

(2016) 08 SHI CK 0061

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 332 of 2011.

State of Himachal Pradesh - Appellant @HASH Vijender Singh

Date of Decision : 02-08-2016

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, Section 35, Section 42, Section 50

Citation : (2016) 3 SimLC 1640

Hon'ble Judges : Dharam Chand Chaudhary and Chander Bhusan Barowalia, JJ.

Bench : Division Bench

Advocate : Mr. D.S. Nainta and Mr. Virender Verma, Addl. Advocates General, for the Appellant; Mr. N.S. Chandel, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Dharam Chand Chaudhary, J. - Respondent Vijender Singh (hereinafter referred to as the "accused") has been acquitted by learned Special Judge (II), Kinnaur at Rampur of the charge under Sections 20 of the Narcotic Drugs and Psychotropic Substances Act, 1986 (hereinafter referred to as "NDPS Act" in short) vide judgment dated 21.5.2011 passed in case RBT No. 24-AR/3 of 2009/2010. The State of Himachal Pradesh aggrieved by the acquittal of the accused has come up in appeal before this Court.

2. The accused belongs to District Sonapat (Haryana). He was booked by the police of Police Station, Kumarsain in a case under Section 20 of the NDPS Act registered on 15.12.2008 vide FIR No. 121/2008 with the allegations that at Kheker Nallah, when the search of the bag he was carrying on his right shoulder was conducted, Charas weighing 5Kgs 900 Grams was recovered therefrom.

3. The prosecution case as disclosed from the record in a nut shell is that on 15.12.2008 ASI Bhagat Ram (PW11), the investigating Officer was away to Sessions Court at Rampur to attend hearing in a bail application, listed there and for getting a challan prepared in some case from the District Attorney, Kinnaur at Rampur. Rapat No. 5(A) Ext.PW11/A was entered in the Rojnamcha of Police Station in this regard. On the same day, around 4:30P.M. PW-11 asked ASI

Shyam Lal PW-3 to depute two police officials in official vehicle towards Kingal-Sainj side for laying nakka. On the information so received, PW-3 has deputed Constable Suresh Kumar PW8 and HHG Naresh Kumar in the official vehicle along with its driver Constable Lachhi Ram. They were also given search light etc. Rapat No. 19(A), Ext.PW11/B to this effect was entered in rojnamcha by PW-3. PW8 and HHG Naresh Kumar went to Khekar Nallah in the official vehicle and met there to the I.O. PW11 at 4:45 P.M. PW11 laid nakka in Khekar Nallah on National High Way No. 22 with the assistance of the police officials accompanying him. At 5:30 P.M., the accused was spotted coming from Sainj side. He was holding a bag on his right shoulder. When arrived closure to the place of nakka and noticing the police party present there, he was taken to surprise and as such tried to flee away. PW-11, however, over powered him with the help of the accompanying police officials. The conduct of the accused having tried to flee away on seeing the police has raised suspicion in the mind of PW-11 that he may be carrying some drug or narcotic substance in the bag.

4. Since the accused allegedly was apprehended at an isolated place, therefore, no person could be associated to witness the search and seizure. The I.O. PW-11, therefore, associated PW-8 C. Suresh Kumar and Constable-driver Lachhi Ram as independent witnesses. The accused was given the option to exercise his legal right of being searched either before a Magistrate or Gazetted Officer orally as well as in writing. The memo prepared by PW-11 in this regard is Ext.PW8/A. As per the endorsement, the accused made in his own hand on this document, he however, opted for his search by PW-11. After obtaining the consent of the accused, PW-11 offered his own search first to the accused which the accused has taken and memo Ext.PW8/B was prepared in this regard. The red and gray coloured bag having mark "Impact Collection" the accused was holding on his right shoulder was opened. One plastic bag having mark "Haryana Handloom House" in English was found kept therein. In that bag, one jean pant of FOQ brand and one shirt of Levis were found kept in that bag. Beneath the pant and shirt one more blue coloured bag was found kept. On opening of that bag, some black coloured substance in the shape of round and sticks was recovered therefrom. On smelling the recovered substance the same appears to be "charas" to PW-11. The accused also disclosed that the recovered substance was "charas". PW-11 had weights and scale with him. The recovered "charas" when weighed was found 5 KGs 900 Grams. Two samples weighing 25-25 grams each were separated from the bulk and packed in two separate parcels which were sealed with six impressions of seal "D". The remaining bulk weighing 5KGs 850 Grams along with pant and shirt was separately put into the same polythene envelope and the bag from which the same recovered and sealed with nine impressions of seal "D".

5. The I.O. thereafter filled in NCB form Ext.PW3/D in triplicate and also obtained the specimen of seal "D" Ext.PW3/C on a piece of cloth. The seal after its use was handed over to Constable Lachhi Ram. The "charas" recovered from the possession of the accused was taken into possession vide seizure memo Ext.PW8/

D in the presence of PW-8 Constable Suresh Kumar and Constable-driver Lachhi Ram. It is thereafter rukka Ext.PW8/E was prepared by PW-11 and it was sent to police Station, Kumarsain through PW-8 for registration of case. On the basis of the Rukka, PW-3 ASI Shyam Lal has registered FIR Ext.PW3/A and made endorsement Ext.PW3/B in this regard on the Rukka. The case file was thereafter handed over to PW-8 for being taken to the I.O. on the spot. Site plan Ext.PW11/C was prepared.

