

A SANJEEET KUMAR SINGH @ MUNNA KUMAR SINGH

v.

STATE OF CHHATTISGARH

(Criminal Appeal No. 871 of 2021)

B AUGUST 30, 2022

[INDIRA BANERJEE AND V. RAMASUBRAMANIAN, JJ.]

- C *Narcotic Drugs and Psychotropic Substances Act, 1985 – ss.20(b)(ii)(C), 54 Presumption u/s.54 – Appellant concurrently convicted u/s.20(b)(ii)(C) and sentenced, relying on the testimony of PW-7-DSP (who acted both as the informant and the IO) – On appeal, held: I.O. examined as PW-7 claims to have done everything only in the presence of independent witnesses – But those independent witnesses not merely denied their presence and participation but also came up with an explanation as to how their signatures found a place in the documents – Thus, a serious doubt is cast on the very search and seizure allegedly made by PW-7 – It is true that s.54 raises a presumption and the burden shifts on the accused to explain as to how he came into possession of the contraband – But to raise the presumption u/s.54 it must first be established that a recovery was made from the accused – The moment a doubt is cast upon the most fundamental aspect, the search and seizure, the appellant, will also be entitled to the same benefit as given by the Special Court to the co-accused – Appellant also entitled to the benefit of doubt – Judgments of the Special Court and the High Court set aside.*
- F *Narcotic Drugs and Psychotropic Substances Act, 1985 – Evidence – Police witnesses, independent witnesses – Held: It is not always necessary that the evidence of the police witnesses have to be corroborated by independent witnesses – Also, independent witnesses turning hostile need not necessarily result in the acquittal of the accused, when the mandatory procedure is followed and the other police witnesses speak in one voice – But if the Court has to completely disregard the lack of corroboration of the testimony of police witnesses by independent witnesses and turn a Nelson's eye to the independent witnesses turning hostile, then the story of the prosecution should be very convincing and the testimony of the*
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official witnesses notably trustworthy – If independent witnesses come up with a story which creates a gaping hole in the prosecution theory, about the very search and seizure, then the case of the prosecution should collapse – Once the prosecution comes up with a story that the search and seizure was conducted in the presence of independent witnesses and they also choose to examine them before Court, then the Court has to see whether the version of the independent witnesses who turned hostile is unbelievable and whether there is a possibility that they have become turncoats.

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Allowing the appeal, the Court

HELD: 1.1 Some propositions of law on which there can be no controversy. They are (i) that as per the decision of the Constitution Bench of this Court in Mukesh Singh, the fact that the informant also happened to be the investigator, may not by itself vitiate the investigation as unfair or biased; (ii) that it is not always necessary that the evidence of the police witnesses have to be corroborated by independent witnesses, as held in Dharampal Singh and Mukesh Singh; (iii) that the independent witnesses turning hostile need not necessarily result in the acquittal of the accused, when the mandatory procedure is followed and the other police witnesses speak in one voice as held in Rizwan Khan; and (iv) that once it is established that the contraband was recovered from the accused's possession, a presumption arises under Section 54. But if the Court has (i) to completely disregard the lack of corroboration of the testimony of police witnesses by independent witnesses; and (ii) to turn a Nelson's eye to the independent witnesses turning hostile, then the story of the prosecution should be very convincing and the testimony of the official witnesses notably trustworthy. If independent witnesses come up with a story which creates a gaping hole in the prosecution theory, about the very search and seizure, then the case of the prosecution should collapse like a pack of cards. It is no doubt true that corroboration by independent witnesses is not always necessary. But once the prosecution comes up with a story that the search and seizure was conducted in the presence of independent witnesses and they also choose to examine them before Court, then the Court has to see whether the version of the independent witnesses who

- A turned hostile is unbelievable and whether there is a possibility that they have become turncoats. [Paras 17, 18][174-G; 175-A-E]

Mukesh Singh v. State (Narcotic Branch of Delhi) (2020)
10 SCC 120 : [2020] 9 SCR 245; *Dharampal Singh v.*

- B *State of Punjab (2010) 9 SCC 608 : [2010] 10 SCR 1160; Rizwan Khan v. State of Chhattisgarh (2020) 9 SCC 627 : [2020] 7 SCR 546 – relied on.*

