

(2009) 06 P&H CK 0010

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No. 2165-SB of 2006 (O and M) . D/d. 22.06.2009

Ajay Malik and Ors

APPELLANT

Vs

State of U.T., Chandigarh

RESPONDENT

Date of Decision : 22-06-2009

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 20

Citation : (2009) 3 RCR(Criminal) 649

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Advocate : R.S. Cheema, with Ms. Tanu Bedi, Mr. M.C. Dingra, Mr. B.S. Malik, Mr. Ashok Malik, Ms. Shobha Gupta and Mr. G.S. Gill, for the Appellant; Sukant Gupta, for the Respondent

Final Decision : Allowed

Judgement

K. Kannan, J.—I. An alleged incident, varying perceptions and court verdict 15.12.2003. The vernacular and the English Newspapers had the public riveted to a story of one of the alleged biggest drug hauls in the recent police history from two prominent citizens of Chandigarh and a domestic servant. The news kept the people in disbelief and revulsion and the press got the story going for nearly a month. 13.12.2003 and 14.12.2003 were the days of reckoning for the Police, U.T., Chandigarh, for, what according to them, their vigilance paid and it was an occasion of pride and exultation. 13.12.2003 and all the days following were horror and disaster to accused, outwardly at least, when, according to them, they were hounded and prosecuted on trumped up charges.

2. Neither theatricals nor public opinion shall matter in a big way when a judicial rendition is sought on the forensic application of evidence and law in a given case to find whether the persons that were brought to the dock have been proved to be guilty of the offences attributed against them beyond reasonable doubt. The trial Court affirmed aye to the charge-sheet, finding all the accused guilty of offences u/s 18 and 20 of the Narcotic Drugs and Psychotropic Substances Act,

1985 (for brevity "NDPS Act") and sentenced them individually to 10 years rigorous imprisonment plus Rs. 1.25 lacs as fine and in default, one and half years rigorous imprisonment for offence u/s 18 of the Act. The accused were also found guilty of offence u/s 20 of the Act and similar sentence awarded u/s 20 was directed to run concurrently. The accused have been incarcerated since 14.12.2003 till date, save for temporary reprieves for A1 and A2 obtained through parole. All the three accused aggrieved by the judgment of the Special Judge, Chandigarh in NDPS Case No. 26 of 08.03.2004/2006 rendered on 14.07.2006 are in appeal.

II. Scope of present appeal

3. The grounds of appeal urged by the appellants are common and at the preamble of the grounds, the judgment of the Lower Court convicting the appellants u/s 18 of NDPS Act and sentencing them to rigorous imprisonment is challenged. The grounds refer to both the findings regarding the alleged possession of opium in contravention of the Act that is punishable u/s 18 and for possession of cannabis (charas), which is in contravention of Section 20 of the NDPS Act. The learned Public Prosecutor, Sh. Shukant Gupta, appearing on behalf of the State points out as a threshold argument in defence that the grounds of appeal make reference only to Section 18 of the NDPS Act and not Section 20. All the grounds taken as a whole, seek to assail the entire prosecution story of the alleged interception, possession and transportation of the contraband and I have no doubt in my mind that reference to conviction u/s 18 alone in the grounds of appeal is but a minor lapse that can cause no impediment for a wholesale look including the conviction u/s 20 also. I have stated this at the beginning only to keep the decks clear for a comprehensive appraisal of the judgment in its entirety.

III. The prosecution version

4. The prosecution story unfolds thus :

On the intervening night between 13.12.2003/14.12.2003, SI Balwan Singh, Operation Cell (PW-3) along with HC Charan Singh, HC Brij Raj, C. Rajinder Singh, C. Kulwant Singh, Inspector Vijay Kumar and SI Pala Ram were on Government vehicle bearing registration No.CH-01-G-9610 driven by C. Gurmeet Singh on patrolling duty. On reaching the "light point" at Sector 20/21, Chandigarh, a person by name Deepak Kohli (PW-4) met them and while they were talking, a secret information was received that Ajay Malik, Devinder Singh and Ling Raj, accused A1 to A3 and who are appellants respectively, were coming in a Lancer car bearing No. CH-03-F-9988 from Labour Chowk to the light point of Sector 20/21, Chandigarh and they were in possession of big quantity of opium and charas. The informer had also informed that the accused had rented out a house in No. 2222, Sector 21, Chandigarh where they packed opium and charas after weighing them in equal quantities for commercial use, for sale. This secret information was reported to have been reduced to writing (Ex.PD) and

informed to the DSP, Operation Cell through C. Rajinder Singh (PW-10).

5. Boulders (naka) were placed at the light point of 20/21 about 2.00 A.M. and as expected, the Lancer car did come. The car was stopped with the assistance of other police officials and the accused were present in the car, who on enquiry disclosed their names. PW-3 served on them notice as required u/s 50 of the NDPS Act (Ex.PE) informing them that they were suspected to have in their possession charas and opium and they were required to be searched. An option was given to them "whether they would get them(selves) searched in the presence of any Magistrate or any Gazetted Officer", upon which each one of the accused was reported to have given in writing in the notices Ex.PE/1 to PE/3 respectively that he had no objection to the search being conducted in the presence of "DSP Saheb". The notices and the reply were attested by the witness Deepak Kohli (PW-4) and SI Pala Ram.

6. Sh. B.D. Bector, Deputy Superintendent of Police, Operation Training and Lines (PW-6) had been informed by wireless to reach the spot. On receiving message from the Control Room, Sh. B.D. Vector reached the spot at 3.00 A.M. in his private car. He was apprised of the details regarding the case by Sh. Balwan Singh (PW-3) and he went to the car CH-03-F-9988 in which the three accused persons were sitting, introduced himself to the three accused that he was posted as DSP and offered to the accused to be searched in the presence of a Magistrate or a Gazetted Officer and told them that he was "also a Gazetted Officer". A notice u/s 50 of the NDPS Act was issued to them conjointly under Ex.PF and on securing no objection and signed by the accused A1 and A2 and after obtaining thumb impression from A-3, gave instructions to PW-3 Sh. Balwan Singh to conduct the search. A1 was sitting on the driver's seat. A3 was sitting on the rear seat of the car behind A1 and on the left of A3 was sitting Devinder Singh (A2). A polythene bag was lying towards the left feet of Ajay Malik and this bag yielded to two bags, one containing charas and other containing opium. On weighment, it was found that the bags were respectively 15 kg of charas and 14 kg of opium. 200 gms. of charas and 200 gms of opium were separated from the remaining and they were made into sealed parcels after packing them in plastic containers. A seal BS was affixed on the samples. The remaining quantity of the contraband were put in the same rexene bag with the seal letter bearing BS. Thereafter the search was conducted on Ling Raj (A3), who had a black colour bag lying near his legs. The bag was opened and charas and opium were found. The charas weighed 15 kg and the opium weighed 13 kg. Samples of 200 gms were separated from opium and charas in the same manner and they were put in sealed parcels with letter BS and the remaining charas and opium were put in the same black colour bag and made into sealed parcel with letter BS. The last person was to be searched was accused Devinder Singh (A2), who was carrying a blue colour bag lying between his legs. Charas weighed 12 kg and the opium weighed 11 kg. 200 gms of charas and of a like quantity of opium were separated from the rest and kept in sealed parcels with seal letter bearing BS. A spot search memo (Ex.PG) was prepared and the incidence of recovery and

sampling were entered in the memo and witnessed by Deepak Kohli (PW-4), the DSP (PW-6) and SI Pala Ram. A ruqa was dispatched immediately through Constable Charan Singh to the SHO, Police Station, Sector 19 to register FIR and to SI, Sarwan Singh for taking up further investigation.

