

Chatter Singh vs State Of Himachal Pradesh on 20 October, 2023

Author: Tarlok Singh Chauhan

Bench: Tarlok Singh Chauhan

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA Criminal Appeal No.604 of 2019.

Reserved on : 16.10.2023.

Date of decision: 20.10.2023.

Chatter Singh

.....Appellant.

Versus

State of Himachal Pradesh
Coram

.....Respondent.

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge. The Hon'ble Mr. Justice Ranjan Sharma, Judge.

Whether approved for reporting?1 No For the Appellant : Mr. N.S.Chandel, Senior Advocate with Mr. Pranav Sharma and Mr. Kshitij Thakur, Advocates.

For the Respondent :

Mr. I.N. Mehta, Senior Additional Advocate General with Ms. Sharmila Patial, Additional Advocate General and Mr. J.S. Guleria, Deputy Advocate General.

Inspector Inder Singh ANTF, Kullu, in person.

Tarlok Singh Chauhan, Judge

The appellant has been convicted and sentenced by the learned Special Judge under Section 20 of the Narcotic Drugs and Whether the reporters of the local papers may be allowed to see the Judgment?Yes Psychotropic Substances Act (for short 'NDPS Act') and aggrieved thereby has filed the instant appeal.

2. The case of the prosecution is that on 27.05.2016, a patrolling party comprising of SI/SHO Inder Singh along with ASI Naresh, HHC Sunil, HHC Karamjeet and HHC Sanjay Kumar left the police

station in civil dress and in a private car as per daily diary entry Ext. PW-10/A. At 9.45 p.m., when the police party reached at New Bus-stand, Nagrota Bagwan, they noticed a boy standing on the left side of bus stand adjoining to last pillar, wearing blue coloured jeans and white coloured T-shirt. The said boy was carrying a yellow and green carry bag and on seeing the police party, he went upward the stairs adjoining to 'Sulbh Souchalya'. This aroused suspicion in the mind of the police party that the person may be carrying stolen articles and was accordingly nabbed by them. At the same time, Shri Ajay Supehia, Pradhan, Gram Panchayat, Ghorab and Gagan Singh came there. Both these persons were associated during investigation and in their presence the boy was asked about his identity on which he disclosed his name as Chatter Singh and also furnished his address. Thereafter, the bag being carried by the appellant was opened and checked in presence of Ajay Supehia and Gagan Singh and on opening, it was found that there was another carry bag of white-green colour in the carry bag being carried by the appellant over which 'Pranav Collection' was written. The carry bag was tied with a knot. On opening and checking, it was found containing some sticks and 'chapati' shaped black coloured substance. Some of the sticks were also found to be wrapped in a plastic cover. On checking after smelling and on the basis of the experience, it was found to be 'charas'. The recovered 'charas' was weighed with an electronic weighing machine and it was found to be 2 Kg 516 grams. The recovered 'charas' was again packed in the same carry bag and the bag was locked with zip. Thereafter, the bag was sealed in a cloth parcel by affixing 7 seals of seal impression 'M'. The specimen of seal impression 'M' was separately taken on a separate piece of cloth Ext. PW-2/A. NCB forms in triplicate were also filled up by PW-11, one of which was Ext. PW-11/A. Seal after its use was handed over to witness Ajay Supehia. The aforesaid case property was taken into possession vide memo Ext. PW-1/A and got signed by independent witnesses as well as appellant. The bulk 'charas' parcel and specimen seal impression Ext. PW-2/A were also got signed by the witnesses and the appellant. The appellant was found in active and conscious possession of 'charas'. Since, an offence under Section 20 of the Act was found to have been committed by the appellant, therefore, ruqa Ext. PW-11/B was written and sent by the I.O. to the police station, Nagrota Bagwan for registration of the case through HHC Karamjeet Singh (PW-1). Photographs of the spot proceedings were clicked vide Ext. PW-8/A-1 to Ext. PW-8/A-7. After spot inspection, spot map Ext. PW-11/C was prepared by the I.O. Thereafter, the police party along with appellant and case property left for the police station where they reached at 12.15 midnight. The case property was deposited by the I.O. with MHC. PW-11 received the case file in the police station itself. The statements of the witnesses were also recorded by the I.O. in the police stations. On 28.05.2016, the I.O. took the aforesaid case property from MHC and moved an application Ext. PW-11/D under Section 52-A of the Act before the learned Judicial Magistrate 1st Class, Kangra. The learned Magistrate issued correctness certificate Ext. PW-11/E and the photographs of these proceedings were taken vide Ext. PW-8/A-9 to Ext. PW-8/A-11 and he thereafter handed over the case file to MHC. The case property was sent to FSL, Junga and obtained the report. After completion of the investigation, case file was handed over to SHO, police station, Nagrota Bagwan, who prepared the challan and presented the same before the learned Special Judge for trial.

3. Finding a prima facie case, charge against the appellant was framed under Section 20 of the Act, to which he pleaded not guilty and claimed to be tried.