1.2 The independent witnesses (CWs 1 and 2) who turned hostile, not only denied having witnessed anything, but also came

- C up with a plausible explanation as to how their signatures found place in the documents mentioned by PW-7. According to both the independent witnesses they went to the police station in connection with some other dispute relating to the members of the Sindhi community. These 2 witnesses claimed to be elected counsellors of the local Panchayat and this claim was not challenged

- D by the Additional Public Prosecutor in cross examination. Therefore, the case on hand is not a routine, run-of-the-mill matter where independent witnesses are won over and they had no explanation to offer about their signatures in the Panchanama. If the story advanced by PW-7 is to be believed, (i) he received the

- E information at about 16:50 hrs.; (ii) he completed the formalities and sent notices to the independent witnesses at 17:10 hrs.; (iii) he left the Police Station at 17:10 hrs., and reached the place of incident in 5-7 minutes; and (iv) his team waited at the place of incident for 40 minutes for the accused to arrive. But in the said timeline, PW-7 is completely silent about the time when the

- F witnesses reached the Police Station or the place of incident. [Paras 25, 27][180-G-H; 181-G-H; 182-A]

1.3 Further, the I.O. examined as PW-7 claims to have done everything only in the presence of independent witnesses. But those independent witnesses not merely denied their presence

- G and participation but also came up with an explanation as to how their signatures found a place in those documents. In such circumstances, a serious doubt is cast on the very search and seizure allegedly made by PW-7. But unfortunately, both the Special Court and the High Court went by the law in theory,

- H without applying the same to the facts of the case. Right from the

beginning, the co-accused (A-2) was implicated at every stage. A Admittedly, the information received by PW-7 at 16:50 hrs. on 31.05.2014 contained a reference to the appellant as well as the co-accused. But for some strange reason, PW-7 chose to serve a notice under Section 50 of the Act only on the appellant and not on the co-accused. PW-7 also omitted deliberately or otherwise, to record, (i) the consent Panchnama of co-accused; (ii) the search Panchnama of the co-accused; and (iii) the recovery Panchnama in relation to the co-accused. This led to the Special Court acquitting the co-accused. It is quite strange that, (i) the information received by PW-7, (ii) the FIR; and (iii) the charge-sheet implicated the co-accused, but the prosecution accepted the finding of the Special Court that there could have been no recovery from the co-accused despite the fact that she was also travelling in the same car. [Paras 31-33][182-E-H; 183-A-B]

1.4 It is true that Section 54 of the Act raises a presumption and the burden shifts on the accused to explain as to how he came into possession of the contraband. But to raise the presumption under Section 54 of the Act, it must first be established that a recovery was made from the accused. The moment a doubt is cast upon the most fundamental aspect, namely the search and seizure, the appellant will also be entitled to the same benefit as given by the Special Court to the co-accused. The appellant is also entitled to the benefit of doubt. The judgments of the Special Court as well as the High Court in so far as the same relates to the conviction of the appellant, are set aside. The appellant shall be released forthwith, unless he is under custody in connection with some other case. [Paras 33A, 34][183-A-D]

Ajmer Singh v. State of Haryana (2010) 3 SCC 746 : [2010] 2 SCR 785; Mohinder Singh v. State of Punjab (2018) 11 SCC 570; State of Punjab v. Baljinder Singh and Ors. (2019) 10 SCC 473 : [2019] 13 SCR 520 – referred to.

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Case Law Reference

[2010] 2 SCR 785

referred to

Para 12

A	(2018) 11 SCC 570 [2020] 9 SCR 245 [2010] 10 SCR 1160 [2020] 7 SCR 546	referred to relied on relied on relied on	Para 12 Para 15 Para 15 Para 15
B	[2019] 13 SCR 520	referred to	Para 15

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 871 of 2021.

From the Judgment and Order dated 01.10.2019 of the High Court of Chhattisgarh at Bilaspur in Criminal Appeal No. 790 of 2017.

Somanatha Padhan, Abhas Parimal, Ashok Anand, Rakesh Kr. Singh, Akash Kakade, Mukul Dev Mishra, Ms. Sujata Kumari Muni, Advs. for the Appellant.

