
(1988) 09 SHI CK 0004
In the High Court Of Himachal Pradesh

State of Himachal Pradesh

APPELLANT

Vs

Sudarshan Kumar and etc.
 Schneider Helmut and etc.
Vs State of Himachal Pradesh

RESPONDENT

Date of Decision : 30-09-1988

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 50, 52(1), 57

Citation : (1989) CriLJ 1412 : (1988) 17 ILR HP 413

Hon'ble Judges : V.P. Bhatnagar, J; R.S. Thakur, J

Bench : Division Bench

Judgement

V.P. Bhatnagar, J.—The determination of these cases requires close scrutiny of the various provisions, particularly those relating to procedure contained in Chapter V of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "Narcotic Act").

2. Here, brief reference may be made at the very outset to the facts of Cr. Rev. No. 106 of 1987 and Cr. Rev. No. 121 of 1987.

3. The first Criminal Revision No. 106 of 1987 is directed against the order dated August 11, 1987 passed by the learned Sessions Judge, Una, whereby he declined to frame a charge-sheet against the accused on the facts placed before him. Briefly stated, the prosecution case was that S.H.O., Babu Ram received a secret information on December 1, 1985 that accused Sudarshan Kumar was carrying on sale of opium at his house and that opium in large quantity could be recovered from his house. On the following morning, he associated three independent witnesses with the raiding party and went to the Sudarshan Kumar's house. He gave his personal search before searching the house. During the search he found a plastic bag hidden underneath a gunny bag. The plastic bag contained opium weighing 352 gins. The case was registered u/s 9 of the Opium Act and accordingly a challan was put up, but the learned trial Court committed the case to the Sessions Judge u/s 18 of the Narcotic Act as the

provisions of the Opium Act stood repealed by the Narcotic Act. The prosecution, however, failed to produce any notification issued by the State Government under the provisions of Section 41 or 42 empowering the police officer concerned to enter, search, seizure and arrest without warrants. In its absence, search effected and the recovery made by the police was held to be without any legal authority to be ignored in the eye of law. The learned Sessions Judge further held the provisions of Sections 50 and 55 of the Narcotic Act as mandatory and non-compliance therewith fatal to the prosecution case. The order of discharge of the accused followed.

4. In Cr. Rev. No. 121 of 1987, the learned Sessions Judge, Solan and Sirmur Districts at Nahan, relying on a judgment given by Punjab and Haryana High Court in *Karam Singh v. State of Punjab* 1987 Shimla Law Journal 541 : 1987 (2) CLR 240 discharged the accused holding, almost on facts similar to those obtainable in Cr. Rev. No. 106 of 1987, that no case was made out since the police officer was not competent to conduct the search and arrest the accused for want of proper notification under the provisions of Sections 41 and 42 of the Narcotic Act.

5. In the remaining four cases, the accused therein have been convicted for offences under the Narcotic Act and awarded the minimum sentence prescribed excepting in one case where the sentence awarded exceeds the minimum. It may be stated here that the minimum prescribed sentence is rigorous imprisonment for a period of 10 years and a fine not less than one lakh rupees.

6. It is in the above background that identical questions of law have been raised in these cases and it is due to this reason that all the cases are being disposed of by a common judgment.

7. The procedure laid down in various sections contained in Chapter V of the Narcotic Act is controlled by the word "shall" which, in legal parlance, means that the requirement is imperative. Nevertheless, the word "shall" need not be given that connotation in each and every case and the provision can be interpreted as directory instead of mandatory depending upon the purpose which the legislature wanted to achieve, as disclosed by the scheme of the Act and the rules.

