Sanjay Kumar @ Sonu &Anr vs State Of Himachal Pradesh on 30 December, 2024

Author: Vivek Singh Thakur

Bench: Vivek Singh Thakur

2024:HHC:16483 IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA Cr. Appeal Nos. 137 and 293 of 2021 Reserved on 13.12.2024 Date of Decision: 30.12.2024

1. Cr. Appeal Nos. 137 of 2021 Sanjay Kumar @ Sonu &Anr.

...Appellants Versus State of Himachal Pradesh ...Respondent

2. Cr. Appeal No. 293 of 2021 State of Himachal Pradesh ...Appellant Versus Pradeep Kumar @ Goga ...Respondent Coram Hon'ble Mr Justice Vivek Singh Thakur, Judge. Hon'ble Mr Justice Rakesh Kainthla, Judge. Whether approved for reporting? Yes For the appellants Mr. Rajiv Rai, Advocate. For the respondent/State Ms. Seema Sharma, Deputy Advocate General For the appellant/State Ms. Seema Sharma, Deputy Advocate General.

For the respondent Mr. Ajay Kumar Dhiman, Advocate _____ Whether reporters of the local papers may be allowed to see the judgment? Yes 2 2024:HHC:16483 Rakesh Kainthla, Judge The present appeals are directed against the judgment and order dated 16.06.2021, passed by learned Special Judge, Ghumarwin, District Bilaspur, H.P. (learned Trial Court), vide which the appellants, namely, Sanjay Kumar @ Sonu and Jasmer Singh (accused before the learned Trial Court), were convicted of the commission of an offence punishable under Section 20

(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') and the respondent Pradeep @ Goga (accused before the learned Trial Court) was acquitted of the commission of an offence punishable under Section 20(b)(ii) (C) of NDPS Act. Accused Sanjay Kumar @ Sonu and Jasmer Singh were sentenced to undergo rigorous imprisonment for ten (10) years each, and they were directed to pay a fine of 1,00,000/- each for the commission of an offence punishable under Section 20(b)(ii) (C) of NDPS Act and in default of payment of the fine, they were directed to undergo further rigorous imprisonment for one year. (The parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

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2. Briefly stated, the facts giving rise to the present appeals are that the police presented a challan against the accused before the learned Trial Court for the commission of offences punishable under Sections 20 and 29 of the NDPS Act. It was asserted that SI/SHO Yog Raj (PW-14), HC Bhag Singh (PW-3), Constable Krishan Baldev (PW-4), HHG Inder Pal and HHG Banta were present at

Swarghat, near B.D.O. Office in an official vehicle bearing registration No. HP69-A-0130, which was being driven by HHG Sanjeev Kumar. They were checking the vehicles moving on the road. Tehsildar Jaspal (PW-2) and Raj Pal (PW-1) were going towards Swarghat at 10:15 a.m. They stopped their car and started talking to SI/SHO Yog Raj (PW-14). A car bearing registration No.HR-10L-8800 came from Bilaspur, H.P., which was signalled to stop. The driver revealed his name as Sanjay @ Sonu, and a person sitting beside him revealed his name as Jasmer Singh. They got frightened after seeing the police. The police became suspicious that they might be carrying some contraband with them. A search of the car was conducted in the presence of Jaspal Singh (PW-2) and Raj Pal (PW-1). SI/SHO Yog Raj found during the search that 4 2024:HHC:16483 the plastic cover/lids of the gear lever and hand brake fitted in the car were not in their position. He lifted the plastic lids/cover and recovered five (5) packets (Ext. P-5 to P-9) wrapped with Khaki tape. SI/SHO Yog Raj (PW-14) removed the Khaki tape and found black sticks wrapped in transparent polythene. He checked the sticks and found them to be Charas (cannabis). He put all the sticks in a single polythene packet (Ex. P-9) and weighed the sticks on an electronic scale. The total weight of cannabis was found to be 1 kg 394 grams. The weight of the Khaki tape and the remaining four (4) transparent polythene packets were found to be 35 grams. The cannabis in the transparent packets was put in a cloth parcel. The remaining polythene packets and Khaki tape were put in a separate cloth parcel. Both the cloth parcels were sealed with six seal impressions of seal 'H' each. The sample seal (Ext.PW-1/D) was taken on a separate piece of cloth. NCB form (Ext.PW-2/A) was filled in triplicate, and a seal impression was put on the form. The seal was handed over to Tehsildar Jaspal Singh (PW-2) after its use. Accused Sanjay Kumar produced RC (Ext.PR-1), Driving licence (Ext.PR-2), Insurance 5 2024:HHC:16483 certificate (Ext. PR-3), and keys of the car and the car. The documents of the car, car and the parcels were seized vide memo (Ext.PW-1/A). SI/SHO Yog Raj (PW-14) prepared a rukka (Ext.PW-14/A) and handed it over to HC Bhag Singh (PW-3) with a direction to carry it to Police Station Swarghat, where F.I.R. (Ext.PW-10/A) was registered. SI/SHO Yog Raj (PW-14) conducted the investigation. He prepared the site plan (Ext.PW14/B) and recorded the statements of the witnesses as per their version. Photographs (Exts.PN-1 to PN-24) of the proceedings were taken. SI/SHO Yog Raj arrested the accused vide memos (Ext.PW1/B and Ext.PW-1/C). He handed over the case property to HC Ram Pal (PW-5) at the Police Station. HC Ram Pal (PW-5) made an entry in register No. 19 (Ext. PW5/A and Ext.PW-5/B) and deposited the case property in Malkhana. He handed over the case property to MHC Naginder Singh (PW-9), the regular MHC. MHC Naginder Singh (PW-9) handed over the parcels to SI/SHO Yog Raj on 12.09.2016 to get the inventory certified. SI/SHO Yog Raj produced the case property and an application for certifying the correctness of the inventory before the learned Chief 6 2024:HHC:16483 Judicial Magistrate, Bilaspur H.P., who assigned the application to learned Judicial Magistrate First Class, Bilaspur, H.P. Two samples of twenty-five (25) grams each were drawn after making the cannabis sticks homogeneous. Each sample was packed in two separate cloth parcels. The thin transparent wrappers were removed from the cannabis, and their weight was found to be twenty-two (22) grams. These wrappers were packed in a separate cloth parcel. Each parcel was sealed with a seal impression of JMIC-Bilaspur (H.P). The photographs of the proceedings (Ext.PK-1 to Ext.PK-16) were taken. Learned Judicial Magistrate First Class passed an order and certified the inventory (Ext.PW- 11/A) by issuing a certificate (Ext.PW-11/B). Case property was deposited with MHC Naginder Singh (PW-9), who entered it at Sl. No. 29 of Malkhana register and kept the case property in Malkhana. He handed over the bulk parcel containing 1.322

kilograms of cannabis and one parcel containing 25 grams of cannabis, sample seal 'H', seal impression of JMIC-Bilaspur (H.P.),NCB -I form, copy of the F.I.R. and copy of the order of the Court to Constable Kirshan Kumar (PW-4) with a direction to carry them to FSL 7 2024:HHC:16483 Junnga vide RC No. 56/16 (Ext.PW-9/B). Constable Krishan Kumar (PW-4) deposited all the articles in a safe condition at FSL Junga and handed over the receipt to MHC Naginder Singh (PW-9) on his return. SI/SHO Yog Raj (PW-14) prepared the Special Report (Ext.PW-7/A) and handed it over to Dy.S.P. Baldev Dutt on 13.09.2016. Dy.S.P. Baldev Dutt made an endorsement on the Special Report and handed it over to Kuldeep Singh (PW7), who made an entry in the Special Report register (Ext.PW-7/A) and retained the Special Report on record. SI/SHO Yog Raj (PW-14) interrogated accused Jasmer Singh, w ho disclosed that the mobile phone recovered from him during the personal search, did not belong to him but to Pradeep @ Gogga, who had got down at Sunder Nagar and left his mobile phone in the vehicle. The mobile phone was put in a cloth parcel, which was sealed with four impressions of seal 'U'. The sample seal (Ext.PW-3/A) was taken on a separate piece of cloth. The mobile phone was seized vide memo (Ext.PW-3/B). It was found during the investigation that all the accused were together. They had purchased the charas together and had visited Fun and Food Corner at Panarsa to 8 2024:HHC:16483 take the food. An application (Ext.PW-14/J) was filed to obtain the billing address, call detail record, customer application form and tower location. Pradeep @ Goga was already arrested in some other case. His custody was transferred. He pointed out the hotel where he had taken the food. He identified Vikas Kumar (PW-8) and Trilok Chand (PW-6). They also identified the accused. A memo (Ext.PW-16/A) was prepared, and a photograph (Ext.PW-18/A) was taken. The statements of the remaining witnesses were recorded as per their version. After the analysis, the result of the analysis (Ext.PW-9/A) was issued, in which it was shown that the sticks analysed in the laboratory were charas, which contained 26.54% and 25.65% w/w resin in it. The statements of the remaining witnesses were recorded as per their version, and after the completion of the investigation, the challan was prepared and presented before the learned Trial Court.

3. The learned Trial Court charged the accused with the commission of offences punishable under Sections 20 and 29 of the NDPS Act, to which the accused pleaded not guilty and claimed to be tried.

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4. The prosecution examined 22 witnesses to prove its case.Rajpal (PW-1) accompanied Tehsildar Jaspal Singh (PW-2). Both of them witnessed the recovery from the vehicle. HC Bhag Singh (PW-3) is the official witness to the recovery. Constable Krishan Kumar (PW-4) took photographs of the inventory proceedings. He also carried the case property to FSL Junga. HC Ram Pal (PW-5) was holding the charge of MHC on 11.09.2016, with whom the case property was initially deposited. Trilok Chand (PW-6) was working as a cashier at Fun & Food Corner Panarsa. He did not support the prosecution case. Kuldeep Singh (PW-7) was posted as a Reader to Dy.S.P., to whom the Special Report was handed over. Vikas Kumar (PW-8) is the owner of Fun and Food Corner Panarsa, who did not support the prosecution case. HC Naginder Singh (PW-9) was working as MHC,with whom the case property was deposited. ASI Harish Chander (PW-10) signed the F.I.R. Monika Sombal (PW-11), Judicial Magistrate, First Class, Bilaspur, H.P. certified the correctness of the inventory. Chander Prakash (PW-12) is the witness to the sale of the vehicle. Suresh Kumar (PW-13) is the

owner of the vehicle. Inspector Yog 10 2024:HHC:16483 Raj (PW-14) conducted the initial investigation and effected the recovery. Harish Kumar (PW-15) purchased the car and sold it to the accused, Sanjay Kumar. HHC Raj Kumar (PW-16) and Jaswinder Singh (PW-17) are the witnesses to the disclosure made by Pradeep @ Goga. Rajinder Kumar (PW-18) conducted further investigation of the case. Rajesh Prashar (PW-19) prepared the supplementary challan. Devinder Verma (PW-20) issued the call details record. Sajid Khan (PW-21) did not support the prosecution case. Sohan Singh (PW-22) is the owner of the car bazaar to whom the car was initially sold.

5. The accused, in their statements recorded under Section 313 of Cr.P.C.,denied the prosecution case in its entirety. They stated that the witnesses deposed against them falsely at the instance of the Investigating Officer. Accused Pradeep @ Goga stated that he never accompanied Sanjay Kumar @ Sonu and Jasmer Singh to Himachal Pradesh. He was falsely implicated. Jasmer Singh stated that he got down at Swarghat on 10.09.2016 at 8:00 p.m. He found that a dispute was taking place between the police and some residents of Haryana. The police asked him to which 11 2024:HHC:16483 place he belonged, and he replied that he belonged to Haryana.The police took him to the Police Station and made a false case against him. Some photographs were taken on the roadside, and some were taken inside the Police Station. No defence was sought to be adduced by the accused.

6. The learned Trial Court held that the testimonies of the prosecution witnesses corroborated each other. Tehsildar Jaspal Singh (PW-2) and the independent witnesses also supported the prosecution case. Minor contradictions in the testimonies of official witnesses were not sufficient to discard them. Defence taken by the accused that they were falsely implicated was not probable. The integrity of the case property was duly established. However, the evidence against Pradeep @ Goga was not sufficient. The owner and cashier of the Hotel Fun and Food Corner did not support the prosecution case. The call detail record was also not sufficient to infer the culpability of accused Pardeep @ Goga. Therefore, the accused, Sanjay Kumar and Jasmer Singh were convicted of the commission of an offence punishable under Section 20(b)(ii)(c) of the NDPS Act and sentenced as aforesaid, whereas accused 12 2024:HHC:16483 Pradeep @ Goga was acquitted of the commission of an offence punishable under Section 20(b)(ii)(c) of the NDPS Act.