Since the accused was found to have committed an offence under Section 20 of the NDPS Act, therefore, he was arrested and memo Ext.PW1/D was prepared in this regard. As desired by the accused, the information qua his arrest was given to one Manjit.

6. Thereafter, PW-11 returned to the Police Station at 10:00 P.M., on the same day. He produced the case property before PW3 ASI Shyam Lal, officiating Station House Officer. The rapat Ext.PW11/E qua arrival of PW-11 along with accused and case property in the Police Station was entered in the Rapat Rojnamcha.

PW-3 has resealed the sample parcels and the parcel containing the recovered "charas" with nine impressions of seal "C". The specimen of seal Ext.PW3/C was obtained on a piece of cloth. PW-3 has also issued the certificate Ext.PW3/E qua resealing of the parcels containing case property and sample parcels. PW-3 thereafter handed over the sample parcels and the parcel containing the case property along with specimen of seals after filling up the relevant columns of NCB form Ext.PW3/D to PW1 Vinod Kumar (MHC) Moharar Head Constable, Police Station, Kumarsain for safe custody in the Malkhana. He received the case property and entered the same at serial No. 303 in the Malkhana register. The extract of such entries is Ext.PW1/A. The I.O. has prepared the special report Ext.PW4/A and handed over the same to MHC for its onward transmission to SDPO Rampur through PW7 Constable Mool Chand. PW7 has delivered the same to PW4 ASI Swaroop Ram, the then Reader to SDPO Rampur. The special report was entered at serial No. 8642 of the receipt register. The extract of such entries is Ext.PW4/B.

7. PW-1 sent one of the sample parcels along with specimen of seal and NCB form to FSL, Junga through Constable Bhupnder Raj PW2 vide RC No. 85/08 Ext.PW1/B. PW2 has deposited the case property in the Forensic Science Laboratory in safe condition and obtained the receipt on the RC which was produced on his return to the Police Station before PW1.

8. On 12.4.2010, PW-9 HC Ramesh Chand the officiating MHC has sent the parcels containing the recovered "charas" to Forensic Science Laboratory, Junga through PW12 Constable Atma Ram vide RC No. 5/10 Ext.PW1/B. PW-12 has deposited the case property in the Laboratory in safe condition and obtained the receipt on the RC which was produced before PW-9 in the Police Station. The case property was brought back on 8.5.2010 by Constable Mohan Lal from the

Forensic Science Laboratory, Junga along with the reports of the Chemical Examiner Ext.PW11/F. The reports received from Chemical Examiner, Forensic Science Laboratory are Ext.PW11/B and Ext.PW11/F.

9. On the completion of investigation, the case file was handed over to PW-6 Sub Inspector Neel Chand, the then SHO, Police Station Kumarsain. He has prepared the challan which was filed in the Court.

10. Learned trial Court on appreciation of the police report and documents annexed therewith has concluded that the involvement of the accused in the commission of an offence punishable under Section 20 of the N.D.P.S. Act stands prima-facie established.

Therefore, charge against him was framed accordingly. He, however, pleaded not guilty to the charge, therefore, the prosecution was called upon to produce evidence in order to sustain the charge so framed against the accused.

11. As noticed supra, police officials Constable Suresh Kumar and Constable-Driver Lachhi Ram were associated by the Investigating Officer PW-11 to witness the search and seizure. The spot being an isolated place, no one could be stated to be associated as independent witness. It is, however, only Constable Suresh Kumar (PW-8) who has been examined to substantiate the prosecution case qua the recovery of charas from the possession of the accused. Another material witness is Constable-driver Lachhi Ram, who has not been examined.

12. The remaining witnesses are formal as PW-1 Constable Vinod Kumar posted as Moharer Head Constable in Police Station, Kumarsain at the relevant time with whom PW-3 ASI Sham Lal has deposited the sample parcels and the parcel containing case property for safe custody in the Malkhana. He has also sent one of the sample parcels to Forensic Science Laboratory, Junga through PW-2 Constable Bhupinder Raj vide RC No. 85/08. PW-3 ASI Shyam Lal on receipt of Rukka has recorded the FIR Ext. PW-3/A. He was officiating as Station House Officer on that day when the case property was produced before him at 10.00 a.m. by the Investigating Officer, PW-11. He has resealed the same with seal "C" and obtained the specimen of the seal Ext. PW-3/C. The sample of seal Ext. PW-3/C was separately taken on a piece of cloth. He also filled in the relevant columns of NCB forms Ext. PW-3/B and issued the certificate qua resealing of the case property Ext. PW- 3/E. He thereafter deposited the case property with PW-1 in the Malkhana. PW-4 ASI Swaroop Ram, the then Reader to SDPO has proved the special report Ext. PW- 4/A and the extract of register, in which it was entered as Ext. PW-4/B. PW-5 Head Constable Govind Singh has recorded the statement of Constable Mool Raj, whereas, PW-6 Sub Inspector Neel Chand, the then Station House Officer, Kumarsain has prepared the challan and filed the same in the Court. PW-7 had taken the copy of FIR and copy of special report. He delivered the copy of special report and the copy of FIR in the office of SDPO, Rampur and copy of the FIR in the Court at Rampur. PW- 9 Head Constable Ramesh Chand while officiating as Moharer Head Constable on 12.04.2010 has