Sourav Roy, Dy. AG, Mahesh Kumar, Prabudh Singh, Zakir Husain, D Ms. Devika Khanna, Mrs. V. D. Khanna for VMZ Chambers, Advs. for the Respondent.

The Judgment of the Court was delivered by

V. RAMASUBRAMANIAN, J.

- E 1. Challenging his conviction for an offence punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (*hereinafter referred to as the 'Act'*) and the sentence of rigorous imprisonment for 10 years together with a fine of Rs.1 lakh imposed upon him by the Special Court and confirmed by the High Court of Chhattisgarh, Accused No.1 has come up with the above appeal.
- F 2. We have heard Mr. Somnath Padhan, learned counsel for the appellant and Mr. Sourav Roy, learned Deputy AG for the respondent State.
- G 3. The case of the prosecution was that on 31.05.2014, the Station House Officer (*SHO for short*) of Chakarbhatta Police Station received a secret information that the appellant and his friend Reena Das, were carrying *ganja* in the dickey of a car bearing registration no.CG-04HA-4850 and were travelling from Raipur to Pendra Road; that the SHO recorded this information in *Rojnamcha Sanha*, prepared *Mukhbir Suchana*, forwarded the said information to the higher officer, proceeded H to the spot, stopped the car, served a notice under Section 50 of the Act,

conducted a search and found 47.370 Kgs. of *ganja* kept in three bags in the dickey of the car; that after weighing the contraband and preparing *Panchnama*, the SHO collected samples from each of the three bags, sent them to Forensic Science Laboratory ('FSL' for short) and after receipt of the Report, filed a charge-sheet against the appellant as well as his friend Reena Das for an offence punishable under Section 20(b) of the Act.

4. The prosecution examined seven witnesses. Two independent witnesses were examined as court witnesses CWs 1 and 2.

5. By a judgment dated 10.05.2017, the Special Court convicted the appellant for the offence under Section 20(b)(ii)(C) of the Act, and imposed a sentence of rigorous imprisonment of 10 years. However, the co-accused Reena Das was acquitted by the Special Court.

6. The State did not file any appeal against the acquittal of Reena Das, who was A-2. But the appellant filed an appeal on the file of the High Court of Chhattisgarh, Bilaspur. The appeal was dismissed by a judgment dated 01.10.2019. Therefore, A-1 who has suffered concurrent convictions has come up with the above appeal.

7. The Special Court, for coming to the conclusion that the appellant was guilty of the offence, relied extensively upon the testimony of Mr. N.L. Dhritlahre, Deputy Superintendent of Police, who acted both as the informant and as the Investigating Officer ('I.O.' for short) and who was examined as PW-7. The Special Court found that PW-7 had followed the procedure prescribed in Sections 43 and 49 of the Act and that his testimony remained unshaken.

8. Though PW-7 claimed that the search and the seizure was conducted in the presence of two independent witnesses examined as CW-1 and CW-2, these two witnesses claimed ignorance of the entire operation. Therefore, the Special Court came to the conclusion that the testimony of PW-7 was not corroborated by the evidence of independent witnesses.

9. However, the Special Court came to the conclusion that the entries made by PW-7 and the documents prepared by him both before and after the search and seizure, corroborated his oral testimony and that therefore the guilt of the appellant stood established beyond reasonable doubt, even without corroboration.

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- A 10. But, interestingly, the Special Court acquitted A-2 namely Reena Das on the ground, *(i)* that though in the Daily Register of Exhibit P-12 and the Memo of Information, the name of A-2 was mentioned, PW-7 did not mention her name in his testimony; *(ii)* that the notice under Section 50 was not served on A-2; and *(iii)* that there was no proof beyond doubt to show that the seized contraband was under the possession and the knowledge of A-2.
- B 11. As we have stated earlier, the State did not file an appeal against the acquittal of A-2. But the High Court held that the evidence of PW-7 remained unshaken even during cross-examination and that there was no reason to disbelieve his version. The High Court also held that the Head Constable and the Constable examined as PWs 3 and 4 corroborated the statement of PW-7 with regard to the compliance of the requirements of Sections 42 and 57 of the Act. Though an argument was raised before the High Court on behalf of the appellant that the samples sent to FSL were not part of the seized contraband, it was rejected by the High Court on the basis of the cogent testimony of PW-7. This is how the High Court confirmed the conviction of the appellant as well as the sentence imposed upon him.