7. Being aggrieved from the judgment and order passed by the learned trial Court, two separate appeals have been preferred. It has been asserted in the appeal filed by accused Sanjay Kumar and Jasmer Singh bearing Cr. Appeal 137 of 2021, that the learned Appellate Court misappreciated and misapplied the provisions of the NDPS Act. The allegations made against the accused, even if accepted as correct, do not constitute any offence punishable under Section 20(b)(ii)(c) of the NDPS Act. No charge should have been framed against the accused, and they should have been discharged at the outset. The findings recorded by the learned Trial Court are based on misreading and mis-appreciation of the evidence. The prosecution relied upon the testimonies of highly interested witnesses, whose testimonies did not inspire confidence. They suffered from inherent contradictions and major improvements. There was non-compliance of Sections 41, 42, 50 and 57 of the NDPS Act by the Investigating Officer. Jaspal Singh (PW-2) 13 2024:HHC:16483 stated that police had told him that they had suspicion regarding the contraband being carried in the vehicle. In such circumstances, compliance with Sections 42 and 50 of the NDPS Act was mandatory. The provisions

of Sections 42 and 50 of the NDPS Act were not complied with. The learned Trial Court had not dealt with the written arguments submitted by the accused. Constable Krishan Baldev, HHG Inder Pal, HHG Banta Singh and HHG Sanjeev Kumar were not examined by the prosecution. This created a serious dent in the prosecution case. The testimonies of Rajpal (PW-1) and Jaspal (PW-2) contradicted each other on material points. There was no electric point on the spot. The photographs also show that proceedings were conducted at a different spot and not at the place where the accused were stated to be apprehended. The Investigating Officer was unable to mention who had taken the photographs. The witnesses cannot be said to be of sterling quality. SI/SHO Yog Raj (PW-14) stated that personal search of the accused was conducted after their arrest upon reaching the Police Station; hence, it was necessary to comply with the requirement of Section 50 of the NDPS Act. The tower 14 2024:HHC:16483 location of the mobile of accused was not proved. The original seals were not produced before the Court, and the link evidence was missing. Therefore, it was prayed that the present appeal be allowed and the judgment and order passed by the learned Trial Court be set aside.

8. In the appeal bearing Cr. Appeal No. 293 of 2021, preferred by the State, it was asserted that the learned Trial Court erred in acquitting accused Pradeep @ Goga. Learned Trial Court set unrealistic standards to evaluate the direct and cogent prosecution evidence. The findings of the learned Trial Court regarding the acquittal are based on surmises, conjectures and hypotheses. Tirlok Chand (PW-6), cashier of Fun and Food Corner Panarsa and Vikas Kumar (PW-8) supported the prosecution case regarding the presence of accused Pradeep @ Goga. Jasvinder Singh (PW-17) had duly proved the identification made by Pradeep @ Goga. These facts were ignored by the learned Trial Court; therefore, it was prayed that the present appeal be allowed and the judgment and order acquitting the accused passed by the learned Trial Court be set aside.

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9. We have heard Mr Rajiv Rai, learned counsel for the appellant/accused, Sanjay Kumar and Jasmer Singh in appeal No. 137 of 2021, Ms Seema Sharma, learned Deputy Advocate General in Criminal Appeal No. 137 of 2021 for the respondent/State and in Criminal Appeal No. 293 of 2021 for the appellant/State and Mr Ajay Kumar Dhiman, learned counsel for the respondent- Pradeep Kumar @ Goga in Criminal Appeal No.293 of 2021.

10. Mr Rajiv Rai, learned counsel for the appellant/accused in appeal No. 137 of 2021, submitted that the learned Trial Court erred in convicting and sentencing the accused, Sanjay Kumar and Jasmer Singh. The prosecution version that the mobile phone was found during the personal search was not proved. The mobile phone was not deposited on the date of the incident but on 15.09.2016. The witness, Raj Pal (PW-5),did not support the prosecution case, and Jaspal Singh (PW-2) stated that he had signed the documents at the Police Station. These statements falsify the prosecution case. The testimonies of official witnesses do not inspire confidence. SI/SHO Yog Raj (PW-14) admitted that he suspected the possession of some contraband, and it 16 2024:HHC:16483 was necessary to comply with the requirements of Section 42 of the NDPS Act. The personal search of the accused was also conducted, and it was necessary to comply with Section 50 of the NDPS Act. The provisions of Sections 42 and 50 of the NDPS Act are mandatory, and their non-compliance is

fatal to the prosecution case. The integrity of the case property was not established. He prayed that the present appeal be allowed and the judgment and order passed by the learned Trial Court be set aside.

11. Ms Seema Sharma, learned Deputy Advocate General for the State, supported the judgment and order passed by the learned Trial Court convicting the accused, Sanjay Kumar and Jasmer Singh. She submitted that the learned Trial Court had rightly held that the possession of charas was proved beyond reasonable doubt. The integrity of the case property was duly established, and there is nothing on record to doubt the prosecution case. The term'contraband'does not mean narcotic drugs. The prosecution evidence shows that the recovery was effected without any previous information; therefore, there was no requirement of compliance with Sections 42 and 50 of the 17 2024:HHC:16483 NDPS Act. Learned Trial Court erred in acquitting the accused Pradeep @ Goga. There was sufficient evidence to connect him with the commission of crime. He had identified the place where he and other co-accused had taken the meal. His mobile phone was found in the vehicle. These circumstances show that he had accompanied the co-accused. Learned Trial Court failed to consider these circumstances; therefore, she prayed that the appeal filed by Sanjay Kumar and Jasmer Singh be dismissed and the appeal filed by State against accused Pradeep @ Goga be allowed and he be convicted for the commission of an offence punishable under Section 29 read with Section 20(b)(ii)(c) of the NDPS Act.

12. Mr Ajay Kumar Dhiman, learned counsel for respondent Pradeep @ Goga in Criminal Appeal No. 293 of 2021, supported the judgment passed by the learned Trial Court acquitting accused Pradeep @ Goga. He submitted that the prosecution evidence, if accepted to be correct, only establishes that all accused were together at Panarsa; however, that is not sufficient to impute the knowledge of transportation of the Charas to Pradeep @ Goga. The 18 2024:HHC:16483 recovery of the mobile phone is highly suspicious. There is no other evidence to connect accused Pradeep @ Goga with the commission of the crime. The statement made by Pradeep @ Goga did not lead to the discovery of any fact, and the same is not admissible under Section 27 of the Indian Evidence Act. Therefore, he prayed that the present appeal be dismissed.

13. We have given considerable thought to the submissions made at the bar and have gone through the records carefully.

Criminal Appeal No. 293 of 2021 (State of H.P. Vs. Pradeep @ Goga)

14. The present appeal has been filed against a judgment of acquittal. It was laid down by the Hon'ble Supreme Court in Mallappa v. State of Karnataka, (2024) 3 SCC 544: 2024 SCC OnLine SC 130 that while deciding an appeal against acquittal, the High Court should see whether the evidence was properly appreciated on record or not; second whether the finding of the Court is illegal or affected by the error of law or fact and thirdly; whether the view taken by the Trial Court was a possible view, which could 19 2024:HHC:16483 have been taken based on the material on record. The Court will not lightly interfere with the judgment of acquittal. It was observed:

> "25. We may first discuss the position of law regarding the scope of intervention in a criminal appeal. For that is the foundation of this challenge. It is the cardinal principle of criminal jurisprudence that there is a presumption of innocence in favour of the accused unless proven guilty. The presumption continues at all stages of the trial and finally culminates into a fact when the case ends in acquittal. The presumption of innocence gets concretised when the case ends in acquittal. It is so because once the trial court, on appreciation of the evidence on record, finds that the accused was not guilty, the presumption gets strengthened, and a higher threshold is expected to rebut the same in appeal.
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> 26. No doubt, an order of acquittal is open to appeal, and there is no quarrel about that. It is also beyond doubt that in the exercise of appellate powers, there is no inhibition on the High Court to reappreciate or re-visit the evidence on record. However, the power of the High Court to reappreciate the evidence is a qualified power, especially when the order under challenge is of acquittal. The first and foremost question to be asked is whether the trial court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence. The second point for consideration is whether the finding of the trial court is illegal or affected by an error of law or fact. If not, the third consideration is whether the view taken by the trial court is a fairly possible view. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity.

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27. It may be noted that the possibility of two views in a criminal case is not an extraordinary phenomenon. The "two-views theory" has been judicially recognised by the courts, and it comes into play when the appreciation of evidence results in two equally plausible views. However, the controversy is to be resolved in favour of the accused. For, the very existence of an equally plausible view in favour of the innocence of the accused is in itself a reasonable doubt in the case of the prosecution. Moreover, it reinforces the presumption of innocence. Therefore, when two views are possible, following the one in favour of the innocence of the accused is the safest course of action. Furthermore, it is also settled that if the view of the trial court, in a case of acquittal, is a plausible view, it is not open for the High Court to convict the accused by reappreciating the evidence. If such a course is permissible, it would make it practically impossible to settle the rights and liabilities in the eye of the law.

28. In Selvaraj v. State of Karnataka [Selvaraj v. State of Karnataka, (2015) 10 SCC 230: (2016) 1 SCC (Cri) 19]:

> (SCC pp. 236-37, para 13) "13. Considering the reasons given by the trial court and on an appraisal of the evidence, in our considered view, the view taken by the trial court was a possible one. Thus, the High Court should not have interfered with the judgment of acquittal.

This Court in Jagan M. Seshadri v. State of T.N. [Jagan M. Seshadri v. State of T.N., (2002) 9 SCC 639: 2003 SCC (L&S) 1494] has laid down that as the appreciation of evidence made by the trial court while recording the acquittal is a reasonable view, it is not permissible to interfere in appeal. The duty of the High Court while reversing the acquittal has been dealt with by this Court, thus: (SCC p. 643, para 9) 21 2024:HHC:16483 '9. ... We are constrained to observe that the High Court was dealing with an appeal against acquittal. It was required to deal with various grounds on which acquittal had been based and to dispel those grounds. It has not done so. Salutary principles while dealing with appeal against acquittal have been overlooked by the High Court. If the appreciation of evidence by the trial court did not suffer from any flaw, as indeed none has been pointed out in the impugned judgment, the order of acquittal could not have been set aside. The view taken by the learned trial court was a reasonable view, and even if by any stretch of the imagination, it could be said that another view was possible, that was not a ground sound enough to set aside an order of acquittal.'"

> 29. In Sanjeev v. State of H.P. [Sanjeev v. State of H.P., (2022) 6 SCC 294: (2022) 2 SCC (Cri) 522], the Hon'ble Supreme Court analysed the relevant decisions and summarised the approach of the appellate court while deciding an appeal from the order of acquittal. It observed thus: (SCC p. 297, para 7) "7. It is well settled that:
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> 7.1. While dealing with an appeal against acquittal, the reasons which had weighed with the trial court in acquitting the accused must be dealt with in case the appellate court is of the view that the acquittal rendered by the trial court deserves to be upturned (see Vijay Mohan Singh v. State of Karnataka [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 :
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> (2019) 2 SCC (Cri) 586] and Anwar Ali v. State of H.P. [Anwar Ali v. State of H.P., (2020) 10 SCC 166 : (2021) 1 SCC (Cri) 395]).

22 2024:HHC:16483 7.2. With an order of acquittal by the trial court, the normal presumption of innocence in a criminal matter gets reinforced (see Atley v. State of U.P. [Atley v. State of U.P., 1955 SCC OnLine SC 51: AIR 1955 SC 807]).

7.3. If two views are possible from the evidence on record, the appellate court must be extremely slow in interfering with the appeal against acquittal (see Sambasivan v. State of Kerala [Sambasivan v. State of Kerala, (1998) 5 SCC 412: 1998 SCC (Cri) 1320])."

15. This position was reiterated in Ramesh v. State of Karnataka, (2024) 9 SCC 169: 2024 SCC OnLine SC 2581, wherein it was observed at page 175:

> "20. At this stage, it would be relevant to refer to the general principles culled out by this Court in Chandrappa v. State of Karnataka [Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325], regarding the power of the appellate court while dealing with an appeal against a judgment of acquittal. The principles read thus: (SCC p. 432, para 42) "42. ... (1) An appellate court has full power to

> review, reappreciate and reconsider the evidence upon which the order of acquittal is founded. (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on the exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and law.
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> (3) Various expressions, such as "substantial and compelling reasons", "good and sufficient 23 2024:HHC:16483 grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc., are not intended to curtail extensive powers of an appellate court in an appeal against acquittal.

Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. In Rajendra Prasad v. State of Bihar [Rajendra Prasad v. State of Bihar, (1977) 2 SCC 205: 1977 SCC (Cri) 308], a three-judge Bench of this Court pointed out that it would be essential for the High Court, in an appeal against acquittal, to clearly indicate firm and weighty grounds from the record for discarding the reasons of the trial court in order to be able to reach a contrary conclusion of guilt of the accused. It was further observed that, in an appeal against acquittal, it would not be legally sufficient for the High Court to take a contrary view about the credibility of witnesses, and it is absolutely imperative that the High Court convincingly finds it well-nigh 24 2024:HHC:16483 impossible for the trial court to reject their testimony. This was identified as the quintessence of the jurisprudential aspect of criminal justice."

16. The present appeal has to be decided as per the parameters laid down by the Hon'ble Supreme Court.

17. The prosecution has relied upon the recovery of the mobile phone from the vehicle bearing registration number HR10L-8800. This mobile phone is stated to belong to the accused, Pradeep @ Goga. SI/SHO Yog Raj (PW-14) stated that he interrogated the accused, Jasmer Singh, who disclosed that the mobile phone recovered from him during his personal search did not belong to him but to another accused, Pradeep @ Goga, who was with them. This statement is inadmissible. It was laid down by the Hon'ble Supreme Court in Dipakbhai Jagdishchandra Patel v. State of Gujarat, (2019) 16 SCC 547: (2020) 2 SCC (Cri) 361: 2019 SCC OnLine SC 588 that a statement made by

co-accused during the investigation is hit by Section 162 of Cr.P.C. and cannot be used as a piece of evidence. Further, the confession made by the co-accused is inadmissible because of Section 25 of the Indian Evidence Act. It was observed at page 568: -

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> 44. Such a person, viz., the person who is named in the FIR, and therefore, the accused in the eye of the law, can indeed be questioned, and the statement is taken by the police officer. A confession that is made to a police officer would be inadmissible, having regard to Section 25 of the Evidence Act. A confession, which is vitiated under Section 24 of the Evidence Act, would also be inadmissible. A confession, unless it fulfils the test laid down in Pakala Narayana Swami [Pakala Narayana Swami v. King Emperor, 1939 SCC OnLine PC 1 : (1938-

39) 66 IA 66: AIR 1939 PC 47] and as accepted by this Court, may still be used as an admission under Section 21 of the Evidence Act. This, however, is subject to the bar of admissibility of a statement under Section 161 CrPC. Therefore, even if a statement contains admission, the statement being one under Section 161, it would immediately attract the bar under Section 162 CrPC."

