

(2005) 04 MAD CK 0124
In the Madras High Court
Case No : Criminal Appeal No. 334 of 2003

Mohamadee @ Ashok Kumar Sharma	APPELLANT
Vs	
State by Inspector of Police, NIB, CID	RESPONDENT

Date of Decision : 08-04-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374

Citation : (2005) 2 LW(Cri) 577

Hon'ble Judges : M. Thanikachalam, J

Bench : Single Bench

Advocate : B. Kumar, for S. Rajapandian, for the Appellant; V. Madhavan, Government Advocate (Crl. Side), for the Respondent

Final Decision : Dismissed

Judgement

M. Thanikachalam, J.—The accused in C.C.No.76/2001, on the file of the Principal Special Judge, Special Court under E.C., and N.D.P.S. Act, Chennai, unable to resist the accusation made against him successfully, suffered conviction, followed by sentence, has preferred this Appeal.

2. The respondent herein, brought the accused/appellant, before the trial court, to face the trial, for the offences u/s 8(c) r/w 21(c) and 29(1) of the N.D.P.S. Act, alleging that he was found to be in possession of 2 kgs., of heroin, on 11.12.2000, at about 3.45 p.m., at Sorento Guest House, First Avenue, Anna Nagar in Room No.110, without any permission and licence, and therefore he should be dealt with u/s 8(c), r/w 21(c), as well u/s 29(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter called "the Act".

3. On the basis of the complaint, the trial court, by going through the materials, having satisfied itself to frame charge and to proceed further, framed a charge against the accused, u/s 8(c) r/w 21(c), as well as u/s 29(1) of the Act.

4. The accused, upon explaining the charge to him, refused to plead guilty, thereby compelled the prosecution, to prove the guilt of the accused, beyond all

reasonable doubt, as contemplated under law. Thus, taking the burden of proof upon their shoulder, in order to discharge the same, the prosecution had marched in five witnesses, armed with 14 documents, supported by eight Material Objects.

5. Upon consideration of the above materials, scanning the same, assessing with law, the learned trial Judge, came to the conclusion that the charge against the accused/appellant u/s 8(c) r/w 21(c) of the Act, alone stood proved beyond reasonable doubt, whereas, the prosecution has failed to prove the guilt of the accused u/s 29(1) of the Act. Thus, deducing the conclusion, the learned trial Judge, slapped a conviction and sentenced the accused, to undergo ten years R.I., and to pay a fine of Rs.1,00,000/-, in default, to undergo two years R.I., for the offences, u/s 8(c) r/w 21(c) of the Act, which is challenged in this Appeal.

6. The facts, in brief, leading to final report, ending in conviction, are thus:-

The Inspector of Police in NIB CID, Chennai - 600 002, had received a telephonic information, from the informer, on 11.12.2000, at about 12.15 p.m., that the accused/appellant was staying in Room No.110 of Sorento Guest House, possessing heroin for sale, which was reduced into writing, under Ex.P8, and the same was submitted to the Additional Superintendent of Police, as required under law. Thereafter, submitting a request for search, before the XIV Metropolitan Magistrate, the Inspector of Police, namely, P.W.4, the Sub-Inspector of Police - P.W.2, and other police officials, went to Sarento Guest House at Anna Nagar. Then, ascertaining the Room Number, requesting Krishnan and Narayana Chetty, to be the independent witnesses for the search, they have knocked the door of Room No.110, and in response, the accused, who was inside, opened the door. On seeing the accused, who does not know Tamil, and knew only Hindi, Mohammed Kasim, (P.W.3) who accompanied P.W.4, informed the accused, introducing themselves about their visit and intention, namely, search, as well as, informing the conditions available u/s 50(1) of the Act, under Ex.P8. Thereafter, they have conducted search in the room, which disclosed, a suit case (M.O.8) under the cot. On opening the suit case, they have found in the surface, a towel, M.O.7, and after its removal, they have noticed, two polythene packets, as well as, two receipts. Sensing that the packets contained heroin, they have taken samples, as per the mandatory provisions and sealed the same, later to be sent for chemical analysis. Thus, completing the process, detailing and describing the procedure adopted, including the recovery, Ex.P4, Mahazar, was prepared.