8. Of late, the menace of narcotic drugs and psychotropic substances has assumed such alarming proportions in the country that the elected representatives of the people could not but take note of it. Those who use these drugs become their slaves and slowly but almost irretrievably push themselves into graves of their own making. Trafficking in drugs meant to amass illegal wealth in a matter of days is an act of perfidy no society can condone. This compulsion has resulted in enacting of the Narcotic Act in order to curb and, if possible, eradicate the evil so much so that breath-taking deterrent minimum punishments have been prescribed for those found guilty. The laudable object enunciated above cannot and should not be permitted to be defeated through imparting non-existent, meaning to some mere technicality found here and there

in the Act or rules. Contemporaneously, every care and caution has to be observed to bestow rightful place to such provisions which the legislature has enacted, in its wisdom, to ensure that in no case, an innocent is convicted, for the minimum sentence laid down for most of the offences are rigorous imprisonment for ten years extending up to twenty years besides very heavy fine. We have set for ourselves these principles to guide us while examining various provisions of the Narcotic Act.

9. The first point which requires consideration is the extent of applicability of the procedure outlined in Chapter V of the Act. The relevant sections in the matter are Sections 37 and 51 of the Act and Sections 4(2) and 5 of the Criminal Procedure Code (hereinafter referred to as "the Code"). Section 37 provides that every offence punishable under the Act shall be cognizable, anything contained in the Criminal Procedure Code notwithstanding. According to Section 51, the provisions of the Code shall apply in so far as they are not inconsistent with the provisions of the Act, to all warrants issued and arrests, searches and seizures made under the Act. Sections 4 and 5 of the Code read as follows:

4. Trial of offences under the Indian Penal Code and other laws. - (1) All offences under the Indian Penal Code (45 of 1860), shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner of place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. Saving.- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred or any special form of procedure prescribed, by any other law for the time being in force.

Thus, the Code is not applicable where any different procedure is prescribed by any other law. This very conclusion flows from the language of Section 51 of the Narcotic Act. In a nutshell, the provisions of the Narcotic Act relating to all warrants issued and arrests, searches and seizures made, as far as applicable, have to be strictly followed in supersession of the provisions of the Code. However, the provisions of the Code would supplement those of the Narcotic Act to the extent the former are not inconsistent with the latter. Such provisions of the Code will, therefore, continue to apply. To reiterate; the procedure enacted in Chapter V of the Narcotic Act, as far as applicable, shall have precedence over that of Criminal Procedure Code. To the extent the provisions of Cr. P.C. are not inconsistent with those of Narcotic Act, the same shall continue to govern the trial of cases under Narcotic Act; thus the procedure laid down in the Narcotic Act is not exhaustive.

10. Next point is of considerable importance. It involves interpretation of Sections 41, 42, 43 and 44 of the Narcotic Act. These sections read:

41. Power to issue warrant and authorisation.- (1)A metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

(2) Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer 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 personal knowledge of information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place may authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The officer to whom a warrant under Sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under Sub-section (2) shall have all the powers of an officer acting u/s 42.

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 or of the Border Security Force 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 personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence 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 Chapter IV relating to such drug or substance; 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 Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun set and sun rise 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 forthwith send a copy thereof to his immediate official superior.

43. Power of seizure and arrest in public places.- 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 in respect of which he has reason to believe an offence punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article 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 an offence punishable under Chapter IV relating to such drug or substance;

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

Explanation.- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

44. Power of entry, search, seizure and arrest in offences relating to coca plant, opium poppy and cannabis plant.- The provisions of Sections 41, 42 and 43 shall so far as may be, apply in relation to the offences punishable under Chapter IV

and relating to coca plant, the opium poppy or cannabis plant and for this purpose references in those sections to narcotic drugs, or psychotropic substance, shall be construed as including references to coca plant, the opium poppy and cannabis plant.

Clearly, the above provisions lay down the power of entry, search, seizure and arrest with or without warrant or authorisation. The analytical examination of these provisions read with other relevant ones give rise to the following conclusions:

(a) The power to arrest and search has been vested in -

(i) any officer to whom a warrant has been addressed by a Magistrate u/s 41(1);

(ii) any officer of gazetted rank belonging to specified departments and empowered by general or special order by the Central or State Government to authorise any officer subordinate to him to arrest and search or the officer so authorised u/s 41(2); and

(iii) any officer duly authorised u/s 42.