sent the sealed parcel containing the recovered charas to Forensic Science Laboratory, Junga vide RC No. 5/10. He has also proved the extract of Malkhana register Ext. PW-9/A and also deposed that report of chemical examiner Ext. PW-9/B was received by him. PW-10 has stated that during his posting in Police Station, Kumarsain, he has received the report of chemical examiner Ext. PW-9/B and prepared the challan. PW-12 Constable Atma Ram has delivered the case property in Forensic Science Laboratory, Junga vide RC No. 5/10.

13. On the other hand, the accused in his statement recorded under Section 313 of the Code of Criminal Procedure has denied the prosecution case either for want of knowledge or being incorrect. While answering question No. 23, it was pleaded in his defence that he had come to seek employment in J.P. Hydel Power Project near Sainj. He alighted from the bus at Sainj. The police inquired from him as to which place he belongs. He replied that he belongs to Haryana. He was taken to Police Station, Sainj. There a boy namely Sanjeev was found to be apprehended by the police with charas weighing more than 11kgs. The said boy was already sitting in the Police Station. He was thereafter taken to Police Station, Kumarsain and implicated in this case later on falsely. He came to know that the said boy was juvenile. His bus tickets were taken from him by the police. Accused, however, opted for not leading any evidence in his defence.

14. Learned trial Court on appreciation of the evidence has arrived at a conclusion that there were contradictions in the statements made by the official witnesses, Constable Suresh and the Investigating Officer PW-11 qua material aspects of the prosecution case and that it was not safe to place reliance thereon to record findings of conviction and sentence against the accused. Even link evidence was also not complete and as such, the accused has been acquitted of the charge under Section 20 of the Act.

15. The State of Himachal Pradesh has assailed the impugned judgment on the grounds inter-alia that the prosecution evidence has been appreciated by learned trial Court in a slip-shop and perfunctory manner. The trial Court has allegedly set unrealistic standards to evaluate the cogent and reliable evidence having come on record from the testimony of the prosecution witnesses PW-8 and PW-11. The link evidence was also complete, however, the same has been discarded for untenable reasons, irrespective of there being no proof that the prosecution witnesses were inimical to the accused. The findings recorded by learned trial Court are stated to be based upon conjectures and surmises and as such, have been sought to be quashed and the accused convicted for the offence he committed.

16. Learned Additional Advocate General has argued with all vehemence that the evidence come on record by way of testimony of official witnesses is as much good as that of an independent person. Also that PW-8 and PW-11 while in the witness box have made consistent statements and thereby supported the prosecution case on all material aspects. It has been emphasised that the Court below has brushed aside the same illegally and in a slip shop manner. Undue

weightage is stated to have been given to the failure of the prosecution to join the independent witnesses. The findings that the evidence qua the location of the place where the search and seizure has taken place and there being no link evidence as recorded by learned Court below are far fetched. It has, therefore, been urged that the prosecution has proved its case against the accused beyond all reasonable doubt. The accused has been sought to be convicted.

17. Mr. N.S. Chandel, learned defence counsel while repelling the submissions made on behalf of the respondent-State has argued that the prosecution story not inspire any confidence being not supported by the independent witnesses. No plausible explanation qua non-joining of independent witnesses, according to Mr. Chandel, is forthcoming. The evidence qua the place of identification of recovery is inconsistent and that the investigation has not been conducted in a fair manner. Whether PW-8 was present in the Police Station on 15.12.2008 or not is also a disputed fact and his presence on the spot is doubtful. According to Mr. Chandel, the link evidence is missing. It is, therefore, canvassed that on the basis of such evidence, no findings of conviction could have been recorded. The appeal, as such, has been sought to be dismissed.

18. In view of the record of this case and also the rival submissions, the following points emerge on record, which need adjudication by this Court:-

(i) Is, the present a case where it was not possible to join independent persons as witnesses, irrespective of efforts made by the Investigating Officer, or the independent witnesses have not been associated deliberately and intentionally?

(ii) Is the evidence as has come on record by way of testimony of official witnesses i.e. PW-8 Constable Suresh Kumar and PW-11, the Investigating Officer not inspires confidence?

(iii) Is the identification of the place where the search and seizure has taken place satisfactorily established from the evidence available on record or not?

(iv) Is the present a case where link evidence stands proved beyond all reasonable doubt or not?

(v) Whether the investigation conducted in this case is fair and impartial and the charas has been recovered from the exclusive and physical possession of the accused or not?

(vi) Whether the present is a case where in view of the evidence available on record, the burden stood shifted upon the accused, however, he has failed to discharge the same even by way of preponderance of probabilities?