7. The accused, when examined, gave a confession statement in Hindi, which was translated by P.W.3, reduced into writing in Tamil, by P.W.4. The accused has not explained the possession of the contraband, such as, how he is entitled to be in possession of those prohibited items, and therefore, they have arrested the accused at about 17.30 hours, then registered a case under Ex.P9.

8. The further investigation conducted by the respondent, including sending of

the sample packets, containing heroin, to P.W.1, revealed that the materials recovered or seized from the accused, are the prohibited items, namely, heroin, as disclosed under Ex.P2. Investigation revealed, that the accused/appellant had not only violated the provisions of Section 8(c) r/w 21(c) of the Act, but also, that he has committed conspiracy, for the sale of heroin, violating law, along with one Jaffer, and in this way, to be dealt with u/s 8(c) r/w 21(c), as well as 29(1) of the Act, a final report has been filed, leading to trial, ending in conviction.

9. Heard Mr. B. Kumar, learned Senior Counsel, for the appellant and Mr. V. Madhavan, Government Advocate (Criminal Side), appearing for the respondent.

10. Mr. B. Kumar, learned Senior Counsel for the appellant, challenged the findings of the trial court, including conviction and sentence, on the following grounds, namely:-

(1) that the prosecution has miserably failed to prove, that Room No.110, Sarento Guest House, was in the occupation of the appellant/accused, wherefrom, it is said, the suit case containing 2 Kgs., of heroin was recovered;

(2) that there is no evidence to show that M.O.8, suit case, belonged to the appellant/accused;

(3)that the prosecution has failed to prove, conscious, exclusive possession of the room, from which, it is said, Narcotic Drug was recovered;

(4) that the mandatory provisions of Section 42 of the Act is violated;

(5) that, there has not been proper compliance of Section 50 of the Act;

(6) that, the prosecution has not examined any independent evidence to prove the search, as well as the seizure; and

(7) that there was violation of Section 55 of the Act also, in addition to certain other minor points.

Elaborating the above points, taking me through the evidence, as well as, supported by some legal principles, a strenuous argument was advanced by the learned Senior Counsel for the appellant/accused, for an acquittal.

11. Mr. Madhavan, learned Government Advocate, appearing for the respondent, while opposing the above submissions, would contend, that the evidence available on record, though they are official witnesses, are sufficient to rope in the appellant/accused, with the offence, as held by the learned trial Judge, that none of the provisions of the Act, has been violated, either during the search or at the time of taking samples, or later, as rightly held by the trial court, and in this view, in fine, supporting the reasonings assigned by the trial court, a plea was made, for confirmation of the findings, thereby to reject the Appeal.

12. From the submissions made by either Counsel, as well as, by going through the plea and counter-plea, the important points that arise for due consideration are:-

(1) Whether the appellant/accused was found to be in possession of 2 Kgs., of heroin, in Room No.110 of Sorento Guest House, as claimed by the prosecution?

(2) Whether any one of the mandatory provisions of the Act has been violated? If so, what is the effect?

(3) Whether the offence reported against the appellant/accused is proved beyond all reasonable doubt, warranting severe punishment preceded by conviction?

13. The appellant/accused was directed to face an offence u/s 8(c) r/w 21(c) and 29(1) of the Act, on the ground, that he was found to be in possession of heroin, weighing 2 Kgs., illegally, without any permission, in Sorento Guest House, First Avenue, Anna Nagar, in Room No.110. The possession, contemplated u/s 8(c), as well as, Section 21(c) of the Act, involving commercial quantity, must be the exclusive possession of the accused, coupled with conscious possession, as ruled by the Apex Court. Unless the prosecution establishes, that the appellant/accused was found to be in possession of heroin, that too, the same was with him, exclusively, then only, the above said Sections, would come to the aid of the prosecution, to punish the appellant/accused. Before going into the facts of the present case, it would be useful to remember the dictum laid down by the Apex Court, in this regard, in order to find out, whether the prosecution case would come within the above said provisions, as well judicial precedent, warranting conviction, or whether the prosecution had violated any provisions of the Act, if so, entitling the appellant/accused to get the benefit of doubt, at least, thereby entitling him to escape from the conviction.

