opium hence he was liable to be acquitted in the light of the law laid down by the Apex Court in the case of ***Mohd. Ali Naved***

***Vs. State of M.P. - 2001(2) EFR 217.***

**18.** On the basis of above discussion I reached the conclusion that independent witnesses in the case were hostile and bulk quantity packets of the opium and samples articles A3, A4, B3,B4 and remnant sample article A1, B1 were not produced at the time of evidence and property was not disposed of at pre-trial stage. The seizure of opium was not proved. Proceedings taken under S. 52A of the Act was not proved. It was also not proved that Kishanlal was the owner of the truck and was having any relation with the seized opium. On the basis of above discussion, appellants were not liable to be convicted. Hence these appeals deserve to be allowed.

**19.** Therefore, these appeals are allowed and the appellants Kishanlal and Budharam are acquitted from the charges under S.8/18(b) of the Act. They be released, if not required in any other offence. Fine, if deposited, be returned to them.

**b/**

**(I.S.Shrivastava)**  
**JUDGE**