

Surat Ram vs State Of H.P on 13 January, 2023

Bench: Tarlok Singh Chauhan, Virender Singh

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA Cr. Appeal No. 393 of 2019 .

Reserved on: 22.11.2022 Decided on : 13.1.2023 Surat Ram ...Appellant Versus State of H.P. ...Respondents _____ Coram Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge Hon'ble Mr. Justice Virender Singh, Judge Whether approved for reporting? 1 yes _____ For the petitioner : Mr. Ashish Jamalta, Advocate, Legal Aid Counsel.

For the respondent : Mr. Ashok Sharma, Advocate General with Mr. J.S. Guleria, Dy. Advocate General and Mr. Rajat Chauhan, Law Officer.

1 Whether reporters of the local papers may be allowed to see the judgment?

Per Virender Singh, Judge .

Appellant Surat Ram, has filed the present appeal, under Section 374 of the Criminal Procedure Code (hereinafter referred to as 'the Cr. P.C.'), against the judgment of conviction and order of sentence, dated 5.4.2019, passed by learned Special Judge, Chamba, (hereinafter referred to as, 'the trial Court') in Session Trial No. 06/2017, under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, (hereinafter referred to as, 'the NDPS Act').

2. By way of the judgment of conviction and order of sentence, the appellant has been convicted by learned trial Court for the commission of offence punishable under Section 20 of the NDPS Act and sentenced to undergo rigorous imprisonment, for a period of 11 years and to pay a fine of Rs. 1,00,000/□ and in default of payment of fine amount, he was further directed to undergo rigorous imprisonment, for a period of one year.

3. The parties to the appeal, herein are referred to, in the same manner, in which, they were referred to, by .

learned trial Court.

4. Brief facts, leading to filing of the present appeal, before this Court, as emerged from the records, are as under:

On 27.10.2016, HC Dev Raj, Incharge, Police Post, Nakrod forwarded the Rukka to the police station, Tissa for registration of the FIR, disclosing therein that on 27.10.2016, he, alongwith other police official, was on patrolling and picketing duty. At about 3:35 a.m. the Investigating Officer alongwith other police officials was present at Bhaled Zero Point and put the picketing there. In the meanwhile, a vehicle

bearing No. HP01C□208, being driven by its driver, came there from Beer side. The Investigating Officer had signaled the said vehicle to stop.

Consequently, the driver had stopped the vehicle. The driver, on inquiry, had disclosed his name as Dumnu Ram.

In the meanwhile, the Investigating Officer noticed one person coming there on foot, carrying a bag on his shoulder. On seeing the police party, he got perplexed and tried to run away, upon which, the Investigating Officer had .

given a warning to him to stop, but, the said person had made an attempt to flee away. As such, the Investigating Officer, with the help of other police officials, nabbed him.

4.1 Due to the activities of the said person, the Investigating Officer developed a suspicion, in his mind, thing, in his possession.

r to that he might be having some narcotic substance or illegal 4.2 On inquiry, the said person had disclosed his name as Surat Ram. Thereafter, the Investigating Officer had apprised him about his suspicion that he might be possessing some narcotic substance, in his rucksack. The Investigating Officer had apprised him of his right to get his bag searched, in the presence of Magistrate or Gazetted Officer. The Investigating Officer had also apprised the accused about the provisions of Section 50 of the NDPS Act, upon which, the accused had opted to give his search to the Police. Thereafter, the I.O. prepared the consent memo, which was signed by the independent witness, Dumnu Ram and other police officials. Thereafter, the rucksack, was opened.

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4.3 On opening the same, the rucksack was found containing another blue coloured bag, which, on opening was found to be containing stick shaped black coloured substance. The said substance, on smelling and on the basis of experience, was found to be charas/cannabis. On weighment, the said substance was found to be 3 kg 200 grams. The contraband, so recovered and sealed, was sent to the SFSL for chemical analysis. Other codal formalities were completed. After completion of the investigation and after securing the positive report of FSL, the Police filed the Challan under Section 20 of the NDPS Act, against the accused, before learned trial Court.

5. On the basis of report under Section 173(2) of Cr. P.C. as well as accompanying documents, including the statements of witnesses recorded under Section 161 of Cr.