14. The prosecution, if succeeded in proving the possession of the heroin, with the appellant/accused, then, Section 54 of the Act, comes to the aid, even shifting the burden of proof also, upon the appellant/accused, to explain possession. If he fails to account the possession satisfactorily, then, raising a presumption in favour of the prosecution, that the appellant/accused had violated the provisions of law, thereby operating the penal Sections, to act against the accused.

15. In Sanjay Dutt v. State, AIR 1994 SCW 3857, the Apex Court, while dealing with the provisions of Sections 5, 3, 21 of the Terrorist and Disruptive Activities (Prevention) Act (1987), had an occasion, to deal with the "conscious possession", as well as "unauthorised possession", wherein, it is held thus:-

"Once the prosecution has proved "unauthorised" "conscious possession" of any of the specified arms and ammunition etc., in a "notified area" by the accused, the conviction would follow on the strength of the presumption unless the accused proves the non-existence of a fact essential to constitute any of the ingredients of the offence."

Therefore, if the prosecution fails to prove the possession, followed by conscious possession, then a presumption available u/s 54 of the Act may not come to the aid of the prosecution.

16. In *Ismailkhan Aiyubkhan Pathan v. State of Gujarat*, 2000 S.C.C. (Cri) 1241, the Apex Court has ruled thus:-

"There is no statutory provision for drawing any presumption that a person who was present at any particular place shall be presumed to be in possession of the narcotic or psychotropic substance. No presumption under law can be drawn even u/s 114 of the Evidence Act merely because these persons were present when PW 7 went there."

The aid of the above passage was sought for by Mr. Kumar, learned Senior Counsel for the appellant/accused, in order to say, that the mere presence of the accused in the room, even assuming, that alone should not be sufficient, unless it is shown that the room was under the exclusive control of the accused, wherefrom, it is said, the contraband was seized. In the case involved in the above decision, it is seen, that when the searching party went to the place, in search of a particular person, he was not available. But, in the room, they have seen the accused and upon search, they have found the contraband, namely, narcotic substance, "charas". On the basis of the search and taking into account the presence of the accused, they were charged u/s 20(b) r/w Section 29 of the Act. In that case, admittedly, the said room was in the possession of one Nasir and Nasir was not prosecuted. Further, Nasir was also not examined to disclose as to how the accused person happened to be in the room, which was under the occupation of him. Therefore, the Apex Court held, that the prosecution was left with only a modicum of evidence, as against the accused, which only showed that the accused were present in the room, which was in the possession of one Nasir and the said room contained a gunny bag with the narcotic substance "charas" thereby showing, there was possibility of others involving. Under the above said facts and circumstances of the case, it is held, the conviction is not sustainable, since possession as contemplated under the Act was not established. The case on hand, is well distinguishable, for the reasons, which I am going to assign infra, which will establish, that the room, wherefrom the contraband was seized, namely, heroin, was under the exclusive control of the accused, not having a chance to infer other's hand might have involved. Further, there is evidence to presume, that it should have been the exclusive control of the accused, since, no other person had access to the said room, when P Ws.2 and 4 had searched the premises and recovered the contraband. In this view of the matter, the above ruling fails to help the appellant/accused, to come out as innocent, even creating any doubt to have the benefit.

17. In *Avtar Singh and Ors. v. State of Punjab*, , while dealing "possession", and the presumption, the Apex Court has held thus:-

"Possession is the core ingredient to be established before the accused in the instant case are subjected to the punishment u/s 15. If the accused are found to be in possession of poppy straw which is a narcotic drug within the meaning of clause (xiv) of section 2, it is for them to account for such possession satisfactorily; if not, the presumption u/s 54 comes into play."

It is also further held -

"Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods."