18. Similarly, it was held in Surinder Kumar Khanna vs Intelligence Officer Directorate of Revenue Intelligence 2018 (8) SCC 271 that a confession made by a co-accused cannot be taken as a substantive piece of evidence against another co-accused and can only be utilised to lend assurance to the other evidence. The Hon'ble Supreme Court subsequently held in Tofan Singh Versus State of Tamil Nadu 2021 (4) SCC 1 that a confession made to the police officer during the investigation is hit by Section 25 of the Indian Evidence Act and is not saved by the provisions of Section 67 of the NDPS 26 2024:HHC:16483 Act. Therefore, no advantage can be derived by the petitioner from the confessional statement made by the co- accused.

19. The prosecution relied upon call detail records (Ext.PW20/A), customer application form (Ext.PW-20/B) and identity proof (Ext.PW20/C) to show that the mobile number was registered in the name of accused Pradeep @ Goga; however, there is no evidence that the mobile number mentioned in the customer application form and call detail record was the same, which was recovered from the accused, Jasmer Singh. SI/SHO Yograj (PW-14) stated in his examination-in-chief that the dual sim mobile phone was recovered from Jasmer Singh,which belonged to Pradeep @ Goga. He has not given the details of the SIM inserted in the mobile. Further, there is no memo of the personal search of the accused, Jasmer Singh, to show that a mobile phone bearing a SIM number was recovered from him. The memo of the search (Ext.PW-1/A) does not mention the details of the mobile phone or the SIM in it. Even the seizure memo of the mobile phone (Ext.PW3/B) does not mention any SIM number. It merely mentions that the mobile phone, which 27 2024:HHC:16483 was disclosed to be belonging to Pradeep @ Goga and was already with the police, was seized by the police. The seizure memo (Ext.PW-3/B) was witnessed by HC Bhag Singh (PW-3) and Constable Pawan Kumar.

20. HC Bhag Singh (PW-3) did not mention that the personal search of accused Jasmer Singh was conducted in his presence, and the mobile phone was found in his possession. He has not mentioned any SIM number. He only stated that he and Pawan Kumar were associated with the Investigating Officer of the case on 15.09.2016, and accused Jasmer Singh disclosed that the mobile phone handed over by him at the Police Station during the personal search belonged to Pradeep @ Goga. The mobile phone was taken into possession after putting it in a cloth parcel. Pawan Kumar was not examined as a witness; therefore, there is no evidence that the mobile phone had the same SIM, which was mentioned in the customer application form and the call detail records. Thus, the recovery of the mobile phone is not sufficient to connect Pradeep @ Goga with the commission of crime.

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21. The prosecution has also relied upon the statements made by Trilok Chand (PW-6) and Vikas Kumar (PW-8) to establish that all the accused went together to Fun and Food Corner on 10.09.2016. Even if this evidence is accepted as correct, it is not sufficient to connect the accused Pradeep @ Goga with the abetment of possession of the charas. The charas was recovered on 11.09.2016. There is no evidence that all the accused were in possession of the charas or they had purchased the charas on 10.09.2016; hence,the mere association of Pradeep @ Goga with Sanjay Kumar @ Sonu and Jasmer Singh on 10.09.2016 cannot lead to an inference of abetment of possession of charas on 11.09.2016.

22. In any case, the evidence led by the prosecution to establish the presence of the accused on 10.09.2016 at Fun and Food Corner is not satisfactory. Vikas Kumar (PW-8) stated that he did not know whether the accused were the same persons who had visited his Dhaba. He could not identify the accused persons. He was permitted to be cross- examined. He stated in his cross-examination by the learned Public Prosecutor that he did not know that one Car 29 2024:HHC:16483 having a Haryana registration number came into the premises of his Dhaba on 10.09.2016. He volunteered to say that he was also running a Dhaba at Patlikuhal and he might be there on that day. He was not aware that three persons had visited his Dhaba. He denied that he had seen those three persons. He denied that one person was being called Goga. He denied that the police had brought one of them to his Dhaba during the investigation. He denied that Sanjay Kumar was the person who was brought by the police. He denied his previous statement recorded by the police.

23. It is apparent from his testimony that he has not supported the prosecution case that three persons, including Sanjay Kumar, had visited his Dhaba.

24. Trilok Chand (PW-6) stated that he was present at the cash counter of the Dhaba, namely, Fun and Food Corner Panarsa. On 10.09.2016, one car HR number stopped in the parking of Dhaba between 11:30 a.m. and 12:00 noon. Three persons came out of the vehicle and asked for a room. Room was shown to them, but they did not hire it. They had coffee in the Dhaba. They asked for lunch at 5-5:30 p.m. and 30 2024:HHC:16483 had took food in the Dhaba. He could not say that the persons present in the Court were the same. They were calling the person who had paid the bill as Goga. The police visited the Dhaba on 16.09.2016 and brought one person whose name was found to

be Sanjay. He told the police that Sanjay was amongst them, but Sanjay was not present in the Court. He was permitted to be cross-examined. He stated in cross-examination by the learned Public Prosecutor that he could not say that Sanjay and the other accused, Pradeep @ Goga and Jasmer Singh, had visited the Dhaba. He stated in his cross-examination by the defence that he could not say how many persons had visited the Dhaba the day before the deposition and the registration number of the vehicle in which the people had visited the Dhaba.

25. The statement of this witness also does not assist the prosecution case. He could not identify Sanjay Kumar in the Court.

26. The prosecution relied upon the identification made by this witness in the presence of the police; however, such identification is inadmissible as it is hit by Section 162 31 2024:HHC:16483 of Cr.P.C. It was laid down in Chunthuram v. State of Chhattisgarh(2020) 10 SCC 733that an identification made in the police presence is hit by Section 162 of Cr.P.C. and inadmissible in evidence. It was observed:-

> "11. The infirmities in the conduct of the test identification parade would next bear scrutiny. The major flaw in the exercise here was the presence of the police during the exercise. When the identifications are held in police presence, the resultant communications are tantamount to statements made by the identifiers to a police officer in the course of the investigation, and they fall within the ban of Section 162 of the Code. (See Ramkishan Mithanlal Sharma v. State of Bombay [Ramkishan Mithanlal Sharma v. State of Bombay, (1955) 1 SCR 903:
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> AIR 1955 SC 104: 1955 Cri LJ 196].)"

27. Thus, no reliance can be placed upon the identification made by him before the police.

28. The prosecution has also relied upon the identification made by Pradeep Kumar @ Goga of Hotel Fun and Food Corner. Rajinder Kumar (PW-18) stated that Pradeep Kumar @ Goga revealed that Hotel Fun and Food Corner was the same Hotel where he and his two friends, Sanjay Kumar and Jasmer Singh, had taken their meal and tea on 10.09.2016. He also identified hotel owner Vikas Kumar (PW-8) and Cashier Trilok Chand (PW-6); however, 32 2024:HHC:16483 this evidence will not assist the prosecution case. It is an admitted version that police had visited Hotel Fun and Food Corner on 16.09.2016 with Sanjay; therefore, the police were aware of the fact that the food was taken in Hotel Fun & Food. The fact discovered by the police cannot be re- discovered by taking recourse to Section 27 of the Indian Evidence Act. It was laid down by the Hon'ble Supreme Court in Thimma and Thimma Raju v. State of Mysore, (1970) 2 SCC 105: 1970 SCC (Cri) 320 that where the police had discovered some fact from other sources, it cannot be re- discovered at the instance of the accused. It was observed at page 112:

> "10. Reliance on behalf of the prosecution was also placed on the information given by the appellant, which led to the discovery of the dead body and other articles found at the spot. It was contended that the information received from him related

distinctly to the facts discovered and, therefore, the statement conveying the information was admissible in evidence under Section 27 of the Indian Evidence Act. This information, it was argued, also lends support to the appellant's guilt. It appears to us that when PW 4 was suspected of complicity in this offence, he would, in all probability, have disclosed to the police the existence of the dead body and the other articles at the place where they were actually found. Once a fact is discovered from other sources, there can be no fresh discovery even if relevant information is extracted from 33 2024:HHC:16483 the accused, and courts have to be watchful against the ingenuity of the investigating officer in this respect so that the protection afforded by the wholesome provisions of Sections 25 and 26 of the Indian Evidence Act is not whittled down by mere manipulation of the record of case diary. It would, in the circumstances, be somewhat unsafe to rely on this information for proving the appellant's guilt. We are accordingly disinclined to take into consideration this statement." (Emphasis supplied)

29. It was laid down by the Hon'ble Supreme Court in Vijender v. State of Delhi, (1997) 6 SCC 171: 1997 SCC (Cri) 857 that where the fact was within the knowledge of the police, it cannot be discovered at the instance of the accused. It was observed at page 179:

"17. Another elementary statutory breach which we notice in recording the evidence of the above witnesses is that of Section 27 of the Evidence Act. Evidence was led through the above three police witnesses that, in consequence of information received from the three appellants on 30-6-1992, they discovered the place where the dead body of Khurshid was thrown. As already noticed, the dead body of Khurshid was recovered on 27-6-1992, and therefore, the question of discovery of the place where it was thrown thereafter could not arise. Under Section 27 of the Evidence Act, if an information given by the accused leads to the discovery of a fact which is the direct outcome of such information, then only it would be evidence, but when the fact has already been discovered, as in the instant case -- evidence could not be led in respect thereof."

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30. A similar view was taken in Allarakha Habib Memon Etc. v. State of Gujarat, 2024 SCC OnLine SC 1910, wherein it was observed:

"41. We find that these so-called confessions are ex- facie inadmissible in evidence for the simple reason that the accused persons were presented at the hospital by the police officers after having been arrested in the present case. As such, the notings made by the Medical Officer, Dr. Arvindbhai (PW-2), in the injury reports of Mohmedfaruk @ Palak and Amin @ Lalo would be clearly hit by Section 26 of the Indian Evidence Act, 1872 (hereinafter being referred to as 'Evidence Act'). As a consequence, we are not inclined to accept the said admissions of the accused as

> incriminating pieces of evidence relevant under Section 21 of the Evidence Act. The circumstance regarding the identification of the place of incident at the instance of the accused is also inadmissible because the crime scene was already known to the police, and no new fact was discovered in pursuance of the disclosure statements." (Emphasis supplied)

31. Therefore, the statements made by accused Pradeep @ Goga pointing out the Hotel where he and other accused had taken food will be inadmissible under Section 27 of the Indian Evidence Act.

32. Further, no fact was discovered pursuant to the statement made by the accused, Pradeep @ Goga by pointing to the Fund and Food Corner.It was laid down by the Hon'ble Supreme Court in H.P. Admn. v. Om Prakash, 35 2024:HHC:16483 (1972) 1 SCC 249: 1972 SCC (Cri) 88 that pointing out the place from where the accused had purchased the weapon of offence does not amount to the fact discovered within the meaning of Section 27 of the Indian Evidence Act. It was observed:

> "13. Thereafter, on the information furnished by the accused that he had purchased the weapon from Ganga Singh, PW 11 and that he would take them to him, they went to the thari of PW 11, where the accused pointed him out to them. It is contended that the information given by the accused that he purchased the dagger from PW 11, followed by his leading the police to his thari and pointing him out, is inadmissible under Section 27 of the Evidence Act. In our view, there is force in this contention. A fact discovered within the meaning of Section 27 must refer to a material fact to which the information directly relates. In order to render the information admissible, the fact discovered must be relevant and must have been such that it constitutes the information through which the discovery was made. What is the fact discovered in this case? Not the dagger, but the dagger hid under the stone, which is not known to the Police (See Pulukuri Kotayya v. King-Emperor [AIR 1947 PC 67: 74 IA 65].) But thereafter, can it be said that the information furnished by the accused that he purchased the dagger from PW 11 led to a fact discovered when the accused took the police to the thari of PW 11 and pointed him out? A single Bench of the Madras High Court in Public Prosecutor v. India China Lingiah, [AIR 1954 Mad 433: 1953 MWN 918: 1954 Cri LJ 583] and in Re Vallingiri, [AIR 1950 Mad 613 : (1950) 1 MLJ 467:
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> 1950 MWN 297] seems to have taken the view that the

36 2024:HHC:16483 information by an accused leading to the discovery of a witness to whom he had given stolen articles is a discovery of a fact within the meaning of Section 27. In Emperor v. Ramanuja Ayyangar, [AIR 1935 Mad 528:

> 1934 MWN 1479: 36 Cr LJ 1442: 42 MLW 124] a Full Bench of three Judges by a majority held that the statement of the accused "I purchased the mattress from this shop and it was this woman (another witness) that carried the mattress" as proved by the witness who visited him with the police was admissible because the word "fact" is not restricted to something which can be exhibited as a material object. This

judgment was before the Pulukuri Kotayya case when, as far as the Presidency of Madras was concerned, the law laid down by the Full Bench of that Court, in Re Athappe Goundan, [ILR 1937 Mad 695: AIR 1937 Mad 618] prevailed. It held that where the accused's statement connects the fact discovered with the offence and makes it relevant, even though the statement amounts to a confession of the offence, it must be admitted because it is that that has led directly to the discovery. This view was overruled by the Privy Council in the Pulukuri Kotayya case, and this Court had approved the Privy Council case in Ramkishan Mithanlal Sharma v. State of Bombay [AIR 1955 SC 104: (1955) 1 SCR 903].