(b) Until officers are duly designated under Clause (a) (ii) and (iii) above, every officer exercising or performing any powers or duties with respect to any matter provided for in the Narcotic Act immediately before the commencement of the Act shall continue to do so after the commencement of the Act. Reference in this connection may be had to the transitional provisions contained in Section 74 of the Narcotic Act;

(c) The officer who has to carry out arrest or search within the ambit of Sections 41(2), 42, 43, 44 and 49, must be superior in rank to a peon, sepoy or constable;

(d) Section 43 confers the power of seizure and arrest in public places, whereas Section 42 covers search of building, conveyance or enclosed place. Further, Section 42 incorporates additional steps to be taken in case the designated officer finds it necessary to enter and search any building conveyance or enclosed place at any time between sun set and sun rise;

(e) A common thread which runs through Sections 41 to 44 (and even Section 49) is that the designated officer thereunder should have reason to believe about the commission of an offence under the Narcotic Act before he conducts search and arrests. If such officer has valid reason to suspect as distinguished from reason to believe, the requirement of law would be met. This is because Section 43 (b) visualises a situation where a person is detained and searched but no illicit article is actually recovered from him. Section 49 expressly uses the words "reason to suspect" instead. Otherwise too, it stands to reason that the designated officer must search on the basis of bona fide suspicion. It may also be noticed here that using powers under Sections 42, 43 and 44 "without reasonable ground of suspicion or detaining, searching or arresting any person vexatiously and unnecessarily" has been made a cognizable offence u/s 58 of the Narcotic

Act. Moreover, the provisions of Section 50 fit in and fortify the conclusion that a designated officer must have reason to believe/suspect before carrying out search. Section 50(1) says:

50. Conditions under which search of person 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.

Manifestly, it would be a contemplated search for illicit articles under the Narcotic Act which would bring the provisions of Section 50(1) into play debarring the designated officer to conduct the search himself and instead to have the search made before a gazetted officer or a Magistrate. Such a search presupposes the existence of a belief/suspicion on the basis of advance information with the designated officer;

(f) A crucial question which crops up here is the legal validity of a search or seizure of illicit articles (say, opium, charas, heroin etc.) by an officer other than the designated officer adverted to above. The possibility of recovery of such articles without there being any advance information cannot be overruled. In fact, it certainly exists. For example, a member of the Central Reserve Police Force looking for illicit arms and ammunition or a member of the Armed Forces in a border engagement may hit upon such a chance recovery. It will be too much to say that such a recovery would not constitute an offence under the Narcotic Act. Take another instance. A designated officer of Police Department conducting search for stolen property in a theft case, illicit liquor or arms may happen to recover smack, brown powder, heroin, opium, Charas etc. Can the prosecution case be faulted on the short ground of non-compliance of the provisions of Section 50 of the Narcotic Act? The answer has to be in a firm negative. Therefore, the upshot of the above discussion is that only a designated officer having advance information is under a legal obligation to comply with Section 50. It also follows as a necessary corollary that only such an officer can take in writing the grounds of his personal knowledge or information given by any person that some one has committed an offence under the Narcotic Act, as postulated u/s 41(2) and Section 42(1) and further record the grounds of his belief under proviso to Section 42(1) and, once again, it is only such an officer who is required to send a copy of information u/s 42(1) and ground of belief forthwith to his immediate official superior (see Sub-section (2) of Section 42), In case of situation not specifically covered as outlined above, there could be no question of complying with the aforesaid provisions. Such cases will be, obviously enough, governed by the provisions of the Criminal Procedure Code and the accused, if found guilty, liable to be convicted under the Narcotic Act; and

(g) Where advance information is available, it must be passed on to the designated officer who has to reduce to writing the said information. (See Sub-section (2) of Section 41 and Section 42). It has also been enjoined upon him to

send forthwith a copy of his report to his immediate superior officer, as provided u/s 42(2). These provisions are mandatory in nature inasmuch as sufficient material would become available to the accused to assist him in demolishing the prosecution case through material contradictions and infirmities, The infraction of these provisions would, therefore, per se be fatal to the prosecution.