4. The prosecution examined 15 witnesses in all. After closure of the prosecution evidence, the appellant was examined under Section 313 Cr.P.C. in which he denied the prosecution case in toto and pleaded himself to be not guilty. He claimed that the witnesses had falsely deposed against him and a false case had been prepared against him. An opportunity was granted to the appellant to lead evidence in defence and he accordingly examined 6 witnesses in his defence.

5. The learned Special Judge after evaluating the evidence convicted the appellant and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- under Section 20(b)(ii)(C) of the Act and in default of payment of fine, the appellant was directed to undergo simple imprisonment for one year. The period during which the appellant had been in judicial/police custody, if any, was ordered to be set off under Section 428 Cr.P.C. against substantive sentence only.

6. PW-1, HHC Karamjeet Singh, material witness, stated that on 27.05.2016, he along with SHO, ASI Naresh, HHC Sunil and HHC Sanjay Kumar had gone on patrolling in a private car to Nagrota Bagwan bazar, Badoh road and 53 miles and reached at Nagrota Bagwan at 8.15 p.m. Thereafter, they had gone to Hatwas from Nagrota and at about 9.45 p.m., they came back through 'Chor Nala'. When they reached near bus-stand, Nagrota Bagwan, they noticed that one person was standing beside pillar near the toilet. On seeing them, the person started going up the stairs and he was then apprehended on the basis of suspicion. By that time, Ajay Supehia (PW-2) and one Gagan Singh also reached there. On inquiry, the person disclosed his name to be Chatter Singh, resident of Dendehli. He then identified the appellant in the court. He further stated that the appellant was carrying one bag in his hand and when bag Ex. P-1 was opened, it was found to be containing another bag and on opening of the carry bag, it was found containing 'charas' Ext. P-3 in the form of wicks and 'chapaties' and when weighed on the weighing scale, which was with the SHO in the I.O. kit, it was found to be 2 kg 516 grams. The 'charas' was again put into the same carry bag and the same was sealed in a cloth parcel by affixing seal impression of 'M'. Sample of the seal 'M' was also taken separately on a piece of cloth and the same after use was handed over to Ajay Supehia. NCB forms in triplicate were filled up by the SHO at the spot. 'Charas' and NCB forms etc. were taken into possession vide memo Ext. PW-1/A which was duly signed by Ajay Supehia, Gagan Singh and also by the appellant. He further stated that SHO prepared ruqa and sent it to police station, Nagrota Bagwan through him which was handed over by him to MHC, who in turn, prepared the case file and handed over it to him for taking to the spot and he accordingly brought the case file to the spot and handed over the same to the SHO for further necessary action. In his cross-examination, he admitted that he did not know the number of the vehicle in which they had left from the police station, but stated that the vehicle was a private vehicle of the SHO himself. He further deposed that after proceeding from the police station, the police party had stopped at bazar for about 2-3 minutes and from bazar, they had gone to Badoh road, but did not remember the time taken to reach that road. From Badoh road, the police party went to 53 miles, but could not remember the time taken to reach there and the time they actually reached at 53 miles. He also did not remember the timings when they started back from 53 miles towards Nagrota, but stated that they had reached at bus-stand, Nagrota Bagwan at about 9.45 p.m. The witness further stated that he alone was in civil dress, whereas, the other police officials were in uniform. He further deposed that at the bus-stand, there were only two civilians present at that time. The moment they reached Nagrota bus stand, they

spotted the appellant and he started goring towards stairs and the SHO immediately went towards him and they too followed him and then the SHO grabbed the appellant with his both hands. They, in turn, surrounded the appellant. He admitted that written proceedings had been conducted by the SHO and ASI Naresh Kumar. He also stated that ruqa was handed over to him by the SHO at about 11.25 p.m. and he reached the police station at about 11.30 p.m. and handed over ruqa to MHC. He had gone on foot. He further deposed that he had not gone back to the spot from the police station because SHO at that time had reached in the police station and there he handed over the case file to SHO. He feigned ignorance regarding the persons accompanying the SHO to the police station. He further deposed that SHO straightaway had gone to his room where he handed over the case file to him.