P.C., learned trial Court found a prima□facie case against the accused, for the commission of offence punishable under Section 20 of the NDPS Act, and the accused has been charge□sheeted accordingly.

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6. When the charge, so framed by learned trial Court, was put to the accused, he did not admit his guilt and claimed to be tried.

7. Since the accused has not pleaded guilty, as such, prosecution has been directed to adduce its evidence.

In order to prove the charge framed against the accused, the prosecution has examined as many as 12 witnesses.

8. After closure of the evidence of prosecution, the entire incriminating evidence appearing against the accused was put to him, in his statement, recorded under Section 313 Cr. P.C.

9. Accused has denied the entire prosecution case and took the defence of false implication.

10. However, the accused has not opted to lead any evidence in his defence.

11. After closure of evidence and after hearing learned Public Prosecutor and learned counsel appearing for the accused, learned trial Court has convicted the accused for the commission of offence, punishable under Section 20 of the NDPS Act and sentenced him, as referred .

above.

12. Feeling aggrieved from the said judgment of conviction and order of sentence, the present appeal has been preferred before this Court on the ground that learned trial Court has convicted the accused, merely on the basis of surmises and conjectures, as the learned trial Court has misread the evidence adduced by the prosecution. The documentary evidence produced on record, has also not been considered by learned trial Court, in right perspective.

13. Highlighting the fact that whole story of the prosecution is based upon the statement of independent witness, PW□ Dumnu Ram and the said witness has not supported the case of the prosecution, when appeared in the witness box, as such, according to the accused, no benefit can be derived by the prosecution from the evidence of PW□ Dumnu Ram.

14. The impugned judgment of conviction has been further assailed on the ground that the learned trial Court has ignored the fact that there was non□compliance of Section 50 of the NDPS Act, as such, according to the .

accused, the entire trial against him stood vitiated.

15. Highlighting the non□compliance of Section 50 of the NDPS Act, a prayer has been made to allow the appeal by setting aside the impugned judgment of conviction and order of sentence and acquitting the accused from the charge framed against him.

16. to Per contra, learned Deputy Advocate General has supported the judgment of conviction and order of sentence on the ground that no finger can be raised on the judgment of conviction and order of sentence, only on the ground that the independent witness, who has been associated by the I.O., when appeared in the witness box, has turned hostile.

17. Heavily relying upon the testimonies of official witnesses, including the Investigating Officer, it has been prayed that the evidence of official witnesses is inspiring confidence and there is no occasion to discard the testimonies of official witnesses, who have withstood the lengthy cross examination. Thus, a prayer has been made to dismiss the appeal.

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18. In order to decide the present appeal, it would be just and proper for this Court to discuss the oral as well as documentary evidence, led by the prosecution, in order to prove the charge, which has been framed against the accused, by the learned trial Court.

19. As stated above, total 12 witnesses have been examined. Out of these 12 witnesses, PW□ is independent witness. PW□, PW□, PW□, PW□ and PW□ are the witnesses to the factum of recovery of contraband, whereas the other witnesses are in the nature of link evidence.

20. PW□ is the Investigating Officer, who, at the relevant time, was posted as Incharge, P.P. Nakrod, in the year 2016. On 27.10.2016, at about 3:10 a.m., he i.e. PW□ alongwith HC Sanjay, C. Rakesh, HHG Manoj, SPO Jamaldeen and SPO Lekh Raj proceeded from P.P. Nakrod, in connection with patrolling and picketing duty. At about 3:35 a.m., when the police party, under his leadership was present at Bhaled Zero Point, he noticed a vehicle bearing No. HP□1C□201, being driven by its driver, coming from Beer side. The said vehicle was signaled to stop for .

checking. When, the vehicle was stopped, only the driver was found in the vehicle. On inquiry, the driver disclosed his name as Dumnu Ram. When I.O. was inquiring from Dumnu Ram, then, he noticed one person, coming on foot, from Kapadi side, carrying a rucksak on his shoulder. On seeing the police party, the said person returned back.

When the said person was directed to stop, he did not stop.

Thereafter, this witness, alongwith other police officials, nabbed him. On inquiry, he has disclosed his name as Surat Ram (accused).