19. We now propose to take for consideration, the above points one by one:-

Points No. (i) to (iii)

20. It is seen that learned trial Judge has acquitted the accused of the charge on the grounds inter-alia that the testimony of official witnesses does not inspire

confidence, in view of the same being inconsistent and contradictory in nature and that corroboration thereto from some independent source was required. The contradictory version qua the place where the search and seizure has taken place also weigh with learned trial Judge while recording the findings of acquittal. Learned trial Judge has also recorded various omissions and commissions attributed to the Investigating Officer while acquitting the accused.

21. It is the Rukka Ext. PW-8/E, which contains the very first version qua the manner in which the accused came to be apprehended by the police, search and seizure having taken place on the spot and the recovery of charas weighing 5.900kgs from the accused. Nothing finds mentioned in this document that it was an isolated place and as such, the independent witnesses could not be associated. Nothing is also there in this document that PW-11 has made any effort to associate the independent person to witness the search and seizure, however, no-one could be associated despite of the efforts so made.

Similarly, nothing to this effect is there in the recovery memo Ext. PW-8/D. Nothing is also there in this document that PW-8 and Constable-driver Lachhi Ram were associated as witnesses to witness the search and seizure. The Investigating Officer, rather after apprehending the accused has ascertained his antecedents, which he disclosed and then conveyed to the accused that search of his bag, which he was holding on his right shoulder was required because he allegedly suspected that the accused may be carrying some narcotic drug or contraband in the bag. The option of the accused qua search of his bag was obtained vide memo Ext. PW-8/A. The bag of the accused was thereafter searched by the Investigating Officer after giving his own search to the accused vide memo Ext. PW-8/B. The charas was recovered in the manner as finds mention in Ext. PW- 8/D from the bag of the accused which was taken into possession. No doubt, consent memo Ext. PW- 8/A, whereby the Investigating Officer has given his own search to the accused Ext. PW-8/B and the recovery memo Ext. PW-8/D bear signatures of PW-8 Constable Suresh Kumar and Constable-driver Lachhi Ram, however, it is not the prosecution case that on account of non-availability of independent witnesses, there was no other option left with the Investigating Officer except for associating them as witnesses to witness the search and seizure. The Investigating Officer while in the witness box as PW-11 has stated that being an isolated place, the independent witnesses were not available. The spot, in the cross-examination is at a distance of 100 meters from village Sainj. In the same breath, he has given such distance as half kilometer. There exists a police post at Sainj.

As per the version of the Investigating Officer in his cross-examination, he neither associated anyone from police post, Sainj or any person from village Sainj. In view of the distance of Sainj from the spot is 100 meters or at the most ? kilometer, had any effort been made by the Investigating Officer, someone could have easily been associated as independent witness because Sainj is a big village having market also and as such, a busy place. Not only this,

but Khekhar village is also situated at a distance of 400 yards below road from the spot as has come in the cross-examination of PW-8. There are 8-10 houses in existence in that village. No effort was made to associate anyone as independent witness from that village also. PW-8 Constable Suresh Kumar has stated in his cross-examination that no effort was made to associate independent witnesses. As per his version, shops were also situated at Kandol, a place situated nearby to the place of occurrence. Such evidence available on record leads to the only conclusion that PW-11 to the reasons best known to him has not made any effort to associate independent persons to witness the search and seizure.

22. It is well settled at this stage that keeping in view there being provision of stringent punishment against an offender under the Act, there must be cogent and reliable evidence available on record to record the findings of conviction. The investigation should also be fair and impartial. It is only possible when the search and seizure is witnessed by some independent person. No doubt, the Apex Court in *State of Haryana v. Asha Devi and another*, (2015) 8 SCC 39, has held that the independent witnesses are not always available for variety of reasons such as the people do not associate with the police and depose against the accused. It has, however, been held in a case where the efforts were found to be made by the Investigating Officer to join independent persons to witness the search and seizure, but no one could be associated despite efforts made. It is again well settled that the findings of conviction against the accused can be recorded on the evidence of official witnesses, of course, if the same inspires confidence.

In the case in hand, no effort has been made to associate independent witnesses, therefore, law casts a duty upon this Court to examine the statements of official witnesses with all care and caution and to form an opinion that the same is worthy of credence or not.

23. The present is a case where no effort has been made to join someone as independent witness; therefore, such conduct of the Investigating Officer renders the prosecution story highly doubtful. The Nakka, as per Rukka Ext. PW-8/E, was laid at Khekhar Nallah bridge near Cheel Nallah. As per recovery memo Ext. PW-8/D, the nakka was laid at Cheel Nallah near Khekhar bridge. Similar is the version qua place of Nakka find mentioned in the special report Ext. PW-4/A. It is, therefore, seen that as per documentary evidence there are two versions qua the place of Nakka i.e. first Khekhar Nallah bridge near Cheel Nallah and the second Cheel Nallah near Khekhar bridge.

