Reserved On: 11.07.2024 vs Sandeep Kumar And Another on 25 July, 2024

2024:HHC:5796-DB IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA Cr. Appeal No. 269 of 2012 Reserved on: 11.07.2024 .

Date of Decision: 25.07.2024

State of H.P. ...Appe

Versus

Sandeep Kumar and another ...Responde

Coram

Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?1 Yes.

For the Appellant : Ms. Ayushi Negi, Deputy Advocate General.

For the Respondents : Mr. Ajay Chandel, Advocate.

Rakesh Kainthla, Judge The present appeal is referred to this Court in view of the difference of opinion between two Hon'ble Judges of this Court regarding the outcome of the appeal. Hon'ble Mr Justice Sureshwar Thakur (J.) allowed the appeal but Hon'ble Mr Justice Anup Chitkara (J.) dismissed the appeal and the matter has been referred to this Court as per Section 392 of CrPC.

2. Briefly stated, the facts giving rise to the present appeal are that the police filed a challan before the learned Trial Whether reporters of Local Papers may be allowed to see the judgment? Yes.

Court for the commission of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'). It was asserted that HHC Hem Ran (PW1), .

HHC Ajay Kumar (not examined), ASI Inder Singh (PW2), LC Saroj Kumari (not examined) and HHC Roop Lal (not examined) were present at Fagu Pul on 14.2.2008 at 3.45 PM. One scooter bearing registration No. PB-07E-1991 came from Banjar.

Accused Sandeep was driving the scooter and accused Ashok Kumar was sitting as a pillion rider. ASI Inder Singh (PW2) signalled the driver to stop the scooter and demanded the papers from him. The driver opened the dickey to get the papers checked. One pink polythene bag (Ex.P2) was visible in the dickey. ASI Inder Singh (PW2) asked the driver to get the bag checked. The driver removed the bag from the dickey. The bag was bearing the words 'Punjab Purse Palace'. It was checked and found to contain small black spheres. ASI Inder Singh smelled the spheres and found them to be charas. The police weighed the charas and found its weight to be 500 grams. Two samples each weighing 25 grams were separated for chemical analysis. The samples were wrapped in separate polythene bags and each packet was wrapped in a separate cloth parcel. The remaining charas was put in the same polythene bag from which it was recovered and the bag was wrapped in a piece of cloth. Each parcel was sealed with seal impressions of seal 'T'. Form NCB-I .

(Ex.PW2/A) was filled in triplicate. A seal impression was taken on the NCB-1 form and the pieces of cloth (Ex.PW1/A) and the seal was handed over to witness Hem Raj after the use. Scooter, RC (Ex.PW1/B), chit (Ex.PW1/C), key of the Scooter and charas were seized vide seizure memo (Ex.PW1/D). Signatures of the witnesses were obtained on the memo. A copy of the seizure memo was supplied to the accused and their signatures were also obtained on the memo. Rukka (Ex.PW2/B) was prepared and sent to the Police Station through HHC Hem Raj, who handed it over to ASI Hari Singh (PW6). He (PW6) recorded the FIR (Ex.PW6/A) and sent the case file to the spot through the same constable. ASI Inder Singh (PW2) carried out the investigation. He prepared the site plan (Ex.PW2/C) and recorded the statements of witnesses as per their version. He arrested the accused and prepared the memos of arrest (Ex.PW2/D and Ex.PW2/E). HHC Hem Raj handed over the case file to ASI Inder Singh, who filled the relevant columns of the documents prepared by him. The case property was handed over to ASI Hari Singh (PW6), who made an entry in the register of Malkhana at Serial No. 61 (Ex.PW6/B) and deposited all the articles in safe condition in Malkhana. ASI Hari Singh handed over one parcel stated to be containing 25 grams of .

charas, NCB-1 form, sample seal, copy of FIR and seizure memo to Contable Puran Chand (PW3) on 16.2.2008 with the direction to carry them to FSL vide RC No. 9 of 2008 (Ex.PW6/C). Constable Puran Chand deposited all the articles at FSL and handed over the receipt to MHC on his return. A special report (Ex.PW2/F) was prepared, which was handed over to Deputy Superintendent of Police, Sayed Ahmad, on 15.2.2008 at 4.00 PM. Deputy Superintendent of Police Sayed Ahmad made an endorsement on the report and handed over the report to his Reader HC Harbans Kumar (PW4), who made an entry in the register at Serial No.5 (Ex.PW4/A) and kept the special report on record. The result of chemical analysis (Ex.PW2/G) was issued in which it was shown that the sample was of charas, which contained 43.60% w/w resin in it. Statements of witnesses were recorded as per their version and after the completion of the investigation, the challan was prepared and presented before the Court.

