Mangilal vs The State Of Madhya Pradesh on 12 July, 2023

Author: M.M. Sundresh

Bench: M. M. Sundresh, A.S. Bopanna

CORRECTED

2023 INSC 634

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1651 OF 2023

MANGILAL ...APPELLANT

VERSUS

THE STATE OF MADHYA PRADESH ...RESPONDENT

JUDGMENT

M.M. SUNDRESH, J.

1. The appellant stood charged and convicted under Section 8(b) read with Section 15(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act"). The Additional Sessions Judge, Special Court NDPS, Jaora, District Ratlam, Madhya Pradesh, convicted the appellant and sentenced him to undergo rigorous imprisonment for 10 years. It was accordingly confirmed by the High Court of Madhya Pradesh. Aggrieved, the present appeal is filed.
THE CASE OF THE PROSECUTION IN A NUTSHELL:

2. The Assistant Sub Inspector, H.S. Sengar, posted at Police Station Kalukheda received an information through a telephonic message on 20.05.2010 that the appellant and co- accused Mathuralal against whom the trial stood abated due to his death were in the process of supplying narcotic substance in the nature of poppy straw. Upon registering the information in the Daily Diary and without wasting time on the procedural compliance, the police force stopped a tractor in which bags containing the contraband were seized. The accused were told about the search upon due compliance of Section 50 of the NDPS Act. A panchnama was written at the place of occurrence. Samples were taken while the accused were informed about the reason for the arrest. A First Information Report was registered under Section 8(b) read with section 15(c), Sections 25 and 29 of

the NDPS Act in Crime No. 53/10. A final report was filed before the jurisdictional Court on 13.09.2010. Before the trial court 16 prosecution witnesses have been shown in the list of witnesses to have been examined by the prosecution while marking 48 exhibits.

3. Of these witnesses, the public witnesses, namely, P.W.2, P.W.3, P.W.4 and P.W.6 turned hostile. Among them P.W.2 & P.W.6 were panch witnesses. These two witnesses signed majority of the exhibits. P.W.5 though not declared hostile has deposed in clear term that the narcotic substance was in existence at the police station even before the alleged occurrence. This part of the testimony has not been questioned by the prosecution. Both the Courts placed reliance upon the FSL Report along with the police witnesses in rendering conviction. To be noted, two of the witnesses bearing testimony to the arrest memo have not been examined by the prosecution for the reasons best known to it.

SCOPE OF SECTION 52A OF THE NDPS ACT, 1985:

> Section 52A of the NDPS Act "52A. Disposal of seized narcotic drugs and psychotropic substances.— (1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.
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> (2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-

section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

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

5. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.

6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn. In due compliance of Section 52A(1) of the NDPS Act the Ministry of Finance (Department of Revenue) issued a Notification No. G.S.R. 339(E) dated 10.05.2007 which furnishes an exhaustive manner and mode of disposal of drugs ending with a certificate of destruction:

> "4. Manner of disposal
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> 1) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, of the Act, or if it is seized by such an officer himself, he

shall prepare an inventory of such narcotic drugs or psychotropic substances as per Annexure 1 to this notification and apply to any Magistrate under sub-section (2) of section 52A as per Annexure 2 to this notification.

2) After the Magistrate allows the application under sub-section (3) of section 52A, the officer mentioned in clause (1) above shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of the drug consignments to the Chairman of the Drug Disposal Committee for a decision by the committee on the disposal. The officer shall send a copy of the details along with the drug consignments to the officer-in-charge of the godown.

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4.2 Mode of disposal of drugs.

(i) Opium, morphine, codeine and thebaine shall be disposed of by transfe

Government Opium and Alkaloid Works under the Chief Controller of Factories.

(ii) In case of drugs other than the drugs mentioned in clause (i), the Chief Controller of Factories shall be intimated by the fastest means of communication available, details of drug consignments that are ready for disposal.

(iii) The Chief Controller of Factories shall indicate within 15 days of the date of receipt of the communication, the quantities of drugs, if any, that are required by him to supply as samples under Rule 67B.

(iv) Such quantities of drugs, if any, as required by the Chief Controller of Factories under clause (iii) shall be transferred to him and the remaining quantities of drugs shall be destroyed as per the procedure outlined in para 4.1.2.

(v) Destruction shall be by incineration in incinerators fitted with appropriate air pollution control devices, which comply with emission standards. Such incineration may only be done in places where adequate facilities and security arrangements exist.

In order to ensure that such incineration may not be a health hazard or polluting, consent of the State Pollution Control Board or Pollution Control Committee, as the case may be, should be obtained. Destruction shall be carried out at the presence of the Members of the Drug Disposal Committee.

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4.4 Certificate of destruction.