14. In the Full Bench Judgment of Seven Judges in Sukhan v. Crown [ILR (1929) 10 Lah 283] which was approved by the Privy Council in Pulukuri Kotayya case, Shadi Lal, C.J., as he then was speaking for the majority pointed out that the expression "fact" as defined by Section 3 of the Evidence Act includes not only the physical fact which can be perceived by the senses but also the psychological fact or mental condition of which any person is conscious and that it is in the former sense that the word used by the Legislature refers to a material and not to a mental fact. It is clear, therefore, that what should be

37 2024:HHC:16483 discovered is the material fact, and the information that is admissible is that which has caused that discovery so as to connect the information and the fact with each other as the "cause and effect". That information which does not distinctly connect with the fact discovered or that portion of the information which merely explains the material thing discovered is not admissible under Section 27 and cannot be proved. As explained by this Court as well as by the Privy Council, normally, Section 27 is brought into operation where a person in police custody produces from some place of concealment some object said to be connected with the crime of which the informant is the accused. The concealment of the fact which is not known to the police is what is discovered by the information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder, stolen property or other incriminating article is not hidden, sold or kept and which is unknown to the Police can be said to be discovered as a consequence of the information furnished by the accused. These examples, however, are only by way of illustration and are not exhaustive. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to him or hidden or kept with him, which the police did not know until the information was furnished to them by the accused. A witness cannot be said to be discovered if nothing is to be found or recovered from him as a consequence of the information furnished by the accused, and the information which disclosed the identity of the witness will not be admissible. But even apart from the admissibility of the information under Section 27, the evidence of the Investigating Officer and the panchas that the accused had taken them to PW 11 and pointed him out and as corroborated by PW 11 himself would be admissible 38 2024:HHC:16483 under Section 8 of the Evidence Act as conduct of the accused."

33. Therefore, no advantage can be derived from the pointing out of the place by accused Pradeep @ Goga.

34. There is no other evidence to connect accused Pradeep @ Goga with the commission of a crime; therefore, the learned Trial Court had taken a reasonable view by acquitting the accused and no interference is required with the same while deciding the appeal against the acquittal. Hence, the present appeal fails, and the same is dismissed.

35. In view of the provisions of Section 437-A of the Code of Criminal Procedure (now substituted by Section 481 of Bhartiya Nagarik Suraksha Sanhita, 2023) the respondent Pradeep @ Goga is directed to furnish bail bonds in the sum of 25,000/- with one surety in the like amount to the satisfaction of the learned Trial Court within four weeks, which shall be effective for six months with stipulation that in the event of Special Leave Petition being filed against this judgment, or on grant of the leave, the respondent/accused on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

39 2024:HHC:16483 Criminal appeal No. 137 of 2021 (Sanjay Kumar @ Sonu &Another vs State of H.P.

36. Rajpal (PW-1) stated that he went to the temple of Santoshi Mata, Kulah, on 11.09.2016. When he was returning from the temple, he met Jaspal (PW-2) in his car on the way. He (Rajpal) also boarded the car. When they reached the BDO Office, Swarghat, on the Chandigarh- Manali National Highway, he found that the police had set up a Nakka. The police were checking the vehicles. Tehsildar Jaspal (PW-2) got down from the vehicle to talk to the police. He remained in the vehicle. He was called by the police, and when he went near the police, the vehicle of the accused was already surrounded by the police. The police searched the vehicle and took out something, but he could not say what was taken out. The vehicle, which was checked by the police, was already present on the spot before he had reached there. He did not remember the registration number of the vehicle or the details of the occupants of the vehicle. He also could not identify them. He was permitted to be cross-examined. He stated in his cross-examination by the learned Public Prosecutor that two persons were 40 2024:HHC:16483 present in the vehicle. The driver of the vehicle revealed his name as Sanjay Kumar @ Sonu, a resident of Panipat. The other person disclosed his name as Jasmer Singh; however, he could not identify them in the Court. He admitted that the police checked the vehicle in his presence and in presence of Tehsildar Jaspal (PW-2). He admitted that five polythene packets wrapped with blown-coloured (Khakhi) plastic tape were found after lifting the lid. He admitted that five transparent polythene packets were found in the vehicle. He admitted that a candle-shaped black substance was found in the poly wrappers after opening the packets. He denied that the material recovered was Charas. He volunteered to say that the police had informed him so. He admitted that the contents of all the polythene packets were put in one packet, and these were weighed with an electronic scale. He did not remember whether the weight of the substance was found to be 1 kg 394 grams. He admitted that the remaining four empty polythene packets were separately weighed, but he could not say that their weight was found to be 35 grams. He admitted that the polythene packet containing the substance was wrapped in a cloth parcel, and 41 2024:HHC:16483 a separate cloth parcel was prepared containing tape and the remaining polythene packets. He admitted that both parcels were sealed by the police with wax seals, but he did not remember that the seal impression was 'H' or that six seals were put on each parcel. He admitted that the police filled the forms and handed over the seal to Tehsildar-Jaspal (PW-2). He admitted

that he and Tehsildar-Jaspal (PW-2) signed parcels and cloth bearing the seal impression. He admitted that the police took the photographs. He identified the photographs Mark -A1 to Mark A-24 of the proceedings conducted on the spot. He admitted that the accused were visible in the photographs Mark-A9 and A10 with him, the Tehsildar and members of the police party. He admitted that the memo (Ext. PW-1/A) was prepared on the spot, and he had signed the same. He identified the substance shown to him in the Court as the same, which was recovered on the spot. He stated in his cross-examination by learned counsel for the defence that he had never seen charas or narcotic substance prior to that day, and the substance shown to him in the Court was seen by him for the first time. The cloth parcels were not stitched in his presence, but he volunteered 42 2024:HHC:16483 to say that a seal was put on the parcels in his presence. The vehicle of the accused was parked towards the left side of the road. Some documents were signed at the Police Station. No personal search of the accused was conducted. He remained on the spot for 20-25 minutes and thereafter went to his shop. He went to the Police Station after 30-45 minutes. He did not know about the contents of the documents signed by him. Tehsildar-Jaspal (PW-2) had also visited the Police Station on that day. He, Jaspal and SHO Yograj (PW-14) are known to each other. He denied that he had deep acquaintance with the SHO. He remained in the vehicle of Tehildar for about 10 minutes. Normally, if the vehicles are stopped by the police, there is a big hold up of the traffic. The police had also stopped other vehicles for checking. No other vehicle was seen in the photographs (Mark A-1 to A-

24). No chairs or tables were available on the spot. He volunteered to say that documentation was done by the police on the bonnet of the vehicle. He admitted that many people had gathered on the spot.

37. It is apparent from the cross-examination of this witness by the learned Public Prosecutor that he has 43 2024:HHC:16483 admitted a substantial part of the prosecution case. He admitted that police searched the vehicle, and Charas (Ext.P-3) was recovered during the search. He also admitted the presence of accused Sanjay Kumar and Jasmer Singh in the vehicle. Therefore, the mere fact that he has been declared hostile by the prosecution and was cross-examined by the learned Public Prosecutor will not discredit his testimony. It was laid down by the Hon'ble Supreme Court in Selvamani v. State, 2024 SCC OnLine SC 837 that the testimony of a hostile witness is not effaced from the record and the version which is as per the prosecution evidence or the defence version can be accepted if corroborated by other evidence on record. It was observed:

> "9. A 3-Judge Bench of this Court in the case of Khujji @ Surendra Tiwari v. State of Madhya Pradesh (1991) 3 SCC 627: 1991 INSC 153, relying on the judgments of this Court in the cases of Bhagwan Singh v. State of Haryana (1976) 1 SCC 389: 1975 INSC 306, Sri Rabindra Kuamr Dey v. State of Orissa (1976) 4 SCC 233: 1976 INSC 204, Syad Akbar v. State of Karnataka (1980) 1 SCC 30: 1979 INSC 126, has held that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. It was further held that the evidence of such witnesses cannot be treated as effaced or washed off the record altogether, but the

44 2024:HHC:16483 same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

10. This Court, in the case of C. Muniappan v. State of Tamil Nadu (2010) 9 SCC 567: 2010 INSC 553, has observed thus:

> "81. It is a settled legal proposition that (Khujji case, SCC p. 635, para 6) '6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether, but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.'
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> 82. In State of U.P. v. Ramesh Prasad Misra, (1996) 10 SCC 360], this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543], Gagan Kanojia v. State of Punjab, (2006) 13 SCC 516], Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450], Sarvesh Narain Shukla v. Daroga Singh, (2007) 13 SCC 360] and Subbu Singh v. State, (2009) 6 SCC 462.
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> 83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof, which are admissible in law, can be used by the prosecution or the defence.
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> 45 2024:HHC:16483
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> 84. In the instant case, some of the material witnesses, i.e. B. Kamal (PW 86) and R. Maruthu (PW 51), turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with the law. Some omissions and improvements in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature.
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> 85. It is a settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to

occur in the statements of witnesses. Vide Sohrab v. State of M.P., (1972) 3 SCC 751, State of U.P. v. M.K. Anthony, (1985) 1 SCC 505, Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217, State of Rajasthan v. Om Prakash, (2007) 12 SCC 381, Prithu v. State of H.P., (2009) 11 SCC 588, State of U.P. v. Santosh Kumar, (2009) 9 SCC 626 and State v. Saravanan, (2008) 17 SCC 587"

38. Jaspal (PW-2) stated that he was coming in his official vehicle towards Swarghat on 11.09.2016. Rajpal met 46 2024:HHC:16483 him on the way, who was also going towards Swarghat. Rajpal knew him; therefore, he took him in the car, and both of them went towards Swarghat. When they reached the BDO Office, they found that police were checking the vehicles. He stopped the car.He and Rajpal came out of the car. He remained on the spot with police. The police had checked many vehicles. Two to three vehicles were already present on the spot. A vehicle bearing registration No.HR10L-8800 was being checked by police. Two persons were present in the vehicle. One of them disclosed his name as Sanjay, but he did not remember the name of the other person. He identified the accused persons present in the Court as the same persons who were present in the vehicle. The police detected some suspicious substances below the cover of the box. He and Rajpal (PW-1) were also standing when police found five plastic packets and took them out of the car. The police opened the packets and found that they contained a black coloured stick-like substance. The police checked the substance and said that it might be charas. The police weighed the substance and found its weight to be 1 kg and 200/300 grams. He did not remember the correct weight of 47 2024:HHC:16483 the substance. The substance was weighed with the polythene envelops. He then corrected to say that the substance, polythene bag and tape were weighed separately. The substance weighed more than 1 kg 300 grams. The weight of the polythene bags and tape was 35 grams. These were put in separate cloth parcels. Charas was kept in a cloth parcel, and the parcel was sealed with six seals of 'H'. The polythene packets and tape were also put in another cloth parcel, and the parcel was sealed with six seals of 'H". The seal impression was taken on a separate piece of cloth (Ext.PW-1/D). The accused persons, he and Rajpal, signed the sample seal. He identified his signatures on the sample seal. NCB form was filled up, and the seal impression 'H' was put on the form. The police handed over the seal to him after its use. The driver handed over the documents of the vehicle and his driving licence. The police seized cloth parcels and documents of the vehicle vide memo (Ext.PW-1/A), which was signed by the accused, him, Rajpal (PW-1) and the police. He identified his signatures on the memo. The police took photographs of the spot(Mark A1 to A24). The Investigating Officer prepared the spot map. He 48 2024:HHC:16483 identified his signatures on the parcels as well as the case property. He stated in his cross-examination that he could not tell the details of the documents prepared by the police initially. His vehicle was not known to the police. He denied that he was called by the police. He, Rajpal and other police officials went to the Police Station at about 11:00 a.m. He admitted that his signatures were obtained only on the white cloth. He admitted that the plain white cloth shown in the photograph did not bear any kind of seal. He remained in the Police Station for 20-30 minutes. He admitted that he had never seen Charas in his life, and the police told him that the substance might be Charas. He admitted that he had not brought the seal, which was handed over to him. He denied that the sample seal was drawn in the Police Station and he was not producing the seal deliberately. He had not lodged any F.I.R. regarding the missing of the seal. Many police officials were writing the documents, but he could not tell which police official wrote which document. No written notice regarding the search of the

vehicle and the personal search was issued by the police. He admitted that the weighing scale was running on an electric connection, and it 49 2024:HHC:16483 was not shown to be connected to the electricity in the photograph. No police official went to the Police Station in his presence. The police had not placed any barricades to stop the vehicles. The nakka was set up on the roadside. The Excise barrier and the barrier of the forest department were located within 100 meters. Three-four (3-4) vehicles were already checked when he reached the spot. He remained on the spot for about 25-30 minutes. The police told him that they had suspicions regarding some contraband being carried in the vehicle and had asked him to associate himself with the search of the accused. The vehicle of the accused was parked on the roadside. The documentation was done by placing papers on the bonnet of the vehicle. The cloth parcel was prepared by the police on the spot in his presence from plain clothes. He denied that the parcels were stitched with a swing machine. He did not remember whether the mobile phone was seized by the police from the accused or not. He admitted that many people had gathered on the spot at the time of the incident. All the polythene packets were transparent white Ext.P-5 to Ext. P-8 appeared to be clean and transparent, whereas Ext.P-4 was soiled with some 50 2024:HHC:16483 substance. Ext. P-5 to Ext.P-8 were smelling neutral, whereas Ext.P-4 had a pungent smell. He denied that no proceedings were conducted on the spot and that entire proceedings were conducted in the Police Station. He denied that he was making false statement because he was a government official.