3. The learned Trial Court framed the charges against the accused for the commission of an offence punishable under Section 20 read with Section 29 of the ND&PS Act. The accused pleaded not guilty and claimed to be tried.

4. The prosecution examined six witnesses to prove its .

case. HHC Hem Raj (PW1) and ASI Inder Singh (PW2) are the witnesses to recovery. Puran Chand (PW3) carried the case property to FSL, Junga. Harbans Kumar (PW4) was working as a Reader to Deputy Superintendent of Police to whom the special report was handed over. Mitter Dev (PW5) prepared the challan.

ASI Hari Singh (PW6) was working as MHC with whom the case property was deposited.

5. Accused Ashok Kumar in his statement recorded under Section 313 of Cr.P.C. admitted that the police party was present at Fagu Pul, he was sitting as a pillion rider on the scooter bearing registration No. PB-07-E-1991, the police had asked the rider of the scooter to stop and demanded the papers, the driver opened the dickey to take out the papers and one polythene was kept in the dickey which was bearing the words Punjab Purse Palace. He admitted that the police asked the driver to show the bag. He denied the rest of the prosecution case, however, he admitted that he was arrested, a memo was prepared and a copy of the memo was supplied to him.

6. Accused Sandeep Kumar admitted that a scooter came from Banjar and he was driving the scooter, the police asked him to stop the scooter and demanded the papers. He admitted that .

the polythene bag bearing the words Punjab Purse Palace was kept in the dickey. He stated that the polythene bag had the papers of the scooter. He admitted that the scooter and documents were seized by the police. He stated that the police demanded money from him. The police stopped them and asked them to hand over the papers. They were told that they would be challaned as they did not have insurance. The police subsequently claimed that the accused had the charas but no charas were kept by them.

7. The statements of Ashok Kumar (DW1) and Ashwani Kumar alias Raj Kumar (DW2) were recorded in defence.

8. The Learned Trial Court held that there was non-

compliance with Section 55 of the ND&PS Act, which is not mandatory but this fact has to be kept in view, while appreciating the link evidence. There was a delay in depositing the case property with FSL. No independent witness was joined despite opportunity and availability. There was insufficient evidence of conspiracy. Hence, the accused were acquitted.

9. Being aggrieved from the judgment passed by the learned Trial Court, the State preferred the present appeal asserting that the learned Trial Court failed to properly .

appreciate the evidence. The testimonies of the witnesses were discarded for untenable reasons. It was duly proved that charas was recovered from the scooter of the accused. The provisions of Section 55 of the ND&PS Act are directory and not mandatory.

Hence, it was prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside

10. The appeal was heard by a Division Bench of this Court. Hon'ble Mr Justice Sureshwar Thakur (J.) held that the memo and case property contained the signatures of the accused and they are estopped from contesting their contents as per Sections 91 and 92 of the Indian Evidence Act. The seals on the parcels were intact which shows that the case property remained intact till its analysis. The failure to comply with Section 55 was not fatal. Hence, the appeal was allowed and the accused were convicted.

11. Hon'ble Mr Justice Anup Chitkara (J.) held that the entry in the daily diary (Ex.PW6/D) does not mention that the police party was carrying weights and scales. No efforts were made to join independent witnesses. Hence, acquittal of the accused was justified and the appeal was liable to be dismissed.

12. Since there was a difference of opinion; therefore, the .

matter has been referred to this Court.

13. I have heard Ms. Ayushi Negi, learned Deputy Advocate General, for the appellant/State and Mr. Ajay Chandel, learned counsel for the respondents.

14. Ms. Ayushi Negi, learned Deputy Advocate General, for the appellant-State submitted that the prosecution witnesses consistently deposed about the search of the scooter and seizure of the charas. Charas was recovered during the routine checking without any prior information and it was not possible to associate independent witnesses. The provision of Section 55 of the ND&PS Act is not mandatory and its violation is not fatal to the prosecution. The seals on the parcels were intact which shows the integrity of the case property. There was no requirement to mention the weights in the daily diary. Therefore, she prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

15. Mr. Ajay Chandel, learned counsel for the respondents/accused submitted that there is non-compliance with Section 52A of the ND&PS Act inasmuch as the samples were taken by the Investigating Officer on the spot and not before the Magistrate. This is fatal to the pros ecution case. Hence, the .

accused are entitled to acquittal on this short ground alone.