7. FIR No. 235 was registered on 14.12.2003 at 5.30 A.M. and it was also entered in the DDR as entry No. 63 at the same time. Sarwan Singh (PW-7) reached the spot at 5.40 A.M. to whom was handed over all the police papers, six bags (three of samples of opium and three of samples of charas) as well as the remaining material in the bags, all with the impression of BS. The accused A-1 to A-3 were handed over to him as well as the car bearing No.CH-03-F-9988. Sample seal had also been handed over to him. PW-7 prepared the rough sketch and recorded the statements of PW-6, PW-4 and SI Pala Ram. He prepared search memos (Ex.PJ, PK and PL) and went to the Police Station, Sector 19 along with the recovered narcotics, accused and witnesses. He produced the case property, sample seal, accused and witnesses before the Inspector, Prem Singh Malik (PW-13), later DSP. He affixed his seal impression PS on all the six parcels produced before him and put his signatures on all the packets along with date. He deposited all the bags before him along with the sample seals at the Malkhana where HC Ram Kumar (PW-2) took them into possession by making entry in the register No. 19. After acquiring remand of the accused from the concerned Illaqa Magistrate, came to the Operation Cell at Sector 26, Chandigarh and further investigation was undertaken. A2 Devinder Singh made a statement (Ex.PP) which was attested by HC Brij Raj Singh (PW12) and Kamaljit Singh. This statement led to search and recovery in House No.2222, Sector 21, Chandigarh where at the instance of the accused Devinder Singh a lady, who was residing as a tenant at the first floor gave the keys and PW-7 opened the door at the ground floor. Plastic bags numbering 350 (Ex.P-1), bag of tej patar (Ex.P-2), tape rolls (Ex.P-3 and P-4), plastic roll (Ex.P-5), packing machine (Ex.P-6), bundle of polythene bag (Ex.P-7), weighing machine (Ex.P-8), small weighing machine (Ex.P-10), plastic bag containing black paper and tej patar (Ex.P-11), mixture of tej patar and black paper etc. (Ex.P-12) and bag of dal chini (Ex.P-13) were taken possession of. Besides the above articles, two plastic containers were also recovered by chance and when the same were opened charas was found. On weighment, it was found to be 1200 gms. 200 gms of charas was separated as sample and it was put in a sealed cover with the seal impression SS at two places. The remaining charas weighing 1000 gms was separately sealed. The recovery was attested by HC Brij Raj Singh (PW-12) and Kamaljit Singh. The recovered charas at the residence was produced before the Inspector Prem Singh Malik, who affixed a seal on both the bags with the same impression of PS at one place each and prepared a sample seal. He directed the same also to be deposited along with the sample seal at the Malkhana where the deposit was registered in Register No. 19.

8. Rajinder Singh (PW-10) was deputed to deposit samples along with the sample seals in Central Forensic Science Laboratory (CFSL) for necessary

examination. The car by which the contraband was allegedly transported was found to belong to Sh. Ashok Malik, brother of A1, after verification with the Registration Authority, Chandigarh. The "examination report" prepared by CFSL (Ex.PT) was spoken to by Dr. A.K. Dalela (PW-8), who stated that he received six sealed cloth parcels each sealed with three seals of BS and one of PS containing Ex.1 to Ex.6 respectively in plastic jars and one sealed cloth parcel sealed with three seals (two of SS and one of PS) containing Ex.7 in a polythene envelope had been examined from 19.02.2004 to 04.03.2004 which revealed opium that gave positive results for the presence of morphine and meconic acid which are active constituents of opium and the percentage of morphine had been found 0.70% in Ex.1, 0.69% in Ex.4 and 0.69% in Ex.6. The samples purported to be charas were subjected to chemical tests and chromatographic analysis (HPTLC & GC-MS) which indicated cannabinoids including tetrahydrocannabinol. Microscopy indicated the presence of characteristic cystolithic hair and the exhibits were samples of charas. The prosecution closed its evidence with examination of 13 witnesses.

IV. The defence version

9. The accused had their own defence version; not that it was necessary, for the elementary principle of criminal jurisprudence is that the prosecution shall establish the case beyond reasonable doubt but it is merely stated to indicate how the trial had progressed. The contention was that the 2nd accused, Devinder Singh had a property dispute with a person called Balwinder Singh @ Bira Brar, who was a notorious drug peddler with international connections. A huge haul of drugs was recovered on 13.12.2003 from one Micky, Bal, Sunil, Satpal and Monu who had been operating for Balwinder Singh @ Bira Brar. The recovery had gained sufficient attention with the higher police officials and Inspector Vijay Kumar, who incidentally was also said to be present at the time of the alleged recovery from the accused, in order to save Balwinder Singh @ Bira Brar swapped the recoveries as having been made from Devinder Singh by foisting a case against him and when Devinder Singh was picked up from kothi 2222, it was attempted to be thwarted by A1, his friend and A3, the latter's domestic servant and hence, they had also been falsely implicated. It was the contention in defence that the accused had been picked up forcibly from the house No. 2222, Sector 21, Chandigarh even on 13.12.2003 and Devinder Singh had himself never given any statement. It was an attempt by the defence to show before the trial Court that even the huge haul was taken only from Ford Ikon Car bearing No. CH01-M-6984 but it was given back to Balwinder Singh @ Bira Brar and only a small quantity had been picked up to mix up with jaggery and other materials. This explained, according to the defence, the relatively low quantity of opium as found in the examination report, although it was above the prescribed percentage of the psychotropic substances under the Act. The claim by the prosecution that the contraband was worth Rs.50 crores was fallacious and exposed their own duplicity that the real contraband that was seized from Balwinder Singh @ Bira Brar was given back to him by Vijay Kumar for a huge

financial recompense. The case was deliberately foisted on the accused by mixing minimal quantities of the contraband substance and nailing them for the financial benefit obtained through Balwinder Singh @ Bira Brar for settling his personal scores against Devinder Singh (A-2).

V. The Press interlude

10. In the intervening period, apart from how the prosecution story was voluntarily given in Court, there happened a significant event, a creation of the police for publicity through Press. It created too large a phantom, which so much distracted the veracity of the prosecution version that it became afraid of its own shadow. That was, even before the alleged recovery of charas from residence at Kothi No. 2222, Sector 21, Chandigarh, there was a press conference convened by the police where the alleged huge haul of charas and opium worth Rs.50 crores was displayed to the Press, with all high ranking police officials carrying broad shoulders in natty uniforms and brimming faces posed themselves before the contraband with the parcels of contraband being shown in open condition. The photographs of open plastic bags with opium and charas in full view being paraded before the Press merrily occupied the front pages of all leading vernacular and the English newspapers on the following day on 15.12.2003. This gave a lie to the whole credibility of the contention of the prosecution that the contraband had been sealed and deposited with the Malkhana since the Press Meet had been arranged on 14.12.2003 at about 3.00 P.M and the Malkhana register itself did not reveal that the goods had been taken away for public viewing or for the press. This exhibition, the police wanted to disown by saying that albeit the press briefing was true, having regard to the huge catch of the contraband, what was shown in the photographs in the press were dummy properties.

VI. Trial Court's findings

(a) on facts, on appreciation of evidence

11. The trial Court found the entire prosecution case to be credible.

The trial Court observed that :-

(i) Two samples of 200 gms each from each of the bags of charas and opium had been taken.

(ii) The prosecution witnesses deposed in unison as regards time, place and recovery of the contraband.

(iii) No direct enmity had been proved against the investigating officer or other prosecution witnesses and that it was not expected at the hands of police officials to falsely implicate any person for the commission of serious offence.

(iv) Press conference itself was true but the photographs, video cassettes and CDs exhibited in Court were not properly proved; that the video cassette had not been shown to be not tampered with and there was no definite indication as to

how even without date, month or year in the cassette, it was possible to identify that it related to the same event; that it had not been even proved that the video cassettes had been kept in safe custody and not tampered with and after all, Daljit Singh (DW-1) himself was not the photographer but only the person who carried the story in the Dainik Bhaskar. The photographer (DW- 6) had only identified the witness PW-4 and the newspaper reports about him and he had no information about the source of the news against the witness.

(v) The evidence of PW2, HC Ram Kumar was wholly acceptable as he had given evidence that the case property had not been taken out at all from Malkhana from the time when it was deposited on 14.12.2003 at 7.50 A.M. till it was taken out on 16.12.2003 for production before the Judicial Magistrate.

(vi) The police was merely being over-zealous in conducting press conference but that did not mean that the contraband was not recovered from the accused persons.

(vii) The defence story was inconsistent, in that they were saying that they were not arrested on the intervening night of 13/14.12.2003 from Labour Chowk but at the same time they were also contending that they had been shown at the CBO, Sector 26 along with the case property before the press (the idea is not very clear from the judgment but it is merely repeated here).

(viii) The evidence of Ram Kumar, MMHC and the fact that they were properly sealed and the Doctor that gave the evidence referred to the seals being intact was sufficient to establish that the sample parcels had been preserved to carry the weight of the prosecution case along with it.

