

(2001) 07 RAJ CK 0105
In the Rajasthan High Court
Case No : Criminal Appeal No. 135 of 1999

Prabhulal and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 04-07-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 157, 293, 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 21, 25, 35, 41

Citation : (2002) 1 RLW 182

Hon'ble Judges : Arun Madan, J

Bench : Single Bench

Advocate : Suresh Sahni, for the Appellant; S.S. Rathore, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Madan, J.

(1). This criminal appeal has been preferred against the judgment of the trial court by (1) Prabhulal, (2) Nandji Alias Nandlal, (3) Dhannatal, (4) Bhojraj, (5) Sheoji (6) Smt. Sugna and (7) Smt. Kalyani, each of whom has been convicted, u/s 8/18 and 8/21 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "the NDPS Act") and sentenced to undergo ten years" RI with a fine of Rs. one lac (in default, further RI for one year).

(2). It is the prosecution case that on an information received on 18.11.1997 as to the appellants being indulged in manufacturing smack from opium, a raiding party headed by Ashwin Kumar, SHO Police Station Chhipa Board (District Baran), consisting of other police personnel including Anar Singh (ASI), Chandra Prakash (ASI), Lal Chand (ASI), Ghasilal (HC) and constables Rameshchand (HC), Phool Chand (PC), Totaram (FC), Bhagwan Singh (FC), Brij Behari (FC), Anil Kumar (FC), had carried out a search at the house and place of Prabhulal (A1) after giving out as to their having been indulged in manufacturing smack from opium

as per information of an informer, and before search when Prabhulal (A1) was called out of his house and he gave out that it was his house being owned and possessed as his residential house wherein five men and two women were alleged to have been residing. During search, in the house it was found that besides house owner Prabhu (A1), five other men and two women were busy in making smack from opium and during this process, stove was burning, over which cauldron was lying full of opium liquid which was being warmed and similarly there was a plastic tub full of brownish liquid, besides there being opium liquid duly filled up in two of tubs and one plastic canister. It was also found that there were one big plastic phial and eight small plastic phials having labelled of "doctor brand spirit" being kept near plastic tubs and that apart there was also one aluminium small cauldron (Bhagona) full of lime liquid and also 21 empty cloth sachets full of opium smells.

(3). Upon having found aforesaid material in the house, each and every member of residents therein were warned to stand thereby for search of the house by the raiding party and were asked to produce any license for keeping smack or manufacturing thereof from opium but they failed to do so. Accordingly, weight of all articles, opium, smack, and other liquid materials got done including cauldron and its weight including cauldron was found 2 kgs and without cauldron its weight (of opium etc.) was 10 kgs out of which two samples each of 100 gms were taken and were got seized and sealed in a plastic sachet first by keeping in a lid of "Jafrani" and then by overwrapping white cloth in a sealed cover. Similarly liquid opium lime was weighed at 15 kgs while plastic tub was weighed at 490 gms and thereafter two samples each of 100 gms were taken thereof which were also got sealed. Further one cloth sack (small) containing smack was got weighed and it was found 112.7 gms including sack, while sack without material was weighing at 51.8 gms and thereafter two samples each of 5 gms were taken and sealed firstly by keeping it in an empty lid of "Jafrani" and then by wrapping white cloth. Similarly a plastic sack of 4 gms containing 292 gms including sack was seized and out of which two samples each of 50 gms are taken and sealed. Other empty phials, sachets, and canister etc. were also seized and sealed, besides a lantern, funnel, balance with measures-three of 500 gms, one of 200 gms, and one of 100 gms.

(4). Accused appellants were arrested at the spot during search after their personal search and seizure of belongings found in [heir possession three plastic tubs and one old gunny sack so also one aluminium cauldron (Bhagona) containing lime liquid were also got seized and sealed in the presence of attesting motbir witnesses. Thereupon crime was registered at No. 468/97 of the aforesaid search for the commission of offence punishable under Sections 8/18, 8/21 and 8/25 of the NDPS Act at PS Chhipa Barod and the investigation was handed over to Ramchandra SHO and after having registered FIR, seized and sealed packets A to K were deposited in the Malk-hana and the investigation commenced.