A certificate of destruction (in triplicate) containing all the relevant data like godown entry number,

gross and net weight of the drugs seized, etc., shall be prepared and signed by the chairman and members of the Drug Disposal Committee as per format at Annexure 3. The original copy shall be pasted in the godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy will be kept by the Drug Disposal Committee. Details of disposal of drugs shall be reported to the Narcotics Control Bureau in the Monthly Master Reports."

7. To be noted, the aforesaid notification was in existence at the time of the commission of the offence alleged in the case on hand, stood repealed with effect from 23.12.2022 vide Notification No. G.S.R.899(E). In any case a notification issued in derogation of the powers conferred under sub-section (1) of Section 52A of the NDPS Act can never contradict the main provision, particularly sub-Section (2). However, any guideline issued by way of a notification in consonance with Section 52A of the NDPS Act has to be followed mandatorily.

8. Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the meaning of Section 114(g) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act). The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatimwise and keeping them in lots preceded by compliance of the procedure for drawing samples. The afore-stated principles of law are dealt with in extenso in Noor Aga v. State of Punjab, (2008) 16 SCC 417:

> "89. Guidelines issued should not only be substantially complied with, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.
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> 90. Recently, this Court in State of Kerala v. Kurian Abraham (P) Ltd. [(2008) 3 SCC 582] , following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.
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> 91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance with these guidelines by the investigating authority which leads to drawing of an adverse

inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

92. Omission on the part of the prosecution to produce evidence in this behalf must be linked with a second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court. The respondents contended that the same had been destroyed. However, on what authority it was done is not clear. Law requires that such an authority must flow from an order passed by the Magistrate. Such an order whereupon reliance has been placed is Exhibit PJ; on a bare perusal whereof, it is apparent that at no point of time had any prayer been made for destruction of the said goods or disposal thereof otherwise. What was necessary was a certificate envisaged under Section 110(1-B) of the 1962 Act. An order was required to be passed under the aforementioned provision providing for authentication, inventory, etc. The same does not contain within its mandate any direction as regards destruction.

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95. The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution. Even for the said purpose the retracted confession on the part of the accused could not have been taken recourse to.

96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.

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100. Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect to the prosecution's endeavour to prove the fact of possession of contraband by the appellant. This aspect of the matter has been considered by this Court in Jitendra v. State of M.P. [(2004) 10 SCC 562 : 2004 SCC (Cri) 2028] in the following terms: (SCC p. 565, para 6) “6. ... 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 the 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 panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act.""

9. On the issue of seizure in the presence of Magistrate, we wish to place reliance upon the decision of this Court in Union of India v. Mohanlal, (2016) 3 SCC 379:

> "16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.
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> 17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.
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> 18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction." FACTS AND DISCUSSION:

10. We have heard the arguments of learned counsel for the appellant and the learned counsel appearing for the State. Incidentally we perused the entire records.

11. The memorandum of informer's information dated 20.05.2010 exhibited under P-3 indicates signature of two witnesses, P.W.2 and P.W.6, both of them turned hostile. Though they admitted

their signature it was clearly deposed that they were not present at the scene of occurrence. In our considered view the Court below have wrongly construed the evidence, in fact these two witnesses were party to most of the exhibits running upto 13. Search warrant under Exhibit P-4 acknowledge the fact that procedure contemplated under the NDPS Act has not been followed. As noted, one of the witnesses to the seizure memo has not been examined while the other turned hostile. Both the witnesses to the arrest memo have not been examined. On the issue of non- production of narcotic substance and panch witnesses turning hostile we wish to reiterate the decision of this Court in Jitendra v. State of M.P., (2004) 10 SCC 562:

> "5. The evidence to prove that charas and ganja were recovered from the possession of the 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. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the 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 them with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused. Although the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, "non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced". The High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.
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> 6. In our view, the view taken by the High Court is unsustainable. 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 the 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 panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned.

The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched." (emphasis supplied)

12. We further find that memorandum under Section 27 of the Act, as witnessed by the two witnesses, P.W.3 and P.W.4 would be of no value in evidence as there is no discovery of new fact involved. Be that as it may, these witnesses also turned hostile. The record would also indicate that an order was passed by the trial Judge permitting the prosecution to keep the seized materials within the police station, to be produced at a later point of time. This itself is a sufficient indication that the mandate of Section 52A has not been followed. There is no explanation either for non-production of the seized materials or the manner in which they are disposed of. No order passed by the Magistrate allowing the application, if any, filed under Section 52A of the NDPS Act. P.W.10, Executive Magistrate has deposed to the fact that he did not pass any order for the disposal of the narcotics substance allegedly seized. Similarly, P.W.12 who is In- charge of Malkhana also did not remember any such order having been passed. On the issue of disposing narcotic substance in derogation of the compliance contained in Section 52A of the NDPS Act, this Court in Union of India v. Jarooparam, (2018) 4 SCC 334 has held as follows:

> "8. What transpires from the abovequoted paragraph is that after taking out two samples of 30 gm each, the Executive Magistrate returned the entire remaining seized property to the investigating officer PW 6. To further ascertain the same, we have also carefully perused the exact content of the proceedings dated 14-10-2004 (Annexure P-5) recorded by the Executive Magistrate, Singoli Tappa. The proceedings recorded as far as the respondent herein is concerned, read thus:
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> Proceedings 14-10-2004: Case submitted. Shri Harvinder Singh, Inspector (Investigating Officer), Narcotics Bureau, Singoli has submitted three sealed packets of seized stuff in Crime No. 1 of 2004 under Sections 8/18 and 8/29 of the NDPS Act, 1985. These packets were marked A, B and C and the details are given as under: 1-A: On the packet marked "A" it was indicated that packet contains 7.200 kg opium seized from Jaroopram, s/o Ganga Ram Bishnoi. On opening the packet, transparent polythene bag was found, in which again two polythene packets were found. One polythene indicated 4.000 kg and the second one 3.200 kg opium, respectively. A composite sample of 30-30 gm each have been taken from the two packets and kept in a small plastic polythene and marked A-3 and A-4 and sealed. The remaining seized stuff and samples sealed as usual are handed over to the presenting officer Shri Harvinder Singh, Inspector.
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> 9. From the above proceedings, it is crystal clear that the remaining seized stuff was not disposed of by the Executive Magistrate. The contraband stuff as also the samples

> sealed as usual were handed over physically to the Investigating Officer Harvinder Singh (PW 6). Also the trial court in its judgment specifically passed instructions to preserve the seized property and record of the case in safe custody, as the co-accused Bhanwarlal was absconding. The trial court more specifically instructed to put a note with red ink on the front page of the record for its safe custody. In such a situation, it assumes importance that there was nothing on record to show as to what happened to the remaining bulk quantity of contraband. The absence of proper explanation from the prosecution significantly undermines its case and reduces the evidentiary value of the statements made by the witnesses.
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> 10. Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of the Court on the genuineness of the samples drawn and marked as A, B, C, D, E, F from the allegedly seized contraband. However, the simple argument that the same had been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by the Magistrate.

On a bare perusal of the record, it is apparent that at no point of time any prayer had been made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is for its disposal is to obtain an order from the competent court of Magistrate as envisaged under Section 52-A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application (see also Noor Aga v. State of Punjab, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748).

11. There is no denial of the fact that the prosecution has not filed any such application for disposal/destruction of the allegedly seized bulk quantity of contraband material nor was any such order passed by the Magistrate. Even no notice has been given to the accused before such alleged destruction/disposal. It is also pertinent here to mention that the trial court appears to have believed the prosecution story in a haste and awarded conviction to the respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect of the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence.

12. Turning to the other discrepancies in the prosecution case, PWs 1 and 2 the independent witnesses portrayed by the prosecution have turned hostile and did not support its case. It is manifest from the record that they had simply put their signatures on the papers at the whims of the investigating agency. Another aspect that goes in favour of the accused is that, the version of prosecution that the respondent voluntarily made the confessional statement cannot be believed in the light of admission by Narcotics Officer (PW 5), a key prosecution witness, that the statement of the respondent-accused under Section 67 of the Act was recorded while he was in his custody and the time was not mentioned on the statements. This fact further gets corroborated with the statement of PW 6 also that the statement of the accused was recorded after arrest and while in

custody. Thus, it cannot be said that the statement of the accused confessing the crime was voluntarily made under the provisions of the Act." (emphasis supplied)

13. There is a serious doubt with respect to the seizure. P.W.5 who was a police officer himself had deposed on the existence of the very same seized materials even before the occurrence. This testimony which destroys the very basis of the prosecution case has not even been challenged.

14. Both the Courts have mechanically placed reliance on the FSL Report while taking the statement of P.W.11 as the gospel truth. The views expressed by him can at best be taken as opinion at least on certain aspects. There are too many material irregularities which create a serious doubt on the very case of the prosecution. On a proper analysis we have no hesitation in holding that the impugned judgments are liable to be set aside and the appellant is to be acquitted by rendering the benefit of doubt.

15. In the result, the conviction and sentence rendered by the Additional Sessions Judge, Special Court NDPS, Jaora, District Ratlam, Madhya Pradesh in Special Sessions No. 19/2010 as confirmed by the High Court of Madhya Pradesh in Criminal Appeal No. 6163 of 2017 stands set aside. The appellant is acquitted of all the charges. Bond, if any, shall stand discharged. The appellant shall be released forthwith if not required in any other case.

.....J. (A.S. BOPANNA) .....J. (M. M. SUNDRESH) New Delhi;

July 12, 2023