(ix) On the quality of the only public witness, Deepak Kohli (PW-4) who had been alleged as a stock witness of police, history sheeter and a hardened criminal, merely because the witness had appeared in nine cases on behalf of the police, it could not be stated that he was a stock witness and further stated that there was no motive for the investigators Balwan Singh or Sarwan Singh to falsely implicate the accused.

(x) Even the motivation of Inspector Vijay Kumar to falsely implicate them, as attributed by the defence had no weight since the accused had not shown as to how the investigators Balwan Singh and Sarwan Singh were themselves under the thumb of Inspector Vijay Kumar or why they should be acting to the dictates of Balwinder Singh @ Bira Brar.

(xi) If Balwinder Singh @ Bira Brar had enmity with Devinder Singh (A-2), there was no reason for implicating A1 and A3 as well, under the NDPS Act.

(xii) If the police had to falsely implicate the accused, there was no reason to plant such a huge quantity of contraband whose value was worth several crores of rupees.

(xiii) Attempt of the defendant to cast a shadow of doubt about the credibility of

the prosecution version by pointing out certain communication from the Ministry of Home Affairs to the Senior Police Officers directing investigation of certain complaints given by the lawyer father of A-1 was found as not making any dent by the fact that father of the accused A-1 was himself an advocate practising at the Supreme Court and the complaints had generated for the first time only on 05.01.2004 nearly a fortnight after the event and only as an afterthought to help his son and others to wriggle out of a formidable prosecution version.

(xiv) Attack by the defence that the car had not been produced in Court to support the version that 15 kg of charas could not have been kept between the legs of A-1 at the driver's seat was found to be meaningless by a reasoning that the witness of technical expert had not been produced by the accused to prove that the contraband could not be carried in the said manner in the Lancer car.

(xv) Even the owner of the car namely the brother of the accused had not tried to take the car from Superdari for the reasons best known to him.

(b) On law, juxtaposing it with facts

12. Adverting to the legal submission that the mandatory provision of Section 50 of the NDPS Act had not been duly complied with, since PW-6, B.D. Bector was of the same Operation Cell, was biased in favour of prosecution and interested in the success of the prosecution case and hence did not qualify to be equated with an impartial Magistrate or a Gazetted Officer, the Court held that since the recovery was only from the car, Section 50 itself would not apply for the recovery was not from "the person". Referring to a decision of the Hon'ble Supreme Court that "the person" in Section 50 would mean a human being with appropriate covering and clothing and footwear, bag, brief-case or any other article or container could, under no circumstances, be treated as a body of human being and it would not, therefore, be possible to include these articles within the ambit of "person" occurring u/s 50. The trial Court also rejected the contention of the defence that there was no evidence to indicate whether the Investigating Officer had put down in writing the information regarding the secret information alleged to have been received as was required u/s 42(2) of the NDPS Act. The learned Judge reasoned, accepting the contention of the Public Prosecutor that the above said provisions would apply only to a situation where search warrants would normally have to be applied for and that a requisite record was to be maintained for such an occasion. Section 42 itself would not be applicable in cases where raid is conducted in a public place and does not involve search of a building or a dwelling house. Referring to a decision of Hon'ble Supreme Court in Narayanaswamy Ravishankar Vs. Asstt. Director, Directorate of Revenue Intelligence, , it held that when the search was made at a public place, the provisions of Section 42 would not apply and only Section 43 would apply.

13. On the factual consideration of the above matters and applying the law to the emerging facts as brought out through evidence of witnesses, the trial Court found the prosecution case to have been fully established and rendered the

conviction as referred to above.

VI. Method of appraisal - General

14. A well structured prosecution version and sound judicial reasoning that approves of it are the result of collation of several events, at once natural and familiar to ordinary course of human conduct. A discordant note there might be in a well composed rhythm; a fake bead may have been added to a garland; and untruth or over-statement could be discerned in a series of facts. The endeavour, however, shall be to see the larger whole. In the matter of appreciation of oral and documentary evidence, one does not look for minor discrepancies as renting asunder a whole prosecution fabric. I shall set about the task of picking up the thread by examination of narration of facts and needle them as one would take the beads to ensure it makes a comprehensive garland that is natural and presentable. To extend the imagery, if I have gathered enough worthy beads, conviction ought to follow; the rope enveloping the accused shall continue to enclose them tighter in a bind within the prison walls. The garland shall be to the prosecution. If there are too many fake beads, the thread ought to be snapped and so too, the rope that binds them to incarceration.

VII. Setting the judicial parameters

15. The NDPS Act makes even the very possession of the narcotics, drugs and psychotropic substances as offence as severely punishable without exception to a period of not less than 10 years of rigorous imprisonment besides fine. The Act that visits stringent punishment, therefore, has to necessarily contain adequate safeguards that the provisions are not misused by powerful police machinery. The accused would plead for the strictest scrutiny of all materials and the enforcement of every procedural formality enjoined under statute and standing instructions. In *Noor Aga v. State of Punjab*, 2008 (3) RCR (Cr.) 633 : 2008 (4) RAJ 381 (SC), the Hon'ble Supreme Court had observed that "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 conduct would 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 but insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values, it is necessary for giving effect to the concept of wider civilisation". The Courts must always remind itself that 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." The statement of law as expressed was but an echo of a forceful pronouncement in a Constitution Bench of the Hon"ble Supreme Court, while it was examining the legal components of Section 50 of the NDPS Act in *State of Punjab Vs. Baldev Singh, etc. etc.*, . Adverting to departmental instructions, the Supreme Court was however, prepared to loosen the rigour in *Khet Singh Vs. Union of India (UOI)*, and said the departure from departmental guidelines must be based on justifiable and reasonable grounds. Contravention of the instructions would not necessarily vitiate the conviction.

16. Here, in this case, the essential charges are possession and transport of opium and charas in commercial quantity by accused A-1 to A-3. How the information had come about the possession, manner of interception, the independent persons that stood witness to the search and seizure, the credibility of the person at whose instance the search was conducted, the integrity of the samples that were taken at the spot and the manner of sealing done, the safety of custody of the contraband till it was sent to Central Forensic Science Laboratory, all of them assume significance. I propose to examine each one of the incidents as constituting a module that shall stand the test of forensic appraisal within the legal boundaries, as expressed by the Hon"ble Supreme Court in the para above.

(a) The Secret Informer

17. It is common knowledge that the persons that operate in narcotics are a powerful mafia given the value of the materials and the international market that is available. A powerful network could be busted only if the State is empowered to have its own device and personnel that cannot be compelled to disclose the source of information. The procedure giving the power of entry, search, seizure and arrest without warrant or authorization is spelt out in Chapter V of the NDPS Act and in particular Section 42 deals with the power of an officer in the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government including para-military forces or armed forces. Section 42 reads as follows :-

42. Power of entry, search, seizure and arrest without warrant or authorisation -
(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or

controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act :

Provided that if such officer has reason to believe that a search warrant or authorization 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.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

It is brought out through the evidence of PW-3 that the information was received on 13/14.12.2003 that a Lancer car with three persons with specified names was soon to cross with opium and charas and that they were regularly storing the contraband in Kothi No. 2222, Sector 21, Chandigarh. It is this information that according to PW-3 made them place naka and get extra vigilant about an imminent interception of the vehicle and the persons. The information which was allegedly sent through Sh. C. Ram Kumar 2509 was not examined. If such an information had been reduced to writing, there was a mandate u/s 42 (2) to send a copy thereof within 72 hours to his immediate official superior. The explanation for not reducing such information in writing that was given before the trial Court and that found acceptance was that the seizure was made in a public place and therefore, it was only Section 43 which was applicable and Section 42 of the NDPS Act itself did not stand attracted. Section 43 of the NDPS Act reads as follows :-

43. Power of seizure and arrest in public place. - Any officer of any of the departments mentioned in Section 42 may -

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

18. Section 43, in my view, operates in a different field than Section 42, though there may be overlapping situations. Section 43 makes specific reference to power of seizure in a public place, while section 42 deals with a situation where the empowered officer has either personal knowledge or information from any person that any narcotic drug or psychotropic substance in respect of which an offence is committed is kept or concealed in any building, conveyance or enclosed place. Whenever a search is conducted in a public place, whatever may be the source of information, it will be only section 43 that will be attracted. The trappings of 42(2) of having to communicate the information in writing does not arise. After all it is the possession and transit that constitutes an offence and the source of information is but a process that aids the interception and apprehension. While secret information is still a constituent of the prosecution version, it is not so fundamental as to vitiate a prosecution theory, if the possession could be established by other evidence. However, the secret information theory takes a serious beating from another perception that an informer who had leaked to police that the accused were storing and packing the materials in Kothi No. 2222, Sector 21 did not evoke sufficient confidence in the police for immediately swinging to action to go to the address given and effect a search immediately. Why immediately, even till late in the evening at 5 O'clock, when a disclosure statement was alleged to have been made by A2., the investigating team did not think of going to the property at all. It almost seems as if the informer's version regarding the storing of contraband at the residence obtained no credibility that even when the police decided to go to the press at 3.00 P.M., they had still not carried out the search at the residence. So much for the value of the secret information and therefore, time now is to pick up the thread at the alleged scene of occurrence and the incidents that were said to have taken place. Is there a worthy bead to be picked ?