(5). After usual investigation and completion thereof, charge sheet was produced against the accused appellants for offences u/s 8/18, 8/21 and 8/25 of the NDPS Act. However the learned trial Court framed the charges against the appellants for offences under Sections 8/18 and 8/21 of the NDPS Act, to which they pleaded not guilty and claimed trial. The prosecution produced as many as 13 witnesses and 49 documents were got exhibited. The accused appellants were examined u/s 313 Cr. P.C. but they failed to produce any evidence in defence despite being granted four chances. After hearing both the parties, by the impugned judgment dated 15.2.1999, the learned Special Judge (NDPS Cases), Chhabra (Baran) convicted and sentenced each of the appellants as indicated above. Hence this appeal.

(6). During the course of arguments, Shri Suresh Sahni learned counsel for the accused appellants firstly contended that though Madholal (PW 5) and Ramsingh (PW 6) were introduced as independent witnesses to the recovery and seizure during impugned search but they have not only turned hostile but also explicitly deposed during trial that the police obtained their signatures/thumb impressions under threat and coercion but this aspect has totally been ignored by the trial Court. Secondly Shri Sahni argued that the trial Court erred in completely ignoring that not only the search but also the seizure process was illegal because the process through which samples were taken did not conform to the rules as is evident from the fact that their weight did not tally with FSL report (ExP47), inasmuch as the prosecution evidence in regard to taking of samples and sealing thereof belied the prosecution story and falsified the entire process of search and seizure. Next contention canvassed by Shri Sahni is that the trial Court erroneously appreciated the evidence of Ghasilal (PW 3) who is the Head Constable and was Malkhana in charge and as per his evidence once it stood established that the samples were returned by the FSL, because this witness admitted that it is correct that objections are of two types firstly the seal is broken and the other objection has no fact, and therefore, taking of the samples renders doubt for the prosecution story. Further there was an obvious lacuna in sealing process of the sample taken which legally warrants and clamours for justice that prosecution case be thrown beyond credibility and visibility of the law because there was no double sealing rather sealing process was done contrary to Rr. 2.02, 2.09, 3.03 and 4.01 of the NDPS Rules, 1985.

(7). Shri Sahni also vociferously argued that the grave dent has taken place in the prosecution case for the reason that entire seized articles were not produced before the trial Court therefore, an adverse inference ought to have been drawn but the trial Court eschewed as irrelevant for by observing that "it is correct that during entire trial opium, smack and other evidence which were seized at the spot were not produced but looking to the heavy recovery, only for this reason the accused cannot be acquitted."

(8). Shri Sahni also laid stress that personal search of female accused (A6 and A7) was carried out in contravention of the law vide Ex.P35 & P40.

(9). Lastly Shri Sahni contended that the trial Court erroneously appreciated the evidence of Ashwini Kumar (PW 12) despite the fact that this witness made various contradictions besides omissions as to the information, reaching of raiding party to the spot, option of gazetted officer of Magistrate, regarding testing of contraband opium/smack and illumination of lantern, because he stated that he did not give any search to any of the accused; and that specimen seal was drawn by him but not available on record nor any document was scribed by him; and as regards violation of Section 157 CrPC he admitted that FIR (ExP 47) was received by the Magistrate on 21.11.1997 but he deposed that it was despatched by him to the Magistrate on 18.11.1997 and similarly there was his admission that it is correct that as per law gazetted officer was required to accompany him before conducting the search but no such officer did join him.

(10). On the contrary the learned Public Prosecutor reiterating the arguments made during trial court has supported the findings recorded by the trial court for sustaining the impugned conviction.