7. PW-2 Ajay Supehia was the Pradhan of Gram Panchayat, Dhorav. He stated that he along with his brother was present in the police station on 27.05.2016 during night as they had come to receive a relative at about 9-9.15 p.m. The police party came in a private vehicle and the police officials were in civil dress. The police had surrounded one boy and they (i.e. Ajay Supehia and Gagan Singh) also went there. The boy was having a bag in his hand which was opened by the police in his presence and on opening, it was found containing 'charas' in the form of wicks and 'chapati' type. It was weighed and found to be more than 2.500 kg. The police had put 'charas' back in the bag and it was sealed in a cloth parcel. The police had prepared 2-3 papers there at the spot and took into possession 'charas' vide memo Ext. PW-1/A on which he and Gagan signed as witnesses. He did not know whether the appellant had signed on the memo or not. He stated that the photographs of the spot had been taken and in the photographs Mark A3 and Mark A5, he was also visible. He further deposed that the appellant was also visible in the photographs. He identified the bag Ext. P-1 and 'charas' Ext. P-3 contained therein, cloth parcel Ext. P-4. He also deposed that even though the seal after sealing the case property had been handed over to him but he had lost the same. Again, stated that it was taken back by the police from him after 10-15 days. On being cross-examined, he stated that he had gone to the police station himself as he was already standing at the bus-stand when the police had reached there. The bag was searched at about 9-9.15 p.m., but he did not remember the name of the official, who had searched the bag. However, the witness stated that in his presence no police official had given search to the appellant. The appellant had not been physically apprehended by any police official, but they surrounded him in a circle. The proceedings had been conducted by the police officials on the bench near the toilet. The written work was being done by one police official, but he did not remember his name. He admitted that he was a witness in 5-10 cases but denied the suggestion that he was a stock witness of police in 25-30 cases. He further denied the suggestion that he was a witness of the police in ND&PS cases only. Volunteered to state that he was witness in some other cases but was not in a position to say as to in how many ND&PS and other cases he had been a witness and spot witness. He further denied the suggestion that in all those cases, he along with Gagan Singh had been cited as a witness. He admitted that he was a contractor besides being President of Gram Panchayat, however, denied the suggestion that he was a contractor for the construction of police station, Nagrota Bagwan and further denied the suggestion that in all those case which had been investigated by SHO Inder Singh (PW-11) he was a witness.

8. PW-3 HC Jeewan Singh stated that on 28.05.2016, he was having additional charge of MHC, police station, Nagrota Bagwan. He stated that during midnight SHO had deposited one cloth parcel

containing 2.516 kgs 'charas' along with sample seal 'M', NCB form in triplicate regarding which he made an entry in the 'malkhana' register at Sr. No. 79 and its abstract was Ext. PW-3/A. He also stated that the case property was demanded from him by the SHO on 28.05.2016 at about 2.30 p.m. for initiating proceedings under Section 52-A of the Act and he had handed over the case property in the same condition. He also stated that the case property was again deposited with him on the same day at around 7.30 p.m. and an entry to this effect was made in column No.5 in Ext PW-3/A. He further deposed that on 29.05.2016, he had sent the case property along with two sample seal, NCB forms in triplicate, seizure memo, copy of FIR and docket through HHC Sohan Lal to SFSL, Junga, for chemical analysis vide RC No. 76/21 Ext. PW-3/B and HHC Sohan Lal had returned the RC to him after depositing the case property in SFSL, Junga. He further stated that the case property was received in the police station, Nagrota Bagwan on 10.06.2016 along with result through HHC Surinder Singh No. 856. In cross-examination, this witness stated that on 27.05.2016 five officials had gone on patrol duty in a private vehicle from the police station at about 4.15 p.m., but he did not know, who was the owner thereof. He admitted that Ajay Supehia being Pradhan of the Panchayat was a regular visitor to the police station and knew all the persons posted in the police station. He did not remember whether the construction work was going on adjacent to the police station, Nagrota Bagwan. But volunteered to state that some tiling work had recently been done in the police station quarters which had been executed by Pradhan Ajay Supehia, who was a contractor by profession. He further denied the suggestion that in all ND&PS cases which were registered during the tenure of SHO Inder Singh, Ajay Supehia remained witness in all those cases.

9. PW-4 HHC Sohan Lal and PW-7 HHC Surinder Kumar have supported the version of PW-3 HC Jeewan Singh.

10. PW-5 HHC Vipin Kumar proved on record receipt of special report under Section 57 of the Act which he had received at about 9.30 a.m. on 30.05.2016 through ASI Naresh Kumar for being delivered to SDPO, Kangra, Sh. Surender Sharma which he duly handed over at about 10.05 a.m.

11. PW6 LHC Raksha Devi, Reader to SDPO, Kangra, made relevant entry of the special report.

12. PW-8 Raman Kumar, photographer, developed the photographs from the memory card on 13.06.2016 and claimed the photographs Ext. PW-8/A-1 to Ext. PW-8/A-8, Ext. PW-8/A-9 to Ext. PW-8/A-11 to be the same which he had developed and certificate to this effect was stated to be Ext. PW-8/B. In cross-examination, he admitted that he had not brought the records pertaining to developing of aforesaid photographs.

13. PW-9 HC Satish Kumar stated that on 07.06.2016, PW-7 Surinder Singh No. 856 had been deputed to SFSL, Junga to deposit the case property of another case and on 10.06.2016, he had brought the case property of the case FIR No. 69/16 and the same had been deposited in the 'malkhana' and an entry to this effect was made in register No.19 at column No.5 of Ext.PW-9/A. In cross-examination, he denied the suggestion that no case property had been deposited with him by PW-7 HHC Surinder Kumar.