(b) The persons at the scene of occurrence

19. The secret information came, according to PW-3, when he along with other persons in the police party were at the light point at Sector 21/22. Deepak Kohli, who had dropped a patient at the hospital at the thick of the night and who was admittedly an acquaintance of Inspector Vijay Kumar arrived at the place. The acquaintance of Deepak Kohli with Vijay Kumar was indeed strange. He was not a police official himself. He was not also a mere member of the public. He was a history sheeter having been allegedly involved in a number of offences including cases of rape, abduction, forgery, fraud, perjury, cheating, criminal intimidation and drug peddling. An inspector in police to be acquainted with such a person is not a surprise but what is really a surprise is that he would also be a person who would be cited as a witness for the prosecution in more than nine cases as admitted by the prosecution itself and found expressed in the judgment of the trial Court. Not merely again only a witness but would seem to be a friend of Vijay Kumar for he attended even the function of a farewell party given to Vijay Kumar when he was promoted from Sub-Insepctor's post to the Inspector's post at another police station. Deepak Kohli's presence is again a matter of extraordinary co-incidence for, he had no reason to be there at 1 O'clock in the night except that his version was, he had dropped off a patient at the hospital. It is not brought out in evidence to secure confidence in his statement as to who the patient was, what his name was and it is in evidence that he never visited the patient any time after he dropped him off at the hospital. The Lancer vehicle as expected carrying the same registration number and the same number of persons whose identity was congruent to the indentity as disclosed by the so-called secret informer. On being stopped, according to PW-3, he satisfied himself about the identity of the three persons, who disclosed their names and on being asked whether they were inclined to be searched in the present of a Magistrate or a Gazetted Officer, expressed consent to be searched by a Gazetted Officer, whereupon the Deputy Superintendent of Police (PW-6) was requested to be present through information given to the control room. He arrived around 3 AM and issued a notice u/s 50 of the NDPS Act on the accused and carried out the search at the vehicle through PW3.

(c) The requirement of notice u/s 50 of NDPS Act

20. The trial Court has held that it is a case where the search was being conducted on the vehicle and not on the persons and therefore, Section 50 itself was not applicable. This, the trial Court said to discount the quality of the Gazetted Officer, who was to carry out the search since the attack of the defence was that the Deputy Superintendent of Police belonged to the very same Operation Cell and therefore, he was biased. The trial Court reasoned that the expressions used u/s 50 of the NDPS Act contemplated only a search of a person and since the contraband had been carried in the vehicle, the search was of the vehicle and not the person and that therefore Section 50 itself did not apply. This reasoning, in my view, is clearly erroneous. In Dilip and Another Vs. State of

M.P., , the Hon''ble Supreme Court referred to a case of personal search of accused but no contraband was found. Soon thereafter when scooter of the accused was searched which resulted in the recovery of opium. The Hon''ble Supreme Court said that Section 50 was required to be complied with even if ultimately the recovery was effected from the scooter. A search of the scooter that did not comply with the requirement of Section 50 was found to be bad in law. In a still later judgment in Noor Aga v. State of Punjab, 2008 (2) RCR (Crl.) 633 : 2008 (4) RAJ 381 (SC) when a luggage of the accused as well as the person of the accused were searched, the Hon''ble Supreme Court had ruled that the provisions of Section 50 would apply. There have been decisions of this Court as well on the subject. One, of a Division Bench and another, of a Single Bench affirming the same view (State of Punjab v. Surjit Singh, 2008 (1) RCR (Crl.) 266 (P&H) (DB), Bhajan Singh alias Gholi v. State of Punjab, 2008 (3) RCR Cri 520 (P&H) (SB). It is not as if the search was not conducted by a Gazetted Officer. The Deputy Superintendent of Police (PW-6) was indeed a Gazetted Officer and it is in evidence that he had disclosed his identity as one and the consent of the accused persons were also secured (vide Ex.PF/1 to PF/3) before the search was directed to be made through PW-3. The trial Court was merely referring to the non-applicability of Section 50 as an occasion to explain that even if PW-6 could not be taken to be an independent person and the intent of the Act was to secure the search either through a Magistrate or a Gazetted Officer and not by a person who was a part of the prosecuting team itself the search was not bad in law. I reject the reasoning of the trial Court that Section 50 was not attracted but the Section has been applied in its letter sans the spirit, if we must have the arguments of the counsel for the appellants to prevail. The decisions cited by them to the effect that PW6''s offer the way he made them to the accused was a partial and an incomplete one would still be required to be examined. It is not a wholesome bead yet, and hence to the consideration of the objections regarding the alleged deficiencies of the offer.

(d) The alleged deficiencies of search u/s 50 of the NDPS Act

21. It is contended on behalf of the appellants that by the law contemplated u/s 50, notices are to be issued to each one of the accused independently and a joint notice issued u/s 50 of the accused and securing the consent for being examined by the DSP did not accord with law. They referred to the decisions of this Court in Gurmit v. State of Haryana, 2008 (4) RCR 412 (P&H), Nimma Ram v. State of Punjab, 1999 (2) RCR 449 (P&H) and Paramjit Singh v. State of Punjab, 1997 (1) RCR 293 (P&H) that held that an option to be searched before a Magistrate or a Gazetted Officer had to be given to each accused individually and not jointly. A similar observation was made in Dharmaveer Lekhram Sharma v. State of Maharashtra, 2001 (2) RCR Cri 788 (Bombay). I do not find myself in agreement with such a strict construction applied to Section 50. So long as a right to be searched by a Magistrate or a Gazetted Officer is given to an accused, it is irrelevant whether it is through a single notice or a joint notice.

22. There is another line of argument that was adopted by learned Senior Counsel, Sh. R.S. Cheema. According to him, Section 50 contemplates two components : One, the option to be searched by a Magistrate or a Gazetted Officer should be apprised to the accused as of right. The PW-6, who disclosed to the accused that they could be searched either by a Magistrate or a Gazetted Officer did not tell them that they had such a right. Second, when he was giving them an option to the search, he ought not have immediately stated that he was also a Gazetted Officer. According to him, the manner in which the offer was made under Ex.PF was partial or incomplete. The option was not to sound like a Hobson's choice. Reference was made to the decision of the Hon''ble Supreme Court in *Man Bahadur v. State of H.P.*, 2008 (4) RCR (Crl.) 563 : 2008 (5) RAJ 554. The Hon''ble Supreme Court had held that the option of search before a Magistrate or a Gazetted Officer given to the accused, if it was not informed that he had a right of search before the Magistrate or Gazetted Officer, the conviction was liable to be set aside. The Hon''ble Supreme Court, however, held in that decision that such communication itself was not necessarily to be made in writing but as far as possible such communication should be made in the presence of some independent and respectable person witnessing the arrest and search. Here, in this case, the communication had been reduced to writing and the expressions found in the communication go along with these lines:

I, Bhagwan Dass Bector, DSP.....give you notice that you three namely Devinder Singh s/o Sh. Darshan Singh....., Ling Raj s/o Barun Lal....., Ajay Malik s/o Sh. Bhal Singh Malik..... are suspected to have in your lancer car No. CH-03F- 9988 charas and opium. Your search and search of your car has to be done. Do you want the search of your car and yourself to be conducted before some Magistrate or some Gazetted Officer. I am also a Gazetted Officer.