(11). I have heard the learned counsel for the parties and perused the entire prosecution evidence and other material on record on the basis of which the impugned judgment has been passed by the trial court. In my considered view, merely because the FIR has reached the Magistrate after three days, it would not demolish other positive and credible evidence on record. This only shows carelessness on the part of the investigating agency. My view is fortified from the decision in Shivram v. State of UP (1). Moreover the accused appellants have failed to show any prejudice being caused to them due to delay in despatching the FIR to the Magistrate in compliance of Section 157 CrPC inasmuch as the evidence of Ashwin Kumar (SHO) (PW 12) clearly established that as soon as an informer gave out secret information as to the accused appellants indulged in manufacturing smack from opium in their house, Such information was got noted down in daily dairy book vide report (ExP48) at No. 799 a copy thereof was endorsed to his superior officer Ramesh Chandra Meena SP and through radiogram to the Addl. SP and to prove these facts, the prosecution also produced Mahvir Prasad, Dy SP (PW 8) who deposed that on 18.11.1997 at about 6 AM he received information from SHO, PS Chhipa Barod vide report (ExP44) as to the manufacturing of smack from opium at the residential house of the accused (Prabhhu-lal) and whereupon he endorsed his signature C to D and pursuant to such information he had also gone to the spot where search & seizure proceedings were being undertaken by the raiding party and on ExP29 he verified seizure vide his signature thereon. Further Ashwin Kumar (PW 12) in cross-examination deposed that the FIR was despatched on 18.11.1997 itself for being transmitted to the Magistrate and he did not know as to how it reached the office of the Magistrate on 21.11.1997. I have carefully perused the FIR (ExP 47) whereon there is an endorsement put by the Reader of the Magistrate to whom the FIR was sent, and according to such endorsement put on 19.11.97, Khuman Singh LHC No. 323 of PS Chhipa Barod produced FIR at 12.20 P.M. and he further endorsed a note that P.O. (Presiding Officer) was on leave and let the FIR be

placed on the P.O.'s return from leave. In such circumstances on 21.11.97 the Magistrate endorsed note on the FIR that it be registered. That apart, keeping in view the search and seizure of huge quantity of the contraband which certainly took long time at the spot commencing in the morning till completion of search and seizure process there, the FIR was got lodged & registered at about 5.30 P.M. at the police station which was situated at a distance of 15 kms away from the place of search and seizure i.e. house of the appellants, therefore, I find no delay if FIR had reached the office of the Magistrate concerned next day at 12.20 P.M. when the Magistrate was on leave.

(12). I must hasten to add that the present one is a case for commission of offence under the NDPS Act and in the instant case, the investigating agency has introduced the independent witnesses to the seizure and search of the accused appellants but these two attesting witnesses to the impugned seizure and search have turned hostile during trial. This is a significant circumstance to draw an inference that they have been won over by the defence with a view to demolish the prosecution case and even these attesting witnesses though admitted their signatures on the memos of the impugned search and seizure of the contraband but denied to have seen the impugned search and seizure on the pretext that their signatures and thumb impressions were got by the police personnel under threat or coercion but surprisingly enough they failed to describe in their deposition as to what type of threat or coercion had been used by the police personnel. In these facts and circumstances of the case, once the searching officer who lodged the FIR and sent the report to the Magistrate, specifically during cross-examination deposed that he despatched the FIR on 18.11.1997 itself, it can reasonably be inferred as to the defence having hampered and tempered with the transmission of the FIR to the Magistrate with a view to delay such transmission. Be that as it may, at the worst, this alleged delay being carelessness on the part of the investigating agency is of no consequence to the accused and for which entire prosecution case cannot be thrown out of the board to render the conviction based on other clinching positive and credible evidence unsustainable. Further from the prosecution evidence as well as other documents on record it is clear that soon after the impugned search and seizure of the contraband from the house of the accused appellants FIR was got lodged and registered at Police Station Chhipa Barod and the investigation commenced at the instance of Ramchandra who during investigation immediately started work of preparing requisite reports and memos and those reports and memos prepared by the investigating officer contain the number of FIR lodged on 18.11.1997. Therefore, there cannot be any doubt that the FIR had come into existence on 18.11.1997 at 5.30 P.M. Even though it had reached the Magistrate belatedly, the delay cannot in view of other evidence create any doubt regarding its genuineness, especially the impugned search and seizure. Moreover, the defence failed during examination of the accused u/s 313 CrPC to state any animosity against any of members of the raiding party or the investigating officer or the searching officer for the impugned search and seizure of the contraband

articles of huge quantity from the house of the accused appellants and they further failed to state any prejudice caused due to the delay in despatching the FIR to the Magistrate, with a view to cast aspersion on the genuineness of the FIR.