39. It was submitted that this witness admitted in his cross-examination that police had told him that they had a suspicion of the presence of the contraband, and that is why he was asked to be associated with the police. This shows that the police had prior information regarding the transportation of the charas, and it was bound to comply with the requirement of Section 42 of the NDPS Act. This submission is not acceptable. The provisions of Section 42 of the NDPS Act applies when the police had a reason to believe from personal knowledge or information given by any person that any narcotic drug, psychotropic substance, or controlled substance is kept or concealed. There is a distinction between vague suspicion and definite grounds of belief. The police are required to comply with the requirement of Section 42 of the NDPS Act when it has 51 2024:HHC:16483 definite information and not a vague suspicion. It was laid down in Babubhai Odhavji Patel and others Versus State of Gujarat 2005(8) SCC 425 that even when the Investigating Officer admitted that DIG had instructed him about the transportation of the intoxicant from the States of Rajasthan and Uttar Pradesh through the vehicles passing in his District, it was only general information. It was not required to be reduced to writing. Only specific information is to be recorded by the empowered officer. It was observed:

> "As regards violation of Section 42 of the NDPS Act, it was contended that PSI, L.U. Pandey had received previous information before going for the search, but he had not recorded this information anywhere, and he had also not informed his superior officers about the proposed seizure. In the present case, the officer who conducted the search was examined as PW-2. What he stated in the evidence was that the D.I.G. had instructed him that intoxicant materials were being transported illegally from the States of Rajasthan and Uttar Pradesh, and the vehicles had been passing through Banaskantha district. This was only general information given by the D.I.G. to PW-2, and such information is not bound to be recorded as a source of information as

> contemplated under Section 42 of the NDPS Act. Section 42 of the NDPS Act provides that specific information alone needs to be recorded by the officer empowered to conduct a search.Here, PW-2 and the members of the patrol team were doing the usual patrol duty, and they incidentally came across the tanker lorry in question and, on search, recovered the

52 2024:HHC:16483 contraband substance from the vehicle. We do not think that there is any violation of Section 42 of the NDPS Act.

5. The counsel for the appellant further contended that the search was conducted at 5.30 A.M., that is, before sunrise, and the PSI should have obtained a warrant or authorisation for conducting the search of the vehicle. This plea also is without any merit. The contraband substance, namely opium, was recovered from the tanker when the usual search of suspected vehicles carrying such contraband was being conducted by the police officials. The police party had no previous information that any contraband substance was being concealed in any building, conveyance or enclosed space, and they had to conduct a search pursuant to such information. Then, only they would require a warrant or authorisation as contemplated under Section 42 of the NDPS Act. If it is a chance recovery, the procedure contemplated under Section 42 cannot be complied with, and the evidence of PW-2 would clearly show that it was a chance recovery." (Emphasis supplied)

40. Similarly, it was held in Subhas Chandra Jana Versus Ajibar Mirdha 2011 Cri. L.J. 257 that section 42 of the NDPS Act is applicable only when the police have specific information. When the police had received secret information, which was not specific but vague or non- provable information, there was no requirement to reduce it to writing. It was observed:

> "The compliance of Section 42(1) of the NDPS Act, 1985 is mandatory. From the facts of the present case, it is very clear that the NCB Officers raided the house of the accused, receiving prior information. But, as per the above-mentioned section, Officers 53 2024:HHC:16483 receiving prior information should reduce the same in writing and also record the reasons for the belief. According to the Prosecution, they did not go on the basis of any information but only to work out an intelligence, whereas PW 2, during cross- examination, said that they raided on the basis of secret information. So, according to the defence, non-compliance of the mandatory provision of Section 42(1) vitiated the trial. In the case, Babulal v. State, 1995 Cri LJ 4105 Bombay High Court observed that no vague information is required to be reduced to writing. Thus, where the information received by the Police Officer was that some persons had arrived at a particular place with a large quantity of brown sugar and they were in search of customers, the information so received was not specific, which required the police to reduce it to writing. This was not information as contemplated under Sections 41 and 42 of the NDPS Act, 1985.
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> This view was approved by the Apex Court in the case of State of Punjab v. Balbir Singh, 1994 Cal CLR (SC) 121 : (AIR 1994 SC 1872: 1994 Cri LJ 3702). Paragraph 22 of the said decision is quoted below:--

> "We have also already noted that the searches under the NDPS Act by virtue of Section 51 have to be carried under the provisions of Cr. P. C., particularly Sections 100 and 165. The irregularities, if any, committed, like independent witnesses not being associated or the witnesses not from the locality while carrying out the searches, etc., under sections 100 and 165, Cr. P. C. would not, as discussed above, vitiate the trial. But a question may still arise: when an empowered officer acting under Sections 41 and 42 of the Act carries out a search under Section 165, Cr. P. C., without recording the grounds of his belief as provided under Section 165, whether such failure also 54 2024:HHC:16483 would vitiate the trial, particularly in view of the fact that such a search is connected with offences under the NDPS Act. Neither Section 41(2) nor Section 42(1) mandates such empowered officers to record the grounds of their beliefs. It is the only proviso to Section 42 (1) read with Section 42(2), which makes it obligatory to record grounds for his belief. To that extent, we have already held the provisions being mandatory. A fortiori, the empowered officer, though is expected to record reasons of belief as required under Section 165, failure to do so cannot vitiate the trial, particularly when Section 41 or 42 do not mandate to record reasons while making a search. Section 165 in the context has to be read along with Sections 41(2) and 42(1) whereunder he is not required to record his reasons."

In the present case, the NCB officials raided the house of the accused not on any specific information but on vague, uncertain and probable information. The term "Secret" nowhere indicates that the information was reliable. So, on the basis of the above-mentioned judgment, there was no requirement to reduce it to writing as there was no formal or definite complaint as such.

Assuming that the NCB Officials had definite information about the Accused, then also the trial cannot be vitiated on this ground. The Apex Court in H. N. Rishbud v. State of Del. AIR 1955 SC 196 : (1955 Cri LJ 526) held that a defect or illegality in the investigation, however serious, has no bearing on the competence of the procedure relating to cognisance or trial.

Drug trafficking is equally, if not more, dangerous, as it allures and has allured, a generation of young Indians from Manipur to Gujarat, from Kashmir to 55 2024:HHC:16483 Kanya Kumari who is crippled by these drugs and psychotropic substances, whose senses are atrophied, to whom illusion has become a reality, who are beating their marches slowly and painfully Farid Ali v. State, 1994 Cal Cr LR 189. In the present case, the accused himself voluntarily made a confessional statement stating that he dealt with Heroin for the livelihood of his family. So, after the voluntary admission by the Accused, there remains no scope to acquit the accused on the grounds of mere irregularity of procedural compliance by the prosecution in the interest of justice. It was held in the case In Re: Md. Farid Ali v. State (1994 Cal Cri LR

189) that Recovery of Narcotics from an accused cannot impede the course of justice merely on the ground of procedural lapses when the contraband goods on ultimate analysis are found to be Narcotic by the expert. It, therefore, excludes the plea of technicality, which cannot make any triumph over social legislation. "

> 41. Further, the statement that the police had a suspicion about contraband is not equivalent to the suspicion of Narcotic Drugs or Psychotropic Substances. The term 'Contraband', according to Merriam-Webster Dictionary, means goods or merchandise exportation or possession of which is forbidden. According to the Cambridge Dictionary, contraband means goods that are brought into or taken out of the country secretly and illegally. According to the Collins English Dictionary, contraband refers to goods that are taken into or out of the

56 2024:HHC:16483 country illegally. According to the Oxford Learner Dictionary,contraband means goods that are illegally taken into or out of the country. Therefore, all the standard dictionaries do not refer to contraband as Narcotic Drugs or Psychotropic Substances, but to illegal goods. Hence, they include many other things besides narcotics or psychotropic substances. Thus, not much advantage can be derived from the admission made by this witness that police had told him about suspicion of the presence of the contraband in the vehicle.

42. HC Bhag Singh (PW-3) supported the prosecution case in his examination-in-chief. He stated in his cross-examination by learned counsel for the defence that his statement was recorded by the Investigating Officer after he reached the spot after 1:00 p.m. The police party departed from the police station at 4:57 a.m. The nakka was laid near the BDO office, and no barricade was fixed. The police checked many vehicles and also challaned many vehicles under the Motor Vehicles Act. They took about 3-4 minutes to check the vehicles. No personal search of the accused Sanjay and Jasmer was carried out by the 57 2024:HHC:16483 Investigating Officer. Bazar was within walking distance. They had no Drug Detection Kit with them on the relevant day. Only an expert can tell about the substance being charas. He volunteered to say that training of the identification was also imparted during training. He denied that the vehicle was detained by the police at the Police Station on 10.09.2016. He denied that the accused were falsely implicated to save the real persons. The mobile phone was already in the possession of the police, and he had seen it during the proceedings on 15.09.2016. The nakka was laid approximately 500 meters from the Police Station. Buildings of the BDO Office, Tehsil and SDM Office are located adjacent to each other. Many visitors used to visit these offices regularly. Nakka was laid on NH 205, which was earlier NH-21. He admitted that vehicular traffic at the Cement Factory is plying on the road. He admitted that there was a long queue of vehicles at the barrier. They were present on the spot from 5:00 a.m. till the completion of the proceedings at about 5:00-6:00 p.m. The vehicle was nabbed by the police at about 10:15 a.m. If each vehicle was stopped for 3-4 minutes, it would lead to a traffic jam. He 58 2024:HHC:16483 volunteered to say that it would not be so when the vehicle was separately checked on the roadside. Tehsildar was passing through the spot, per chance. Rajpal (PW-1) used to be President of some Temple Committee. Rajpal (PW-1) never visited the Police Station in his presence. Tehsildar reached the spot before the vehicle was signalled to stop. The SHO stopped the vehicle when he was talking to Jaspal. Tehsildar was not called to check the vehicle; rather, he was present while the checking of the vehicle was being carried out. All the police officials went to the vehicle to check it. Tehsildar had not carried out the checking of the vehicle. He remained on the spot till 4:00 p.m. Witnesses had not left the spot till the completion of the proceedings. There was no electricity connection available on the spot. There were pine trees adjacent to the spot. The Police Station had eucalyptus trees in its yard. Tehsildar and Rajpal were not called to the Police Station after the

completion of the formalities. It took about 1 hour and 20 minutes for arrival and departure from the spot to the Police Station. The accused were arrested at about 4:00 p.m. The accused were searched before putting them in police lock up. He did not remember whether any 59 2024:HHC:16483 memo was prepared regarding the search of the accused or not. He denied that all the proceedings were falsely conducted.

43. SI/SHO Yograj (PW-14) also supported the prosecution case in his examination-in-chief. He stated in his cross-examination by learned defence counsel that Nakka was set up at about 5:00 a.m. He did not count the number of vehicles checked by the police from 5:00 a.m. to 10:15 a.m. He had checked many vehicles during the checking but did not remember whether he had challaned any vehicle or not for violation of Traffic Rules. There were five (5) other police officials besides him. Tehsildar was already present with the police party before the vehicle of the accused was intercepted. Rajpal (PW-1) was also present on the spot before the arrival of the car of the accused. Tehildar was coming from Bilaspur towards Swarghat. Tehsil Office and B.D.O. office are located adjacent to each other. Tehsildar was going for his own work. He had not talked much with Tehsildar before the car of the accused came. Tehsildar stopped his car on the roadside and came towards the police party. He had stopped the car at about 7- 60 2024:HHC:16483 8 meters from him. Every car was not searched. A personal search of the accused was not conducted on suspicion. The police party remained on the spot till 4:30 p.m. Tehsildar and Rajpal (PW-1) remained on the spot till 4:30 p.m. Tehsildar and Rajpal (PW-1) did not accompany the police to the Police Station. Four polythene packets were opened by him on the spot,and the contents of four polythene packets were put in the 5th polythene packet, which also had contraband. The contraband was taken out of the car by him. The witnesses were present when the car was being searched. HC Bhag Singh (PW-3) was standing beside him. He signalled the vehicle to stop. The weighing machine was with the police party. The photographs (Ext. PN-1 to Ext.PN-24) were taken by one of the police officials, but he did not remember his name. No electric point was available on the spot. People did not gather near the police party. He denied that the photographs were taken at some other place. He admitted that no photograph of the sealing of the case property was taken. The charas was also wrapped with very thin polythene. He admitted that there were eucalyptus trees near the Police Station. He volunteered to say that 61 2024:HHC:16483 eucalyptus trees also existed on the spot. He admitted that no documents regarding the personal search of the accused were placed on the Court file. The accused were arrested at 4:00 p.m. on 11.09.2016. The personal search of the accused was conducted in the Police Station. The description of the mobile phone was not given. The mobile phone was recovered from Jasmer Singh. He denied that police falsely implicated the accused, and nothing was recovered by the police.

44. The testimony of the prosecution witnesses corroborated each other in material particulars. Jaspal Singh-Tehsildar (PW-2) is an independent and respectable person. He had no reason to support the police.