20.1 The I.O. has also apprised the accused that his act of fleeing away from the spot, had developed a suspicion, in his mind that he might be carrying some contraband with him. He was also apprised about his right under Section 50 of the NDPS Act orally as well as in writing that he has the legal right to be searched before the Magistrate or the gazetted officer. The meaning of the Gazetted Officer and Magistrate was explained to the accused. However, the accused has opted to give the search of his rucksack, to the police party, present there. In this .

regard, the I.O. prepared the consent memo Ext. PW□2/A, which was signed by independent witness Dumnu, HC Sanjay as well as by the accused.

20.2 Thereafter, memo with regard to search of Police party was prepared. Apart from the personal search, search of the I.O kit was given to the accused. Thereafter, rucksack, which the accused was carrying, was searched.

On opening the rucksack, one blue coloured carry bag was found. On opening the same, the black coloured substance in the shape of sticks was found therein. On the basis of smell and experience, the said substance was found to be Cannabis/Charas. On weighment, the Charas was found to be 3 kg 200 grams. The Charas, so recovered, was again put in the same blue coloured bag and the same was put inside the rucksack.

20.3 Thereafter, the rucksack was sealed in white piece of cloth/pulinda with six seal impressions of seal 'TD'. The NCB forms in triplicate, Ext. PW□11/A was filled and seal impression 'TD' was embossed on the NCB forms, in triplicate. He filled columns No. 1 to 8 of the NCB forms .

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The sample seal, Ext. PW□2/C was drawn on a separate piece of cloth. The seal impression 'TD', after use was handed over to Dumnu Ram. The contraband, so recovered and sealed was taken into possession. The spot was photographed and video□graphed.

20.4 Thereafter, he has prepared Rukka, Ext. PW□11/B and the same was forwarded to Police Station, Tissa, for registration of FIR, through Constable Rakesh Kumar.

The copy of the Rukka was also sent to SDPO Dalhousie, through HHG Manoj. Thereafter, this witness had prepared the spot map. He had recorded the statements of witnesses.

The accused was arrested, vide memo Ext. PW□2/E. The accused was got medico□legally examined at CHC Tissa.

Thereafter, he went to Police Station, Tissa, where Constable Rakesh Kumar met him with the case file.

20.5 Thereafter, this witness had filled the FIR number on the documents, prepared on the spot.

Thereafter, the case property for re□sealing was presented before SHO/Inspector, Dharam Singh. Consequently, the case property was re□sealed, vide memo, Ext. PW□8/C. .

Thereafter, the case property, alongwith documents, was handed over to MHC. After some time, the SHO again handed over the case property alongwith the accused, to be taken to the Chief Judicial Magistrate, Chamba, for conducting proceedings under Section 52□A of the NDPS Act.

20.6 to Learned Chief Judicial Magistrate, Chamba prepared the certificate of correctness, Ext. PW□ 11/E, alongwith the inventory Ext. PW□1/F. 20.7. This witness has duly identified the case property, which was shown to him in the Court, as sealed parcel, Ext. P□, two small parcels, Exts. P□2 and P□3.

20.8 In cross□examination, this witness has deposed that he was not having any prior information regarding the accused possessing the contraband. He has categorically stated that he had not asked the driver the reason of his moving during odd hours of night. PW□ Dumnu Ram was not searched. No street light was there on the spot, however, the police party was carrying the home lights with them. The documents of the vehicle were stated to be .

checked with the help of home lights, but again stated that he did not find time to check the documents, as the accused had made attempt to flee away. Nakrod market is stated to be 2 km away from the spot. However, he has feigned his ignorance about the fact whether there is PHC at Nakrod market or not. The distance of Nakrod market and the Police Post, Nakrod is stated to be 2□ 1/2 kms. He has also feigned his ignorance about the fact whether the Doctor used to be there at PHC round the clock.

20.9. He has denied that there was office of SDO, PWD at Nakrod. The office of Parvatiya Gramin Bank is stated to be 100 meters away from the Nakrod market. This witness has given the option to the accused of his personal search, as well as search of his bag. This witness took about 10 minutes to prepare the consent memo and the proceedings including weighment of contraband were conducted by him, with the help of home lights and torch.

Accused was also searched for his 'Jamatalashi'. He has given vague replies that most of the documents were prepared by him and some of the documents were prepared .

by other police officials, under his dictation. However, according to him, he has not prepared the re□ seal memo.