The response from each one of the accused was that they had no objection for the search being made in the presence of the DSP. There is definitely no statement made that the accused had a right to be searched either by a Magistrate or a DSP. The normal expression, which should have come along with the statement made by PW-6 must have been on these lines "you have a right to be searched by a Magistrate or a Gazetted Officer"; instead the expressions are to the effect whether they wanted the search to be conducted before some Magistrate or a Gazetted Officer. The expressions are not definitely happily worded. The Hon''ble Supreme Court in *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat*, 1995 (2) RCR(Cri.) 388 (SC) held that the protection u/s 50 is sacrosanct and cannot be disregarded as merely technical. It said that it was imperative on the part of the officer to inform the accused of his right to be searched either before a Magistrate or a Gazetted Officer. Cogent evidence has to be produced to show that the accused was made aware of such a right. The Hon''ble Supreme Court went so far as to held that there is no question of drawing presumption u/s 114(e) of Evidence Act that requirement of Section 50 was complied with. In *K. Mohanan v. State of Kerala*, 2000 SCC Cri 1228, the Hon''ble Supreme Court held that if the accused who was subjected to search

was merely asked whether he required the search to be made before a Gazetted Officer or Magistrate, it could not be treated as communicating to him that he had a right under law to be searched. So, in that case, what PW-1 had done was to seek opinion of the accused was whether he wanted to be searched or not, and the Hon''ble Supreme Court observed that if he had been told that he had a right under law to have himself searched, it could still not be gauged what would have been the answer given by the accused. But so long as the main defence adopted by the accused at all stages was that Section 50 had not been properly complied with, the Court said that the courts below ought to have seen that the right guaranteed u/s 50 was sacrosanct and it could not be diluted. That was a case where the Hon''ble Supreme Court was dealing with the situation where the Sub-Inspector of the Police had conducted a search on the accused person and recovered a packet from the folder of this loincloth that contained brown sugar. No offer at all had been given. In that context the Hon''ble Supreme Court was referring to the right u/s 50 in the manner referred to above. In this case the search ultimately was only at the instance of a Gazetted Officer. It is indeed doubtful whether the option was fair enough to the accused. The option of the search by PW-6 itself was said to have followed an earlier option given by PW-3 (Ex.PE) when each one of the accused had stated that they had no objection to being searched in the presence of DSP. There again the option did not seem as much as an expression of a right available to the accused.

23. Ms. Tanu Bedi, learned counsel arguing for the accused also refers to several decisions of this Court that if the Gazetted Officer was himself biased when he is a part of the investigating team, the offer was not valid (*Jit Singh v. State of Punjab*, 2008 (2) RCR 655 (P&H), *Chhotu Ram v. State of Haryana*, 2002 (2) RCR(CrL.) 287 (P&H), *Mahi Pal Singh v. U.T., Chd.* 1998 (1) RCR (CrL.) 519 (P&H), *Mohammad Salim Bashir Shaikh v. State of Maharashtra*, 2004 (2) RCR(CrL.) 403 (Bombay), *Rashidi Ally Chigale v. State of Maharashtra*, 2003 2 RCR 197 Bom, *Suresh Chandra v. State of Rajasthan*, 2002 (2) RCR (Cri) 6 (Rajasthan), *Karam Chand v. State (Delhi)* 2006 (2) RCR (CrL.) 167 (Delhi), *Des Raj v. State of Punjab*, 2005 (3) RCR (CrL.) 334 (P&H), *Bhajan Singh v. State of Punjab*, 2008 (3) RCR (CrL.) 520 (P&H), *Dharmaveer Lekhram Sharma v. State of Maharashtra*, 2001 (2) RCR (CrL.) 788 (Bombay), *Mohinder Singh v. State of Punjab*, 2001 (3) RCR (CrL.) 673 (P&H)). Particularly in *Mohammad Salim Bashir Shaikh's* case, the Bombay High Court was dealing with the situation where the accused was informed that he was entitled to be searched before a Magistrate or a Gazetted Officer but the accused was also told immediately that one amongst the raiding party was a Gazetted Officer. This, the Court held was an inducement and feeler given to accused for being searched before that Gazetted Officer and held that it was not in compliance of Section 50 and the conviction was set aside. In this case, there is a slight difference that PW-6 was not part of the raiding party. Several other decisions which have been referred to above are cases where the expression of option was before "Gazetted Police Officer" or the Gazetted Officer himself was a part of the raiding party." No immediate parallel could be taken

from any of these decisions but one thing is clear that the accused had not been given a fair option of either being apprised that they had a right or that they had a right to be examined by any Gazetted Officer. It almost seemed like closing an option for them by suggesting that a Gazetted Officer, who is Deputy Superintendent of Police was available and whether they would accept such an option. The requirement of Section 50, in my opinion, was clearly breached, if a strict and technical construction should be placed on the words used while sounding the option. On the other hand, if we must consider that the search was purported to be made by a Gazetted Officer and the accused had purported to have expressed consent to be searched to be made by such gazetted officer, the case would survive further consideration. I do not want to drop the thread yet; I shall still examine the next bead.

(e) The search memo and sealing of the contraband

24. The trial Court had observed that two samples respectively of the alleged substances as opium and charas were taken from each one of the packets in the immediate vicinity of the accused persons. That is, if each one had a bag and each bag contained two packets, one containing opium and another containing charas, four samples must have been taken from each bag held by each accused and in all making to 12 samples. It was definitely not done and as spoken to by the prosecution and brought out through the evidence of the Doctor from CFSL there were only 6 samples taken at the spot, apart from the samples allegedly recovered from Kothi No. 2222, Sector 21. Learned counsel appearing for the appellants rely on several decisions to the effect that two samples were mandatory. Section 55 of the NDPS act reads as follows :-

55. Police to take charge of articles seized and delivered - An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

25. Though several other decisions (Chhabil Das v. State of Haryana, 1998 (1) RCR 133 (P&H), Gurcharan Singh v. State of Punjab, 2005 (4) RCR 681 (P&H), Hawa Singh v. State of Haryana, 2005 (4) RCR(Criminal) 292 (P&H), Gurmit v. State of Haryana, 2008 (4) RCR 412 (P&H)) seem to take the view that two samples were required to be taken and that if only one sample was taken, it is not in compliance with Section 55. There is no such requirement from the bare reading of the Act. However, central government standing instructions no. 1/88 salutary as it is, reads thus :

(i) If the drugs seized are found in packages/containers, the same should be serially numbered for purpose of identification etc.

(ii) Samples must be drawn on the spot of recovery in duplicate, in the presence of search (panch) witnesses and the person from whose possession the drug is recovered.

(iii) The quantity to be drawn in each sample should be 5 gms in respect of all narcotic drugs and psychotropic substances except in the cases of opium, ganja and charas, hashish where a quantity of 24 gms in each case is required. The same quantity should be taken for the duplicate samples also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

(iv) In the case of seizure of a single package/container one sample in duplicate is to be drawn. In case of seizure of more than one packages/container one sample in duplicate from each package/container should be drawn.

(v) All samples must be drawn and sealed in the presence of the accused, panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person from whose possession the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and duplicate of each sample.

(vi) The sample in duplicate should be kept in heat sealed plastic bags. The plastic bags should be kept in a paper envelope and properly sealed. Such sealed envelope should be marked as original and duplicate.

(vii) The samples should be dispatched to the respective laboratories under the cover of a Test Memo which shall be prepared in triplicate in proforma NCB. We have already noticed that failure to comply with the statutory notification will not itself vitiate conviction. There must be good enough explanation for not conforming to the notification. The second sample itself would be to make available to the accused an opportunity for fresh chemical examination, if he is not satisfied with the examination report as produced by the prosecution. No attempt was made in this case to show that the accused had any ground to suspect that the report was not correct. The defence was more on other fundamental issues. The sealing was not properly done; what was shown to the Press as having been seized was in open parcels and there was no authenticity to the sealing and the sampling. These are other related issues which are discussed elsewhere in the judgment, while considering the issues of exhibition of the alleged contraband before the Press meet. It is referred here to illustrate that no prejudice had been shown by taking of only one sample. I do not accept the contention that the taking of one sample by itself was a vitiating circumstance but the question whether it was sealed properly in order that the report of the CFSL was obtained from the original condition in which the articles were seized is still a matter to be considered. The sampling and sealing are themselves only to ensure that the subjects of recovery are made available in their pristine condition for experimentation by scientific experts and that the person that was found in

possession held really substances which were narcotic substances. This is ensured by the manner of keeping of the substance at the Malkhana and by sealing and sampling preserved as such till it reached the CFSL. These are subjects which are to be considered independently. This bead is kept aside to examine it afresh for a different consideration. Now to the issue of registration of FIR falling next in the chronological meter.