14. PW-10 Constable Parveen Dutt stated that he was posted as CCTNS operator in police station, Nagrota Bagwan and he had made entries in the daily station diary Nos.025 dated 27.05.2016, 003, 028 and 037 dated 28.05.2016 and 040 dated 10.06.2016 which were Ext. PW-10/A to Ext. PW-1/E. In his cross- examination, he admitted that on 27.05.2016 approximately 60-70 entries had been made in the daily station diary in the computer system. He denied that he had not made any entry pertaining to the instant case.

15. PW-12 ASI Ashok Rana stated that on 27.05.2016 at about 9.45 p.m., ruqa Ext. PW-11/B was received through HHC Karamjeet for registration of case on the basis of which FIR No. 69/16 Ext. PW-12/A was registered at police station, Nagrota Bagwan, which bore his signatures. An endorsement to this effect was also made on the ruqa and thereafter he prepared the case file and handed over the same to HHC Karamjeet in order to hand over the same to the I.O. He again stated that ruqa was received at 11.35 p.m. On being cross-examined, he stated that time of departure from the spot had been mentioned at 11.25 p.m.

16. The Investigating Officer PW-11 S.I. Inder Singh has deposed on the same lines as set out in para-6 (supra) and, therefore, the same is not being reproduced herein. In his cross- examination, the witness stated that they had gone on patrol duty in a private car owned by one Malhotra. He admitted that the vehicle number was not mentioned in the departure report. He then stated that initially they had gone towards Nagrota Bagwan side and thereafter they had gone to Badoh road. In between, they had not checked any vehicle and spent 45 minutes in Nagrota Bagwan and thereafter they had gone to 53 miles at about 9-9.15 p.m. As they reached at Nagrota Bagwan, police station, they stopped the vehicle where they spotted the appellant. At that time, apart from the police party, appellant and two persons, there was none present. At that time, there was no bus with passengers at the bus stand and even HRTC staff members were not present at the bus-stand. He did not know the exact timings of the night buses that crossed through Nagrota Bagwan. He feigned ignorance about the bus service from Nagrota Bagwan after every half an hour. He denied the suggestion that there were many persons present at the bus stand at the relevant time. He stated that he did not know the appellant prior to the occurrence in question. He stated that the police party was not in uniform at that time. Volunteered to state that the appellant might have recognized them and that is why he tried to run away. He stated that entire police party had nabbed the appellant. He further deposed that he knew witnesses Ajay Supehia and Gagan prior to 27.05.2016 and admitted that Ajay Supehia was a witness in another case. He volunteered to state that since he (Ajay Supehia) was the Pradhan of the Gram Panchayat that is why he was associated. He feigned ignorance regarding Ajay Supehia being a contractor. He further feigned ignorance regarding Ajay Supehia having been taken over the contract of repair work of police station and residential quarters. He denied the suggestion that Ajay Supehia used to visit the police station everyday.

17. PW-13 S.I. Naresh Kumar has deposed on similar lines as PW-11. In his cross-examination, he stated that the police party had gone to the spot in a private vehicle but did not remember the number thereof. He further deposed that it was the SHO, who had brought the vehicle, but the same was not a taxi. He also deposed that they left the police station at 4.15 p.m. and it took 30-45 minutes to reach Badoh road from the police station. Volunteered to state that the police party had gone to the bus stand and also had done patrolling nearby the police station. He did not remember

the time when the police party started from 53 miles to Hatwas. He further stated that at Hatwas they spent about 15/20 minutes on patrolling, however, stated that the police officials were in civil dress and was not in a position to tell how the appellant had identified them. Volunteered to state that the appellant might have noticed their "physical structure". He further stated that it was the appellant, who tried to run away and then they got suspicion that the appellant might be carrying some stolen articles in his bag. He further stated that it was the SHO, who could reveal whether the appellant was asked that he wanted to be searched either before a Gazetted Officer or a Magistrate. He admitted that personal search of the appellant was not carried out at the spot. He further deposed that Ajay Supehia and Gagan came to the spot of their own and they were not called by the police party. Apart from two persons, there was no other independent person present at the spot. He knew Ajay Supehia prior to the occurrence in question, however, denied the suggestion that Ajay Supehia was a witness in 20-25 cases. He did not know that Gagan was a relative of Ajay Supehia and also feigned ignorance that Ajay Supehia had taken contract of repair of the police quarters. He denied the suggestion that Ajay Supehia used to visit the police station daily. He further deposed that HHC Karamjeet had handed over the case file to the SHO in the police station at about 12.15 a.m. when they reached the police station. But, he feigned ignorance regarding there being any communication between SHO and Karamjeet that the police party was coming to the police station. He denied the other suggestions also.

18. PW-14 Ishwari Parsad stated that at the relevant time, he was posted as SI/SHO, police station, Nagrota Bagwan and on 13.08.2016 ASI Naresh Kumar had handed over the case file after completion of the investigation by the I.O. for preparation of challan and he accordingly prepared the challan and presented the same before the Court for trial. In the cross-examination, he admitted that investigation of the case had not been conducted by him.

19. PW-15 Surender Sharma, Dy. S.P. stated that at the relevant time he had been posted as SDPO, Kangra. On 30.05.2016, HHC Vipan Kumar had produced the special report before him at about 10.05 a.m. and after making an endorsement Ext. PW-15/A over the same, he had handed over a copy of the information to the Reader for making necessary entry in the concerned register.