However, he could not tell about the documents, which were prepared by the other police officials, under his dictation.

20.10.

As per this witness, the police party remained at the spot for 3□4 hours. He could not disclose how Constable Rakesh Kumar had gone to Police Station alongwith Rukka. He could not disclose who wrote mark 'DB', encircled in red ink, on Ext. PW□2/A. Rest, he has denied the entire suggestions, which were put to him, by learned counsel appearing for the accused.

21. PW□ Dumnu Ram has been examined as independent witness by prosecution. However, when appeared in the witness box, he has not only resiled from his earlier statement, made before the Police, under Section 161 Cr.P.C., but, narrated a different story, by disclosing that one policeman had called him at about 10:30 a.m. when he was present, at his shop and directed him to reach at

P.P. Nakrod. Thereafter, this witness had switched off his .

mobile and gone to sleep. At about 11:30 p.m., the police party had approached him and asked to accompany the police party to Police Post, Nakrod. In Police Post, Nakrod, he was directed to sign some documents. When he had inquired about the documents, the Police had disclosed him that it is just a formality.

21.1 to Since, this witness has resiled from his earlier statement to the Police, as such, on the request of learned Public Prosecutor, learned trial Court has declared this witness as hostile and learned Public Prosecutor has been permitted to cross-examine this witness.

21.2 Despite of the best efforts made by learned Public Prosecutor, nothing material could be elicited from this witness, except his admission, qua his signatures over the documents, Ext. PW□/A, Ext. PW□/B, Ext. PW□/C, Ext. PW□/D and Ext. PW□/E. This witness has further deposed that he did not sign the blank papers, but put the signatures over the above documents, on the direction of the Police, who had told him that it is just a formality. No complaint, in this regard, was made by this witness, to any .

higher authority.

22. PW□ H.C. Sanjay Kumar was also the member of the police party, which has recovered contraband, in this case. This witness has supported the version of I.O. on all the material aspects of the case. This witness has clicked the photographs of the spot, Ext. PW□/F and conducted the videography of the spot, vide memo Ext. PW□/F1. He also deposed that Constable Rakesh Kumar met I.O.

outside the Police Station, Tissa alongwith case file, which he had handed over to HC Dev Raj. Thereafter, HC Dev Raj filled the FIR number on the documents prepared on the spot and recorded the statement of C. Rakesh Kumar. He also recorded the statement of Reader to SDPO, Dalhousie, MHC, P.S. Tissa and HHC Subhash Kumar. Like I.O., he had identified the case property, which has been shown to him by learned Public Prosecutor.

22.1 In the cross-examination, this witness has deposed that police party left to Police Post, Nakrod at about 3:10 a.m. The distance of Police Post from the spot is stated to be ½ km and they took 15 minutes to reach .

there, on foot. At the spot, picketing was laid. No residences were stated to be there at Bhaled Zero Point. No provision of light was stated to be there at the spot. The accused was stated to be noticed at a distance of about 10 meters and was nabbed at a distance of 12 to 15 meters. All the police officials were stated to be in uniform, except SPOs. The documents of the car were checked with the help of home light. No personal search of the accused was conducted, but again stated that after his arrest, jamatalashi was conducted. He could not disclose about the fact that the memo was prepared by the I.O.

22.2 He has further deposed that portion 'A' to 'A' of the consent memo, Ext. PW□2/C was written in one go, but again stated that FIR was written afterward. The distance between the spot and Police Station, Tissa is stated to be around 18 kms.

23. PW□3 C. Rakesh Kumar has also supported the version of PW□1 on all the material aspects of the case, including the fact that the I.O. prepared the Rukka and handed it over to this witness, with a direction to submit .

the same with Police Station, Tissa for registration of FIR.

The Rukka was submitted to the Police Station, Tissa, on the basis of which, FIR was registered and after registration of the FIR, the case file was prepared and the same was given to this witness by MHC with a direction to hand over the same to I.O.

24. to The I.O. alongwith police party and accused met this witness in front of Police Station, Tissa. This witness had handed over the file to I.O. The I.O. thereafter, filled the FIR number on the documents, prepared by him on the spot and recorded his statement.