16. I have given considerable thought to the submissions at the bar and have gone through the records carefully.

17. It was held in Tanviben Pankajkumar Divetia v. State of Gujarat, (1997) 7 SCC 156 that the third Judge is free to decide the appeal by resolving the differences in the manner he thinks it proper. It was observed: -

> 5. The plain reading of Section 392 clearly indicates that it is for the third Judge to decide on what points he shall hear arguments, if any, and it necessarily postulates

> that the third Judge is free to decide the appeal by resolving the difference in the manner, he thinks proper. In Babu v. State of U.P. [AIR 1965 SC 1467 : (1965) 2 SCR 771] it has been held by a Constitution Bench of this Court that where the third Judge did not consider it necessary to decide a particular point on which there had been difference of opinion between the two Judges, but simply indicated that if at all it was necessary for him to come to a decision on the point, he agreed with all that had been said about by one of the two Judges, such decision was in conformity with law.

That the third Judge is free to decide the appeal in the manner he thinks fit, has been reiterated in Hethubha v. State of Gujarat [(1970) 1 SCC 720: 1970 SCC (Cri) 280: AIR 1970 SC 1266] and Union of India v. B.N. Ananti Padmanabiah [(1971) 3 SCC 278: 1971 SCC (Cri) 535:

> AIR 1971 SC 1836]. In State of A.P. v. P.T. Appaiah [(1980) 4 SCC 316; 1980 SCC (Cri) 960: AIR 1981 SC 365] it has been held by this Court that even in a case when both the Judges had held that the accused was guilty but there was difference of opinion as to the nature of offence committed by the accused, it was open to the third Judge to decide the appeal by holding that the accused was not .
>
> guilty by considering the case on merit.
>
> 6. Where a case is referred to a third Judge under Section 392 CrPC, such Judge is not only entitled to decide on what points he shall hear the arguments, if any, but his decision will be final and the judgment in the appeal will follow his decision. Precisely for the said reason, it has been held by the Allahabad High Court that if one of the Judges, who had given a different opinion ceases to be Judge, the judgment may be pronounced by another Bench of the High Court, the reason being that the ultimate decision in the appeal is to abide by the decision of the third Judge and pronouncement of the decision in conformity with the decision of the third Judge is only a formality (Balku v. Emperor [AIR 1948 All 237: 1948 All LJ 102: 49 Cri LJ 264]).
>
> 7. Section 392 CrPC clearly contemplates that on a difference of opinion between the two Judges of the Division Bench, the matter is to be referred to the third Judge for his opinion so that the appeal is finally disposed of on the basis of such opinion of the third Judge..."

18. A similar view was taken in Sajjan Singh v. State of M.P., (1999) 1 SCC 315: 1999 SCC (Cri) 44 wherein it was observed:

> "10. The statement of law is now quite explicit. It is the third Judge whose opinion matters; against the judgment that follows therefrom that an appeal lies to this Court by way of special leave petition under Article 136 of the Constitution or under Article 134 of the Constitution or under Section 379 of the Code. The third Judge is, therefore, required to examine the whole of the case independently and it cannot be

> said that he is bound by that part of the two opinions of the two Judges comprising the Division Bench where there is no difference. As a matter of fact, the third Judge is not bound by any such opinion of the Division Bench. He is not hearing the matter as if he is sitting in a three-judge Bench where the opinion of the majority would prevail. We are thus of the opinion that Prasad, J. was not right in his approach and his hands .
>
> were not tied as far as the three appellants, namely, Gajraj Singh, Meharban Singh and Baboo Singh before him were concerned in respect of whom both Judges of the Division Bench opined that they were guilty and their conviction and sentences were to be upheld."

19. In the present case, the Hon'ble Judges have not formulated the points of difference; hence, the matter has to be independently examined.

20.

r to The present appeal is 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 an appeal against acquittal cannot be allowed merely on the difference of opinion. 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.
>
> 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.

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) '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 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:

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 :

(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]).

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])."

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

22. HHC Hem Raj (PW1) stated that the case property was sealed with six impressions of seal 'T'. Seal impression was taken separately on pieces of cloth. NCB-1 Form was filled and the seal was handed over to him after the use. The case property was produced in the Court. The parcel was sealed with seal 'T' and the seals were intact. He identified the parcel, bag and the charas. He also identified the sample parcel which was prepared on the spot.

23. The report of analysis (Ex.PW2/G) reads that one sealed cloth parcel bearing six seals of seal 'T' was received through C. Puran Chand. The seals were intact and tallied with the seal impression sent by SHO, Police Station, Banjar. This report and the observations of the Court that the seals were intact establish the integrity of the case property.

24. It was held in Baljit Sharma vs. State of H.P 2007 HLJ .

707, 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."

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

> "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."

26. 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:

> "19.....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 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.
>
> 20. 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.
>
> 21. The case property was produced in the Court and there is no evidence to show that the same was ever tampered with."