20. Now, adverting to the testimonies of the defence witnesses. DW-1 Mukesh Kumar stated that he was serving as a Chowkidar, New bus stand, Nagrota Bagwan for the last 7-8 years and his duty hours were from 7.00 p.m. to 7.00 a.m. On 27.05.2016, he was on duty from 7.00 p.m. to 7.00 a.m. and stated that from 9.00 p.m. till 12.00 mid night, buses entered the police station after every 15 minutes and around 300-400 passengers were there on that night. He further deposed that during that time tea-stalls and 'dhabas' were also open. On being cross-examined, he stated that he could not produce any record to prove that he was appointed as a Chowkidar at Nagrota Bagwan bus-stand and could not produce any duty roster to prove that he was on duty on 27.05.2016 from 7.00 p.m. to 7.00 a.m. He admitted that even the police was on patrol duty and visited the bus stand.

21. DW-2 Ravi Kumar stated that he had brought the original record regarding maintenance of residential building of the police station and as per records, the aforesaid work had been executed by a government contractor and general order suppliers Shri Ajay Supehia, which were Ext. DW-2/A-1 to Ext. DW-2/A-11. In cross-examination, he admitted that the aforesaid works had been executed

with effect from 01.06.2017 to 30.06.2017.

22. DW-3 HC Raju Dhiman, MHC, police station, Nagrota Bagwan stated that he had brought the requisitioned records pertaining to FIR Nos.167/2010, 108/2011, 111/2011, 88/2009, 122/2009 and 69/2016 registered at the police station, Nagrota Bagwan. He further deposed that as per the records of the above FIRs, Shri Ajay Supehia, Pradhan, had been cited as a witness. Volunteered to state that Ajay Supehia, however, was not Pradhan in the year 2010. He further deposed that in FIR No. 69/2016, Ajay Supehia was cited as a witness in the capacity of Pradhan, Gram Panchayat, Ghorab. In case FIR No. 108/2011, he was cited as a witness in his capacity as a Government Contractor and in rest of the FIRs, he was cited as a witness in an individual capacity. On being cross-examined, he admits that during investigation, the police usually call the respectable inhabitants of the locality as witnesses. He also admits that generally the police associate Pradhan and other members of the panchayat as witnesses during investigation of the case on the basis of their availability on the spot.

23. DW-4 Vipin Kumar, shopkeeper, stated that the appellant was not related to him. On 04.09.2019, he had gone to HRTC Office, Nagrota Bagwan and applied for information whether Chowkidar Mukesh Kumar (DW-1) was on duty at the bus-stand on 27.05.2016 and 28.05.2016. On this application, Adda Incharge, Nagrota Bagwan, had issued a certificate Ext. DW-4/A. In his cross-examination, he admitted that it had not been mentioned in Ext. DW-4/A as to on the basis of which record, this certificate was issued. However, volunteered to state that Adda Incharge had called for some records on the basis of which it was issued. He admitted that Adda Incharge along with records were still available at Nagrota Bagwan. He also admitted that there was no stamp of the office of issuing authority on Ext. DW-4/A but denied the suggestion that same was not a genuine certificate.

24. DW-5 Kuldeep stated that he was running a tea shop at Nagrota bus-stand and his shop would open in the morning around 5.00-6.00 a.m. and close around 1.00 a.m. (midnight). He further deposed that from 9.00 p.m. till 12.00 in the night, buses used to enter the bus-stand after every 15-20 minutes and around 300-400 people were present at the bus stand during that time. He also deposed that on 27.05.2016, he was present in his shop at the bus-stand from 9.00 p.m. to 12.00 in the night and the passengers were having their dinner or tea in the shops. On being cross-examined, he admitted that on 28.06.2016, he was not present in his shop and had gone to attend marriage of his brother Baldev Chand. He stated that the constructed area of the bus-stand was covered around 70-80 metres and there were many shops in the bus-stand and the bus-stand building itself was five storeyed one. He stated that his shop was in the center of the bus-stand.

25. DW-6 Rakesh Kumar stated that he was taxi driver at Nagrota and used to park his taxi at Nagrota Bagwan from where he used to ply his taxi from 7.00 p.m. to 7.00 a.m. and stated that from 9.00 p.m. to 12.00 in the night, buses used to enter the bus-stand after an interval of 15 minutes and there would be around 300-400 people during that time. He further stated that on 27.05.2016, he was at Nagrota Bagwan bus-stand with his taxi. On being cross-examined, the witness admitted that he had maintained the logbook which had not been brought by him to the Court. He further deposed that around 15 taxis used to ply from Nagrota Bagwan bus-stand and the bus authorities

had earmarked the place for taxis which was at the end of the bus-stand at one side. He further stated that he was paying parking fee to the contractor but had not brought the receipt of parking fee on 27.05.2016. He admitted that whenever taxis were parked, the receipt was issued and counterfoil was kept by the contractor. Volunteered to state that the contractor was not issuing the receipts. However, he also admitted that he had not made any complaint regarding non-supplying of the receipts by the parking contractor.