11. Reverting to Section 50(1), the contents of which have already been reproduced above per verbatim, it has been hotly debated before us whether the designated officer is or is not bound to inform the person whom he is about to search of his right to be taken without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate to be searched in their presence. It appears that he must do so to enable the person concerned to exercise his aforesaid right. This is an extremely valuable right which the legislature has clothed him with and has been incorporated in the Narcotic Act keeping in view the severity of the sentence. The rationale behind this provision is manifest. A search before a Gazetted Officer or a Magistrate would impart much more authenticity and credit-worthiness to the proceeding. It would, verily, strengthen the prosecution. Thus, there is no conceivable reason why a designated officer should shirk from affording a real opportunity to the person concerned to avail of his right, if he so desires. But for it, this valuable right would become illusory and a farce. In fact, the designated officer should, as far as practicable, make the offer in question to the person in the presence of two independent and respectable witnesses of the locality. If he fails to do so, onus would be on prosecution to prove that association of such witnesses was not possible on the facts and circumstances of a particular case. This provision thus cannot but be regarded as mandatory and violation thereof per se would be fatal to the prosecution case.

12. And then, Chapter V of the Narcotic Act lays down the procedure to be followed after the search and arrest of the accused. According to Section 52(1), the person arrested is to be informed, as soon as may be, about the grounds of arrest. Section 52(2) says that the person arrested and articles seized are to be forwarded to the Magistrate who issued the warrant u/s 41(1), However, in cases other than warrants, the person arrested and articles seized are to be forwarded to the Officer-in-Charge of the nearest Police Station or the Officer invested with powers of Officer-in-Charge of a Police Station for the investigation of offence under the Act (sub-section (3) of Section 52). Section 55 casts a duty on the Officer-in-Charge to keep articles in safe custody and allow any officer, who may accompanying such articles, to put his seal or take sample. Then comes Section 57 which postulates that any person making arrest or seizure shall make full report to his immediate superior officer within 48 hours.

13. While determining whether the above provisions to be followed after the search and arrest are directory or mandatory, it will have to be kept in mind that the provisions of a statute creating public duties are, generally speaking, directory. The purpose is to incorporate certain procedural instructions for a strict

compliance by public functionaries. "Nevertheless, non-compliance of these instructions per se cannot render the acts done as null and void. In other words, it will have to be shown that such non-compliance has caused prejudice and failure of justice, in which case alone the provisions would partake the nature of being mandatory. Judging the provisions in the light of the touchstone indicated above, we have no hesitation, whatsoever, in holding that the provisions which stand incorporated in Section 52(1) and Section 57 are mandatory in character, but that the remaining provisions are merely directory. The reason is that the right to be informed about the grounds of arrest contained in Section 52(1) and the requirement of Section 57 to the effect that any person making arrest or seizure shall make full report to his immediate superior officer within 48 hours, confer valuable rights on the accused. When informed about the grounds of arrest at the earliest opportunity, the accused becomes aware of, at the very outset, what he has to meet in the long run. Failure to do so would certainly prejudice his defence. Similarly, the provision requiring the person making arrest or seizure to make a full report to his immediate superior officer within 49 hours, brings into existence a document which can be used for purposes of cross-examination in defence. The making of such a report within 48 hours will also bring to an end the possibility of improving the prosecution version after that time. If these provisions are not strictly complied with, the prosecution must fail, but the same cannot be said with respect to the remaining provisions incorporated in Sections 52(2), 52(3) and 55. In their case, the defence will have to show that failure of justice has resulted due to non-compliance thereof.

14. We may now notice the case law under the Narcotic Act as also other cases relied upon by the learned Counsel for the parties.