24. Now if coming to the evidence as has come on record by way of the testimony of material prosecution witnesses, the Nakka was laid at Cheel Nallah near Khekhar bridge. The Investigating Officer while in the witness box as PW-11 has stated that the Nakka was laid in Khekhar Nallah on National Highway No. 22. In his cross-examination he has admitted that as per recovery memo Ext. PW-8/D, Rukka Ext. PW-8/E and special report Ext. PW-4/A, the place where Nakka was laid is Cheel Nallah near Khekhar bridge. Not only this, but as per his

version Khekhar Nallah near Cheel Moad and Cheel Moad near Khekhar Nallah are two different places. He also admits that PW-8 Constable Suresh Kumar and Constable-driver Lachhi Ram in their statements recorded by him under Section 161 of the Code of Criminal Procedure have disclosed the place of occurrence as Cheel Nallah near Khekhar bridge. The Investigating Officer in his cross-examination has further admitted that he did not call anyone from village Sainj or Khekhar or from the locality near Kandol bridge for being joined as independent witnesses to witness the search and seizure. Therefore, the version of the Investigating Officer in the examination-in-chief that the Nakka was laid in Khekhar Nallah on National Highway No. 22 is contradictory from his own version in the cross-examination and also the documentary evidence Ext. PW-8/D, PW-8/E and Ext. PW-4/A as discussed supra.

25. Now, if the version of PW-8 is seen, the Nakka was laid at Cheel Nallah near Khekhar bridge where PW-11, the Investigating Officer met them. However, when cross-examined, he has come forward with the version that PW-11 had met them near Khekhar bridge. The Nakka, according to him, was laid near Khekhar bridge. In the same breath, he admits that as per his statement recorded by the Investigating Officer under Section 161 of the Code of Criminal Procedure, Nakka was laid at Cheel Nallah near Khekhar bridge. This witness has also other version qua this aspect of the matter and as per the same the Nakka though was laid near Khekhar bridge, however, in between rain shelter and bridge. The same, however, was not disclosed by him in his statement recorded by the Investigating Officer, because as per his statement, the Nakka was laid at Cheel Nallah, which is situated near Khekhar bridge. It is thus seen that PW-8 has also made different statements qua the place where the Nakka was laid and the accused apprehended.

26. The evidence as has come on record by the testimony of PW-8 and PW-11 qua the location of the spot is, therefore, contradictory in nature. No doubt, as per documentary evidence, the Nakka was laid at Cheel Nallah near Khekhar bridge. It is even so recorded in the statement under Section 161 of the Code of Criminal Procedure made by PW-8 and Constable-driver Lachhi Ram during the course of investigation. PW-8 has also stated so while in the witness box. However, his testimony in cross-examination, if examined carefully, has given three different locations i.e. Cheel Nallah near Khekhar bridge, Khekhar bridge and place near Khekhar bridge and in between rain shelter and bridge. So far as PW-11 is concerned, as per his version in the examination-in-chief, Nakka was laid at Khekhar bridge. He admits that as per documentary evidence, the Nakka was laid at Cheel Nallah near Khekhar bridge. The official witnesses, therefore, have contradicted each other so far as the spot where the accused was apprehended. In the absence of the independent witnesses, it is difficult to believe that the accused was apprehended at Khekhar Nallah or Cheel Nallah near Khekhar bridge. The present, therefore, is a case where the prosecution evidence qua the place of recovery of charas from the accused does not inspire any confidence.

27. In view of what has been said herein above, the Investigating Officer while in the witness box has stated that being an isolated place, no-one could be associated as independent witness to witness the search and seizure, however, in his cross-examination he admits that no efforts were made to call someone from village Sainj or Khekhar or from the locality near village Kandol. PW-8 has also stated that no efforts were made to join anyone as independent witness. So far as the place of recovery is concerned, as discussed in detail herein above, the version of PW-8 and PW-11 qua this aspect of the matter is also contradictory in nature. The present, therefore, is a case where the testimony of official witnesses i.e. PW-8 and PW-11 hardly inspires any confidence.

Therefore, by placing reliance on their testimony, it cannot be believed that the search and seizure has taken place, in the manner as claimed by the prosecution.

28. In view of what has been said herein above, the present is a case where the Investigating Officer has not made any effort to join some independent person to witness the search and seizure intentionally and deliberately. The evidence as has come on record by way of his own testimony and that of PW-8 Constable Suresh Kumar being inconsistent and contradictory in nature, hardly inspire any confidence. In the absence of cogent and reliable evidence qua identification of the place of recovery, it cannot be believed that the search and seizure has taken place at Khekhar nalla. All the three points are, therefore, answered accordingly.

Point No. iv

29. Learned defence counsel has vehemently argued that the link evidence is not complete. We, however, are not impressed with the argument so addressed, for the reason that as per Rukka, PW-11 has sealed the sample parcels with 6-6 seals, whereas, parcel containing the bulk with 9 seals of impression "D". Not only this, but the sample of seal Ext. PW-8/C was separately obtained. The Rukka further reveals that NCB forms were filled-in, in triplicate and the impression of seal "D" was also embossed thereon against the relevant columns. The recovery memo Ext. PW-8/D also substantiates this part of the prosecution case. The special report Ext. PW-4/A also supports the prosecution case in this regard. Now, if coming to the resealing part, rapat Ext. PW-11/A amply demonstrates that PW-1 has returned to the Police Station at 10.00 a.m and produced the parcels containing the recovered charas and the sample parcels, NCB forms and sample of seal before PW-3 ASI Shyam Lal, the officiating Station House Officer. This document further reveals that PW-3 has resealed the sample parcels with 6-6 seals of impression "C", whereas, the parcels containing the recovered charas with nine impression of the same seal. Not only this but he has also filled in the relevant columns of NCB-1 form and thereafter deposited the case property with PW-1. The certificate issued by PW-3, Ext. PW-3/E substantiates the manner in which the case property along with NCB-1 forms and sample of seal was produced by PW-11 before PW-3. PW-1 Moherer Head Constable Vinod Kumar has appended the receipt of the fact that he has received the case property and also the NCB-1 forms. Meaning thereby that the sample