26. Learned counsel for the appellant has mainly urged the following points:

- (i) Inception of the case of the prosecution itself is false.
- (ii) Case property produced does not belong to present case.
- (iii) Non-compliance of Section 52A of ND&PS Act.
- (iv) Weighing and sealing of case property doubtful at the spot.

27. It is argued by learned counsel for the appellant that once the aforesaid points are taken into consideration to its logical end, then it would be proved that the prosecution case has no legs to stand and was required to be dismissed and the learned Special Judge grossly erred in convicting and sentencing the appellant.

28. On the other hand, Mr. I.N. Mehta, learned Senior Additional Advocate General would support the judgment and argue that since the prosecution has proved its case beyond reasonable doubt, therefore, the learned Special Judge had no option but to have convicted and sentenced the appellant.

29. We have heard the learned counsel for the parties and have gone through the records of the case.

- (i) Inception of the case of the prosecution itself is false.

30. It is urged on behalf of the appellant by Shri Nareshwar Singh Chandel, Senior Advocate, assisted by Shri Pranav Sharma and Shri Kshitij Thakur, Advocates that as per the prosecution case the police party comprising of PW-1, PW-11 and PW-13 left the police station at about 4.15 p.m. in civil dress in a personal vehicle vide rapat Ext. PW-10/A. However, there is no explanation forthcoming why the police party had not used the government vehicle which was there at the police station, as is evident from Exts. PW-10/B and Ext. PW-10/C. He would further argue that none of the witnesses has told about name of the owner of the vehicle and the registration number thereof nor the same is shown in Ext. PW-10/A which makes the case of the prosecution itself unreliable.

31. We have considered the arguments and find it rather strange as to why the police party did not use the official vehicle and chose to go in a private vehicle whose registration number nor its ownership was known to any of the witnesses. As observed above, PW-13 had feigned ignorance

regarding registration number of the vehicle in which they had left the police station and in his cross- examination he stated that he did not remember the number of the vehicle and he further stated that the SHO had brought the vehicle.

32. Whereas, PW-11 in his cross-examination stated that the vehicle in question was owned by Malhotra. This witness also did not disclose the registration number of the vehicle.

33. PW-1 HHC Karamjeet, on the other hand, deposed in his cross-examination that the vehicle was a private vehicle of the SHO himself. If that was so, then what prevented PW-13 to say that the vehicle used belonged to Investigating Officer-PW-11 and why the Investigating Officer PW-11 in turn said that the vehicle belonged to one Malhotra.

34. This assumes importance because in all the documents i.e. ruqa Ext. PW-11/B, application Ext. PW-11/D for obtaining the admitted certificate and in the special report Ext. PW-6/A, it had been mentioned that the vehicle in question was a personal vehicle and as per I.O. (PW-11), the vehicle belonged to one Malhotra and did not belong to any of the members of the raiding party.

35. Apart from the above, it is conceded at the Bar that 53 miles is towards Kangra from Nagrota Bagwan, whereas, Hatwas is in the opposite direction towards Palampur side. Now to test the veracity regarding the story of the prosecution as to how they reached Nagrota Bagwan, it would be noticed that as per PW-1 the police party reached Nagrota Bagwan bazar at 8.15 p.m. and thereafter had gone towards Hatwas at about 9.45 p.m. and then came back to 'Chor Nala'. In his cross-examination, he stated that after proceeding from police station, the police party had stopped over at bazar where they remained for 2-3 minutes and from bazar, they went to Badoh road and from there to 53 miles and then reached Nagrota Bagwan bus-stand at 9.45 p.m. Here, he did not state that the police party went to Hatwas as was earlier stated by him in his examination-in-chief.

36. PW-13, on the other hand, stated that the police party had gone towards Badoh road side and thereafter to 53 miles and then had come back to Nagrota Bagwan at 8.15 p.m. and thereafter the police party had gone to Hatwas side and reached at Nagrota Bagwan bus-stand at 9.45 p.m. In his cross-examination, he further clarified that from 53 miles, the police party had gone to Hatwas.

37. Now, it would be noticed that the versions put-forth by PW-1 and PW-13 are entirely different and, therefore, we would now refer to the deposition of the Investigating Officer Inder Singh, who in his cross-examination did not state a word regarding the police party having gone to the Hatwas side or the police party having started from 53 miles and rather stated that the police party had started from 53 miles at 9-9.15 p.m., whereas, as per PW-13 the police party had already reached Nagrota Bagwan at 8.15 p.m. and thereafter went to Hatwas side and from Hatwas side reached at Nagrota Bagwan at 9.45 p.m.

38. We see no reason why the testimonies of spot witnesses PW-1, PW-11 and PW-13 should be so contradictory which indeed does make the prosecution case suspect. Why we observe so because as per the admitted case of the prosecution and as otherwise borne out from Ext. PW-10/A, all the police officials were in civil dress. However, PW-1, on the other hand, stated contrary by claiming

that all the police officials were in uniform besides him.