27. It was held in Jarnail Singh v. State of Punjab, (2011) 3 .

SCC 521: (2011) 1 SCC (Cri) 1191: 2011 SCC OnLine SC 330 that where the seals were intact, the delay in sending the sample is not fatal.

It was observed:

> "22. Mr Ujjal Singh then submitted that there was a delay of twelve days in sending the sample of narcotics for chemical examination. This submission, in our opinion, is without any factual basis. The trial court as well as the High Court, on examination of the entire material, concluded that there was sufficient independent evidence produced by the prosecution regarding the completion of link evidence. Therefore, the delay in sending the sample parcel to the office of the chemical examiner pales into insignificance. We are of the considered opinion that a mere delay in sending the sample of the narcotic to the office of the chemical examiner would not be sufficient to conclude that the sample has been tampered with. There is sufficient evidence to indicate that the delay, if any, was wholly unintentional.
>
> 23. This Court had occasion to deal with a similar issue, in Balbir Kaur v. State of Punjab [(2009) 15 SCC 795: (2010) 3 SCC (Cri) 997]. The Court made the following observations:
>
> (SCC p. 803, para 24) "24. As far as the delay in sending the samples is concerned, we find the said contention untenable in law. Reference in this regard may be made to the decision of this Court in Hardip Singh case [Hardip Singh v. State of Punjab, (2008) 8 SCC 557 : (2008) 3 SCC (Cri) 580] wherein there was a gap of 40 days between seizure and sending the sample to the chemical examiner. Despite the said fact the court held that in view of cogent evidence that opium was seized from the appellant and the seals put on the sample were intact till it was handed over to the chemical examiner, delay itself is not fatal to the prosecution case."

24. The trial court as well as the High Court, on examination of the evidence on record, concluded that the case property was handed over by Ram Pal (PW 4), .

Investigating Officer to the SHO Inspector Rachpal Singh (PW 3). This witness checked the case property and affixed his own seal bearing impression "RS" on the case property as also on the sample impression of the seal. The case property was deposited with MHC Shudh Singh on the same day.

25. Sudh Singh appeared as PW 1 in court and tendered his affidavit, Ext. PA to the effect that the case property including the sample parcel and the specimen impression of the seal, duly sealed and intact was deposited with him by Ram Pal, PW 4, on 23-9-1994. He also stated that he handed over the sample parcel, duly sealed and the sample impression of seal to Constable Chet Ram on 4-10-1994 for depositing the same in the office of the chemical examiner. It was further stated that none had tampered with the aforesaid case property and the seal which remained in his custody. He ultimately deposited the case property in the office of the chemical examiner on the same day and tendered a receipt.

26. This apart, there is a report of the chemical examiner (Ext. PJ) which indicates that the seals were intact when the sample was received and tallied with the sample impression of the seal. It is noteworthy that such a report of the chemical examiner would be admissible under Section 293 CrPC.

27. Considering the aforesaid clear evidence, it cannot be said that there is any infirmity in the link evidence merely because there was a delay of a few days in sending the sample to the office of the chemical examiner."

28. 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 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)

29. Therefore, I respectfully agree with the judgment of Hon'ble Mr Justice Sureshwar Thakur (J.) that the integrity of the case property was established.

.

30. In the present case, the police stopped the scooter to check its documents and when the dickey was opened the polythene packet was seen. Thus, it was a case of chance recovery and the police did not have any prior information regarding the transportation of charas. While dealing with a similar case of a chance recovery, it was laid down by the Hon'ble Supreme Court in Kashmira Singh Versus State of Punjab 1999 (1) SCC 130 that the police party is under no obligation to join independent witnesses while going on patrolling duty and the association of any person after effecting the recovery would be meaningless. It was observed:

> "3. Learned counsel for the appellant has taken us through the evidence recorded by the prosecution as also the judgment under appeal. Except for the comment that the prosecution is supported by two police officials and not by any independent witness, no other comment against the prosecution is otherwise offered. This comment is not of any value since the police party was on patrolling duty and they were not required to take along independent witnesses to support recovery if and when made. It has come in the evidence of ASI Jangir Singh that after the recovery had been effected, some people had passed by. Even so, obtaining their counter-signatures on the documents already prepared would not have lent any further credence to the prosecution version."

31. It was laid down by the Hon'ble Supreme Court in Raveen Kumar v. State of H.P., (2021) 12 SCC 557 that non-

.

association of the independent witnesses will not be fatal to the prosecution case. However, the Court will have to scrutinize the statements of prosecution witnesses carefully. It was observed:

> "19. It would be gainsaid that the lack of independent witnesses is not fatal to the prosecution case. [Kalpnath Rai vs. State, (1998) AIR SC 201] However, such omissions cast an added duty on Courts to adopt a greater degree of care while scrutinising the testimonies of the police officers, which if found reliable can form the basis of a successful conviction."