parcels and the parcels containing the case property duly sealed by the Investigating Officer and resealed by PW-3 were received by PW-1 along with NCB-1 form and samples of seals "D" and "C". The entries Ext. PW-1/A in the Malkhana register also substantiate this aspect of the matter. These entries have been made by PW-1 Vinod Kumar.

30. True it is that there is no mention of deposit of NCB-1 forms along with case property in the Malkhana, however, when the NCB-1 forms were prepared by the Investigating Officer on the spot and the relevant columns filled-in by the Investigating Officer and also the officiating Station House Officer, PW-3 as well as the same handed over to PW-1, therefore, merely that there is no mention of NCB-1 form in Ext. PW-1/A, it cannot be said that the same was not deposited along with the case property in the Malkhana. True it is that in the RC Ext. PW-1/B also, there is no mention that along with sample parcels, the NCB-1 forms were also sent to Forensic Science Laboratory; however, PW-1 has stated that the sample of seal and NCB-1 forms were also sent to the Laboratory along with sample parcels. He has not been cross-examined that the sample of seal and NCB forms were not sent by him to the Laboratory. The suggestion that no entry qua NCB forms finds mentioned in Ext. PW-1/A and RC Ext. PW-1/B was admitted by PW-1 and rightly so, however, for want of his cross-examination that the same were not sent by him to the Laboratory along with sample parcels, the only conclusion would be that the sample of seal and NCB-I forms were also sent to the Forensic Science Laboratory.

31. Above all, the report of chemical examiner Ext. PW-11/F reveals that the sample of seals and NCB-I forms were also sent along with the sample parcels. The entire bulk was also sent to Forensic Science Laboratory on 12.04.2010 by PW-9, the officiating MHC vide RC No. 5/10. In the entry Ext. PW-9/A in the Malkhana register there is no mention that the samples of seal "D", "C" and NCB forms were also sent along with parcels containing the recovered charas. PW-9 has, however, stated that the specimen of seal and NCB forms were also sent along with parcel to the laboratory. The suggestion to the contrary given to this witness in his cross-examination has, however, been denied being wrong. On the other hand, the report of chemical examiner Ext. PW-9/B reveals that sample of seal and NCB forms were also sent along with parcel containing the charas. Therefore, merely that PW-9 has omitted to make an entry in Malkhana register that sample of seal and NCB forms were also sent along with parcel containing the recovered charas, it cannot be said that the same actually were not sent because the overwhelming evidence, as discussed herein above leads to the only conclusion that the same were also sent to the laboratory along with sealed parcels. PW-12 Constable Atma Ram is the person, who had taken the sealed parcels to the laboratory. According to him, the same remained in his safe custody. Therefore, it cannot be said that the link evidence is missing.

32. True it is that Constable-driver Lachhi Ram to whom, as per the prosecution case, the seal was handed over, has not been examined nor the seal produced.

However, no prejudice can be said to have caused to the accused thereby, because no suggestion was given to the Investigating Officer that the parcels were not sealed by him with seal "D" and "C" nor that the seal was not handed over by him to Lachhi Ram. The present, therefore, is not a case where it can be said that the link evidence is not complete, therefore, the findings to the contrary recorded by learned trial Court are neither legally nor factually sustainable.

Point No.(v)

33. As per the findings recorded herein above, the official witnesses PW-8 and PW-11 are not reliable and trustworthy. The evidence qua the place of recovery as has come on record is contradictory in nature. True it is that such a huge quantity i.e. 5.900 Kgs could have not been planted upon the accused.

However, at the same time, for want of cogent and reliable evidence, it can not be said that the same has been recovered from the physical and conscious possession of the accused, in the manner as claimed by the prosecution. It also remained unexplained as to what prompted PW-11, the Investigating Officer to prepare for laying a Nakka when he was away to attend hearing in some case in the Court of learned Sessions Judge, Kinnaur at Rampur. By which mode he came to village Khekhar is again missing. When the police chowki, Sainj falls on the way, why the incharge or someone else was not associated from the Chowki under whose jurisdiction the area where the search and seizure has taken place falls. When village Sainj was nearby situated from the spot i.e. about 100 yards away why someone is not associated as witness from village Sainj or from Khekhar and for that matter from village Kandol. When the clinic of Dr. Sansar Chand and a "Dhaba" was situated nearby why the efforts were not made to join someone therefrom to witness the search and seizure. The conduct of the Investigating Officer is, therefore, not above board. The investigation seems to be not conducted in a fair and impartial manner for the reasons best known to him.