(13). In Balbir Singh's case (2) after referring to a number of judgments, the Apex Court held that failure to comply with the provisions of the Cr.P.C. in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 per se does not vitiate the prosecution case and if there is such a violation, what the Courts have to see is whether any prejudice was caused to the accused. No doubt, vide Section 51 of the NDPS Act, the provisions of the Code of Criminal Procedure, 1973 shall apply, insofar as they are not inconsistent with the provisions of the NDPS Act, to all warrants issued and arrests, searches and seizure made under the NDPS Act. Thus, the NDPS Act after incorporating the broad principles regarding search, seizure and arrest etc. in Sections 41, 42, 43, 49 and 50 has laid down in Section 51 that the provisions of the Code of Criminal Procedure shall apply insofar as they are not inconsistent with the provisions of the NDPS Act. The expression "insofar as they are not inconsistent with the provisions of this Act" occurring in Section 51 of the NDPS Act is of significance. This expression implies that the provisions of the Code of Criminal Procedure relating to search, seizure or arrest apply to search, seizure or arrest under NDPS Act also except to the extent they are "inconsistent with the provisions of the Act." Thus, while conducting search and seizure, in addition to the safeguards provided under the Cr.P.C. the safeguards engrafted under the NDPS Act are also required to be followed. Thus once it is settled law that the provisions of the Cr.P.C. are made applicable to the NDPS cases, then the rule of prudence and/or appreciation as to the credibility of the evidentiary value of the police personnel relating to the search and/or seizure of the contraband is equally applied in such NDPS cases.

(14). Needless to reiterate the sound rule of prudence comprehensively that before conducting a search the police officer is required to call upon some independent and respectable people of the locality to witness the search. However it may be added that it may so happen that no such person is available or even if available, is not willing to be a party to such search and it may also be that after joining the search, such persons later on turn hostile, as has happened in the case at hand. However, in any of such eventualities the evidence of the police officers conducting the search cannot be disbelieved solely on the ground that no independent witness was examined or if examined then not supported by turning hostile to prove the search. At worst, in case of no attempt made by the police officer to join with him some persons of the locality available to witness the search or recovery, it would affect the weight of evidence of such searching police officer, though not its admissibility. Further circumstances of not joining any of those witnesses cannot affect the credit worthiness of the prosecution case, itself. As indicated above, none of the prosecution witnesses who have been examined to support the prosecution emanating from the impugned search

and seizure of the contraband had allegedly bore any ill-will or malice against the appellants. Of course they all belong to the police force but merely on that account their evidence cannot be said to be tainted. Since the departmental witnesses would be interested in the success of the prosecution case prudence requires that their evidence be scrutinized with more care. I have critically and carefully analyzed the evidence of all the prosecution witnesses and find that despite lengthy cross-examination nothing has been elicited which may in any way discredit their testimony at all. These police officials-prosecution witnesses had no reason to falsely implicate the appellants. They have successfully stood the test of cross-examination.

(15), The FSL report (ExP49) lends enough corroboration to their evidence. This report (ExP49) contains description of packets that the packets four in number marked A1; B2; C1; and D1 enclosed within separate white cloth which were properly sealed bearing impressions which tallied with specimen seal impression forwarded and the seals were intact. Similarly, as per report (ExP49) these four packets were received by the FSL on 12.12.97 through letter No. 16711 dt. 11.12.97, and result of their examination is that the sample contained in each of the packet marked A1 and D1 gave positive Tests for the presence of Diacetyl morphine (Heroin) in traces alongwith other opium alkaloids; that the sample contained in packet marked C1 gave positive tests for the presence of diacetyl morphine (Heroin) alongwith other opium alkaloids; and the sample contained in packet marked B2 gave positive tests for the presence of Chief constituents of coagulated juice of opium poppy having 1.61% (one point sixty one percent) morphine. In this view of the matter, FSL report (ExP49) is admissible in evidence u/s 293 CrPC, because the packets sent for chemical examination were received duly sealed properly with intact sealing by the FSL, despite the evidence of Mohibur-Rehman who had carried the seized & sealed packets of the contraband to the FSL and from whose evidence despite searching cross examination by the defence nothing has been elicited to demolish his evidence which proved the delivery of packets A1 to D1 duly sealed properly with intact sealing to the FSL on 12.12.97, inasmuch as in cross-examination no question was put to PW9 as to those alleged objections put by the FSL whether being related to hampering or tampering with the sealing of seized packets of the contraband and even as per his chief examination, it stands established that alleged objections related to merely deficiency in formalities in the papers forwarded and not the seized packets, and as per deposition in his cross-examination this witness got completed deficiency in the forwarding papers. ExP45 is an office copy of the forwarding letter of the SHO PS Chhipa Barod for sending seized packets in a sealed manner to the FSL but through SP Baran which stands proved by PW9, who specifically in chief examination deposed that he had taken the seized packets of the contraband for being delivered to the FSL in a sealed cover alongwith forwarding letter from the Malkhana incharge and which were first taken to the SP office from where he took forwarding letter and then had gone to the FSL. Ghasilal (PW 3) Malkhana Incharge proved