In the case involved in the above decision, a vehicle was checked by the concerned, who was on the patrolling duty, which disclosed, the vehicle was carrying 16 bags of poppy husk. One person, who was sitting in the front seat by the side of the driver and another person sitting on the back side of the truck ran away leaving the vehicle. Two persons, sitting at the back and the driver of the vehicle, alone were apprehended, charge-sheeted. While dealing with the above facts, the Apex Court has come to the conclusion, thus:-

"It is quite probable that one of them could be the custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. For instance if they are labourers engaged merely for loading and unloading purposes and there is nothing to show that the goods were at least in their temporary custody, conviction u/s 15 may not be warranted."

This kind of factual situation is not available in the case on hand. It is the case of the prosecution, at the time of the search, while knocking the door of the room, the accused alone came out from the closed room and after search, the contraband was seized, etc, thereby showing, there is no possibility of any other person having access to the room, since, it is also not the case of the defence, that he came to the room occasionally, though the room belongs to somebody, etc. Considering the factual situation, viz., in the closed room, except the accused, none was present, when the search conducted, I am of the view, the presumption contemplated u/s 54 of the Act, could be invoked, which I will discuss in detail also, at later point of time. It is not necessary, that it should be proved, that the legal possession of the room was with the accused, when no one had access to the room being closed etc. In this view, straight away applying the above principle, is not possible, and it all depends upon the facts and circumstances of the case.

18. The Apex Court, in *Gopal v. State of M.P.*, 2004 S.C.C. (Cri) 443, while deciding a case, where contraband was recovered from a heap of kadvi, which was lying on the boundary of two agricultural fields, one belonging to accused and the other belonging to an accused, who was acquitted, held, the convicted accused is entitled to benefit of doubt, since the possession cannot be fixed under surmise, unless it is established that the contraband was in conscious possession of the appellant.

From the facts of the case, it is seen, from the common boundary of two fields, the contraband was recovered, and it is not made known with certainty, from whose control, the contraband was seized, etc. Therefore, the trial court itself felt, one of the accused is not entitled to be convicted, and the said benefit was rightly extended to the convicted accused also, by the Hon'ble Apex Court, since

there was no concrete evidence, to prove, that the contraband was in the conscious possession of the appellant. As stated above, this ruling also, may not come to the aid of the appellant/accused, since, here, only from a room, where the same was absolutely under the control of the accused/appellant, since it is proved, he came out from the room, when knocked, and the contraband was also seized, thereby raising presumption of possession, as contemplated u/s 54 of the Act, coupled with the Indian Evidence Act.

19. Learned Government Advocate, in order to attract the presumption available u/s 54 of the Act, as well as, the presumption of culpable mental state, available u/s 35 of the Act, drew my attention to the decision reported in Madan Lal v. State of H.P., 2003 SCC (Cri) 1664. In the case involved in the above decision, Additional Superintendent of Police, on information, stopped a car, along with the raiding party, and noticed that one of the accused was driving the car and the remaining accused persons were sitting therein. Thereafter, when the car was searched, a black-coloured bag was found, which contained a steel doloo kept in a plastic bag, containing 820 grams of charas. On the basis of the search and recovery, the accused were prosecuted, convicted, which was confirmed by the Apex Court, and while doing so, re-affirming the view already available, it is held thus:-

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

This dictum would be squarely applicable to the case on hand, considering the factual scenario, established by the examination of witnesses, whose evidence is trustworthy.

20. It is the submission of the learned Senior Counsel for the appellant, that the mandatory provisions available under Sections 42, 50 and 57 of the Act, were not complied with, in this case and, therefore, it should be held, the entire prosecution case is vitiated and the result should be the acquittal of the appellant/accused. True, as held by the Apex Court, in State of Punjab Vs. Balbir Singh, ,

"Under Section 42 such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42 should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision, the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."

Therefore, it should be shown by the prosecution, that P.W.4, who comes within Section 42 of the Act, had complied the above provision, and the failure, if any

noticed, it should be held that, it affects the prosecution case and not otherwise, which I will discuss, based on facts, in the coming paragraphs.