15. The provisions of the Narcotic Act were examined in depth in *Karam Singh v. State of Punjab* 1987 (2) CLR 240 decided on March 20, 1987. The brief facts of that case were that a patrolling party consisting of one head constable and three constables found the accused coming from the opposite direction. The accused then turned back quickly thereby arousing suspicion of the police party which apprehended him. On his search, 50 grams of opium was recovered. On the above facts, it was held, after reading together the provisions of Section 4 of the Criminal Procedure Code and Sections 37 and 51 of the Narcotic Act, that the procedure laid down in Chapter V of the Act governing investigation of the offences will have to be followed. The learned single Judge in that case further proceeded to hold that the head constable was not entitled to arrest the appellant therein nor could he conduct the search as he lacked powers u/s 41, 42 or 43 of the Act. Furthermore, the provisions of Sections 50, 52 and 57 were also held to be mandatory.

16-17. The ratio of *Karam Singh's* case (supra) was followed by the Punjab and Haryana High Court in *Bhajan Singh v. State of Haryana* (1988) 1 Cri 444 and *Hakam Singh Vs. Union Territory*. In *Hakam Singh's* case, the accused was apprehended on the road side pursuant to a secret information that he was in

possession of crushed poppy heads. On search he was found to be carrying one bag containing 15 Kgs. of crushed poppy heads, As stated above, the learned single Judge followed the ratio of Karam Singh's case (supra) but in addition also considered the question as to whether the secret information received by the police was required to be taken down in writing and held that provision to that effect was mandatory and its non-compliance had prejudiced the accused. While scrutinising the provisions of Section 50 of the Act and, in particular the words "if such person so requires" used therein, the learned Judge held that it was mandatory on the part of the arresting officer to enquire from the accused whether he would like to be searched in presence of the nearest Gazetted Officer or the Magistrate and that failure to do so would be fatal to the prosecution case.

18. Some of our conclusions are at variance with those of Karam Singh 1987 (2) CLR 240 and Hakam Singh. We have given detailed reasons therefor. To that extent we are of the view that the law laid down in those two cases, with all respect, is not correct.

19. Two other cases relied upon by Mr. Devinder Gupta are Ranjhan Dass v. State 1988 (1) Cri 843 decided by a Division Bench of the Bombay High Court and Gulam Hussain v. State of Rajasthan 1988 (1) Cri 51 decided by the Rajasthan High Court. In those cases, the accused have been acquitted on merits and the provisions of the Narcotic Act as such were not discussed. Therefore, much assistance cannot be derived from the said two cases.

20. The learned Assistant Advocate General has sought reliance from a string of authorities which follow the law laid down in H.N. Rishbud and Inder Singh Vs. The State of Delhi, in support of his argument that illegality committed in the course of investigation does not in itself vitiate the result of trial. Those cases are The State of Madhya Pradesh Vs. Mubarak Ali, Munna Lal Vs. State of Uttar Pradesh, Muni Lal Vs. Delhi Administration, M.C. Sulkunte Vs. State of Mysore, Khandu Sonu Dhobi and Another Vs. State of Maharashtra, Khandu Sonu v. State of Maharashtra On the other hand, the learned Counsel for the accused have sought support from the law laid down in Delhi Administration Vs. Ram Singh, wherein the accused was discharged in a case under Suppression of Immoral Traffic in Women and Girls Act, 1956 on the sole ground that the offence had been investigated by a police officer other than a special police officer as provided in that Act. These cases are being noticed in all fairness to the learned Counsel for the parties, though we do not intend to embark on an exercise of discussing each one of them at length for reasons of brevity. Suffice to say that the Narcotic Act is a special law meant to meet a different situation and the provisions thereof have to be interpreted in their own background and also the guidelines to which we have already adverted to in above paragraphs.