- C 12. Assailing the concurrent judgments of the Special Court and the High Court, it was contended by the learned counsel for the appellant, *(i)* that the informant and the I.O. happened to be the same person; *(ii)* that the independent witnesses namely CW-1 and CW-2 did not support the case of the prosecution, thereby leaving the testimony of PW-7 uncorroborated; *(iii)* that when the appellant and the co-accused were alleged in the charge-sheet to be travelling in the same car from which *ganja* was seized, the acquittal of one of them and the conviction of the other, on the basis of the very same testimony of PW-7 cannot be sustained; and *(iv)* that the principles laid down in a series of judgments of this Court have not been followed by the Special Court and the High Court. The learned counsel for the appellant placed reliance specifically upon the decisions of this Court in *Ajmer Singh vs. State of Haryana*¹ and *Mohinder Singh vs. State of Punjab*².

D 13. As regards the testimony of PW-7, on which the Special Court and the High Court placed heavy reliance and complete faith, the learned counsel for the appellant raised the following contentions:-

H ¹(2010) 3 SCC 746
H ²(2018) 11 SCC 570

- There are several omissions in his evidence; A
 - He arrested both the accused and also charge-sheeted them, but admitted that there was no search warrant.
 - He further stated that photograph of the vehicle was not in the list of Final report and Crime Number was not mentioned in photograph of car; B
 - He was silent about presence of CWs i.e. independent witnesses and those independent witnesses pleaded ignorance;
 - Even property seizure memo was not signed by accused and witnesses and there was no stamping. This is also admitted by him; C
 - He admitted that he had not recorded the statement of the actual owner of the vehicle, which is a fundamental flaw in the investigation;
 - No notice U/S 50 NDPS Act was sent to Reena Das (A-2). Except in the FIR and Charge Sheet, name of Reena Das was not mentioned anywhere i.e. consent letter, memo of consent, memo of searching, memo of seizure/recovery of contraband substance, memo of identification of materials, memo of physical verification of weighing machine, memo of weighing of contraband substance, memo of sample weighing of intoxicated materials etc.; D
 - But he denied in the cross examination, the suggestion that lady was not seated in the vehicle; and E
 - Time mentioned varied from document to document.
14. The learned counsel for the appellant also raised an issue about the ownership of the car and highlighted the fact that the owner namely, Bhumika Patel (PW-4) was not even interrogated. But we do not think the ownership of the car was of any material significance. Therefore, we are not dealing with the same elaborately. F
15. In response to the contentions raised on behalf of the appellant, it was argued by the learned Deputy AG for the State:- G
- That the NDPS Act is a complete Code in itself;
 - That once the procedure enumerated in Sections 42, 43, 49 & 50 are scrupulously followed, it was for the accused, from whose possession the substance is recovered, to explain how he came into possession; H

- A ■ That as held by this Court in *Mukesh Singh vs. State (Narcotic Branch of Delhi)*³, it is not always necessary to corroborate the testimony of police officials, through the testimony of independent witnesses;
- That as held by this Court in *Dharampal Singh vs. State of Punjab*⁴, lack of independent witness is not fatal to the case of the prosecution;
- B ■ That by the same analogy it was held by this Court in *Rizwan Khan vs. State of Chhattisgarh*⁵, that the independent witnesses turning hostile, cannot be a ground for acquittal under the NDPS Act;
- C ■ That the protection under Section 50 of the Act is available only to the search of the body of a person and not to the search of a vehicle or place, as held by this Court in *State of Punjab vs. Baljinder Singh and Ors.*⁶;
- D ■ That since the recovery was made in this case from the boot of the car, Section 50 had no application and hence the acquittal of the co-accused was also of no consequence;
- That the question whether the informant can be I.O. is no longer *res integra* in view of the decision of this Court in *Mukesh Singh* (supra);
- E ■ That once possession is proved under Section 54, the accused is presumed to be guilty of the offence, in view of the presumption under Section 54 of the Act; and
- That therefore the concurrent findings of the Courts below need no interference.