32. This position was reiterated in Rizwan Khan Versus State of Chhattisgarh (2020) 9 SCC 627, wherein, it was observed:

> "8.2 Having gone through the entire evidence on record and the findings recorded by the courts below, we are of the opinion that in the present case, the prosecution has been successful in proving the case against the accused by examining the witnesses PW3, PW4, PW5, PW7 and PW8.

> It is true that all the aforesaid witnesses are police officials and two independent witnesses who were panchnama witnesses had turned hostile. However, all the aforesaid police witnesses are found to be reliable and trustworthy. All of them have been thoroughly cross-examined by the defence. There is no allegation of any enmity between the police witnesses and the accused. No such defence has been taken in the statement under Section 313, Cr.P.C. There is no law that the evidence of police officials unless supported by independent evidence, is to be discarded and/or unworthy of acceptance.
>
> It is settled law that the testimony of the official witnesses cannot be rejected on the grounds of non-corroboration by an independent witness. As observed and held by this Court in a catena of decisions, examination of independent witnesses is not an indispensable requirement and such .
>
> non-examination is not necessarily fatal to the prosecution case, [see Pardeep Kumar (supra)]. In the recent decision in the case of Surinder Kumar vs. State of Punjab, (2020) 2 SCC 563, while considering a somewhat similar submission of non-examination of independent witnesses, while dealing with the offence under the NDPS Act, in paragraphs 15 and 16, this Court observed and held as under:
>
> "15. The judgment in Jarnail Singh vs. State of Punjab (2011) 3 SCC 521, relied on by the counsel for the respondent-State also supports the case of the prosecution. In the aforesaid judgment, this Court has held that merely because the prosecution did not examine any independent witness, would not necessarily lead to a conclusion that the accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status.
>
> 16. In State (NCT of Delhi) vs. Sunil, (2011) 1 SCC 652, it was held as under (SCC p. 655) "It is an archaic notion that actions of the police officer should be approached with initial distrust. It is time now to start placing at least initial trust in the actions and the documents made by the police.

At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law, the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature."

Applying the law laid down by this Court on the evidence of police officials/police witnesses to the facts of the case in hand, referred to hereinabove, we are of the opinion as the police witnesses are found to be reliable and trustworthy, no error has been committed by both the courts below in convicting the accused relying upon the deposition of the police officials."

.

33. Similar is the judgment of this Court in Balwinder Singh &Anr. Vs State of H.P., 2020 Criminal L.J. 1684, wherein it was held:-

> "3. (iii) Learned defence counsel, contended that in the instant case, no independent witness was associated by the Investigating Officer, therefore, the prosecution case cannot be said to have been proved by it in accordance with provisions of the Act. Learned defence counsel, in support of his contention, relied upon titled Krishan Chand versus State of H.P.,2017 4 CriCC 531 3(iii)(d). It is by now well settled that prosecution case cannot be disbelieved only because the independent witnesses were not associated."

34. This position was reiterated in Kallu Khan Vs State of Rajasthan, AIR 2022 SC 50, wherein it was held: -

> "16. The issue raised regarding conviction solely relying upon the testimony of police witnesses, without procuring any independent witness, recorded by the two courts, has also been dealt with by this Court in the case of Surinder Kumar (supra) holding that merely because independent witnesses were not examined, the conclusion could not be drawn that accused was falsely implicated. Therefore, the said issue is also well-settled and in particular, looking to the facts of the present case, when the conduct of the accused was found suspicious and a chance recovery from the vehicle used by him is made from a public place and proved beyond a reasonable doubt, the appellant cannot avail any benefit on this issue. In our view, the concurrent findings of the courts do not call for interference."

35. A similar view was taken in Kehar Singh v. State of H.P., 2024 SCC OnLine HP 2825 wherein it was observed:

> 16. As regards non-association of the independent .

witnesses, it is now well settled that non-association of the independent witnesses or non-supporting of the prosecution version by independent witnesses itself is not a ground for acquittal of Appellants/accused. It is also well settled that the testimonies of the official witnesses, including police officials carry the same evidentiary value as the testimony of any other person. The only difference is that the Court has to be most circumspect while appreciating the evidence of the official witnesses to rule out the possibility of false implication of the accused, especially when such a plea is specifically raised by the defence. Therefore, while scrutinising the evidence of the official witnesses, in cases where independent witnesses are not associated, contradictions and inconsistencies in the testimonies of such witnesses are required to be taken into account and given due weightage, unless satisfactorily explained. However, the contradiction must be material and not trivial one, that alone would assume significance.