25. In the cross□examination, he has deposed that police party was not having any prior information regarding the accused possessing the contraband. Village Kudi is stated to be at a distance of about 1½ km from the spot.

The distance between PHC, Nakrod and the spot is stated to be 1 km. He has feigned his ignorance about the fact whether any police official was sent to Police Post, Nakrod in search of independent witness. The vehicle, which was driven by PW□, reached the spot after 10 minutes from the .

time when the police put picketing. The contraband was weighed four times. Rest, he has denied all the suggestions, which were put to him by learned counsel for the accused.

26. The other witnesses are of link evidence and formal witnesses. PW□2, Constable Raj Kumar had entered the rapat No. 12, Ext. PW□2/A and rapat No. 13, Ext. PW□12/B on 27.10.2016 and also issued CCTNS certificate, Ext. PW□2/C regarding FIR, Ext. PW□8/A.

27. PW□5 HC Deep Kumar was posted as MHC, Police Station, Tissa, at the relevant time. On 27.10.2016, as per the Mallkhana register, the case property pertaining to the present case was deposited in Mallkhana by Inspector/SHO Dharam Singh with MHC Ravinder Kumar.

On 28.10.2016, this witness has sent the case property of this case to FSL Junga, vide RC No. 136/16, through HHC Subhash Chand. On 28.10.2016, the case property of the case was received at Police Station, Tissa through HHC Subhash Chand after chemical analysis. On 6.12.2016, this witness has sent the case property to the Court of learned CJM, Chamba. On the next day i.e. on 7.12.2016, HC .

Sanjay Kumar deposited the case property alongwith two pulindas, containing 25□25 grams charas, sealed with three seals of CJM, Chamba. He had entered the same in the relevant register.

28. PW□6 is Constable Sandeep Kumar, No. 469, who was posted as MC at P.O. Nakrod. On 27.10.2016, he entered the rapat regarding departure of the police party, vide Ext. PW□6/A.

29. PW□7 Constable Dalip Kumar was posted as Reader to the Dy.S.P. On 27.10.2016, the then Dy.S.P. Sh. Sagar Chand handed over the copy of Rukka Ext. PW□7/A, after making his endorsement. This witness had entered the same in the relevant register, at serial No. 18.

On 29.10.2016, the then Dy.S.P. Sh. Sagar Chand handed over the special report, Ext. PW□7/B to this witness after making endorsement and he entered the same in the relevant register. He has proved the abstract of register as Ext. PW□7/C and Ext. PW□7/D.

30. PW□8 HC Ravinder Kumar was officiating MHC at Police Station, Tissa. On 27.10.2016, Rukka was .

received at Police Station, Tissa through Constable Rakesh Kumar, upon which he registered the FIR Ext. PW□8/A and made an endorsement thereon. After preparing the case file, he handed over the same to Constable Rakesh Kumar with a direction to hand over the same to the I.O. on the spot. On the same date, at about 11:00 a.m., HC Dev Raj came to Police Station alongwith other police officials and accused and handed over one seal pullinda, sealed with 6 seal impressions of seal 'TD' for resealing alongwith NCB forms in triplicate, recovery memo and seizure memo, sample seal, case file and jamatalashi articles of the accused to SHO/Inspector Dharam Singh. Resealing process was conducted by sealing the said pullinda with the seal impression 'TE'. Sample seal Ext. PW□8/B was drawn on the separate piece of cloth. Seal impression 'TE' was embossed on the NCB form in triplicate. Seal impression 'TE', after use was handed over to this witness, which he had brought with him, when he had appeared in witness box on 7.6.2018. Re□seal memo Ext. PW□8/C was prepared and thereafter, the case property was deposited in .

mallkhana. On the same date, Constable Naresh Kumar deposited the case property, after obtaining the certificate of correctness under Section 52□A of NDPS Act. He had duly identified the case property, which has been shown to him in the Court.

31. In the cross□examination, he deposed that the Rukka was received at Police Station, Tissa at about 8:00 a.m. This witness took about 40 minutes to lodge the FIR and prepare the case file. Re□seal memo Ext. PW□8/A was prepared by Inspector/SHO Dharam Singh between 11:00 and 11:30 a.m. He has admitted that his statement regarding dealing with the case property of this case was not recorded. He has denied that he has not made any entry in the Malkhana register.