34. We, however, are not in agreement with learned defence counsel that PW-8 Constable Suresh Kumar was not present in the Police Station nor witnessed the search and seizure for the reason that nothing is there in Ext. D-B, the extract of daily diary that he was away from the Police Station on 15.12.2008. As regards, Ext. D-C, no doubt, PW-8 has been shown to be on duty and rightly so because this is the role call taken in the evening and not only PW-8 but Constable-driver Lachhi Ram has also been shown to be on duty and rightly so as they returned to Police Station at 10.00 a.m. along with the Investigating Officer after completing the investigation on the spot.

35. Any how, for the reasons already recorded, we find the present a case where the recovery of charas from the physical and conscious possession of the accused has not been proved beyond all reasonable doubt. The investigation has also not been conducted in a fair and impartial manner.

Point No. (vi)

36. The present, in view of the discussion herein above, is not a case where the prosecution has discharged the onus upon it with the help of cogent and reliable evidence. Therefore, neither the presumption as envisaged under Sections 35 and 54 of the N.D.P.S. Act can be drawn against the accused nor the present is a case where the burden to prove otherwise shifts upon him. No doubt, his defence that he had come to Sainj in connection with search of some job in J.P. Hydel Power Project situated nearby, is not plausible and he being the resident of Haryana, his presence at Sainj creates doubt and it may just possible that he had come there with a purpose may be to carry charas from that area, because rapat No.27 in the extract of rapat rojnamcha Ext. D-B, he himself produced in evidence reveals that another FIR No. 120/08 was registered on the same day qua the recovery of charas weighing 5.500kgs from one Sanjit Kumar in that very area. Said Sanjit Kumar is also a resident of village Nahra, Teshil Sonipat, District Haryana, to which place the accused belongs. It is just possible that the accused and Sanjit Kumar aforesaid both had come to carry charas and were apprehended with huge quantity of charas. However, as the Investigating Officer has not conducted the investigation in a fair and impartial manner and also, in accordance with law, there is no option except for giving benefit of doubt to the accused on account of various omissions and commissions committed by the Investigating Officer while conducting the investigation of this case. In view of faulty investigation also, no findings of conviction can be recorded against the accused.

37. It is settled law that the provisions of the act and the punishment prescribed thereunder being stringent, the extent of burden to prove the case is on the prosecution. True it is that the Court must strive towards giving effect to the parliamentary object and its legislative intent to curb the menace of illicit trafficking of drugs, but at the same time, it is necessary to uphold the individual human rights and dignity so that the democratic values are also uphold. This Court is not oblivious to well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of proof qua the commission of offence by the accused thus would be necessary to convict him. The same, however, is lacking in this case. Therefore, irrespective of the observations herein above that the accused, a resident of Haryana, had come to the area where the search and seizure has taken place with a purpose, for want of cogent and reliable evidence against him, this Court finds it difficult to connect him with the commission of the offence and consequently to convict him.

38. In view of what has been said herein above, this appeal fails and the same is accordingly dismissed. Consequently, the judgment under challenge is affirmed. Personal bond furnished by the accused shall stand cancelled and surety bond discharged.

39. Before parting with the case, we would be failing in our duty, if ignore the manner in which PW-11 ASI Bhagat Singh, the Investigating Officer has conducted himself before the accused was nabbed and during the course of

investigation he conducted in this case. We have already observed that his conduct throughout was not found to be above board. What prompted him to lay "Nakka" and by which mode he reached at the place of "Nakka" remained unexplained. As a matter of fact, in order to remove all doubts, he should have explained that the purpose of laying Nakka was traffic checking or interception of some offender having come to that area in connection with business of narcotic drugs or psychotropic substance or was proposed to be laid in routine. How PW-8 went to the spot at Khekhar nalla straight in the official vehicle being driven by Constable-driver Lachhi Ram to join the Investigating Officer PW-11 has also remained unexplained. On the other hand, as per entries in the rapat Ext. PW-11/B, the official vehicle along with two police personnel and its driver was sought to be sent towards Kingal and Sainj side for laying "Nakka". What was the basis of laying "Nakka" at Khekhar nalla, this aspect has also remained unexplained. The conduct of the Investigating Officer in not joining the independent witnesses from the nearby locality i.e. Sainj, village Khekhar or from Kandol, the places situated nearby also speaks in plenty qua the manner in which the investigation was conducted in this case. Why incharge or any other police official from police post Sainj, situated at a distance of 100 yards from the spot was not associated in "Nakka" also creates doubt about the authenticity and genuineness of the prosecution story, especially when one more case of illicit trafficking of charas registered vide FIR No. 120/08 was also detected on the same day and in the same area because in the log book of the official vehicle, the purpose of its use on that day has been mentioned as detection of this case and also the another case registered vide FIR No. 120/08. It is not understandable as to why the Investigating Officer has concealed this aspect of the matter, particularly when it is he who has filled up and signed the entries to this effect in the log book. If the Investigating Officer conducted himself in this manner, it may not be inappropriate to conclude that he did so to implicate an innocent person in a criminal case falsely, which is an offence punishable under Section 58 of NDPS Act and even under Section 211 of the Indian Penal code also, besides, being violative of the provisions contained under Chapter XI of The H.P. Police Act and the rules framed thereunder.