17. Evidently, this is a case of chance recovery, therefore, the police party was under no obligation to join independent witnesses while going on patrolling duty and the association of any person after

effecting the recovery would be meaningless.

Xxxx

19. A similar reiteration of law can be found in the judgment rendered by the learned Single Judge of this Court in Avtar @ Tarri v. State of H.P., (2022) Supreme HP 345, wherein it was observed as under: --

> "24. As regards the second leg of the argument raised by learned counsel for the appellant, it cannot be said to be of much relevance in the given facts of the case. The fact situation was that the police party had laid the 'nakka' and immediately thereafter had spotted the appellant at some distance, who got perplexed and started walking back. The conduct of the appellant was sufficient to raise suspicion in the minds of police officials. At that stage, had the appellant not been .
>
> apprehended immediately, police could have lost the opportunity to recover the contraband. Looking from another angle, the relevance of independent witnesses could be there, when such witnesses were immediately available or had already been associated at the place of 'nakka'. These, however, are not mandatory conditions and will always depend on the fact situation of each and every case. The reason is that once the person is apprehended and is with police, a subsequent association of independent witnesses, may not be of much help. In such events, the manipulation, if any, cannot be ruled out."

Xxxx

22. A similar reiteration of law can be found in a very re- cent judgment of the Coordinate Bench of this Court in Cr.

A. No. 202 of 2020, titled Dillo Begum v. State of H.P., de- cided on 27.03.2024."

36. Thus, in view of the binding precedents of this Court and Hon'ble Supreme Court, the non-association of independent witnesses is not fatal and the prosecution case cannot be discarded due to the non-association of independent witnesses.

Hence, I respectfully disagree with the judgment of Hon'ble Mr Justice Anoop Chitkara (J.) that the prosecution case is to be discarded due to the non-association of the independent witnesses.

37. It was laid down by this Court in Duni Chand Vs. State of H.P. 2001 (2) Shim. LC 206 that provisions of Section 55 of ND&PS Act are not mandatory and the accused cannot be .

acquitted due to their non-compliance. It was observed:

"16. The learned Counsel next contended that the provisions of Section 55 of the NDPS Act have not been complied with by the Investigating Officer which has caused serious prejudice to the accused. It is the evidence of PW-7 that after the contraband was recovered from the possession of the accused, PW-1 Pyar Singh was asked to bring scales and weights from his nearby tea shop and thereafter recovered Charas was weighed. Two samples of 25 grams each and two samples of 10 grams each of 'Battis' (small sticks) and 'Golas' (small balls) were taken from the recovered charas and the samples were sealed with three seals of seal bearing impression 'K'whereas the remaining Charas was sealed with six seals of the same impression. PW-7 deposited the case property with JPW-4 MHC Des Raj. PW-4 deposed that on 26.11.1999, ASI Kishan Dass had brought four samples duly sealed with sample seal and deposited the same in Police Malkhana which was kept by him in safe custody. On 28.11.1999, he took out one sample of 25 grams sealed with a seal bearing impression 'K' with three seals and handed over the sample to Constable PW-3 Amin Chand for being carried to Forensic Science Laboratory, Kandaghat. Shri Kishan Chand (PW-6) was the Inspector/Station House Officer of the Police Station, Kihar during the relevant time. He deposed that on 26.11.1999, he had gone to Dharamshala. Section 55 of the NDPS Act authorizes the Officer-in- charge of the police station to take charge and keep in safe custody pending the orders of the Magistrate all articles seized under this Act within the local area of his police station and which can be delivered to him and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take sample from them and all samples so taken shall also be sealed with a seal of the Officer-in-charge of the Police Station. Provisions of Section 55 are directory in nature and in the present case, undisputedly, no seal was affixed by the Officer-in-charge .

of the Police Station upon the seized contraband. It appears that PW-6 could not affix his seed as an officer- in-charge of the police station upon the samples deposited by PW-7 with PW-4 as PW-6 was not present in the police station on 26.11.1999. The contention of the learned Counsel that as there was no re-seal of the samples by the station house officer under Section 55 of the NDPS Act, the possibility of tampering with the samples could not be ruled out is unfounded and cannot be accepted. If there is any such irregularity committed by the Investigating Agency, the same shall not vitiate the proceedings in this case. The decision of Deep Chand v. State of Himachal Pradesh, 1995 (2) Sim. L.C. 256, relied upon by the learned Counsel for the accused, turns out on the facts of that case. It is well settled by now that the defence will have to show that failure of justice has resulted due to non-compliance of the directory provisions of Section 55 of the NDPS Act. In Gurbax Singh v. State of Haryana, 2000 (1) Crimes 235, their Lordships of Supreme Court have held that the provisions of Sections 52 and 57 are directory and violation of these provisions would not ipso facto vitiate the trial or conviction. The judgment proceeded to hold that the Investigating Officer cannot totally ignore these provisions and such violation will have a bearing on appreciation of evidence regarding the arrest of the accused or