32. PW□9 is Inspector/SHO Dharam Singh. He has deposed about the manner, in which, the case property was re□sealed by him.

33. PW□o is LC Kavita Kumari, who entered rapat No. No. 17, Ext. PW□o/A regarding sending of the case .

property to FSL, Junga. She has also entered rapat No. 18, dated 28.11.2016, Ext. PW□o/B with regard to receipt of the case property alongwith result from SFSL, Junga.

34. Learned trial Court has convicted the accused on the ground that the I.O. has complied with Section 50 of the NDPS Act and rejected the submissions of learned defence counsel, for non□ compliance of Section 42 of the NDPS Act.

35. So far as the alleged non□ compliance of Section 50 of the NDPS Act is concerned, it is no longer res□integra that Section 50 of the NDPS Act is applicable only in the case, where contraband is recovered from the personal search of the accused. As per deposition of the I.O., when the accused was nabbed, he was apprised about the suspicion, which the I.O had developed in his mind, due to activities of the accused and also apprised him that the accused might be carrying some contraband or suspicious article with him. Thereafter, the I.O. had given the options as per Section 50 of the NDPS Act orally as well as in writing and the accused had given the consent, vide memo, .

Ext. PW□2/A. It is the further case of the Investigating Officer that after obtaining consent of the accused, vide memo Ext. PW□2/A, the police party had given their personal search to the accused, vide memo Ext. PW□2/B. Interestingly, the I.O. has deposed that the rucksack having two strings, belonging to the accused, was searched and on opening the same, the contraband was allegedly found in it. It is not the case of the prosecution that after obtaining consent, vide memo Ext. PW□2/A, personal search of the accused was conducted.

36. In such situation, there is no hesitation for this Court to hold that the alleged recovery has not been effected from the personal search of the accused, but, the same was allegedly found from the rucksack, which, the accused was allegedly carrying.

37. Question regarding the applicability of the provisions of Section 50 arose before the Hon'ble Apex Court in a case titled as, State of H.P. vs. Pawan Kumar, reported in (2005) 4 Supreme Court Cases 350. The relevant paragraphs of the judgment are reproduced as .

under:□"10.We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the Section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad commonsense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilized society. Therefore, the most appropriate meaning of the word "person" appears to be "the body of a human being as presented to public view usually with its appropriate coverings and clothings". In a civilized society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include

footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothings and also footwear.

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body .

of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.

(self-emphasis supplied)

38. Similar view has also been taken by Hon'ble Apex Court in a case titled as, State of Punjab vs. Baljinder Singh & Anr, reported in 2019 (14) SCALE 226. The relevant paragraph of the judgment is reproduced as under: "15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does .

not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in Madan Lal vs. State of H.P. [(2003) 7 SCC 465]. The Court has observed: (SCC p. 471, para

16) "16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see Kalema Tumba v. State of Maharashtra [(1999) 8 SCC 257], State of Punjab vs. Baldev Singh [(1999) 6 SCC 172] and Gurbax Singh vs. State of Haryana [(2001) 3 SCC 28]). The language of Section 50 is

implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case¹. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance."

39. If the facts and circumstances of the present case are seen, in view of the decisions of the Hon'ble Supreme Court, as referred above, this Court has no hesitation to hold that the provisions of Section 50 of the NDPS Act are not applicable in the present case.

40. So far as non-compliance of Section 42 of the NDPS Act is concerned, there is nothing on the file, even to .

probabilize that the Police party present on the spot, was having any prior information regarding indulgence of the accused in the business/transportation of the contraband.

41. The I.O. has specifically stated that at about 3:10 a.m., on 27.10.2016, he alongwith other police officials had proceeded from P.P. Nakrod in connection with picketing and patrolling duty. The same fact has been found mentioned in the departure report, Ext. PW-6/A. From the documentary evidence as well as cross-examination of the official witnesses, there is nothing on record even to probabilize the said plea that the police was having any prior information, about the indulgence of the accused in transportation/business of charas.

42. If the facts and circumstances of the case is seen in light of the decision of Hon'ble Supreme Court in State of Punjab versus Baldev Singh, reported in (1999) 6 Supreme Court Cases 172, then there is no legal hesitation for this Court to hold that the alleged recovery was from a public place. Thus, the provisions of Section 43 of the NDPS Act are applicable in the present case, not the .

provisions of Section 42 of the NDPS Act.