39. In addition to the aforesaid, another important aspect which casts serious doubt on the story of the prosecution is that as per the consistent version, it is claimed that the appellant on seeing the police party had tried to run away and was apprehended by the police party. Now, once the police party was in civil dress which is otherwise established from the rapat Ext. PW-10/A and duly proved in the testimonies of PW-1, PW-11 and PW-13 and from the photographs, then why would any person much less the appellant try to run away given the fact that all these persons were travelling in a private vehicle and not in a police vehicle.

40. Another circumstance which casts a serious doubt is regarding the omnipresence of stock witness Ajay Supedia, who appeared at the scene and was associated as a witness to the recovery. The story of the prosecution is that apart from the police party, the appellant and two independent witnesses, no other person was present at the bus-stand which fact already stands belied by the testimonies of the defence witnesses whose testimonies have been referred to hereinabove. Then why only PW-2 Ajay Supedia and his brother Gagan were alone associated as witnesses is beyond our comprehension given the fact that PW-2 has been a stock witness and that fact has been established in the testimonies of the defence witnesses.

41. PW-11 and PW-13 both lose their credibility when they try to feign ignorance and rather deny that the award of contract of construction in the police station was in favour of PW-2 Ajay Supedia.

42. When all the aforesaid circumstances are taken up independently and cumulatively, the prosecution version itself becomes suspect, but that by itself does not in any way entitle the appellant to an honourable acquittal and nonetheless he can definitely be acquitted by giving benefit of doubt in his favour.

43. As regards the honourable acquittal, the other contentions as raised by the appellant will have to be gone into

(ii) Case property produced does not belong to present case.

44. As per the prosecution, the parcel containing contraband was sealed with 7 seals of 'M'. The said parcel was presented before the learned Judicial Magistrate (II), Kangra for obtaining certificate under Section 52A of the Act on 28.05.2016. In the proceedings conducted by the learned Judicial Magistrate, it has nowhere been mentioned that the case property had 7 seals of 'M', rather, the case property was found to be containing three seals of Sub Divisional Judicial Magistrate, Kangra having the seal impression of "SDJM" Kangra. Absence of seal 'M' from the parcel assumes to be an omission, but the presence of seal of "SDJM" Kangra appearing on the case property even prior to it being certified under Section 52A of the Act clearly not only indicates but establishes the fact that the case property so produced before the Magistrate did not belong to the present case.

(iii) Non-compliance of Section 52A of ND&PS Act.

45. It is vehemently argued that as per the prosecution case 7 seals of 'M' were affixed on the parcel containing contraband and the said parcel was not presented before the learned Magistrate as per the provisions of Section 52A of the Act, therefore, the appellant is entitled to be acquitted in terms of the judgment rendered by the Hon'ble Supreme Court in Criminal Appeal No. 3191 of 2023 (arising out of SLP(Crl.) No.3010 of 2023) titled as Yusuf @ Asif vs. State, decided on 13.10.2023, wherein it was held as under:

"3. On the basis of the information received by the Intelligence Officer of Narcotics Control Bureau (hereinafter referred to as "NCB"), a lorry parked near Puzhal Central Jail, Chennai, was intercepted by NCB on 28.03.2000 early in the morning. Four persons were found in the lorry and upon search, they were found in possession of commercial quantity i.e. 20 kgs of heroin kept in two jute bags. The samples were drawn from each of the packets i.e. 14 big and 12 small polythene packets kept in the two jute bags and they were seized under a seizure memo i.e. Mahazar. All the four persons were arrested after receiving the analyst report that the seized substance was nothing else but heroin.

4. Consequently, the case crime No.113/2000 was registered. The trial court upon consideration of the evidence on record held all the four persons guilty under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") and convicted them to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1 lakh each, in default of which a further imprisonment of one year was ordered.

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8. We have heard learned Senior counsel for the appellant. The main plank of his argument is that the entire action of seizure and sampling is wholly illegal. It was done in violation of the mandatory provisions of Section 52A (2) of the NDPS Act as the procedure prescribed therein was not followed in drawing the samples and seizing the alleged narcotic substance. Further, there is a serious doubt about the correctness of samples sent for analysis as to whether they were actually the samples of the seized contraband.

9. Learned counsel for the respondent on behalf of the State submitted that the search and seizure was based upon the prior information received by the Intelligence Officer of NCB who has been examined as PW1. The accused persons were disclosed the identity of the officers and after obtaining their consent in writing, the search was carried out in the presence of Superintendent of Police, NCB (PW8) who was a gazetted officer. After seizure, two samples from each packet were drawn and packed

separately and were sealed. The NCB seal No.12 was affixed to it and the correct seal number was mentioned in the Mahazar and all other documents except in the godown receipt whereby inadvertently seal No.11 was mentioned. The Officers involved in the search, seizure and arrest operation had duly submitted their report as referred to under Section 57 of the NDPS Act.