seizure of the article. In that case, the Investigating Officer has admitted that the seal which was affixed on the muddamal parcel was handed over to the witness and was kept with him for ten days. The witness also admitted that the muddamal parcels were not sealed by the officer-in-charge of the police station as required under Section 55 of the NDPS Act. The prosecution in that case has not laid any evidence as to whether the chemical analyser received the sample with proper intact seals and it created a doubt whether the same sample was sent to the Chemical analyser. On the basis of the evidence and faulty investigation by the prosecution, their Lordships came to the conclusion that it would not be safe to convict the accused for the serious offence of poppy husk. The learned Counsel for the accused also relied upon State of .

H.P. v. Bhike Ram, 1995 (2) Sim. L.C. 335; Thanni Ram v.

State of Haryana, 2000 SCC (Cri) 189; State of Punjab v. Tek Ram, 1997 (1) CLR 579, Criminal Appeal No. 1 of 1999 i.e. Raj Kumar v. State of H.P., decided on 17.11.2000, Karam Singh v.

State of Punjab, 1988 (2) Crimes 278 Punjab and Haryana High Court, Bhajan Singh v. State of Haryana, 1988 (1) Crimes 444; Punjab and Haryana High Court, Rajesh v. State, 1989 (3) Crimes 638 Delhi, Pradeep Kumar v. State, 1989 Cri.

L.J. 2438 Delhi High Court, Chhote Lal v. State of Rajasthan, 1990 (1) Crimes 246; Wilson Dayal v. State, 1993 (1) Crimes 207, Delhi High Court, Bala Ram v. State of Rajashtan, 1993 (2) Crimes 1130, Mansaram v. State of M.P., 1994 (2) Crimes 346 and Ravinder Singh v. State of Punjab, 1997 (3) Crimes 60 Punjab and Haryana High Court.

17. The ratio of the law laid down in the above-said judgments is that if it is assumed that the provisions of Section 55 of the NDPS Act are directory in nature, this does not mean that those have not to be complied with. The only fact of such provisions would be that the prosecution has to explain that those were not complied with. If the explanation for non-compliance is satisfactory, it has to be seen whether any prejudice has been caused to the accused or not. In the present case, as stated above, the prosecution has rendered an explanation that the officer-in-charge of the police station was out of station at the time when the seized articles were brought by PW~7 to the police station, Kihar and handed over to PW-4. PW-4 has categorically deposed that all the parcels remained intact during the period they remained in his custody. PW-3 stated that PW-4 handed over the sealed parcel duly sealed with a seal bearing the impression 'K' along with parcel seals to him for taking them to CTL. Kandaghat on 28:11.1999. He took the same sealed parcels to Kandaghat and deposited them in Kandaghat on 29.11.1999; He categorically stated that the parcels remained intact during the period they remained in his custody. In the teeth of the satisfactory explanation rendered by the prosecution, we are of the view that non- compliance of Section 55 is a mere irregularity and failure to comply with will not vitiate the entire prosecution case .

which is otherwise proved against the accused."

38. Similarly, it was held in State of Punjab v. Leela, (2009) 12 SCC 300: (2010) 1 SCC (Cri) 568: 2009 SCC OnLine SC 883 that the provisions of Section 55 of NDPS Act are directory. It was observed:

"13. It is not in dispute that provisions of Section 55 are directory in nature. In the instant case, the DSP who was examined as PW 1 is an officer and was higher in rank or of the same rank as the SHO in the instant case. There is no reason indicated as to how the accused has been prejudiced by PW 1 putting his seal instead of the SHO. The provisions are directory and as there is no doubt about the authenticity of the official act, the High Court ought not to have held that there was non-compliance with the requirement of Section 50."

39. Therefore, I respectfully agree with the judgment of Hon'ble Mr Justice Sureshwar Thakur (J.) that the provision of Section 55 of the NDPS Act is directory.