(f) The registration of FIR and other documents

26. On a roqqa sent under Ex. PH, the FIR was reported to have been registered under Ex. PU at 5.30 am on 14.12.03. The learned Senior Counsel, Sh. Cheema also pointed the DDR entries contained more information, such as the name of the father of one of the accused and the car number which had not been mentioned even in the FIR. Admittedly, several spot documents such as the search memo, recovery memos and the rough site plan prepared at the spot (Ex.PG, PH and PO) surprisingly contain reference to FIR No.235 dated 14.12.2003 and it is inconceivable as to how memos prepared at the spot could bear a reference to FIR No. which came to be registered later at 5.30 A.M. Two inferences could settle it: either the FIR was registered prior to the alleged recovery of contraband or the number of FIR was inserted in these documents after its registration. In both the situations it seriously reflects upon the integrity of the prosecution version. Several decisions were cited across the bar to the effect that if the documents prepared at the spot contain mention of FIR, there was a serious doubt to the prosecution theory (*Lalji Shukla v. State (Delhi)*, 2000 (1) RCR 305 Del *Hashim v. State (Delhi)*, 2000 (1) RCR 235 Del, *Ramesh Prakash v. State (Delhi)*, 2000 (1) RCR (Criminal) 306 (Delhi), *Kailash @ Kuddu Vs. State of Delhi*, . The FIR had been registered on 14.12.2003 at 5.30 A.M. and the copy of which is reached the Magistrate only the following day on 15.12.2003. Learned Senior Counsel appearing for the appellants points out that there was a delay in the dispatch of the FIR to the Magistrate, which was not properly explained. The FIR received on the following day, in my view, is not too long as to excite any suspicion. Even in the FIR it is stated that a special informer had informed that the accused persons were carrying opium and charas in their Lancer car and that he had also known that they used to bring charas and opium in plastic bags at their rented Kothi No. 2222, Sector 21. It is indeed surprising again that a matter that found a place even in the FIR of a persistent conduct of the accused in bringing and weighing bags of charas and opium and storing in Kothi No. 2222, Sector 21 found no action of the investigating officer right through the day till the evening just before the sunset when the police was reported to have carried out a search at Kothi No. 2222, Sector 21. This is again another incredible and unsavoury act of the prosecution.

(g) The Press Meet

27. The learned counsel for the appellants point out to the fact that even without reference to the photographs as seen in the newspapers and as exhibited through electronic media, it was an admitted case that there was a press meet

on 14.12.2003 at 3.00 P.M. At the press meet, the alleged contraband were exhibited along with the accused persons. PW-3 had admitted in his evidence : "A press conference was called by Sh. SPS Dhariwal, the then SP Operation, Chandigarh in which these three accused were also present. In my presence the case property of this case was not produced for demonstration. As far as I remember on that day when press conference was called these three persons were under police remand..... I have seen Ex.D1 newspaper. In this newspaper I identify the photographs of SPS Dhariwal, DSP B.D. Bector, Vijay Kumar Inspector, MHC Operation Cell. All the three accused persons present in this case are also shown in this photograph." PW-2, HC Ram Kumar, who had been posted as MMHC in the Police Station at Sector 19 has this to say in his examination in Court : "The photograph in the newspaper Chandigarh Bhaskar on front page dated 15.12.2003 I have seen. The photograph is Mark-D. This photograph is of the case property of this case and this photograph is of CBO Cell, Chandigarh. In this photograph I identify Sh. SPS Dhariwal and Sh. B.D. Bector, DSP..."

28. These two persons did not go as far as to the extent of saying that the goods shown as contraband in the newspapers were not the case property. We have to really wait till the evidence of PW-6 when a whole new case is brought about when we find the photographs showing the contraband in open condition to be wholly inconsistent with the state of affairs projected by the prosecution that the goods had been properly sealed and kept in the Malkhana. Therefore, PW-6 had completely made a volte face when he says as follows :-

.....I had never got myself photographed with the case property. I have seen the photograph Ex.D1 on the newspaper. Therein I am shown standing with others. In this photograph the case property of this case was not shown. Rather it was only a demonstration of dummy property. I do not know who had organised the thing for the newspaper and the photograph projecting dummy case property. That might have been done by Inspector Vijay Kumar or HPS Dhaliwal, SP.....

Evidently, he was passing the buck on the names of two persons, who were never brought as prosecution witnesses. Such a serious mishap of bags of contraband lying in open condition admitted to be shown before the press and captured by the electronic media required a very strong explanation. It was not merely a trivial matter or a matter that could be pushed under the carpet in the manner the trial Court had done. The person who was responsible for carrying out the story had brought the videos and CDs before Court. DW-1 gave evidence to the effect that he was present at the spot when the photographs were taken. The authenticity of the documents could not have been doubted by the only fact that the CDs or the video cassettes did not carry date and time. It was really a matter of evidence when even the prosecution witnesses had admitted that there was a press conference and when they had also to assume that at the press conference, goods shown as contraband were lying in open condition, which was inconsistent with a case of sealing the goods and keeping them in safe custody at

the Malkhana. The prosecution was bound to put it in fairness even in the chief-examination to explain the manner how only dummy property had been shown to the Press. On the other hand, there was a complete concealment of the press briefing itself in the evidence of the police in chief examination and when photographs were confronted, the explanation trotted out was some other property had been shown before the press. It is not merely a minor lapse but there is a very strong suspicion about the entire prosecution story. The entries in the Malkhana that the goods had not gone out of its custody till 16.12.2003 when they were sent to the Court become very seriously suspect. The Press meet and the exhibition of contraband marks a violent break in the chain of custody of the contraband.

29. It was not merely the so called dummy property which had been shown in the press. So many other articles which are said to have been recovered at the residence in Kothi No. 2222, Sector 21, Chandigarh were also shown to the press. The several articles like suitcases and other personal belongings which are said to have been recovered later in the part of the day surprisingly find a presence in the press meet, which was anterior in point of time to search and recovery at kothi no. 2222. This again is a very serious lapse that prosecution had not properly explained. It only showed that the so-called recovery made at the residence in Kothi No. 2222, Sector 21 and entered as Ex.PQ could not be true. An advance display of future recovery is quite an absurd situation. As pointed out already PW-2 himself admits that photograph D1 contained the case property that includes the several articles which were seized through Ex.PQ.

(h) Failure to seize the car and to prosecute its owner

30. The alleged transport of the contraband through the Lancer car bearing registration No. CH-03F-9988 also becomes suspicious if it is considered by the fact that vehicle itself was not seized nor the owner of the vehicle ever examined by the Investigating Officer. As a matter of fact till a petition was filed for release of the vehicle before this Court when this Court passed an order in Crl. Misc. No. 12719 of 2008 on 07.04.2008, no proceedings have been taken either u/s 60(3) or Section 63 of the NDPS Act. Surprisingly even the owner of the car Sh. Ashok Malik had not been challaned as an accused under Sections 8 or 25 of the NDPS Act for using or permitting of his car to be used for the purpose of transportation of the contraband. Unless, as it is contended by the counsel for the accused persons, the vehicle itself had not been used for the transport and the alleged interception and spot recovery was a big lie, neither the owner of the car could have been spared without recording a statement nor the vehicle could have been omitted to be seized in the manner contemplated by law. The natural prosecution instinct ought to have been to seize the vehicle. It is no answer to merely point out that the owner of the vehicle had not taken any steps for release of the vehicle during the trial of the proceedings. More than the omission of the owner, the omission of the police in the manner it dealt with one of the important items of the case property is a matter of great intrigue and suspicion that makes a

severe dent on the credibility of the prosecution version.