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 subsections 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 to the officer empowered under section 53, the officer referred to in subsection (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 Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under subsection (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 to 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 subsections (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 of the mandate of subsection (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 *Union of India vs Mohanlal and Anr* (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 fine of Rs.1 lakh and in default of payment of fine to undergo further imprisonment of one year is hereby set aside."

46. We have gone through the aforesaid judgment and find that the same is not applicable to the facts of the instant case. The Hon'ble Supreme Court was there dealing with a case where the samples had been drawn from bulk and thereafter sent for chemical analysis and the residue of the bulk sample remained with the Investigating Agency and it was in this background that the Hon'ble Supreme Court held that the samples could not be held to be a valid piece of primary evidence. However, this is not the fact situation obtaining in the present case. Here, the entire contraband has been sent for chemical analysis and in such circumstances, there can be no better and primary evidence for the purpose of trial.

47. We have already taken the same view in Criminal Appeal No. 385/2018 in case titled Narayan Singh vs. State Of H.P, decided on 25.08.2023.

(iv) Weighing and sealing of case property
doubtful at the spot.

48. It is vehemently argued by Shri Chandel that Ext.
PW-10/A nowhere reflects that I.O. kit was taken by the

Investigating Officer and even PW-13 and I.O. (PW-11) nowhere in their statements have made a reference to the I.O. kit being carried by them. Apart from this, PW-11 and PW-13 nowhere state that electronic weighing machine was taken out from the I.O. kit and lastly PW-11 only states that 'charas' was weighed with a weighing scale.

49. Dealing with a similar issue, a Coordinate Bench of this Court in Criminal Appeal No. 106 of 2018 titled as Diwakar vs. State of Himachal Pradesh, decided on 05.07.2019 held as under:

"9. A bare perusal of daily diary entry No. 14 dated 13.2.2015 (Ext.PW-7/A) reveals that there is no mention that when the police party had gone for patrolling they were also carrying the investigation kit. There is no mention that the police party was having any source of light or torch with them.

10. Similarly, there is no evidence that the police party was carrying any investigation kit or weighing scale. In the absence of the earliest evidence of the police party

carrying weights and scale, it would be doubtful to believe the version of the police. None of the police officials state that they had actually carried the investigation kit from the police station. This renders the prosecution story of having weighed and sealed the contraband substance on the spot to be extremely doubtful, if not false. Law is very well settled that the burden is always upon the prosecution to prove its case and it shifts to the accused under Sections 35 and 54 of the NDPS Act only when the prosecution has discharged its initial burden.

11. In the absence of the Investigation kit, how could the police procure the NCB form. A bare perusal of the NCB form reveals that it is a printed form with words 'TEST MEMO' written on it. There was no occasion for the police team to keep it with them. It is not even folded to arrive at some assumption that it was kept in the pocket of some police personnel.

12. It is not the case of the prosecution that the electronic scale, cloth parcels, seal impression of seal-T, sealing wax (laakh), thread and needles were brought from the police post or the police station."

50. All the aspects, as noted above, have gone unexplained by the prosecution and the same makes the case of the prosecution doubtful. Unfortunately, none of the aforesaid circumstances has been taken into consideration by the learned Special Judge and it has erred in convicting and sentencing the appellant little realizing that harsher is the punishment, stricter is the proof required.

51. Now that the prosecution has failed to connect the case property with the instant case, obviously, in such circumstances, the appellant is entitled to be honourably acquitted. Therefore, the conviction and sentence of the appellant cannot sustain. Accordingly the appeal is allowed and the judgment passed by the learned Special Judge convicting and sentencing the appellant is set aside. The appellant is acquitted of the charge framed against him. Consequently, the appellant, in the instant case, is ordered to be released immediately, if not required in any other case.

52. The Registry is directed to prepare release warrants of the appellant.

53. In view of the provisions of Section 437A Cr.P.C., the appellant is directed to furnish a personal bond in the sum of Rs.25,000/- with one surety of the like amount to the satisfaction of the learned Registrar (Judicial) of this Court, which shall be effective for a period of six months with a stipulation that in an event of an SLP being filed against this judgment or on grant of the leave, the appellant on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

54. Pending application, if any, also stands disposed of.

55. Records be sent back forthwith.

(Tarlok Singh Chauhan) KALYAN Digitally signed by KALYAN CHAND AWASTHI DN: C=IN, O=HIGH COURT OF HIMACHAL PRADESH, OU=HIGH COURT OF HIMACHAL PRADESH

SHIMLA, Judge Phone=068e8173504da3a6d6e56308707033e63c7253b4e6eb0f2a8f0285cdb5737f49, PostalCode=171001, CHAND S=Himachal Pradesh, SERIALNUMBER=7fe19e609f07c9899a24f7f61744de9a7a35cc62f67431d8415b71bf186fbd4f, CN=KALYAN CHAND AWASTHI Reason: I am approving this document AWASTHI Location:

Date: 2023-10-20 14:21:36 (Ranjan Sharma) Judge 20th October, 2023.

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