40. In the present case, the samples were taken on the spot and not in the presence of the Magistrate. It was laid down by the Hon'ble Supreme Court in Simarnjit Singh v. State of Punjab, 2023 SCC OnLine SC 906 that Section 52A (3) requires the Officer to approach the Magistrate to seek permission to draw representative samples. The samples will then be enlisted and the correctness of the list of samples so drawn would be certified by the Magistrate. It means that the entire exercise has to be .

carried out before the Magistrate, which has to be certified by him to be correct. It is not permissible to draw samples on the spot. It was observed: -

> "8. We have perused the evidence of PW-7 Hardeep Singh in which he has stated that from the eight bags of poppy husk, two samples of 250 gms each were drawn and converted into 16 parcels. This has been done immediately after the seizure.
>
> 9. In paragraphs 15 to 17 of the decision of this Court in Mohanlal's case (2016) 3 SCC 379, it was held thus:
>
> "15. It is manifest from Section 52-A(2) include (supra) that upon seizure of the contraband, the same has to be forwarded either to the officer-in-

charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission

to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing .

of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with subsections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates the taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."

10. Hence, the act of PW-7 of drawing samples from all the packets at the time of seizure is not in conformity with the law laid down by this Court in the case of Mohanlal 2016 (3) SCC

379. This creates serious doubt about the prosecution's case that the substance recovered was contraband."

41. This position was reiterated in Yusuf v. State 2023 SCC OnLine SC 1328, wherein it was observed:-

> "10. In order to test the above submissions, it would be relevant to refer to the provisions of Section 52A (2), (3) and (4) of the NDPS Act. The aforesaid provisions provide for the procedure and manner of seizing, preparing the inventory of the seized material, forwarding the seized material and getting inventory certified by the Magistrate concerned. It is further provided that the inventory or the photographs of the seized substance and any list of the samples in connection thereof on being certified by the Magistrate shall be recognized as the primary evidence in connection with the offences alleged under the NDPS Act.
>
> 11. For the sake of convenience, relevant sub-sections of Section 52A of the NDPS Act are reproduced hereinbelow:
>
> .
>
> "52A. Disposal of seized narcotic drugs and psychotropic substances.-
>
> (1) --
>
> (2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest

police station or the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in subsection (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

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

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

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

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

(4) Notwithstanding anything contained in the Indian .

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

12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or the officer so mentioned under Section 53, the officer so referred to in sub-section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were

drawn in the presence of a gazetted officer is not sufficient compliance with the mandate of sub-section (2) of Section 52A of the NDPS Act.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.

.

15. In Mohanlal's case (2016) 3 SCC 379, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.

17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court, as well as the trial court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with a fine of Rs. 1 lakh and in default of payment of fine to undergo further imprisonment of one year, is hereby set aside." (Emphasis supplied)

42. A similar view was taken in Bothilal v. Narcotics Control Bureau, 2023 SCC OnLine SC 498, wherein it was observed: -

> "15. Admittedly, PW-2 drew two samples from each of the packets of contraband found in the hotel room and kept them in two separate plastic covers. These covers were sealed and the remaining contraband was also sealed. Thus, the prosecution claims that the samples were .
>
> prepared even before the packets were sent to the Station House Officer. The submission of the learned senior counsel appearing for the appellant in Criminal Appeal 451 of 2011 was that a grave suspicion was created about the prosecution's case as this action by the PW-2, was contrary to Section 52-A of the NDPS Act.

16. In paragraphs 15 to 17 of Mohanlal's case (2016) 3 SCC 379, it was held thus:

> "15. It is manifest from Section 52-A(2)include (supra) that upon seizure of the contraband, the same has to be forwarded either to the officer-in-

charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in .

the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates the taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."

17. Thus, the act of PW-2 of drawing samples from all the packets at the time of seizure is not in conformity with what is held by this Court in the case of Mohanlal (2016) 3 SCC 379. This creates serious doubt about the prosecution's case that the substance recovered was contraband." (Emphasis supplied)

43. This position was reiterated in Mohd. Khalid v. State of Telangana, 2024 SCC OnLine SC 213 wherein it was observed:

> "22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in the presence of the jurisdictional Magistrate. In this view of the matter, the FSL report (Exhibit P-11) is nothing but a waste paper and cannot be read in evidence."

44. Thus, in view of these precedents, the samples are required to be taken in the presence of the Magistrate and it is impermissible to take the samples on the spot in the absence of the Magistrate. No reliance can be placed upon the report of analysis obtained after analyzing the samples taken on the spot.

45. In the present case, the samples were not taken in the Magistrate's presence and the prosecution version that the recovered suspected material was Charas has not been .

established.

46. Therefore, I respectfully agree with the judgment of Hon'ble Mr. Justice Anoop Chitkara (J) that the appeal deserves to be dismissed.

47.

dismissed. to Consequently, the present appeal fails and the same is (Rakesh Kainthla) Judge 25th July, 2024 (Chander)