21. The Narcotic Drugs and Psychotropic Substances Act, 1985, is very stringent, contemplating severe punishment, aiming to protect the society, from the influence of the Narcotic Drugs and Psychotropic Substances, which spoils the younger generation having the temptation to taste this poison. Aiming to curb the illegal trafficking, preventing the person from indulging in this kind of activities, the Act contemplates severe punishment. While so, it provides safeguard and protection to the accused, aiming that an innocent person should not be brought an accused, for extraneous reasons. At the same time, realising, that there may be possibility for the accused to escape, creating some unnecessary doubt, to safeguard the process of prosecution also, certain kinds of presumptions were made available in the Act. This being the position under law, there is nothing wrong in expecting, that the safeguard or protection provided under the Act, should be followed scrupulously, serving the purpose, and if violation is noticed or reported, then the consequences must be serious, doubting about the genuineness of the case, violating the proceedings, and giving benefits to the accused, under the noble principle, innocent should not be convicted, that too, seriously. In this way, Section 50 of the Act contemplates, thus:-

"50. Conditions under which search of persons shall be conducted:- (1) When any officer duly authorised u/s 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised u/s 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided u/s 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the

reasons for such belief which necessitated such search and within a seventy-two hours send a copy thereof to his immediate official superior."

Realising, that the condition may not be possible to be followed always, or, it may not be necessary, at all relevant time, that too, when the person was not very particular, that the above said provision should be complied with, sub-section (5) of section 50 of the Act was introduced, in addition to the in-built provision available u/s 50(1) of the Act, where, it says, this condition should be followed, "if such person so requires" thereby making it not mandatory always.

22. In *State of Punjab v. Baldev Singh*, 1999 SCC (Cri) 1080, it is held thus:-

"The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. Severe punishments have been provided under the Act for mere possession of illicit drugs and narcotic substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right u/s 50."

It is further held in the above decision, that if a search was conducted, without intimating to the suspect that he has a right to be searched before a gazetted officer or a Magistrate, it would be violative of the "reasonable, fair and just procedure", as well as the safeguard contained in Section 50 of the Act. This mandatory provision will come into play, when the person was searched and any contraband was seized from the person, thereby making him liable for the offences reported under the Act. On the other hand, if a place, where the suspect was found to be in possession, was searched, probably, the safeguard may not be available to that person, since, the caption of Section 50 of the Act reads, "Conditions under which search of persons shall be conducted", and not the place which comes u/s 42 of the Act. Therefore, in this case, as if there was violation of Section 50 of the Act, appears to be illusory, not available to the appellant/accused.

23. It is the case of the prosecution also, that the suspected person, namely, the accused was personally searched, and in this view, it could be said, Section 50 of the Act, is mandatory. The personal search was made by P.Ws. 2 and 4, for that, records are also available, indicating nothing recovered from the person. The case of the prosecution is, that only from the room, which was under the control of the appellant/accused, the contraband was seized. Further, there is ample material, in which the appellant/accused himself had signed, indicating, Section 50 of the Act, scrupulously followed, supported by oral evidence, thereby exposing, the safeguard or protection provided to a person u/s 50 of the Act, is

not at all violated, even causing any abrasion. In this view, on the ground, safeguard u/s 50 of the Act, was not followed, I would say, even now itself, the appellant/accused is not entitled to an acquittal.

24. It is the case of the prosecution, that on information from the informer, on 11.12.2000, at about 12.15 p.m., P.W.4 and his men, went to room No.110 of Sorento Guest House, in order to search and find out the reported crime. P.W.4, the Inspector of NIB, CID, comes u/s 42 of the Act. Section 42(1) reads, thus:-

" if he has reason to believe from personal 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 V-A 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."