endorsement entry (ExP28) put in the Malkhana register from which it stands established that when the seized packets of the contraband firstly taken by Muhirrehman (PW 9) were in sealed condition but also when they were received back for removing the objections as to the papers formality then also in a sealed cover and further when they were sent again on 11.12.97 to the FSL then also they were taken by Muhirrehman in a sealed condition. Ghasilal (PW 3) has not at all deposed despite searching cross-examination that the objections put by the FSL when returned back first time on 7.12.97 were relating to the sealing process of the contraband packets. Hence in my considered view, none of the assertions made by the defence to disbelieve the prosecution witnesses in regard to the credibility of the FSL report (ExP45), malkhana register entry (ExP28A), Ghasifal (PW 3), & Muhirrehman (PW 9) has any merit to render the conviction not sustainable. Further I do not find any substance in defence case that there was no double sealing process therefore there was violation of NDPS Rules in this regard. For the first time such an assertion has been made before this Court and nothing was argued before the trial Court nor prosecution witnesses were cross examined as to the double sealing process whether done to the seized articles or not at the time of search and seizure of the contraband.

(16). As regards difference in weight of the packets received by the FSL, A1 and B2, in my considered view the trial Court has rightly found such a minor difference in weight as of insignificance in view of the fact that the seized articles in packets A1 and B2 were undoubtedly brown coloured kneaded wet substance and brown coloured liquid sample respectively and as per FSL report (ExP49) packet A1 was packed in small polythene bag repacked in cylindrical tin container while packet B2 was packed in polythene bags, mouth fastened by a piece of thread which was repacked in cylindrical tin container. Thus the samples being wet and liquid substances, the chances of losing their weight due to air moisture atmosphere and having come out of the packing are bleak inasmuch as difference in weight has not caused difficulty to the chemical analyser for proper chemical analysis with a view to come out for a definite conclusion.

(17). Contrarily, the prosecution evidence clearly discloses that the seized articles were produced before the officer in-charge of the police station in a sealed cover and they were sent for safe custody inasmuch as they were kept in the Malkhana and even while they were taken for the chemical analysis they were properly sealed. The FSL report clearly established that the articles examined by the FSL were the articles connected with this case. Neither was the FSL report challenged nor was any application given for examining the chemical analyser as a witness to establish that the seals on the samples received for chemical examination were not intact or properly put when received by him or that lesser quantity of sample having difference in weight of the seized wet liquid samples of the contraband received by the FSL had caused difficulty in chemical analysing them. Even in statement u/s 313 CrPC the appellants had not stated that nothing happened at the taken place or that everything was done at the police station or that the seized articles were not sealed at the place of search during the

impugned search or that women accused were not personally searched either during their arrest or the impugned search by the policemen.

(18). As regards the assertions of the defence as to the evidence of Mohanlal (PW 2) photographer, he proved that he had taken photos marked Exp2 to P26 and further he admitted his signature affixed on memo (Exp27). As per his evidence he had gone to take photo and reached the place in village Sarangkhera at about 3 or 4 O'clock in the evening of 18.11.97. His presence for taking photos has also been admitted even by hostile witness Madholal (PW 5) who admitted his signature as attesting witness to memo (Exp27). I do not find any contradiction from his evidence despite searching cross-examination by the defence as to the timing of snapshots with a view to disbelieve his version. Variation in the timing stated in chief examination or cross-examination is not substantial rather it is insignificant being minor. Contrarily his presence is established at the place of search and seizure of the residential house of the accused appellants who appear to have been sitting at the time of search by the police. That apart in chief examination photographer admitted that he fell unable to recognise enclosed reel as it had no marks at his instance. Once the photos (Exp2 to P26) were admitted and proved to have been taken by photographer Mohanlal (PW 2) it makes no difference if its negative reel was not got exhibited despite the witness having brought the negatives at the time of recording of his statement in court as is evident from chief examination.