16. We have carefully considered the rival contentions. We have also perused the records of the Special Court including the testimony of witnesses.

17. At the outset we would take note of some propositions of law on which there can be no controversy. They are, (*i*) that as per the decision of the Constitution Bench of this Court in *Mukesh Singh* (supra), the fact that the informant also happened to be the investigator, may not by itself vitiate the investigation as unfair or biased; (*ii*) that it is not

³(2020) 10 SCC 120

⁴(2010) 9 SCC 608

⁵(2020) 9 SCC 627

H ⁶(2019) 10 SCC 473

always necessary that the evidence of the police witnesses have to be corroborated by independent witnesses, as held in *Dharampal Singh* and *Mukesh Singh* (supra); (iii) that the independent witnesses turning hostile need not necessarily result in the acquittal of the accused, when the mandatory procedure is followed and the other police witnesses speak in one voice as held in *Rizwan Khan* (supra); and (iv) that once it is established that the contraband was recovered from the accused's possession, a presumption arises under Section 54.

18. But if the Court has — (i) to completely disregard the lack of corroboration of the testimony of police witnesses by independent witnesses; and (ii) to turn a Nelson's eye to the independent witnesses turning hostile, then the story of the prosecution should be very convincing and the testimony of the official witnesses notably trustworthy. If independent witnesses come up with a story which creates a gaping hole in the prosecution theory, about the very search and seizure, then the case of the prosecution should collapse like a pack of cards. It is no doubt true that corroboration by independent witnesses is not always necessary. But once the prosecution comes up with a story that the search and seizure was conducted in the presence of independent witnesses and they also choose to examine them before Court, then the Court has to see whether the version of the independent witnesses who turned hostile is unbelievable and whether there is a possibility that they have become turncoats.

19. Let us see in the case on hand what PW-7 stated about the manner in which the witnesses were roped in. The relevant portion of the testimony (Chief Examination) of PW-7, where a reference is made to independent witnesses, is extracted as follows:

“(5) I got the information on 31.05.2014 at 16.50 Hrs. from informant that the one silver colour Hyundai Verna Car having registration no.C.G.-04-HA-4850 is silver, in which, Sanjeet Kumar Singh @ Munna Singh resident of Kabir Nagar, Raipur and his lady friend namely Reena Das @ Manali Das resident of Kabir Nagar, Raipur have left towards Pendra road from Raipur carrying huge quantity of cannabis in the truck (Dikki) of Car for the purpose of sale, who would go via Pandidihha bypass Road. I lodge the above report at the serial no.1283 of Station Diary register maintained at Police Station. Today, I brought the Daily

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- A Register with me. The Serial No.1283 entered in the Daily Register is Exhibit P-12 and its certified copy is Exhibit P-12 “C: I prepared the memo (Panchnama) of the information of informant in the presences of witnesses Virender Kumar Sahu and Baldev Singh Rajput. The memo (Panchnama) of the information of informant is Exhibit P-13 and I had my signatures on A to A parts. *I served notice for the purpose of summoning to the witnesses. The notice given to the witness Sunil Maldhani which is Exhibit C-14, where my signatures on B to B parts and the notice sent to the witness Firturam Banware for appearing/presenting at the time of proceedings is Exhibit C-1, on which, my signatures is on B to B parts.*
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- (7) Thereafter, I made entry at serial no.1286 in the daily register maintained at Police Station about the departure time i.e.17.10 hrs. along with constable nos.444, 672 and woman constable no.981 for Bypass Road Tiwaripara for the purpose of barricading by Government vehicle. I also took the documents and seal with me. The in-charge namely A.S.I., Sharma of Police Assistant Center, Sakri was informed and the witnesses namely Katti Sunil Kalwani and Firturam Banware were also taken for the purpose of proceedings and in this connection, I made entry at the serial no.1286 in daily register, which is Exhibit P-17 and the certified copy of the same is Exhibit P-17 “C”.
- F (8) I prepared the memo (Panchnama) under Section 50 N.D.P.S Act in the presences of witnesses namely Sunil Maldhani and Firturam Banjare, which is Exhibit C-2 and on which, my signatures at C to C parts.
- G (9) Contraband substance in three plastic bags was recovered from the dickey of Car having registration no.C.G – 04-H.A – 4850 in possession of Sanjeet Kumar Singh, seizure is Exh C 5 where my signature is at D to D Part. When I see the bags kept in dickey of the car by opening the stitches in presence of Sunil Maldhani Firturam Banwane.”
- H 20. In his cross-examination, PW-7 stated as follows:

“(22) Both the witnesses belong to Chakarbhata. I know previously to both witnesses. I have sent the notices to both witnesses in their names. It is correct to say that I cannot recall today that through whom, the above notice was sent. It is also correct to say that I had sent the above notice at 17.10 Hrs. I cannot recall that at what time, the above witnesses in Police Station.

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(24) The houses of witnesses namely Sunil Maldhani and Firturam is situated at the distance about one Kilometer away from Police Station. It is correct to say that it takes the time to search for and reaching to witnesses. The witness was silent, when the question asked that at what time the independent witnesses were presented. It is incorrect to say that on the memo of the information received from the informant, I had took the signatures of respective signatures of witnesses after returning to Police Station from the place of the occurrence of incident.

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(29) I get the contraband substances identified by the witnesses. It is correct to say that I have not mentioned that contraband substances identified by the witnesses in memo of identification Exhibit C-7.

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(38) It is also incorrect to say that the witnesses used to frequently visit at Police Station. Today, I cannot recall that on the date of occurrence of incident, the witnesses namely Sunil Maldhani and Firtu Banware had visited to the Police Station in relation of their own some dispute. It is also incorrect to say that I get the signatures on the documents of above both witnesses at Police Station.”

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21. Having seen what PW-7 said about the presence of independent witnesses, let us now see what these independent witnesses had to say. The relevant portion of the testimony of Shri Firuturam Banware examined as CW-1 reads as follows:

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- A "1. I know Sunil Malghani. I and Sunil Malghani both were Counsellor of Bodri Panchayat. I do not know accused persons present herein the Court. I am seeing them today for the first time.
- B 2. I was not called by Police of Police station Chakarbhatta in relation to Mukhbir information of Ganja in the year 2014 or at another time, I was never called at Police-station, I never went to Pendidih by pass road with Police. Police never stopped any car in my presence, I had not seen that accused persons present here in the court were sitting in any car, Police never seized any Ganja from any car in my presence. Police did not do any weighing proceedings of Ganja or proceedings of taking sample in my presence.
- C 3. In the year 2014 I went to the Police-station Chakarbhatta in relation to the dispute between some *Sindhis* and at that time Police took my signature on some documents. I did not read in which relation those documents were and I was also not told about the contents of documents because at that time no documentation was done. Exhibit C.1, C.2, C.3, C.4, C.5, C.6, C.7, C.8, C.9, C.10 which is in three pages, Part A to A of C.11, C.12, C.13 bears my signature. Part B to B of Ex.P/9 bears my signature. Police did not took my statement.
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//Cross-examination by Shri Kundan Singh, Public Prosecutor for Prosecution//

- F 4. I had studied up to Eighth Class. It is correct to say that as I am Counsellor it is my duty to help Police. Earlier I was Counsellor of Nagar Panchayat Bodri two times for five years. It is correct to say that being Counsellor I have to visit Police whenever I am called. It is correct to say that during the investigation of crime Public Representatives are called, witness himself states that once he was called. It is incorrect to say that on 31.05.2014 at about 17.00 hours I was called at the Police-station, witness himself states that because there was dispute between *Sindhis* he went to the Police-station. It is correct to say that at that day Sunil Maghlani also went there with me. It is correct to say that
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upon saying of someone document must not be signed A
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7. It is incorrect to say that Weighment Panchnama was done in my presence. It is incorrect to say that Ganja recovered from accused was weighed in my presence and in the presence of Sunil Malghani and at that time 20 kilo 370 grams in one bag, 20kilogram in second bag and 07 kilogram in third bag was found.”