The case of the prosecution is, an information was received from the informer through phone, at about 12.15 p.m., on 11.12.2000, which was reduced into writing under Ex.P8. About the recording of this information, P.W.4 has given evidence, and I do not find any reason to disbelieve the same. Ex.P8 says, that a person by name Mohammadi alias Ashok Kumar Verma, a person, who is dealing with the heroin, is staying at Room No.110, Sorento Guest House, Anna Nagar, and if the Inspector goes immediately, he could be apprehended. As seen from Ex.P8, except the address where the appellant/accused was staying, the details of the accused, such as, wherefrom he hails, what is the father's name, native address, etc., were not furnished by the informer, and they were also not recorded in Ex.P8. P.W.2 has deposed, the accused, after their knocking the door, opening the same, on enquiry, informed that he belonged to Chothri Chavuthi village, Chithodi District, Rajasthan State. He has further deposed, that the information supplied by the appellant/accused was in Hindi, which was translated by P.W.3; tallied with the information received by the Inspector, on comparison. But, as seen from Ex.P8, there is no mention about the address of the appellant/accused, namely, the native place, etc. On the basis of this inconsistency, a submission was made by the learned Senior Counsel for the appellant, that the information said to have been received by P.W.4, may not be Ex.P8, and in fact, it should be held, that the original information received, if at all, might have been suppressed. In this view, it was further urged, that the mandatory provisions of Section 42 of the Act, are not complied with. The evidence given by P.W.2, that both the addresses tallied, may not be the native place of the appellant/accused, and it must be with reference to the room, where the accused was found. Further, it is not mandatory, that all the details which the Inspector had received through phone, must be reduced into writing, and it is sufficient, that the

information given by the informer, regarding the availability of narcotic drug or psychotropic substance, or controlled substance in respect of which an offence punishable under the Act has been committed, alone is reduced into writing. As seen from Ex.P8, the information is properly recorded, regarding the name of the person, place of stay, dealing with narcotic drug, etc., which are sufficient for the compliance of Section 42(1) of the Act. Section 42(2) of the Act contemplates, that the information in writing under sub-section(1), shall be submitted to the superior officer, within 72 hours, which is also promptly complied with, as seen from the endorsement of A.D.S.P., that is, on the same day, at 12.30 hours. In this view of the matter, I am of the considered opinion, as rightly held by the trial court, that Section 42(2) of the Act is duly complied with, and there is no violation of any kind, warranting even any suspicion, for the alleged non-compliance.

25. The requirements of Section 50 of the Act, may not be necessary in this case as adverted above. However, it is also fulfilled, without violation, as seen from the records, which is supported by the oral evidence. P.Ws.2 and 4 have categorically deposed, about the right available to the appellant/accused, u/s 50 of the Act, which is also supported by Ex.P5, wherein, the accused has also signed. I do not find any reason to discard Ex.P5, which has the support of the satisfactory oral evidence of P.Ws.2 and 4 and that is why, I have observed, in the previous paragraph, that there is no violation of Section 50 of the Act.

26. The main thrust of the learned Senior Counsel for the appellant/accused was, that the prosecution has failed to show, that room No.110 of the Sorento Guest House, was in the occupation of the accused; that the suit case, which was recovered from the said room, also belonged to the accused, since, that the prosecution has not let in any evidence, indicating or evidencing that this room was taken by the accused for rent to stay there. The register maintained by the Guest House owner, was not secured. Thus, it was submitted, in the absence of any such proof, based on material, that the room was under the occupation of the accused, the contraband said to have been recovered from that room, cannot be connected with the accused, drawing presumption also. True, though it is stated, two persons working in the Guest House, were present at the time of search and seizure, they have not been examined. For, the non-examination of the said two persons, it seems, by producing materials, the same was explained by the prosecution, which was accepted by the trial court, not challenged. Some receipts said to have been recovered along with the contraband, were produced to show that this appellant/accused used to stay in this Guest House, thereby probablising that on the date of the search, he might have been in the occupation of room No.110 of Sorento Guest House. True, as rightly submitted by the learned Senior Counsel for the appellant, those receipts will not prove clinchingly, about the possession of the room No.110, by the appellant, on the date of the incident. In my considered opinion, non-production of the register of the guest house, or any receipt, indicating the occupation of room No.110 of the Guest House, by the accused, may not loom large, in this case, since, it is well

established, by the acceptable oral evidence, that the appellant/accused was found, in the closed room, namely, No.110 of the Guest House, wherein, the contraband was seized. If it is the case of the prosecution or the case of the appellant/accused, that room No.110 of the Guest House, was registered in somebody's name, where the accused went occasionally, for some other purpose, then a doubt should arise, whether the accused was in the occupation of the room, that too, whether he was possessing the contraband, consciously, as held by the Apex Court, in the above said rulings. This kind of situation does not arise in this case. P.Ws.2 and 4 have categorically stated, acceptably also, that after ascertaining room No.110 of the Guest House, when they had knocked the door, the appellant/accused alone opened the door, came out, thereby showing, in the room, there was no other person.