(i) Failure to examine Inspector Vijay Kumar

31. The non-examination of Vijay Kumar and the ominous presence at the spot of recovery of Deepak Kohli are again matters that throw a ring of suspicion about the case of the prosecution. Admittedly, Vijay Kumar, Inspector was present at the time when the alleged seizure took place. It was seriously contended against Vijay Kumar that he had earlier registered a case for Balwinder Singh @ Bira Brar on a complaint received from him against A2. On several representations given by A1's father, it is brought out through the defence witnesses that investigation had also been directed to be done and it was shown during the relevant time between 03.12.2003 to 31.12.2003, there had been several phone calls between Inspector Vijay Kumar and Balwinder Singh @ Bira Brar. Balwinder Singh @ Bira Brar was not a holy person. He had several cases against him. Vijay Kumar was a person, who was fairly closed to Deepak Kohli. Deepak Kohli had himself given evidence to the effect that he knew very well Inspector Vijay Kumar "...Inspector Vijay Kumar was known to me prior to the occurrence as he remained SHO where I am residing..... Once I attended farewell party given to Vijay Kumar, Inspector..... I know the landline telephone number of Criminal Branch 2791978 where Vijay Kumar, Inspector was posted at the time of registration of case...." By keeping Vijay Kumar out of witness box, as contended by learned Senior Counsel, Sh. Cheema, transparency in prosecution is compromised. He had a reason to explain the presence of Kohli at the spot. He had a reason to explain Brar's role or the absence of it in the alleged swapping of the contraband that was said to have been confiscated from Brar on 13.12.2003. If we consider the fact that all along prosecution had been maintaining the story that the catch was worth more than Rs.50 crores and that ultimately it turned out in the examination report of the CFSL that the presence of opium was only in the range of about 0.7%, then it creates a strong suspicion in the mind of this Court whether the defence theory propounded by the accused persons that there had been a nexus between Vijay Kumar and Balwinder Singh @ Bira Brar and that the goods which were really caught had gone elsewhere and what was shown in Court as case property was not really the property that was seized by the police and which fell for big time advertisement before the public and the press.

(j) No independent, respectable witness

32. Even citing of the two public witnesses, one Kamaljit Singh who was said to have witnessed the search and seizure at kothi 2222, was not examined as he was said to have been gained over. The only other witness was Deepak Kohli. His presence at the spot and as a witness for search and recovery is not worthy of acceptance. A person that figures as a public witness for the police in about 9 cases ought to obtain the moniker as stock witness. A person against whom cases of rape, forgery and extortion have been registered and who is a history sheeter is no holy cow. When Section 100 of the Criminal Procedure Code refers

to the independent and respectable inhabitants of the locality it is not without significance. A case that is brought by the police before Court cannot be sustained by mere evidence of the police personnel themselves. If the version of the police has to be believed, it has to be supported by persons who have no nexus with the police for wrong reasons and who are respected in the society by their conduct, calling or avocation. Deepak Kohli has nothing to boast of to lend any credibility to the prosecution case. It is too much of a co-incidence that Deepak Kohli could have passed through the spot at the same time when an informer informed the police party that the accused were about to pass through in a Lancer car with the contraband and it is again too much of coincidence that at the same time Vijay Kumar, Inspector who was probably the only person to be acquainted with Deepak Kohli for wrong reasons happened to be there and that it so happened the vehicle came to the spot as expected. An unusual synchronicity! The conduct of the Deepak Kohli even during the time of trial in the witness box was highly dubious. It has come on record through defence witnesses that he had attempted to meet A2 on two occasions at Buraill Jail and the couple of calls which he had made to A2's wife at Canada give room for suspicion that he was bargaining for some undue favours before he came to the witness box. The prosecution story cannot just stick on versions of such like persons who had fragile character.

(k) How the Trial Court faulted

33. Hitherto, I have examined the whole case with reference to documents and provisions of law and the deductions that have been made so far could be superimposed on the reasoning of the trial Court and the arguments made in support of its decision by the learned Public Prosecutor, Sh. Sukant Gupta.. From the time when the secret information was supposed to have been received till the stage when the examination reports of CFSL were received, there have been various divergent views that have taken from how the trial Court has approached the whole issue. There is but one area of congruence as well and to set them out first, there was no requirement of the secret information to have been recorded in writing and dispatched to the superior officer as required u/s 42 of the NDPS Act since the place of interception and search was at a public place and it was only Section 43 which was attracted. Thus far and no further.

34. There are also some areas where though I am not in full agreement with the reasoning of the trial Court. They are not vital to have a bearing on the ultimate result. One of them is with reference to where A-1 was supposed to have kept 15kg bag of charas. Adverting to the improbability of a version that A-1 was seen driving the vehicle with the bag between the legs on the premise that it could have been too bulky to be accommodated at the driver's seat, the trial Court placed the burden on the accused persons and making an adverse comment on their failure to produce an expert witness or produce the car itself before Court to demonstrate that it was not possible. It was a clear mistake in placing the burden on the accused but it still did not have any serious bearing, in my view,

to the case. Deepak Kohli actually stated in his evidence that he was a witness to the search that yielded a white bag "between the legs of accused Ajay Malik." A contradiction had been elicited in the evidence of B.D. Vector (PW-6) where he had improved the version from how he had originally made u/s 161 (Cr.PC) statement by saying that "polythene bag was lying towards the left leg feet of Ajay Malik". In the application filed u/s 52A of the NDPS Act moved by SHO for certification of inventories (Ex.PV), it had been stated that "one rexene katta white colour was lying in the feet of driver of car namely Ajay Kumar". In the ruqqa (Ex.PH) signed by Balwan Singh, it was again stated that "a white colour rexene bag was lying near the feet of driver Ajay Malik." In the FIR (Ex.PU), the reference was to "rexene white bag containing charas and opium recovered near the feet of driver Ajay Malik." It could be noticed that the references as found "between the legs", "near the feet of the driver", "by the side of left leg feet of the driver" etc., could be understood in various ways but by and large, what was attempted to be inferred was one bag was there at the front seat alongside the driver A-1 near his feet. Whether it was on the seat or by the seat was a matter of little importance. The trial Court had committed a mistake in assuming that two samples had been drawn from each bag containing opium and charas from each of the accused. I still do not think that by itself was a very serious lapse although the instructions clearly reveal that two samples should be required to be taken. Two or three samples could be necessary only when the accused persons seriously doubt the veracity of the report of the forensic expert and seek for fresh chemical analysis of the product to be made and no such requisition had been made by any of the accused and it could not be said that the accused were put to any serious hardship by such a process. This is stated only to make a comprehensive treatment of all the points urged by respective parties.

35. There were some aspects which the trial Court had completely omitted to consider. The failure of the prosecution to examine Inspector Vijay Kumar. He was most importantly in the raiding party and the first amongst other officers in the raiding party. He was also a person at the press meet and was known to have had previous acquaintance with a key public witness Deepak Kohli. I have already outlined above how his evidence was necessary to explain a lot of things. It again failed to notice that the case of dummy property was introduced for the first time through PW6. Even if the photographs were not to be believed, there was definite oral evidence about through PW-2 and PW-3 about the exhibition of contraband and it seriously impacted the integrity of the samples and the authenticity of the version that they were properly sealed and kept in the Malkhana. It seriously cast a doubt also on the genuineness of entries in the Malkhana register. Unfortunately, the original Malkhana register itself was not produced in Court when there was a serious doubt about the fact that whether the materials that had been placed in the Malkhana had indeed been kept only at the Malkhana and not taken out on 14.12.2003 afternoon for public viewing.