21. The law relating to the cases having been discussed, we now propose to deal with each case on merit.

22. The facts giving rise to the filing of Criminal Revision No. 106 of 1987 have

been narrated above. The learned Sessions Judge, Una discharged the accused on the ground that S.H.O., Babu Ram, who led the raiding party, had not been empowered under the provisions of Sections 41 or 42 of the Narcotic Act. The perusal of the impugned judgment shows that the learned Sessions Judge did not consider the transitional provisions of Section 74, pursuant to which S.H.O., Babu Ram could exercise powers with respect to any matter provided for in the Narcotic Act even after the commencement of the Act. The learned Sessions Judge further held the provisions of Sections 50 and 55 of the Narcotic Act as mandatory and non-compliance therewith fatal to the prosecution case. He has obviously fallen into an error in the matter. Section 50 comes into play when a person is to be searched and has no application at all to a search of any house. It speaks of taking a person to the nearest Gazetted Officer or Magistrate for conducting his search. In this case, a plastic bag containing 352 grams of opium was found hidden underneath a gunny bag. As regards Section 55, violation thereof has been held to be directory and, therefore, could not result in order of discharge. The impugned judgment, as a sequel, is not sustainable in law and is quashed. The record of this case be returned to learned Sessions Judge, Una for hearing the parties afresh and framing charge-sheet, if so warranted keeping in view totality of the observations made by us hereinbefore.

23. Criminal Revision 121 of 1987 will also have to be accepted and the impugned judgment discharging the accused on the sole ground that the Police Officer was not competent to conduct the search and arrest the accused set aside, as the transitional provisions contained in Section 74 of the Narcotic Act have not been properly appreciated. The learned Counsel for the accused respondent has not addressed any arguments to establish that the Police Officer concerned could not exercise the powers under the aforesaid transitional provisions. Accordingly, we quash the impugned judgment and order the record to be sent back to the learned Sessions Judge, Solan and Sirmur Districts at Nahan with directions to hear the parties afresh in the light of the totality of the observations made above and frame charge-sheet, if so warranted.

24. In Criminal Appeal No. 67 of 1986, accused Schneider Helmut was allegedly found attempting to encash forged dollars in State Bank of India branch at Kullu. Immediately before his arrest, he had been residing in village Kasol in a rented room. The police took him to that room on March 15, 1986 with a view to conduct search in order to find out whether there were more forged dollars in that room. The police party consisted of Sub Inspector Brahm Dev (PW. 6), S.H.O., Police Station, Kullu, two head constables and one constable, They associated two independent witnesses belonging to village Kasol. The said witnesses are Kishan Singh (PW 1) and Bir Singh (PW 2). The lock of the room was opened with the key Ext.P-5 which was already in possession of the police. While conducting the search, bag Ext.P-2 was found hanging on the southern wall of the room. A smaller bag Ext. P-3 was found inside it. It contained charas Ext. P-4 weighing 900 grams in a plastic envelop. The trial of the accused resulted in his conviction under the provisions of Section 20 of the Narcotic Act

by the learned Sessions Judge, Mandi, Kullu and Lahual Spiti Districts at Mandi, who sentenced him to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 1,00,000/-. In default of payment of fine, the accused was ordered to undergo further rigorous imprisonment for 2 1/2 years. Aggrieved from the aforesaid order, this appeal has been preferred by accused Schneider Helmut.

25. The accused, when examined under the provisions of Section 313 of the Code, has denied that the Charas in question belonged to him. In reply to question 13, he has stated that the door of the room which was in his possession could easily be opened without the help of the key. He had some Charas weighing hardly one or two Tolas in his room, but that is still lying there. He had no other Charas in his possession.