(19). As analysed above, as regards recording of secret information and then sending it to superior officer, compliance of Sections 41 & 42 of the NDPS Act has been made by the prosecution and it stood proved that informer's information was recorded in original was onwards transmitted to the superior officer to the searching officer. Similarly the impugned search and seizure in the present case was made in the presence of a gazetted officer as has been stated by Mahavir Prasad, Dy. SP (PW 8) who being gazetted officer had also verified the search and seizure having been made by the empowered officer Ashwin Kumar, SHO (PW 12) and these police officials-prosecution witnesses have satisfied the trial Court at the trial of the case by deposing about due compliance with the requirements provided in Sections 42 & 50 of the NDPS Act. And, a presumption u/s 54 of the NDPS Act can only be raised after the prosecution has established that the accused was found to be possession of the contraband in a search conducted in accordance with the mandate of Sections 42 & 50. However, I may clarify that on its plain reading, Section 50 of the NDPS Act comes into play only in the case of a search of a person as distinguished from search of any premises etc., because Section 50 prescribes the conditions under which search of a person shall be conducted. And, if the empowered officer, without any prior information as contemplated by Section 42 makes a search or causes arrest of person during normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, then the requirements of Sections 42 & 50 of the Act are not attracted.

(20). Here I think it proper to have brief resume of provisions contained in Sections 42 and 43 of the NDPS Act. Sub Section (I) of Section 42 lays down that empowered officer upon having a prior information of any person should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without a warrant between sunrise and sunset and he may do so without recording his reasons of belief. Further, the proviso to Sub-section (1) lays down that if the empowered 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, any time between sunset and sunrise, after recording the grounds on his belief. Vide Sub-section (2) of Section 42, the empowered officer who takes down information in writing or records grounds of his belief under the proviso to Sub-section (1), shall forthwith send a copy of the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. Material difference between provisions of Section 43 and Section 42 is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with the regard to the commission of an offence before conducting search and seizure, whereas Section 43 does not contain any such provision as in Section 42.

(21). In the instant case since the impugned search and seizure of the contraband articles under the NDPS Act acting on prior information was about to search a building, i.e. residential house of the accused (Prabhulal) and its occupier being indulged in manufacturing drugs and preparation in relation to the opium, Section 50 of the NDPS Act would not come into play as it can be invoked only in case of a search of a person, inasmuch as the offences with which the accused appellants including women accused (A6 to A7) have been charged are punishable under Sections 8/18, 21 and 25 of the NDPS Act. Section 25 of the NDPS Act relates to the punishment for allowing premises etc. to be used for commission of an offence. Section 21 pertains to punishment to contravention in relation to manufactured drugs and preparations. u/s 25 of the NDPS Act, the owner or occupier or having the control or use of any house, room enclosure, space, place animal or conveyance is included for allowing premises to be used for commission of an offence. Hence, even if personal search of women accused (A6 & A7) was carried out in contravention of law vide Exp35 & P40, in the facts and circumstances of the case is of no consequence keeping in view the offences charged against them. That apart in fact Exp35 & P40 are arrest and personal search memo and a perusal thereof established that their personal search was got made by them viz. Smt. Sugna (A6) was got personally searched through co-accused Smt. Kalyan Bai (A 7) who was searched in person by Sugna (A6) while they were being arrested.

(22). It is trite law that "unlawful possession" of the contraband is the sine qua

non for conviction under the NDPS Act and that factor has to be established by the prosecution beyond a reasonable doubt. Therefore, the seized contraband is evidence. But in the absence of proof of possession of the same, an accused cannot be held guilty under the NDPS Act.

(23). The entire impugned search & seizure of the contraband substances having been recovered from the house of Prabhulal (A1) had made by Ashwin Kumar (PW 12) SHO PS Chhipa Barod vide memo (ExP29A) which stands verified by Mahavir Prasad (PW8) DySP (Circle Officer). All prosecution witnesses have proved search and seizure memo besides other memoes prepared during the investigation. Ashwin Kumar (PW 12) searching officer proved that he was empowered officer under the NDPS Act to search and seizure the contraband from the house of accused appellants. Thus the impugned search was carried out by the searching officer in accordance with mandate under the NDPS Act in the presence of DySP (gazetted officer) from the conscious possession of the house (place of the impugned search) so also in the presence of all the accused appellants who have not at all disputed nor objected their presence or conscious possession of the house at the time of the impugned search.