45. It was submitted that Rajpal (PW-1) and Jaspal (PW-2) stated that they had visited the Police Station and had signed some of the documents in the Police Station. This is contrary to the statements of the police officials, who denied that Jaspal (PW-2) and witness Rajpal (PW-1) had visited the Police Station on the day of the incident. There is indeed a discrepancy in the statements

of the witnesses 62 2024:HHC:16483 regarding the visit of Rajpal (PW-1) and Jaspal (PW-2) to the Police Station. However, it is merely a discrepancy regarding the details surrounding the incident and does not affect the core of the prosecution case. Further, it is to be noted that the incident took place on 11.09.2016, whereas the statement of Rajapal (PW-1) was recorded on 13.12.2017, the statement of Jaspal (PW-2) was recorded on 08.08.2018, the statement of Bhag Singh (PW-3) was recorded on 06.11.2018, and the statement of SHO/SI Yog Raj (PW-14) was recorded on 18.02.2021. Therefore, sufficient time had elapsed between the incident and the date of the recording of the statements of the witnesses. The contradictions were bound to come with time because of the failure of the memory with time. The principles of appreciation of ocular evidence were explained by the Hon'ble Supreme Court in Balu Sudam Khalde v. State of Maharashtra 2023 SCC OnLine SC 355, as under:-

> "25. The appreciation of ocular evidence is a hard task. There is no fixed or straightjacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:
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> "I. While appreciating the evidence of a 63 2024:HHC:16483 witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.
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> II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which did not have this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. III. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. IV. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.
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> 64 2024:HHC:16483 V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial

scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence, which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to the exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time sense of individuals which varies from person to person.

65 2024:HHC:16483 XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events, which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination by counsel and out of nervousness mix up facts, get confused regarding the sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the latter statement, even if the latter statement is at variance with the former to some extent it would not be helpful to contradict that witness."

[See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 Cri LJ 1096: ((1983) 3 SCC 217: AIR 1983 SC 753) Leela Ram v. State of Haryana, (1999) 9 SCC 525: AIR 1999 SC 3717 and Tahsildar Singh v. State of UP (AIR 1959 SC 1012)]

46. It was laid down by the Hon'ble Supreme Court in Karan Singh v. State of U.P., (2022) 6 SCC 52 : (2022) 2 SCC (Cri) 479: 2022 SCC OnLine SC 253 , that the Court has to examine the evidence of the witnesses to find out whether it 66 2024:HHC:16483 has a ring of truth or not. The Court should not give undue importance to omission, contradictions and discrepancies which do not go to the heart of the matter. It was observed at page 60:-

> "38. From the evidence of Mahender Singh, PW 4, it appears that no specific question was put to him as to whether the appellant was present at the place of occurrence or not. This Court in Rohtash Kumar v. State of Haryana [Rohtash Kumar v. State of Haryana, (2013) 14 SCC 434 : (2014) 4 SCC (Cri) 238]held : (SCC p. 446, para 24) "24. ... The court has to examine whether evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness."

39. Referring to Narayan Chetanram Chaudhary v. State of Maharashtra [Narayan Chetanram Chaudhary v. State of Maharashtra, (2000) 8 SCC 457: 2000 SCC (Cri) 1546], Mr Tyagi argued that minor discrepancies caused by lapses in memory were acceptable, contradictions were not. In this case, there was no contradiction, only minor discrepancies.

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40. In Kuriya v. State of Rajasthan [Kuriya v. State of Rajasthan, (2012) 10 SCC 433: (2013) 1 SCC (Cri) 202], this Court held: (SCC pp. 447-48, paras 30-32) "30. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even, in law, render credentials to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to the material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in Kathi Bharat Vajsur v. State of Gujarat [Kathi Bharat Vajsur v. State of Gujarat, (2012) 5 SCC 724 :

(2012) 2 SCC (Cri) 740], Narayan Chetanram Chaudhary v. State of Maharashtra [Narayan Chetanram Chaudhary v. State of Maharashtra, (2000) 8 SCC 457: 2000 SCC (Cri) 1546], Gura Singh v. State of Rajasthan [Gura Singh v. State of 68 2024:HHC:16483 Rajasthan, (2001) 2 SCC 205: 2001 SCC (Cri) 323] and Sukhchain Singh v. State of Haryana [Sukhchain Singh v. State of Haryana, (2002) 5 SCC 100: 2002 SCC (Cri) 961].

31. What is to be seen next is whether the version presented in the Court was substantially similar to what was said during the investigation. It is only when exaggeration fundamentally changes the nature of the case the Court has to consider whether the witness was stating the truth or not. [Ref. Sunil Kumar v. State (NCT of Delhi) [Sunil Kumar v. State (NCT of Delhi), (2003) 11 SCC 367:

2004 SCC (Cri) 1055]].

32. These are variations which would not amount to any serious consequences. The Court has to accept the normal conduct of a person. The witness who is watching the murder of a person being brutally beaten by 15 persons can hardly be expected to state a minute-by-minute description of the event. Everybody, and more particularly a person who is known to or is related to the deceased, would give all his attention to take steps to prevent the assault on the victim and then to make every effort to provide him with medical aid and inform the police. The statements which are recorded immediately upon the incident would have to be given a little leeway with regard to the statements being made and recorded with utmost exactitude. It is a settled principle of law that every improvement or variation cannot be treated as an attempt to falsely implicate the accused by the witness. The approach of the court has to be reasonable and practicable. Reference in this regard can be made to Ashok Kumar v. State of Haryana [Ashok Kumar v. State of Haryana, (2010) 12 SCC 350: (2011) 1 SCC (Cri) 266] and Shivlal v. State of Chhattisgarh [Shivlal v. State 69 2024:HHC:16483 of Chhattisgarh, (2011) 9 SCC 561 : (2011) 3 SCC (Cri) 777] ."

41. In Shyamal Ghosh v. State of W.B. [Shyamal Ghosh v. State of W.B., (2012) 7 SCC 646 : (2012) 3 SCC (Cri) 685], this Court held : (SCC pp. 666-67, paras 46 & 49) "46. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses inasmuch as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused. ... Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution.

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49. It is a settled principle of law that the court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/or in isolation. We are unable to see any material or serious contradiction in the statement of these witnesses which may give any advantage to the accused."

42. In Rohtash Kumar v. State of Haryana [Rohtash Kumar v. State of Haryana, (2013) 14 SCC 434 : (2014) 4 SCC (Cri) 238], this Court held : (SCC p. 446, para 24) "24. ... The court has to examine whether the evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more, particularly keeping in view the deficiencies, drawbacks, and infirmities 70 2024:HHC:16483 pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness."

47. Similar is the judgment in Anuj Singh v. State of Bihar, 2022 SCC OnLine SC 497: AIR 2022 SC 2817, wherein it was observed:-

> "[17] It is not disputed that there are minor contradictions with respect to the time of the occurrence or injuries attributed on hand or foot, but the constant narrative of the witnesses is that the appellants were present at the place of occurrence armed with guns and they caused the injury on informant PW-6. However, the testimony of a witness in a criminal trial cannot be discarded merely because of minor contradictions or omissions, as observed by this court in Narayan Chetanram Chaudhary & Anr. Vs. State of Maharashtra, 2000 8 SCC
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> 457. This Court, while considering the issue of contradictions in the testimony while appreciating the evidence in a criminal trial, held that only contradictions in material particulars and not minor contradictions can be ground to discredit the testimony of the witnesses. The relevant portion of para 42 of the judgment reads as under:
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> "42. Only such omissions which amount to a contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself 71 2024:HHC:16483 would not necessarily render the testimony of the witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false, and the sense of observation differs from person to person. The omissions in the earlier statement, if found to be of trivial details, as in the present case, the same would not cause any dent in the testimony of PW 2. Even if there is a contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness."

48. Therefore, in view of the binding precedents of the Hon'ble Supreme Court, the statements of the witnesses cannot be discarded due to omissions, contradictions or discrepancies. The Court has to see whether the discrepancies affect the prosecution case adversely or not and whether they are related to the core of the prosecution case or the details. In the present case, the contradiction does

not go to the core of the prosecution case, and it cannot be used to discard the prosecution version.

49. It was further submitted that witnesses admitted that the weighing machine is shown to be electricity-

72 2024:HHC:16483 operated in the photographs, and there was no electricity on the spot. This submission is not acceptable. It is apparent from the photographs (Ext.PN-4 and Ext.P-5) that the electric cord is wrapped around the weighing machine;still, the reading of the machine is visible in it, which shows that the weighing machine is not only operable with electricity alone but can operate without electricity as well. Thus, the mere fact that there was no electricity connection available on the spot will not make the prosecution case suspect.

50. It was submitted that the police official admitted that a search of the accused was conducted before they were put in the judicial lockup. Therefore, it was necessary to comply with the requirement of Section 50 of the NDPS Act. Since the police have not complied with the requirement of Section 50 of the NDPS Act, therefore, the prosecution case is to be discarded. This submission is also not acceptable. It was laid down by Hon'ble Supreme Court on Ranjan Kumar Chadha vs State of H.P. 2023 SCC Online SC 1262; AIR 2023 SC 5164 that even if the personal search of the accused is conducted,but no recovery was effected from the personal search, there is need to comply with Section 50 of NDPS Act, 73 2024:HHC:16483 and the accused cannot be acquitted merely because the personal search of the accused was also conducted.

51. Moreover, Section 51 of the Code of Criminal Procedure, 1973, provides that whenever a person is arrested by a Police Officer without a warrant, the Officer making the arrest may search such person and place all articles other than necessary wearing apparel found upon the accused in safe custody and provide a receipt of the articles found in possession of the person. Thus, the Code of Criminal Procedure contemplates the search of the person who has to be arrested by the police. Hence, the search of the accused person before they were put in the judicial lockup was pursuant to the mandate provided in Section 51 of Cr.P.C., which does not contemplate the giving of option under Section 50 of NDPS Act before carrying out the search and, no advantage can be derived from the fact that accused were searched before they were put in judicial lock up.

52. It was submitted that Constable Krishan Baldev, HHG Inder Pal, HHG Banta Singh and Driver HHC Sanjeev Kumar were not examined, and this caused a serious dent in 74 2024:HHC:16483 the prosecution case. This submission is also not acceptable. It was laid down by the Hon'ble Supreme Court in Pohlu v. State of Haryana (2005) 10 SCC 196 that the intrinsic worth of the testimony of witnesses has to be assessed by the Court, and if the testimony of the witnesses appears to be truthful, the non-examination of other witnesses will not make the testimony doubtful. It was observed: -

> "[10] It was then submitted that some of the material witnesses were not examined and, in this connection, it was argued that two of the eye-witnesses named in the FIR, namely, Chander and Sita Ram, were not examined by the prosecution. Dharamvir, son of Sukhdei, was also not examined by the prosecution, though he was a material

witness, being an injured eyewitness, having witnessed the assault that took place in the house of Sukhdei PW 2. It is true that it is not necessary for the prosecution to multiply witnesses if it prefers to rely upon the evidence of eyewitnesses examined by it, which it considers sufficient to prove the case of the prosecution. However, the intrinsic worth of the testimony of the witnesses examined by the prosecution has to be assessed by the Court. If their evidence appears to be truthful, reliable and acceptable, the mere fact that some other witnesses have not been examined will not adversely affect the case of the prosecution. We have, therefore, to examine the evidence of the two eyewitnesses, namely, PW 1 and PW 2, and to find whether their evidence is true, on the basis of which the conviction of the appellants can be sustained. "

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53. This position was reiterated in Rohtash vs State of Haryana 2013 (14) SCC 434, and it was held that the prosecution is not bound to examine all the cited witnesses, and it can drop witnesses to avoid multiplicity or plurality of witnesses. It was observed:

14. A common issue that may arise in such cases where some of the witnesses have not been examined, though the same may be material witnesses, is whether the prosecution is bound to examine all the listed/cited witnesses. This Court, in Abdul Gani & Ors. v. State of Madhya Pradesh, AIR 1954 SC 31, has examined the aforesaid issue and held that as a general rule, all witnesses must be called upon to testify in the course of the hearing of the prosecution, but that there is no obligation compelling the public prosecutor to call upon all the witnesses available who can depose regarding the facts that the prosecution desires to prove. Ultimately, it is a matter left to the discretion of the public prosecutor, and though a court ought to and no doubt would take into consideration the absence of witnesses whose testimony would reasonably be expected, it must adjudge the evidence as a whole and arrive at its conclusion accordingly, taking into consideration the persuasiveness of the testimony given in the light of such criticism, as may be levelled at the absence of possible material witnesses.

15. In Sardul Singh v. State of Bombay, AIR 1957 SC 747, a similar view has been reiterated, observing that a court cannot normally compel the prosecution to examine a witness which the prosecution does not choose to examine and that the duty of a fair prosecutor extends only to the extent of examination of such witnesses, who are necessary for the purpose 76 2024:HHC:16483 of disclosing the story of the prosecution with all its essentials.

16. In Masalti v. the State of U.P., AIR 1965 SC 202, this Court held that it would be unsound to lay down as a general rule, that every witness must be examined, even though the evidence provided by such witness may not be very material, or even if it is a known fact that the said witness has either been won over or terrorised.

In such cases, it is always open to the defence to examine such witnesses as their own witnesses, and the court itself may also call upon such a witness in the interests of justice under Section 540 Cr.P.C.

(See also: Bir Singh & Ors. vs. State of U.P., (1977 (4) SCC 420)

17. In Darya Singh & Ors. v. State of Punjab, AIR 1965 SC 328, this Court reiterated a similar view and held that if the eye-witness(s) is deliberately kept back, the Court may draw an inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case.

18. In Raghubir Singh v. State of U.P., AIR 1971 SC 2156, this Court held as under:

> "10. ... Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need to be produced without unnecessary and redundant multiplication of witnesses. The appellant's counsel has not shown how the prosecution story is rendered less trustworthy as a result of the non-production of the witnesses mentioned by him. No material and important witness was deliberately kept back by the prosecution. Incidentally, we may point out 77 2024:HHC:16483 that the accused, too, have not considered it proper to produce those persons as witnesses for controverting the prosecution version....."