26. As stated above, PW-1 Kishan Singh and PW-2 Bir Singh are the two independent and respectable witnesses of the locality which were associated by the raiding party at the time of conducting the search. The perusal of their cross-examination, however, reveals that they were kept standing outside the room and the recovery of Charas weighing 900 grams was not made in their presence at all. They were called inside and shown the Charas and told that it had been recovered from the room, this is as good as total non-compliance with the provisions of Section 100 (4) of the Code. As held in Smt. Prem Latta Vs. State of Himachal Pradesh, this lacuna renders the prosecution case shaky. The provisions of Sub-section (6) of Section 100 of the Code were also not complied with inasmuch as no copy of the recovery memo prepared u/s 100 ibid, duly signed by the witnesses, was delivered to the accused or any other person. Moreover, the plea taken by the accused in defence appears to be quite probable and the possibility that the Charas weighing 900 grams, even if held to have been found on search of the room in possession of the accused did not belong to him cannot be ruled out. In our opinion, the accused is entitled to benefit of doubt on the facts and circumstances of this case.

27. We must repel, on account of the legal position enunciated by us above, the contention put forward on behalf of the accused that S.I., Braham Dev (PW 6) was not empowered u/s 42 of the Narcotic Act to conduct the search. But, this case also must fail for want of compliance with the mandatory provisions of Sections 52(1) and 57. Consequently, Criminal Appeal 67 of 1986 is accepted and the impugned judgment set aside. Accused Schneider Helmut is directed to be released forthwith. Charas, which is the case property, be disposed of according to law.

28. Appellant Gabriel has filed Criminal Appeal No. 79 of 1986 which is directed against the judgment dt. Aug. 23, 1986 of the learned Sessions Judge, Mandi, Kullu and Lahual Spiti Districts at Kullu, whereby he convicted accused Gabriel u/s 20 of the Act and sentenced him to undergo imprisonment for 10 years and to pay a fine in the sum of Rs. 1,00,000/-. In default, the accused was ordered to undergo further imprisonment for 2 1/2 years. The prosecution story against this

accused is that Moti Ram (PW 3) was on patrol duty at Puranapul near Manikaran on Dec. 3, 1985, along with PW 1 Chuni Lal, constable and PW 2 Anup Ram, constable and two other police constables. The accused was seen coming from Manikaran. He tried to turn back on seeing the police party but was apprehended. On his search, Charas 450 grams was found in the inner pocket of his coat.

29. Here also, the prosecution case is too weak and insipid to be acted upon. Exhibit PA is a seizure memo which, according to the prosecution itself, was prepared at the spot. In no circumstances, therefore, this memo could contain the number of the FIR as it does, because FIR Ext. PE was recorded in the Police Station on receipt of Ruqa Ext. PB. It shows that the investigation has not been above board. Another reason which makes the prosecution case unworthy of ordence is that the seizure memo shows that the accused was not carrying anything on his person except Charas. Then, all witnesses belong to the Police Department and no effort was made to associate two independent and respectable persons of the locality. The time gap between detention of the accused and his search, in any case, could have been utilized in finding out such witnesses. The mandatory provisions of Sections 50, 52(1) and 57 of the Narcotic Act have also been infringed. The provisions of Section 100(6) of the Criminal Procedure Code were also given a complete go-by. On these facts, it would be highly unsafe to maintain the order of conviction. Accordingly, we accept this appeal, set aside the impugned judgment and order that accused Gabriel be released forthwith, Charas, which is the case property, will be disposed of according to law.

30. We will now take up Criminal Appeal 90 of 1986, wherein Rudolt Kropf was charged and convicted for offences u/s 20 of the Narcotic Act and Section 14 of the Foreigners Act. He was sentenced to undergo rigorous imprisonment for 15 years and to pay a fine in the sum of Rs. 1,50,000/- by the learned Sessions Judge, Mandi, Kullu and Lahual Spiti Districts at Mandi. He has been further sentenced u/s 14 of the Foreigners Act to undergo rigorous imprisonment for 3 years and to pay a fine in the sum of Rs. 5,000/-. In default of payment of fine on first count, the accused had been ordered to undergo further rigorous imprisonment for 5 years and in default on second count, for further period of one year. The sentences, however, have been ordered to run concurrently. The prosecution case against him is that A.S.I. Amar Singh (PW 4) along with one head constable and two constables was on duty at check post, Bajaura on Mar. 22, 1986. Bus No. HYE-1319 of the Haryana Roadways coming from Manali and going to Chandigarh reached the check post at about 8 a.m., when PW-4 Amar Singh, while checking the bus, found on its roof one iron box with two locks. He got suspicious and on making enquiries found that the accused was its owner. The accused was asked to open the box after which the articles kept therein were checked. It was then found that the box in question contained 2 Kgs. and 100 grams of Charas, 3 1/2 Kgs. of Bhang leaves and flowers and 40 grams of hashish oil.