22. The relevant portion of the evidence of Shri Sunil Kumar Malghani, examined as CW-2 reads as follows:

- “1. I do not know accused persons present here in the Court. In the Year 2014 I was Counsellor of Ward number 7 of Bodri Nagar Panchayat. Two and half year ago I and Firturam Banware went to Police-station Chakarbhatta. We went there for compromise for the dispute between our people. Police took our signature on 4-5 documents. No proceedings were done by Police in my presence. Police did not caught any articles from the accused persons in my presence. Police did not gave me any notice.
2. Part A to A of notice under Section 160 of the Cr.P.C. vide Ex.P/14 bears my signature. Part B to B of C.2, C.3, C.4, C.5, C.6, C.7, C.8, C.9, C.10, C.11, C.12, C.13 bears my signature.

//Cross-examination by Shri Kundan Singh, Public Prosecutor for Prosecution//

3. It is correct to say that I and Firturam Banware went to Police-station Chakarbhatta in the evening at 5.00 hours of 31.05.2014. It is incorrect to say that notice was given to me by Police-station Chakarbhatta to be present for the investigation of Ganja case. It is incorrect to that with Police I and Firturam Banware went to Pendidih by pass road.
4. It is incorrect to say that Car number C.G.04 H.A. 4850 which was in possession of accused Sanjeet Kumar was stopped and searched and at that time form the back side dickey of car psychotropic Ganja was found inside three

A white color plastic bags and it's Panchnama was done in my presence."

23. CWs 1 and 2 were cross-examined by the Additional Public Prosecutor. A suggestion was put to both these witnesses that the family of the accused persons met them and that they were influenced. In this regard CW-1 denied the suggestion of the Public Prosecutor in the following words:

"10. It is incorrect to say that family of accused persons met me and because they gave me offer and in that greed I am giving false statement. Witness himself states that he does not know

C family of accused persons. It is incorrect to say that today family of accused persons came in the Court and met me."

24. Similarly, CW-2 denied the suggestion of the Public Prosecutor that he came under the influence of the family members of the accused. The relevant portion reads as follows:-

D "4. It is incorrect to say that family of accused persons met me. It is also incorrect to say that today I am giving false statement because of influence of parents of accused persons. It is true to say that before signing the document one must read it. It is incorrect to say that proceedings took place in my presence and for this reason I signed on documents.

//Cross-examination by Shri Kundan Singh, Public Prosecutor for Prosecution//

F 5. It is correct to say that when I signed on documents at that time nothing was written on documents. It is correct to say that my signature was taken on blank documents. It is correct to say that the documents on which my signature was taken were not read over to me."

G 25. The independent witnesses who turned hostile, not only denied having witnessed anything, but also came up with a plausible explanation as to how their signatures found place in the documents mentioned by PW-7. According to both the independent witnesses they went to the police station in connection with some other dispute relating to the members of the *Sindhi* community. These 2 witnesses claimed to be elected counsellors of the local Panchayat and this claim was not challenged by the Additional Public Prosecutor in cross examination.

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Therefore, the case on hand is not a routine, run-of-the-mill matter where independent witnesses are won over and they had no explanation to offer about their signatures in the *Panchanama*. A

26. The statement of these two independent witnesses assumes significance in the light of certain other facts also. They are:-

- ❖ According to PW-7, he received information from one Mukhbir at 16:50 hrs. on 31.05.2014; B
- ❖ PW-7 claims that upon receipt of information, he prepared Exhibit P-5 and completed the other formalities. Thereafter PW-7 sent notices to the independent witnesses at 17:10 hrs.; C
- ❖ PW-7 further claims that he departed to the place of incident at 17:10 hrs, from the Police Station and that the distance between the place of incident and the Police Station is approximately 7-8 Kms.;
- ❖ PW-7 stated that the houses of the independent witnesses Sunil Kumar Malghani and Firuturam Banware were located at a distance of approximately 1 Km from the Police Station; D
- ❖ Interestingly, the Learned Special Judge records in Paragraph 24 of the deposition of PW-7 that when asked about the time of arrival of the independent witnesses at the Police Station, the witness (PW-7) remained silent; E
- ❖ In Paragraph 25 of the testimony of PW-7 (cross-examination) it is recorded that PW-7 reached the place of incident in 5-7 minutes approximately. This is despite the fact that even according to PW-7, the distance between the Police Station and the place of incident was approximately 7-8 Kms.; and F
- ❖ PW-7 further claimed that his team waited at the place of incident for 40 minutes, after which the accused reached the place of incident.