19. In Harpal Singh v. Devinder Singh & Ann, AIR 1997 SC 2914], this Court reiterated a similar view and further observed:

> "24. ... Illustration (g) in Section 114 of the Evidence Act is only a permissible inference and not a necessary inference. Unless there are other circumstances also to facilitate the drawing of an adverse inference, it should not be a mechanical process to draw the adverse inference merely on the strength of non- examination of a witness even if it is a material witness....."

20. In Mohanlal Shamji Soni v. Union of India &Anr., AIR 1991 SC 1346, this Court held:

> "10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless, if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act.
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> .. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are

enacted whereunder 78 2024:HHC:16483 any Court by exercising its discretionary authority at any stage of enquiry, trial or another proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re- examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

21. In Banti @ Guddu v. State of M.P. AIR 2004 SC 261, this Court held:

"12. In trials before a Court of Session, the prosecution "shall be conducted by a Public Prosecutor". Section 226 of the Code of Criminal Procedure, 1973 enjoins him to open up his case by describing the charge brought against the accused. He has to state what evidence he proposes to adduce for proving the guilt of the accused.....If that version is not in support of the prosecution case, it would be unreasonable to insist on the Public Prosecutor to examine those persons as witnesses for the prosecution.

13. When the case reaches the stage envisaged in Section 231 of the Code, the Sessions Judge is obliged "to take all such evidence as may be produced in support of the prosecution". It is clear from the said section that the Public Prosecutor is expected to produce evidence "in support of the prosecution" and not in derogation of the prosecution case. At the said stage, the Public Prosecutor would be in a position to take a decision as to which among the presences cited are to be examined. If there 79 2024:HHC:16483 are too many witnesses on the same point, the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects.....This will help not only the prosecution in relieving itself of the strain of adducing repetitive evidence on the same point but also help the Court considerably in lessening the workload. The time has come to make every effort possible to lessen the workload, particularly those courts crammed with cases, but without impairing the cause of justice.

14. It is open to the defence to cite him and examine him as a defence witness."

22. The said issue was also considered by this Court in R. Shaji (supra), and the Court, after placing reliance upon its judgments in Vadivelu Thevar v. State of Madras; AIR 1957 SC 614; and Kishan Chand v. State of Haryana JT 2013 (1) SC 222, held as under:

"22. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but the quality of their evidence that is important, as there is no requirement in the law of evidence stating that a particular number of witnesses must be examined to prove/disprove a fact. It is a time-honoured principle that evidence

> must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible, trustworthy, or otherwise. The legal system has laid emphasis on the value provided by each witness, as opposed to the multiplicity or plurality of witnesses. It is, thus, the quality and not quantity which determines the adequacy of evidence, as has been provided by Section 134 of the Evidence Act. Where the law requires the examination of at least one 80 2024:HHC:16483 attesting witness, it has been held that the number of witnesses produced over and above this does not carry any weight."

23. Thus, the prosecution is not bound to examine all the cited witnesses, and it can drop witnesses to avoid multiplicity or plurality of witnesses. The accused can also examine the cited, but not examined, witnesses, if he so desires, in his defence. It is the discretion of the prosecutor to tender the witnesses to prove the case of the prosecution, and "the court will not interfere with the exercise of that discretion unless, perhaps, it can be shown that the prosecution has been influenced by some oblique motive." In an extraordinary situation, if the court comes to the conclusion that a material witness has been withheld, it can draw an adverse inference against the prosecution, as has been provided under Section 114 of the Evidence Act. Undoubtedly, the public prosecutor must not take the liberty to "pick and choose" his witnesses, as he must be fair to the court and, therefore, to the truth. In a given case, the Court can always examine a witness as a court witness if it is so warranted in the interests of justice. The evidence of the witnesses must be tested on the touchstone of reliability, credibility and trustworthiness. If the court finds the same to be untruthful, there is no legal bar for it to discard the same.

54. This position was reiterated in Rajesh Yadav v. State of U.P., (2022) 12 SCC 200: 2022 SCC OnLine SC 150, wherein it was observed at page 224: -

> Non-examination of witness
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> 34. A mere non-examination of the witness per se will not vitiate the case of the prosecution. It depends upon the quality and not the quantity of the 81 2024:HHC:16483 witnesses and their importance. If the court is satisfied with the explanation given by the prosecution, along with the adequacy of the materials sufficient enough to proceed with the trial and convict the accused, there cannot be any prejudice. Similarly, if the court is of the view that the evidence is not screened and could well be produced by the other side in support of its case, no adverse inference can be drawn. The onus is on the part of the party who alleges that a witness has not been produced deliberately to prove it.
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> 35. The aforesaid settled principle of law has been laid down in Sarwan Singh v. State of Punjab [Sarwan Singh v. State of Punjab, (1976) 4 SCC 369: 1976 SCC (Cri) 646]: (SCC pp. 377-78, para 13) "13. Another circumstance which appears to have weighed heavily with the Additional Sessions Judge was that no independent witness of Salabatpura had been examined by the prosecution to prove the prosecution case of assault on the deceased, although the evidence shows that there were some persons

> living in that locality like the "pakodewalla", hotelwalla, shopkeeper and some of the passengers who had alighted at Salabatpura with the deceased. The Additional Sessions Judge has drawn an adverse inference against the prosecution for its failure to examine any of those witnesses. Mr Hardy has adopted this argument. In our opinion, the comments of the Additional Sessions Judge are based on a serious misconception of the correct legal position. The onus of proving the prosecution case rests entirely on the prosecution, and it follows as a logical corollary that the prosecution has complete liberty to choose its witnesses if it is to prove its case. The court cannot compel the prosecution to examine one witness or the other as its witness. At the most, if a material witness is withheld, the court may 82 2024:HHC:16483 draw an adverse inference against the prosecution.

But it is not the law that the omission to examine any and every witness, even on minor points, would undoubtedly lead to rejection of the prosecution case or drawing of an adverse inference against the prosecution. The law is well-settled that the prosecution is bound to produce only such witnesses as are essential for the unfolding of the prosecution narrative. In other words, before an adverse inference against the prosecution can be drawn, it must be proved to the satisfaction of the court that the witnesses who had been withheld were eyewitnesses who had actually seen the occurrence and were, therefore, material to prove the case. It is not necessary for the prosecution to multiply witness after witness on the same point; it is the quality rather than the quantity of the evidence that matters. In the instant case, the evidence of the eyewitnesses does not suffer from any infirmity or any manifest defect on its intrinsic merit. Secondly, there is nothing to show that at the time when the deceased was assaulted, a large crowd had gathered, and some of the members of the crowd had actually seen the occurrence and were cited as witnesses for the prosecution and then withheld. We must not forget that in our country; there is a general tendency amongst the witnesses in mofussil to shun giving evidence in courts because of the cumbersome and dilatory procedure of our courts, the harassment to which they are subjected by the police and the searching cross-examination which they have to face before the courts. Therefore, nobody wants to be a witness in a murder or any serious offence if he can avoid it. Although the evidence does show that four or five persons had alighted from the bus at the time when the deceased and his companions got down from the bus, there is no suggestion that any of those persons stayed on to witness the occurrence.

83 2024:HHC:16483 They may have proceeded to their village homes."(emphasis supplied)

36. This Court has reiterated the aforesaid principle in Gulam Sarbar v. State of Bihar [Gulam Sarbar v. State of Bihar, (2014) 3 SCC 401: (2014) 2 SCC (Cri) 195]: (SCC pp. 410-11, para 19) "19. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but the quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible, trustworthy or otherwise. The legal system has laid emphasis on the value provided by each witness rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence, as has been provided by Section 134 of the Evidence Act. Even in probate cases, where the law requires the examination of at least one attesting

witness, it has been held that the production of more witnesses does not carry any weight. Thus, a conviction can even be based on the testimony of a sole eyewitness if the same inspires confidence. (Vide Vadivelu Thevar v. State of Madras [Vadivelu Thevar v. State of Madras, 1957 SCR 981: AIR 1957 SC 614], Kunju v. State of T.N. [Kunju v. State of T.N., (2008) 2 SCC 151 : (2008) 1 SCC (Cri) 331], Bipin Kumar Mondal v. State of W.B. [Bipin Kumar Mondal v. State of W.B., (2010) 12 SCC 91 : (2011) 2 SCC (Cri) 150], Mahesh v. State of M.P. [Mahesh v. State of M.P., (2011) 9 SCC 626 :

(2011) 3 SCC (Cri) 783], Prithipal Singh v. State of Punjab [Prithipal Singh v. State of Punjab, (2012) 1 SCC 10 : (2012) 1 SCC (Cri) 1] and Kishan 84 2024:HHC:16483 Chand v. State of Haryana [Kishan Chand v. State of Haryana, (2013) 2 SCC 502 : (2013) 2 SCC (Cri) 807].)"

55. Thus, no adverse inference can be drawn for not examining all the prosecution witnesses.

56. In the present case, the prosecution had examined two independent witnesses, Rajpal (PW-1) and Jaspal (PW-2) and two official witnesses, HC Bhag Singh (PW-3) and SI/SHO Yog Raj (PW-14). Their evidence was credible. The other witnesses would have repeated what was told by the witnesses who were examined in the Court, and their examination would not have added to anything. Thus, the prosecution cannot be discarded because other witnesses were not examined by the prosecution.

57. It was submitted that a huge traffic jam would have resulted if the vehicles were stopped on the National Highway. There was no traffic jam; therefore, the prosecution's case that the police had intercepted the vehicle of the accused and carried out the search is not acceptable. This submission is not acceptable. HC Bhag Singh (PW-3) stated in his cross-examination that if each vehicle was stopped on the highway for 3-4 minutes, there 85 2024:HHC:16483 would be a traffic jam, but he clarified that it would not happen if vehicles were separately checked on the roadside.

His statement shows that it was possible to search the vehicle on the roadside without causing a traffic jam. Jaspal (PW-2) stated that the vehicle was checked on the roadside.

Thus, there would have been no traffic jam and the submission that since there was no traffic jam, the prosecution case is suspect cannot be accepted.

58. It was submitted that the defence version is made probable by the photographs in which eucalyptus trees are visible. The police officials admitted that eucalyptus trees exist on the compound of the Police Station. This shows that the investigation was not conducted on the spot but on the compound of the Police Station. This submission is not acceptable. This Court is not an expert in determining the descriptions of trees, but it appears from the photographs available on record that the pine trees are visible in them.

Further, even if the eucalyptus trees are visible, Yog Raj (PW-14) stated in his cross-examination that eucalyptus trees also existed on the spot. Hence, the photographs do not falsify the prosecution's version that the vehicle was 86 2024:HHC:16483 apprehended on the spot or the investigation was conducted on the spot.

59. It was submitted that the photographs that were taken on record are inadmissible because a Certificate under Section 65B of the Indian Evidence Act was not placed on record. This submission will not help the defence. The defence itself is referring to the photograph to cast doubt on the prosecution's case, and it is difficult to see how the defence can raise the argument that photographs are inadmissible and, at the same time, that the photographs demolish the prosecution's case. If the photographs are inadmissible, they cannot be looked into on behalf of the prosecution or on behalf of the defence as well. Thus, this argument will not help the accused.

60. It was submitted that Tehsildar was a government officer who was interested in the success of the case. This submission cannot be accepted. Tehsildar is an Executive Magistrate and an independent person. Nothing has been brought out in the cross-examination to show that he has an interest in supporting the prosecution case or 87 2024:HHC:16483 deposing against the defence. Hence, this submission that he is an interested person is not acceptable.

61. It was submitted that call detail records of the accused person's tower location of their mobile phone were not brought on record to establish the prosecution case.

Tower location would have been corroborative evidence, but when the testimonies of prosecution witnesses are found to be credible and corroborating each other in material particulars, the absence of the call detail records and tower location will not make the prosecution case suspect.

62. It was submitted that the four polythene packets were smelling neutral, whereas one had a pungent smell.

This casts doubt on the prosecution's case. This submission is not acceptable. The witnesses stated that the contents of four polythene packets were transferred to the fifth. Hence, only the fifth packet would smell of the charas, and the remaining four packets would lose the smell with time.

Thus, nothing much can be made of this fact.

63. The testimonies of prosecution witnesses corroborated each other. The statement of Rajpal, who had 88 2024:HHC:16483 tried to support the defence by resiling from his earlier statement, also admitted the prosecution case. The prosecution witnesses categorically denied the defence of the accused that the accused were apprehended

on the previous night. The accused claimed that a false case was made against them to shield the real culprits; however, no reason was assigned as to why the police official would conspire with the Tehsildar and Rajpal (PW-1) to make a false case against the accused. Nothing was suggested to them in their cross-examination, and no such explanation was provided in their statement recorded under Section 313 of Cr.P.C. Therefore, the learned Trial Court had rightly discarded the defence version and accepted the prosecution version that the police had stopped the vehicle bearing registration No.HR10L-8800, in which accused Sanjay Kumar @ Sonu and Jasmer Singh were travelling, and from which 1 kg 394 grams of black sticks were recovered. Both the accused were travelling in the same vehicle and, therefore, they would be deemed to be in possession. In Madan Lal versus State of H.P. (2003) 7 SCC 465: 2003 SCC (Cri) 1664: 2003 SCC OnLineSC 874, the contraband was recovered 89 2024:HHC:16483 from a vehicle, and it was held that all the occupants of the vehicle would be in conscious possession of the contraband.