"10. The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of

any Narcotic Drug or Psychotropic Substances in a public place where such possession appears to him to be unlawful."

43. The solitary independent witness allegedly associated in the investigation of the case by the I.O. has turned hostile. Despite the best efforts made by learned Public Prosecutor, nothing material could be elicited from the cross-examination of this witness.

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44. Learned trial Court has convicted the accused in this case, relying upon the testimonies of the official witnesses. There is no legal embargo that the conviction cannot be based upon the testimonies of official witnesses. The law treats the official witness at par with the independent witness. However, before accepting the testimony of the official witness to convict the person for the offence punishable under the NDPS Act, it is the bounden duty of the Court to see whether the testimony of the official witness is confidence inspiring or having the ring of truth in it.

45. The stringent punishment has been provided for the offences punishable under NDPS Act. 'Stringent the punishment, Stricter the proof' is the theory propounded by the Hon'ble Supreme Court in Noor Aga versus State of Punjab, relevant portion of the judgment is reproduced as under:

"56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of .

minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. "proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provision of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of "wider civilisation". The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Panjab v. Baldev Singh 24 it was stated: (SCC p. 199, para 28) "28.... It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a state are scrupulously followed."

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence."

46. As held above, when stringent punishment has been provided, then the prosecution is duty bound to .

prove its case beyond the shadow of reasonable doubt.

Same principle is applicable where the alleged independent witness has turned hostile or has failed to support the prosecution case.

47. Merely, if the provisions of Section 42 or Section 50 of the NDPS Act are not held to be applicable or have been complied with, does not mean that the case of the prosecution is liable to be accepted ipso facto. The prosecution has to prove its case by leading cogent evidence, demonstrating that the things were happened at the spot, as deposed by the official witnesses. If the defence is able to create doubt(s) in the prosecution case and it affects the credibility of the testimonies of the official witnesses, then, the benefit of the same would be liable to be extended to the accused.

48. In this case, the provisions of Section 50 of the NDPS Act are not applicable, as the alleged recovery of contraband was not made from personal search of the accused, but, from the rucksack, which he was allegedly carrying at the time when he was allegedly nabbed by the .

I.O.

49. The I.O., no doubt, has taken an over cautious approach to comply with the provisions of Section 50 of the NDPS Act by preparing the consent memo, Ext.PW□2/A. It is the specific case of the I.O. /PW□1 that the activities of the accused had developed suspicion in his mind that he might be carrying "some contraband or suspicious articles with him". Hence, he has prepared the consent memo, Ext. PW□2/A. This document contains the facts which are contrary to the oral deposition made on oath by the I.O. This document is allegedly prepared by the I.O. before search of the rucksack of accused.

50. In this document, the I.O had expressed his suspicion in the following words;

"I have suspicion that you are having narcotic substance charas/cannabis in your possession".

Similarly, in the title of this document, the I.O. has mentioned the following lines:

"P.S. Tissa, Case FIR No. 121/2016, dated 27.10.2016, under Section 20 of the NDPS Act, P.S. Tissa, District Chamba"

Except the FIR No. 121, the other contents of the title were written by the I.O. in one go.

51. Learned Deputy Advocate General appearing for the State could not satisfy the conscience of this Court as to how the I.O. came to know that the accused was possessing contraband, which would only fall within the definition of Section 20 of the NDPS Act. Admittedly, the consent memo was prepared prior to the search of the rucksack of the accused. The specific contraband "charas/cannabis" is not only the contraband, which attracts the provisions of the NDPS Act.

52. Even otherwise, mentioning the section "20 of the NDPS Act" in Ext. PW□2/A is the fact, which destroys the case of the prosecution beyond any repair and this Court is constrained to hold that things have not happened at the spot, in the manner, in which the same have been stated to be happened, by the prosecution witnesses.

53. Merely, if Section 50 of the NDPS Act is not held to be applicable, in the present case, does not mean .

that the documents, which were prepared by the I.O. and has been relied upon the prosecution, cannot be looked into. This is the document, which demonstrates that the I.O. as well as his associates have made a futile attempt to conceal the material facts from the scrutiny of the Court.