27. Law does not say, that the contraband should be recovered from a place, which belonged to the accused, or, the place was in the legal possession of the accused. If at all, it is shown, that the person was not in the legal possession of the place, or some one has any right therein to have access, a doubt could arise, whether that person was in the conscious possession of the contraband, and nothing more. This doubt could be erased, when it is made out positively, that the room was under the control of the person concerned, and no other person had access, at the time of the search or before the search. In this case, it is established, that the appellant/accused used to stay in the Sorento Guest House, by the production of Ex.P7. In this way, being a person known to the management of the Sorento Guest House, even without registering the room in his name, he might have been allowed to stay in room No.110 of the Guest House, and in this way alone, it appears to my mind, from the proved facts, that the appellant/accused was staying in room No.110 of the Sorento Guest House, Anna Nagar, which fact is well established, because of the proved fact, he alone came out from the room, when P.Ws.2 and 4 had knocked the door. Therefore, the submission of the learned Senior Counsel for the appellant/accused, that the prosecution has failed to prove the possession of the room No.110 of the Guest House, by the accused, by producing documents, fails to convince me, to take contra view, as if, from his custody, the contraband could not have been recovered, or somebody might have been involved in this case.

28. Learned Senior Counsel for the appellant/accused, inviting my attention, to some of the discrepancies found in the oral evidence of P.Ws.2 and 4, attempted to create a doubt, regarding the recovery of heroin, from room No.110 of the Guest House, that too, from the suit case. It is not the case of the prosecution, that on the basis of the confession given by the appellant/accused, the suit case containing the heroin was recovered. It is also not the case of the prosecution that some of the witnesses have deposed about the sale of heroin by the appellant/accused, in room No.110 of the Guest House, which led to the recovery of the suit case, which contained heroin, except the information. Even in the absence of any such case, if it is made out, when room No.110 of the Guest House was under the control of the appellant/accused, the suit case was

recovered from the said room in his presence, that is sufficient, to hold that the contraband was also under the control of the accused, thereby proving possession with him, thus shifting the burden upon the accused, to explain or account the possession, as contemplated u/s 54 of the Act, and, for non-explanation, giving presumption also in favour of the prosecution.

29. It is the case of the prosecution, that in room No.110 of the Guest House, while searching, M.O.8, the suit case was found, and upon opening, M.O.7 was noticed, upon the surface, then on removal, two packets found, recovered, containing heroin. P.W.2 has not given any evidence, at the time of examination-in-chief, how the suit case was opened, whether it was locked, if so, who was having the key, etc. It is his evidence, that some key was found over the cot. But, it is not known, what happened to that key, whether it was recovered or not. But, during the cross-examination, P.W.2, admits, that the Inspector of Police, opened the suit case, using the key, which was available, upon the cot, thereby informing, that the suit case was under lock and key. The Inspector, who was examined as P.W.4, admits in his cross-examination, that the suit case was not locked, and he has not opened the suit case, using the key available upon the cot, thereby, contradicting the oral evidence of P.W.2. There is no reference in the Mahazar also, regarding the availability of the key. On the basis of this evidence, it was urged, that the alleged recovery of heroin from the suit case must be false, or at least, it should create a reasonable doubt, about the recovery, and its benefit should go to the appellant/accused. By going through the other materials, as well as, the date of incident, and the date of examination of the witnesses, I am unable to entertain any doubt, since, there may be some discrepancy in the evidence given by the witnesses, when they have spoken regarding the incident which had taken place, prior to 1-1/2 years or so, depending upon their reproducing capacity and memory. It is a settled position of law, that all the contradictions or inconsistencies are not fatal to the prosecution case, unless that inconsistency or contradiction, had caused any unrepairable crack in the case of the prosecution. In this case, whether the suit case was locked or not, whether the key was available with the accused or not, the fact is well established by other evidence, that only from the suit case, which was in the room, under the control of the accused, the contraband was seized, and, therefore, ignoring the above said inconsistency, as did by the trial court, I am satisfied that only from the suit case, which was available in Room No.110 of the Guest House, which was in the occupation of the accused, the contraband was seized, thereby possession as well as, conscious possession was proved, leading to the presumption available u/s 54, as well as u/s 35 of the Act, regarding the culpable mental state.