36. There were some areas of consideration that are difficult to reconcile with law or logic. It was a strange logic that the trial Court had adopted that the accused

must have taken steps to have the vehicle produced in Court. I have already pointed out that the most natural conduct of the prosecution would have been to produce it as case property, if the recovery had been made from the vehicle at the spot on the intervening night of 13/14.12.2003. The investigating officer who found on investigation through the RTA that the vehicle had belonged to the brother of the accused could not have left the matter there without investigating further on the complicity or otherwise of the brother of the accused and also without taking steps for seizing the vehicle and producing it as case property in Court. Far from the accused having to produce the car, the prosecution was bound to have taken steps to seize the car under the relevant provisions of the NDPS Act. The failure to do so is a very serious flaw and causes a massive dent to the prosecution version. It was not merely a case of lapse on the side of prosecution but an event that shows the improbability of the version that the vehicle had been involved in the incident. The trial Court had upheld the prosecution on a sweeping statement that there was no necessity for the prosecution to fabricate such a case on the accused when no enmity was shown. Again, to it, there was no need for foisting a case for such a "heavy recovery". It beats logic as to how the police should be shown to have a motive for foisting a case. Motive is invariably looked for the version of an independent witness as to why he was making a statement for or against the accused or why the accused participated in the occurrence against a particular victim. It is never a matter of relevance as to why the police could foist a case. It may have myriad reasons to do so or it could be a case of mistaken identity; It may be just a sheer pride of announcing that they have apprehended the accused when all that they recovered were goods without trace of who the culprits were; It could be just an occasion to settle scores at the instance of one powerful person against another. As in this case, it was suggested that Balwinder Singh @ Bira Brar had a serious property dispute with A2, who was making demand for refund about Rs. 38 lacs alleged to have been paid by him to Balwinder Singh @ Bira Brar. The trial Court did not also see why even if Section 50 was not attracted and the option for search had not been offered by a Magistrate or by a Gazetted Officer, still why it did not look for the type of person that law envisages u/s 100 (4) of the Criminal Procedure Code. It is not without reason that the statute contemplates that the search to be made in the presence of an independent and respectable inhabitant of the locality. Deepak Kohli was never independent as a person, who had several cases registered against him and was not respectable as a person, who was a history sheeter himself. If the recovery could not be vouched by the statement of a witness like Deepak Kohli, the evidence of PW6 on a stand-alone basis, who was actively interested as a person belonging to the same Operation Cell required corroboration. The corroboration was not just possible through a witness like PW4. The alleged "heavy recovery" was itself a myth, as was pointed out by the counsel for the appellants. There is first of all no credible evidence about the value of the contraband. A mass of material that contained 0.7% of opium could not have been worth the fantastic amounts that the prosecution would want the Court to believe. Indeed the value of the contraband itself was not a matter of

very serious consequence, if it was contraband and if it was of commercial quantity and if a person was found in possession, the offence would be taken as clearly made out. The argument of heavy recovery is itself unattractive, except that it could have been used to influence the mind of the Court about the enormity of its operation and a large network that could be involved. If we weed out the concept of heavy recovery and look for recovery of any narcotic drug or psychotropic substance, there is still not a strong evidence available to clutch at.

37. The learned Public Prosecutor relies on decisions *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, ; *Sukhdev Yadav and Others Vs. State of Bihar*, and *Appabhai and another v. State of Gujarat*, 1988 (Supp) Supreme Court Cases 241) to bring home the point that where an appeal against conviction was mainly based on minor discrepancies in prosecution evidence, the Court would not reopen the concurrent findings of facts. The Courts have consistently maintained that if basic version of witnesses was probable, minor discrepancies would not render it unreliable. I have already pointed out that it is not clearly a case of discrepancies but a complete lack of independent witnesses to support the prosecution version that stands only on the crutches of official witnesses. I have also pointed out the trial court was at error both on law and facts. The learned Public Prosecutor referred to the issue that practice of discarding evidence of police officer was frowned upon in *State, Govt. of NCT of Delhi v. Sunil and another*, 2001 (1) RCR 56 : (2001) 1 SCC 652 by the Hon''ble Supreme Court, when it said that official acts of police should be presumed to be regularly performed and the archaic notion to approach actions of police with initial distrust should be discarded. The Hon''ble Supreme Court was dealing with a serious criminal case of rape and murder of a female child aged 4 years by two persons. The Hon''ble Supreme Court was considering the case in the absence of a direct evidence and when it had to reconcile with discrepant medical opinions. The wide expression of statutory presumption u/s 114 cannot stick to a case under NDPS Act, as expressly observed by the Hon''ble Supreme Court in *K. Mohanan v. State of Kerala*, 2000 SCC 1228, referred to supra. The learned Public Prosecutor also has relied on the decisions in *Seeman @ Veeranam Vs. State*, by Inspector of Police, and *State of M.P. v. Udai Singh*, 1998 SCC 593 for the proposition that if the occurrence was in the night when no independent witnesses could be expected, conviction could be based on testimony of only relatives when nothing on record to show false implication. Both the decisions have come under regular IPC offences and while the former referred to the non-production of an independent witness mentioned in FIR, the latter referred to examination of at least a relative of the victim. I have already set out the legal parameters that the standard on proof that is necessary under NDPS Act is very high and there shall not be scope for exciting the least suspicion in the prosecution version. If it was difficult to obtain an independent witness at the thick of the night, at least it should have been an independent Gazetted Officer. To look for conviction only on the evidence of PW-6, who was the Deputy Superintendent of Police for recovery and on the evidence of forensic expert and

PW2 that the samples have been properly sealed is looking for too much. It could be only at the cost of trashing under carpet several important missing links and puffing up a hopelessly fragile evidence.

VIII. Conclusion

38. Although the judgment was reserved for pronouncement on 01.07.2009, having regard to the conclusion that I have arrived at, I served notices on the counsel appearing for all the parties for an earlier pronouncement on 22.06.2009. Learned counsel for the appellants who have filed Crl. Misc. Application Nos. 10943-94 of 2009 for additional evidence have stated that they could be dismissed as not pressed. Yet another Crl. Misc. Application is filed for reception of additional evidence is also dismissed as infructuous.

39. Summing up, there was no secret informer and if there was one, in police reckoning, he was not taken seriously, for an information regarding storing and packing materials at kothi 2222 was never taken to its logical end by carrying out the search immediately; Deepak Kohli, the public witness did not arrive by accident at 1 am at the spot. He was but a stock witness and he could have been made to give any statement to support the police version; the placing of naka and intercepting the Lancer car were highly doubtful, since the police did not seize the car and produce it as case property before court; the fact that the police did not think of investigating the complicity or otherwise of the owner of the car with the other accused was most unnatural, if the car had been involved in the incident; PW6 was not an independent gazetted officer and his offer for search did not properly apprise the accused about their right to be searched by a gazetted officer and even the offer he gave proposing himself as a gazetted officer was in the nature of Hobson's choice; the FIR had been already prepared at the time when spot memos were prepared, for that alone explained the reference to FIR No. in the spot memos; alternatively, the FIR No. was interpolated in the spot memos subsequently; there was no explanation given for taking only single sample from each one of the packets, contrary to central government instructions; assuming there was no prejudice, the integrity of sealing and sampling and the chain of custodial safety at the malkhana was seriously compromised by putting the contraband before the press on 14.12.03 at 3 pm; if the goods shown before the press was only dummy property, the version came too late for the first time through PW6 and not spoken to by either PW2, PW3 or PW5, who were police personnel and who ought to have known the same; the placing of alleged dummy property by inspector Vijay Kumar or the SP, Sh Dhaliwal, as conjectured by PW6 ought to have been explained by examination of either of them in court; the exhibition of goods alleged to have been seized later in the course of the day at kothi 2222 at about 5 pm in the press meet at 3 pm was impossible that cast a doubt about the search and seizure at kothi 2222; the non-examination of inspector Vijay Kumar, who was alleged to have been in the raiding party and who had active communication line with Balwinder Singh @ Bira Barar, between whom and A2 there was admittedly

a property dispute, seriously undermined the transparency in the investigation and the absence of any independent and respectable public witness to the so called huge cache of drugs diluted the quality of evidence on the most crucial aspect of possession and recovery of the contraband from the accused; Deepak Kohli was a history sheeter and a stock witness and his evidence evoked no credibility. In other words, there are no worthy beads to make for a comprehensive garland, to complete the metaphor that we have maintained through this judgment for piecing together a prosecution version by a chain of wholesome events.

40. Accused persons, who have been under incarceration for over five years, could not be interested in knowing any more than the last sentence of a judgment whether their convictions are sustained or set aside. Any counseling rendered in a judgment for a need to search their own conscience and lead honest lives would only be taken as insipid pontification. Still, I cannot leave without exhorting to them that strange are the ways of the world. One may not always understand why a particular person comes by needless suffering for no wrong act done. Call it fate, destiny, divine will, bad luck and what have you, but the inexorable truth is : Cause and effect are tools of science, neither of theology nor of superstition. The appellants shall alone know, searching their own conscience whether it was another kafkaesque trial or whether it was some kind of nemesis catching up. The pregnant last sentence shall be the judgment under appeal is set aside, the appeal is allowed and the appellants are set at liberty.