54. to At the cost of repetition, it is the case of the I.O. that he was not having any prior information regarding the indulgence of the accused in the transportation/business of the charas, then how these words have found mentioned in the document, Ext. PW□2/A.

55. The situation would have been otherwise had the I.O. not mentioned the words "charas/cannabis". The futile attempt of the I.O. to improve his case, while appearing in the witness box by deposing that he has apprised his suspicion qua the fact that accused might be carrying some contraband or suspicious articles, is the fact which creates doubt on his statement.

56. Another fact, which assumes significance in this case, is about the manner, in which, the contraband was allegedly weighed by the I.O. at the spot. After giving the alleged options, vide memo, Ext. PW□2/A, according to the I.O., he and his associates had given their personal search to the accused, vide memo Ext. PW□2/B. This document again contains the description of the case, which will be registered against the accused, after alleged recovery of the contraband.

57. The perusal of these two documents, Ext. PW□2/A and Ext. PW□2/B shows that the I.O. in anticipation has mentioned the sections, which would attract against the accused in this case, even before the search of the rucksack or before the recovery of the contraband of the charas.

58. In the document, Ext. PW□2/B the contents of I.O. kit have been stated to be the weighing scale, weights of 50 grams to 1 kg and other articles. When the I.O. was having the weight of only 50 grams to 1 kg in the I.O. kit, then, how the contraband weighing 3 kg 200 .

grams was weighed, is a question, which has remained un□explained in this case.

59. This Court also fails to comprehend how the contraband allegedly weighing 3 kg 200 grams could be weighed with the weights of 50 grams to 1 kg, as it has weighed by him only once.

r to specifically been deposed by the I.O. that contraband was

60. Another point which has been highlighted by learned counsel for the appellant/accused in this case is that the contraband was recovered from pithu bag (rucksack). The same version has been given by PW□2 and PW□3, whereas in the report of FSL, Ext. P□Z, the following description has been mentioned in column No. 10 of the report:

"10. On opening the sealed cloth parcel, the exhibit stated as charas, in the form of sticks & sticks bundles in blue colored carry bag, was found in black & multicolored cloth bag. On weighing the exhibit stated as charas on electronic balance, the weight was found to be:

Total weight of parcel = 3.320 kg Weight of Carry bag, cloth bag & parcel cloth = 0.258 kg Weight of exhibit = 3. 062 kg"

61. The description as mentioned in para□10 of the .

FSL report is contrary to the description given by the I.O.

as well as PWs 2 and 3. There is much difference between the rucksack (pithu) and multi coloured cloth bag. This fact is sufficient to draw the inference that the true picture has been withheld from the scrutiny of the Court by the I.O., for the reasons best known to him.

62. The I.O. allegedly filled the NCB form, Ext. PW□11/A. Interestingly, in column No. 1, the FIR number seems to be written in one go. Whereas, in other documents, i.e. Ext. PW□2/A, Ext. PW□2/B, Ext. PW□2/D and Ext. PW□2/E, the FIR No. 121 of 2016 has been written in red ink. From this fact, it can be stated that the NCB form was not filled by the I.O. in the manner, as deposed by him. The NCB form, in NDPS cases, is an important and vital piece of evidence. When the same comes under the clouds of suspicion, the benefit of the same would also go to the accused.

63. In view of the discussion made above, this Court is of the view that the learned trial Court has fallen .

into error by relying upon the statements of official witnesses, which do not inspire confidence and no ring of truth has been found in those statements, by this Court, in judicial scrutiny. Moreover, the case of the prosecution is shrouded under the cloud of mystery, as detailed above.

64. Consequently, r to the judgment of conviction passed by learned trial Court, in Session Trial No. 06/2017, does not sustain in the judicial scrutiny by this Court and the same is set aside.

65. The accused is acquitted from the charge framed against him.

66. The accused is undergoing sentence and presently lodged in jail. He is ordered to be released forthwith, if not, required in any other case.

67. The Registry is directed to prepare the release warrant.

68. Records be sent back. The pending application(s), if any, are also disposed of.

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(Tarlok Singh Chauhan) Judge (Virender Singh) Judge 13th January, 2023 Kalpana r
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