30. It is an admitted position, that at the time of search and preparation of the Mahazar, etc., no case has been registered, and only after bringing the accused to the police station, a case has been registered. But, as seen from the documents, and as admitted by P.W.4, in all the documents, Crime Numbers are quoted. Taking advantage of this fact, an attempt was made to doubt about the

genuineness of the documents, as if they were created or prepared in the police station itself, illegally detaining the appellant/accused, even before the date of incident, on 11.12.2000. P.W.4 has given explanation, how the Crime Number was quoted. When the documents were prepared at the time of search, arrest, etc., no Crime Number was given, and only at a later point of time, that is, after registering the case alone, immediately, Crime Number was written. In this procedure, I am unable to find any illegality or irregularity, that too, affecting the case of the prosecution. If the documents are left without Crime Numbers, then it may not be possible for the prosecution, to correlate the particular document, connecting with the Crime Number, though it was later registered. If no crime number is written, then there is possibility to say, that this document not connected with this case. In this way, in order to supply the correlation, or to connect the document, there is nothing wrong in writing Crime Number, at a later point of time, that is, immediately after the registration of the case, before sending the documents to the authorities concerned. Only in this way, it appears to my mind, P.W.4 had furnished the Crime Number, which will not, in my considered opinion, vitiate, the documents, or create any doubt about the procedure followed, such as, search, recovery, etc. In this view, I am unable to entertain any doubt, regarding search conducted and recovery made, in this case.

31. Section 57 of the Act contemplates, whenever any person makes any arrest or seizure under this Act, it should be intimated immediately to the superior officer, that is, within 48 hours, next after such arrest or seizure, which is also complied with in this case, as deposed by the witnesses, and as seen from Ex.P11, thereby showing no violation of this Section, also.

32. P.Ws.4 and 2 have also deposed convincingly, how sample was taken from two packets, packed and sealed, etc., which was later sent for chemical examination through court. P.W.1, who had examined the sample packets, sent through court also, has affirmed about the packing, availability of seal, etc., thereby showing, that the sample taken from the contraband seized from the possession of the appellant/accused alone, had been sent for chemical examination, which revealed, that the contraband comes under the heading heroin. In the procedure adopted, while taking the sample, and sending for chemical examination also, by going through the materials, I am unable to find any irregularity or illegality.

33. Section 55 of the Act contemplates, how the contraband may be delivered to an Officer in-charge of police station, empowering him, permitting the person who delivered the same, to take sample, affix his seal, etc. P.W.2 has deposed, that all the contrabands were sent to Court with their seal, and how the accused and the properties were handed over to the Additional Superintendent of Police, by P.W.4. Section 55 of the Act, prescribes the procedure for safe custody, and it is only in the nature of direction and not coming within the meaning of mandatory procedure to be followed scrupulously, which would give generally, protection to the accused, and in this way, even assuming that Section 55 of the

Act is not followed, the prosecution case cannot be doubted, and, therefore, I conclude, there is no violation u/s 55 of the Act, vitiating the proceedings.

34. The trial court, considering all these facts very elaborately and ignoring certain discrepancies, which are liable to be ignored, has come to the conclusion correctly, that the offence u/s 8(c) r/w 21(c) of the Act, against the appellant/accused, was proved beyond all reasonable doubt, thereby convicting under this Section and acquitting the accused u/s 29(1) of the Act, which requires only confirmation, not interference.

35. For the foregoing reasons, in my considered opinion, the appeal is devoid of merits, liable to be dismissed. Accordingly, the same is dismissed, confirming the conviction and sentence of the trial court.