27. Therefore, if the story advanced by PW-7 is to be believed, G
(i) he received the information at about 16:50 hrs.; (ii) he completed the formalities and sent notices to the independent witnesses at 17:10 hrs.;
(iii) he left the Police Station at 17:10 hrs., and reached the place of incident in 5-7 minutes; and (iv) his team waited at the place of incident for 40 minutes for the accused to arrive.

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- A 28. But in the above timeline, PW-7 is completely silent about the time when the witnesses reached the Police Station or the place of incident.
- B 29. Exhibit C-1 is the notice purportedly served on the independent witness Firuturam Banware. This notice directs the said witness to appear at 17:10 hrs. at the place indicated therein namely, “*Saida Tiwari Para By-pass Main Road*”. Even according to PW-7 this notice to the witness was sent only at 17:10 hrs., to be served at the residence of the witness located 1 Km. away. Therefore, there was no way that PW-7 could have expected the witness to be available at the place of incident at 17:10 hrs.
- C 30. Exhibit C-2 is the notice served on the appellant herein (A-1) under Section 50 of the Act. The time shown therein is 18:00 hrs. This notice requires the appellant to indicate whether he would like to be searched in the presence of Magistrate or Gazetted Officer. It is also stated in the notice that the contents thereof were read over in the presence of witnesses. Exhibit C-3 is the consent *Panchnama* of the appellant agreeing to be searched by the police officer. This *Panchnama* contains the names of Sunil Malghani and Firuturam Banware (CWs 1 and 2). Even the search *Panchnama* of the accused marked as Exhibit C-4 refers to the presence of CWs 1 and 2 at the time of search.
- E 31. Therefore, it is clear that the I.O. examined as PW-7 claims to have done everything only in the presence of independent witnesses. But those independent witnesses not merely denied their presence and participation but also came up with an explanation as to how their signatures found a place in those documents.
- F 32. In such circumstances, a serious doubt is cast on the very search and seizure allegedly made by PW-7. But unfortunately, both the Special Court and the High Court went by the law in theory, without applying the same to the facts of the case.
- G 33. Right from the beginning, the co-accused Reena Das (A-2) was implicated at every stage. Admittedly, the information received by PW-7 at 16:50 hrs. on 31.05.2014 contained a reference to the appellant as well as the co-accused Reena Das. But for some strange reason, PW-7 chose to serve a notice under Section 50 of the Act only on the appellant and not on the co-accused. PW-7 also omitted deliberately or otherwise, to record, (i) the consent *Panchnama* of co-accused; (ii) the

search *Panchnama* of the co-accused; and *(iii)* the recovery A
Panchnama in relation to the co-accused. This led to the Special Court
acquitting the co-accused. It is quite strange that, *(i)* the information
received by PW-7, *(ii)* the FIR; and *(iii)* the charge-sheet implicated the
co-accused, but the prosecution accepted the finding of the Special Court
that there could have been no recovery from the co-accused despite the
fact that she was also travelling in the same car.

33-A. It is true that Section 54 of the Act raises a presumption
and the burden shifts on the accused to explain as to how he came into
possession of the contraband. But to raise the presumption under Section
54 of the Act, it must first be established that a recovery was made from
the accused. The moment a doubt is cast upon the most fundamental
aspect, namely the search and seizure, the appellant, in our considered
opinion will also be entitled to the same benefit as given by the Special
Court to the co-accused.

34. In view of the above, we are of the considered view that the
appellant is also entitled to the benefit of doubt. Therefore, the appeal is
allowed. The judgments of the Special Court as well as the High Court
in so far as the same relates to the conviction of the appellant, are set
aside. The appellant shall be released forthwith, unless he is under custody
in connection with some other case. No costs.

Divya Pandey

Appeal allowed.