(24). Thus in my considered view, the impugned search was made in the presence of the Gazetted Officer (Mahavir Prasad (DySP) (PW 8) by Ashwin Kumar (PW 12) (SHO PS Chhipa Barod) therefore, there was no illegal search, whereas the contraband seized during the impugned search of the house where all the appellants found present being in conscious possession of the contraband on prior information having been conducted in accordance with the mandate of Section 42 of the NDPS Act can be used as evidence of unlawful possession of the contraband narcotic substances so as to sustain his impugned conviction. There was no illegality rendering the trial unfair. The prosecution has established beyond reasonable doubt that the accused were found to be in possession of the contraband in search conducted in accordance with the mandate of Sections 42 of the Act.

(25). Further, the contraband narcotic substances were recovered from the residential house and in the presence of all the accused appellants who were inside the house. During recovery of the contraband narcotic substances and its memo none of the accused appellants ever protested by saying that the house was not in their possession or that they were not residing therein or that the contraband articles seized did not belong to them. Moreover, the presence of huge quantity of contraband narcotic substances in the house being in conscious possession of the accused appellant could not have been possible without knowledge and taking the inhabitants of the house (place of the impugned search & seizure of the contraband) into confidence.

(26). Having carefully perused the impugned judgment I am of the opinion that the trial Court has rightly considered and scrutinised the prosecution evidence which can safely be relied upon as the statements of the prosecution witnesses consisting of the searching, seizing, investigating and empowered officer as well

as chemical analysis report (FSL) do not suffer from any infirmity nor is there any good reason for not accepting their evidence. Hence in my opinion the Trial court did not commit any error in holding what was found from the appellants was contraband heroin. The courts are aware of the fact that the Narcotic offences like "most contagious dreadfully disease, is fast spreading in our society like cancer and AIDS. Hence once a person is found to have committed offence under the NDPS Act, there cannot be any question of showing any mercy to him. The statutory presumption incorporated u/s 35 and 54 of the NDPS Act would be attracted only when possession of the contraband articles by the accused is established without doubt. Similarly Section 54 provides statutory presumption of culpable state of the accused. Two statutory presumptions have been engrafted in the NDPS Act by the Parliament in its wisdom obviously because of the serious nature of the offence of drug trafficking which affects the society at large, designedly and devisedly. Since the culpable mental state shows the intention, knowledge or motive which at times may be difficult to establish and therefore u/s 35 presumption of culpable mental state of the accused is provided for. Hence the court is empowered to presume the existence of such mental state of an accused and which would come into play only after the link between contraband drug or articles and the accused is established without doubt. However, it stands propounded from Section 54, itself, that statutory presumption in Section 54 could be attracted upon the proof of the possession of the contraband articles by the accused, inasmuch as the possession by the accused or of the accused is a *sine qua non* if it is established without doubt and it could be established from the evidence of the police or empowered officer and even in cases of the witnesses turning hostile to the prosecution case. Thus having considered over all circumstances emerging from the evidence on record and having given anxious thought to the relevant dictum of law. I have no hesitation in upholding the findings arrived at by the Trial Court as to the contraband substances seized from the possession of the appellants in their house, on the basis of which the appellants have been convicted and sentence for the offence charged under the impugned judgment.

(27). Lastly the learned counsel for the accused appellants contended that all the appellants belong to one family and each & every member of the family found in the house during the impugned search and seizure of the contraband has been made accused even the lady family members namely Stigna & Kalyani (A6 & A7), therefore, some leniency should be shown keeping in view the fact that they have been languishing in jail for last about four years, by reducing the substantive sentence to the period already undergone. Similar contention was raised by an old man accused in *Jagdish Budhroji Purohil v. State of Maharashtra* (3), but the Apex Court declined to accede to the request for reduction in the sentence. Once the findings recorded by the trial Court are confirmed that the offending articles were found from the possession of the accused appellants from their house and such findings are held by this Court being quite justified, in my considered view also, a huge quantity of psychotropic substances was found from

the possession of the appellants from their house, therefore, persons indulging in an activity of this type do not deserve leniency.

(28). As I do not find any substance in any of the contentions raised on behalf of the appellants resultantly, this appeal fails and is hereby dismissed. The impugned judgment of the Special Judge (NDPS Cases), Chhabra (supra), is affirmed. The appellants are in jail. They be detained to serve out the remaining sentence imposed by the trial court and upheld by this Court. They be accordingly informed.