It was observed:

"19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle, and as noted by the trial court, they were known to each other, and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act, which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section

20 is not attracted.

22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja [(1979) 4 SCC 274:

1979 SCC (Cri) 1038: AIR 1980 SC 52] to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

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23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. As noted in Gunwantlal v. State of M.P. [(1972) 2 SCC 194: 1972 SCC (Cri) 678: AIR 1972 SC 1756], possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

25. The word "possession" means the legal right to possession (see Heath v. Drown [(1972) 2 All ER 561:

> 1973 AC 498 : (1972) 2 WLR 1306 (HL)]). In an interesting case, it was observed that where a person keeps his firearm in his mother's flat, which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness [(1976) 1 All ER 844: 1976 QB 966 : (1976) 2 WLR 361 (QBD)] .)

26. Once possession is established, the person who claims that it was not a conscious possession has to establish it because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54, where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused- appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

64. It was laid down by the Hon'ble Supreme Court in Union of India v. Mohd. Nawaz Khan, (2021) 10 SCC 100:

> 91 2024:HHC:16483 (2021) 3 SCC (Cri) 721: 2021 SCC OnLine SC 1237 that a person is in possession if he is in a position to exercise control over the article. It was observed on page 111:
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> "25. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable under Sections 21, 27-A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In Madan Lal v. State of H.P. [Madan Lal v. State of H.P., (2003) 7 SCC 465: 2003 SCC (Cri) 1664] this Court held that: (SCC p. 472, paras 19-23 & 26) "19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record

> are that all the accused persons were travelling in a vehicle, and as noted by the trial court, they were known to each other, and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.
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> 20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act, which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.
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> 21. It is highlighted that unless the possession was coupled with the requisite mental element, i.e. conscious possession and not mere custody 92 2024:HHC:16483 without awareness of the nature of such possession, Section 20 is not attracted.
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> 22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja [Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja, (1979) 4 SCC 274: 1979 SCC (Cri) 1038] to work out a completely logical and precise definition of "possession" uniform[ly] applicable to all situations in the context of all statutes.
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> 23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.
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> 26. Once possession is established, the person who claims that it was not a conscious possession has to establish it because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles."

26. What amounts to "conscious possession" was also considered in Dharampal Singh v. State of Punjab [Dharampal Singh v. State of Punjab, (2010) 9 SCC 608 :

> (2010) 3 SCC (Cri) 1431], where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case.

The standard of conscious possession would be different in the case of a public transport vehicle with several persons as opposed to a private vehicle with a 93 2024:HHC:16483 few persons known to one another. In Mohan Lal v. State of Rajasthan [Mohan Lal v. State of Rajasthan, (2015) 6 SCC 222: (2015) 3 SCC (Cri) 881], this Court also observed that the term "possession" could mean

physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge."

65. In the present case, the accused did not lead any evidence to show that their possession was not conscious, and the learned Trial Court was justified in holding that the possession of the accused was duly proved.

66. The case property was deposited with HC Ram Pal (PW-5), who was officiating as MHC in the absence of regular MHC Naginder Singh (PW-9). He and Naginder Singh stated that the case property remained intact till it remained in their custody. Their version is duly corroborated by the certificate issued by the Judicial Magistrate, First Class, Bilaspur, H.P., certifying the correctness of the inventory(Ext.PW-11/A). The Magistrate resealed the parcels with seven seals of seal impression JMIC, Bilaspur and the remaining 1.322 Kg with three seal 94 2024:HHC:16483 impressions of seal JMIC-Bilaspur. The result of analysis (Ext. PW-9/A) mentions that the parcel was sealed with six seal impressions of seal "H" and three seal impressions of seal JMIC Bilaspur (H.P.), and one cloth parcel (Mark- A) was sealed with seven seal impressions of JMIC-Bilapsur, (H.P.) The seals were intact and tallied with specimen seals sent by the forwarding authority and seal impression of "H" impressed on forms NCB-I. This report shows that the case property was intact, and there was no tampering with the seals. It was held in Baljit Sharma vs. State of H.P 2007 HLJ 707, that where the report of analysis shows that the seals were intact, the case of the prosecution that the case property remained intact is to be accepted as correct. It was observed:

> "A perusal of the report of the expert Ex.PW8/A shows that the samples were received by the expert in a safe manner, and the sample seal separately sent tallied with the specimen impression of a seal taken separately. Thus, there was no tampering with the seal, and the seal impressions were separately taken and sent to the expert also."

67. Similar is the judgment in Hardeep Singh vs State of Punjab 2008(8) SCC 557, wherein it was held:

> 95 2024:HHC:16483 "It has also come on evidence that till the date the parcels of the sample were received by the Chemical Examiner, the seal put on the said parcels was intact.

That itself proves and establishes that there was no tampering with the previously mentioned seal in the sample at any stage, and the sample received by the analyst for chemical examination contained the same opium, which was recovered from the possession of the appellant. In that view of the matter, a delay of about 40 days in sending the samples did not and could not have caused any prejudice to the appellant."

68. In State of Punjab vs Lakhwinder Singh 2010 (4) SCC 402, the High Court had concluded that there could have been tampering with the case property since there was a delay of seven days in

sending the report to FSL. It was laid down by the Hon'ble Supreme Court that case property was produced in the Court, and there was no evidence of tampering. Seals were found to be intact, which would rule out the possibility of tampering. It was observed:

> "The prosecution has been able to establish and prove that the aforesaid bags, which were 35 in number, contained poppy husk, and accordingly, the same were seized after taking samples therefrom which were properly sealed. The defence has not been able to prove that the aforesaid seizure and seal put in the samples were in any manner tampered with before it was examined by the Chemical Examiner. There was merely a delay of about seven days in sending the samples to the Forensic Examiner, and it is not proved as to how the aforesaid delay of seven 96 2024:HHC:16483 days has affected the said examination when it could not be proved that the seal of the sample was in any manner tampered with. The seal having been found intact at the time of the examination by the Chemical Examiner and the said fact having been recorded in his report, a mere observation by the High Court that the case property might have been tampered with, in our opinion, is based on surmises and conjectures and cannot take the place of proof.
>
> 17. We may at this stage refer to a decision of this Court in Hardip Singh v. State of Punjab reported in (2008) 8 SCC 557 in which there was a delay of about 40 days in sending the sample to the laboratory after the same was seized. In the said decision, it was held that in view of cogent and reliable evidence that the opium was seized and sealed and that the samples were intact till they were handed over to the Chemical Examiner, the delay itself was held to be not fatal to the prosecution case. In our considered opinion, the ratio of the aforesaid decision squarely applies to the facts of the present case in this regard.

18. The case property was produced in the Court, and there is no evidence to show that the same was ever tampered with."

69. Similar is the judgment of the Hon'ble Supreme Court in Surinder Kumar vs State of Punjab (2020) 2 SCC 563, wherein it was held:-

> 10. According to learned senior counsel for the appellant, Joginder Singh, ASI, to whom Yogi Raj, SHO (PW-3) handed over the case property for producing the same before the Illaqa Magistrate and who returned the same to him after such production was not examined, as such, link evidence was incomplete. In this regard, it is to be noticed that Yogi Raj SHO handed over the case property to Joginder 97 2024:HHC:16483 Singh, ASI, for production before the Court. After producing the case property before the Court, he returned the case property to Yogi Raj, SHO (PW-3), with the seals intact. It is also to be noticed that Joginder Singh, ASI, was not in possession of the seals of either the investigating officer or Yogi Raj, SHO. He produced the case property before the Court on 13.09.1996 vide application Ex.P-13, the concerned Judicial Magistrate of First Class, after verifying the seals on the case

> property, passed the order Ex.P-14 to the effect that since there was no judicial malkhana at Abohar, the case property was ordered to be kept in safe custody, in Police Station Khuian Sarwar till further orders. Since Joginder Singh, ASI, was not in possession of the seals of either the SHO or the Investigating Officer, the question of tampering with the case property by him did not arise at all.
>
> 11. Further, he has returned the case property, after production of the same, before the Illaqa Magistrate, with the seals intact, to Yogi Raj, SHO. In that view of the matter, the Trial Court and the High Court have rightly held that the non-examination of Joginder Singh did not, in any way, affect the case of the prosecution. Further, it is evident from the report of the Chemical Examiner, Ex.P-10, that the sample was received with seals intact and that the seals on the sample tallied with the sample seals. In that view of the matter, the chain of evidence was complete." (Emphasis supplied)

70. Therefore, the prosecution version is to be accepted as correct that the case property remained intact till its analysis at FSL, Junga.

71. It was submitted that Tehsildar Jaspal (PW-2) had not produced the seal before the Court, and the same is 98 2024:HHC:16483 fatal to the prosecution case. This submission is not acceptable. It is not necessary for a witness to produce the seal before the Court as sample seal impression "H" (Ext.PW-1/D), seal impression "H" on NCB Form (Ext.PW-2/A) were available on record for comparison. It was laid down by the Hon'ble Supreme Court in Varinder Kumar Versus State of H.P. 2019 (3) SCALE 50 that failure to produce the seal in the Court is not fatal. It was observed:-

> "6. We have considered the respective submissions. PW10 is stated to have received secret information at 2.45 P.M. on 31.03.1995. He immediately reduced it into writing and sent the same to PW8, Shri Jaipal Singh, Dy.S.P., C.I.D., Shimla. At 3.05 P.M. PW7, Head Constable Surender Kumar stopped PW5, Naresh Kumar and another independent witness, Jeevan Kumar, travelling together, whereafter the appellant was apprehended at 3.30 P.M. with two Gunny Bags on his Scooter, which contained varying quantities of 'charas'. PW8, Shri Jaipal Singh, Dy.S.P., C.I.D., Shimla, who had arrived by then, gave notice to the appellant and obtained his consent for carrying out the search. Two samples of 25 gms. Each were taken from the two Gunny Bags and sealed with the seal 'S' and given to PW5. PW2, Jaswinder Singh, the Malkhana Head Constable, resealed it with the seal 'P'. The conclusion of the Trial Court that the seal had not been produced in the Court is, therefore, perverse in view of the two specimen seal impressions having been marked as Exhibits PH and PK. It is not the case of the appellant that the seals were found tampered with in any manner."

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72. It was specifically held in Virender Kumar (supra) that when the sample seals were produced before the Court, the conclusion of the Trial Court that seals were produced before the Court was perverse.

73. The learned Trial Court noticed while examining Rajpal (PW-1) that seals were intact on the parcels. Thus, the learned Trial Court had satisfied itself with the correctness and integrity of the seal. Hence, the submission of the learned defence counsel that the seal was not produced before the learned Trial Court and the prosecution case is to be discarded is not acceptable.

74. It was submitted that Yog Raj (PW-14) did not comply with the requirement of Section 55 of the NDPS Act because the case property was not resealed in the present case. This is fatal to the prosecution case. This submission is not acceptable. It was laid down by this Court in Prem Bahadur Vs State of H.P., 2009 (1) Shim. L.C. 65, that the provisions of Sections 52 and 55 are not mandatory and directory. When the investigating officer was the SHO and he had not resealed the case property, believing that since he 100 2024:HHC:16483 was SHO and there was no such requirement, it was not sufficient to acquit the accused. It was observed:-

> "12. From a perusal of the aforesaid two judgments, it is apparent that the provisions of Sections 52 and 55 are not mandatory but only directory. If there is substantial compliance with the same, the accused cannot be acquitted. If there are sufficient reasons for non-compliance of the Sections, then also the accused cannot claim the benefit of acquittal under these provisions. At best, the Court may have to scrutinise the prosecution evidence with greater care and caution.
>
> 13. In the present case, the recovery of the Charas has been proved beyond a reasonable doubt. We cannot lose sight of the fact that the investigating officer, PW6, was also the SHO of the Police Station, Manali. He presumed that he was the in-charge of the police station and, therefore, provisions of Sections 52 and 55 were not applicable to him. At best, it can be presumed that when he was the investigating officer, some other police officer must be deemed to be in charge of the police station. At best, we can presume that MHC Khem Chand (PW 2) was the in-charge of the police station. However, even if we presume that MHC Khem Chand (PW 2) was the in-charge of the police station, then the mere non-compliance of Sections 52 and 55 by not putting the seal on the sample would not by itself be a ground to acquit the accused."

75. The prosecution has also complied with the requirement of Section 57 of the NDPS Act ina much as the Special Report (Ext.PW-7/A) was sent to Dy. S.P. Baldev Dutt,who handed it over to his reader Kuldeep Singh (PW-7) 101 2024:HHC:16483 on 13.09.2016. The statement of Kuldeep Singh (PW-7) is duly corroborated by the entry made in the register (Ext.PW-7/B), and there is nothing in the cross- examination of Kuldeep Singh to doubt his testimony.

76. Thus, the learned Trial Court had rightly held that the prosecution version proved beyond reasonable doubt that the accused, Sanjay Kumar @ Sonu and Jasmer Singh, were found in

possession of 1 kg and 394 grams of Charas. They failed to produce any document authorising their possession, and they were righty held guilty for the commission of an offence punishable under Section 20(b)(ii)(C) of the NDPS Act.

77. The learned Trial Court sentenced each of the accused to undergo rigorous imprisonment for 10 years and was directed to pay a fine of 1,00,000/- each, which is a minimum sentence and no interference is required with it.

78. No other point was urged.

79. In view of the above, the present appeal fails, and the same is dismissed.

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80. A copy of this judgment along with the record of the learned Trial Court be sent back forthwith. Pending applications, if any, also stand disposed of.

(Vivek Singh Thakur) (Judge) (Rakesh Kainthla) Judge 30th December, 2024 (ravinder)