31. As regards the offence u/s 20 of the Narcotic Act, this appeal will have to be accepted. The search was conducted at a barrier and the accused was stated to be travelling in a bus full of passengers. It is, therefore, surprising that the prosecution could not associate witnesses of a status which would lend assurance to its case. The police must have taken into custody the entire luggage of the accused, but, curiously enough, no list of articles other than incriminating ones was prepared. PW 3 Jhabe Ram is the only independent witness, but he was not associated with the search, this is clear from his statement in the examination-in-chief itself that he was told by the police that there was charas in a bag kept in the box Ext.P-8. It is also difficult to believe that a foreigner without pass-port and visa would indulge in an offence of this nature. The accused cumulatively, therefore, is entitled to benefit of doubt. The mandatory provisions of Sections 52(1) and 57 have also not been complied with. His conviction and sentence u/s 20 of the Narcotic Act is, therefore, set aside.

32. As regards the conviction under the Foreigners Act, the main argument of the learned Counsel for the accused has been that the accused has been in jail since Mar. 3, 1986. He also must have earned remissions by this time. It has, therefore, been prayed that the sentence may be reduced to the imprisonment already undergone. We are prone to agree with this submission and, maintaining the order of conviction under the Foreigners Act, reduce the sentence to the imprisonment already undergone. As a result, it is ordered that the accused be released forthwith. The incriminating articles under the Narcotic Act, which are the case property, be disposed of according to law.

33. Appellant Om Parkash in Criminal Appeal 189 of 1988 has been convicted u/s 20 of the Narcotic Act and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/- by the learned Additional Sessions Judge, Mandi, Kullu and Lahual Spiti Districts camp at Kullu, vide his impugned judgment dt. May 23, 1988. In default of the payment of fine, he has been further ordered to undergo rigorous imprisonment for a period of 5 years. In this case, the police is stated to have received a secret information on Jan. 15, 1987 at about 5 p.m. in Manali Bazar that the accused had in his possession Charas. Sub-Inspector, Amar Singh of Police Station, Manali constituted a raiding party consisting of some constables and also associated two independent witnesses, namely, Dhani Ram and Tek Chand. The accused was detained near Beas Bridge at Manali and found to be carrying one bag on his shoulders containing 1 Kg. and 700 grams of Charas wrapped in a plastic cover.

34. In the instant case, the police had advance information with respect to the accused carrying Charas. The police party was in Manali Bazar. It is, therefore, shocking that they could associate two independent witnesses, one of whom namely PW 1 Dhani Ram did not support the prosecution case at all and had to be declared hostile, whereas the other namely PW 2 Tek Chand is an illiterate person belonging to a far away village Gurdor. It beats one's imagination as to why some persons of such status and position could not be persuaded to join the

police party on whose testimony the Court could act without second thought. It is not to say that an illiterate person, in all circumstances, is not a good witness, but in case of present nature, we cannot but observe with all the emphasis at our command that the police must devise new and improved investigating processes and ensure that the calibre of the evidence which is brought before a court of law is of a high order. Besides, in this case also, the mandatory provisions of Sections 50, 52 (1) and 57 have not been complied with. The accused is, therefore, entitled to acquittal. Accordingly, this appeal is accepted and it is directed that the accused be released forthwith. The incriminating articles be disposed of according to law.