40. If not shocking, it is painful to point out that irrespective of the N.D.P.S Act enacted by the Parliament in 36th year of Republic of India with an object to make stringent provisions for control and regulation of the operations relating to Narcotic Drugs and Psychotropic Substances including forfeiture of the property derived from or use in the illicit trafficking of Narcotic Drugs and Psychotropic Substances to curb the drug menace, our Investigating Officers are still not well averse to the procedure mandatory as well as directory in nature required to be followed before conducting the raid with or without warrant and authorization, conducting the search of the accused and seizure of the Narcotic Drug and Psychotropic Substance, if any, recovered from him. The procedure as prescribed under Chapter V of the Act is neither cumbersome nor of such a nature that authorised officer/official is not in a position to understand the same. The

Investigating Officers are either not following the same intentionally or deliberately to the reasons best known to them, may be for some extraneous considerations or are easy going and inefficient, hence do not want to learn the procedure so prescribed and apply the same in each and every case under the Act, they come across. They are not following the bare minimum requirement of joining independent witnesses while conducting search and seizure even in those cases also where they can do so easily. Even no case yet came to notice where the I.Os either resorted to the procedure prescribed under Section 100(8) of the Code of Criminal procedure or launched prosecution against any person under Section 187 of the Indian Penal Code on account of he or she having refused to assist the police without any reasonable cause.

41. We feel that it is now high time to formulate the guidelines for being followed by all concerned including the Investigating Officers during the search and seizure conducted in a case registered under the Act. We, therefore, direct as under:-

(i) Before resorting to search and seizure and arrest of a person believed to have committed an offence in relation to a Narcotic Drug or Psychotropic Substance under the Act and resort to conduct search of a building, conveyance or place where the Narcotic Drug or Psychotropic Substance or a document and an article, which may furnish evidence qua commission of an offence under the Act believed to have kept or concealed, the Investigating Officer, would associate two independent and respectable persons from the locality as witnesses to witness the search, seizure and arrest. In case any person refuses to witness the search and seizure without reasonable cause despite "Hukamnama" delivered to him/her, to take down the name and parentage etc. of such person for record, including proceeding against him under Section 108 (8) of the Code of Criminal Procedure and in appropriate cases may even launch prosecution also under Section 187 of the Indian Penal Code. Also collect evidence to establish that irrespective of efforts made, no one could be associated as independent witness for the reason to be recorded in writing.

(ii) As provided under sub-section (i) of Section 41 of the N.D.P.S Act to obtain warrant of arrest of any person believed to have committed an offence punishable under the N.D.P.S. Act or for the search of any building, conveyance or place to search the same by day or by night, where Narcotic Drug or Psychotropic Substance or controlled substance or other article, which may furnish evidence of the commission of offence under the Act is believed to have kept or concealed, from the Magistrate of the 1st Class or any Magistrate of the 2nd Class especially empowered by the State Government in this behalf.

(iii) As provided under Sub-section (2) of Section 41 of the Act to obtain authorisation from a superior Police Officer, Gazetted in rank to arrest a person, if there are reasons to believe that such person has committed an offence under the Act or search of building, conveyance or place whether by day or by night if there are reasons to believe either from personal knowledge or information given

by any person and taken down in writing that any Narcotic Drug or Psychotropic Substance or controlled drug or other articles, which may furnish evidence of the commission of an offence under the Act or any illegally acquired property or document or article, which may furnish evidence of holding any illegally acquired property liable to be seized or freezed or forfeited under Chapter 5(a) of the Act. The Police Officer, Gazetted in rank can himself also arrest such a person or search a building, conveyance or place.

(iv) The Investigating Officer, an officer superior in rank to Peon, Sepoy or Constable, if have reasons to believe that an offence under the Act has been committed qua Narcotic Drug or Psychotropic Substance or any document or other article, which may furnish evidence of the commission of such an offence or illegally acquired property liable to be seized or freezed or forfeited under Chapter 5(a) of the Act has been kept or concealed, shall arrest such a person and also enter into and search any building, conveyance or place between sunrise and sunset after taking down in writing, the information to this effect if received from a source without obtaining search warrant or authorization, of course, after recording reasons that in the event of time is spent to obtain the search warrant or authorization, the Narcotic Drug or Psychotropic Substance is likely to be concealed by the offender in order to facilitate him to make his escape good as per the mandate of sub section (1) of Section 42 of the Act. Maintain a proper record in this regard for being produced in evidence during the course of trial.

(v) The information so received, if taken down in writing, under sub-section (i) of Section 42 of the Act, the same be invariably sent to his immediate superiors within 72 hours of such arrest, search and seizure, as provided under sub-section (2) of Section 42 of the Act and maintain proper and faultless record in this regard also.

(vi) In a case of prior information, to apprise the accused of his legal right to opt for his search either before a nearest Gazetted Officer or Magistrate orally as well as in writing strictly in terms of provisions contained under Section 50 of the Act in the presence of independent persons, if available and associated to witness the search and seizure. In the event of independent person not available for the reasons to be recorded in writing, in the presence of accompanying police officials or anyone else. The practise of giving option to the accused qua his search to the police is deprecated because Section 50 only speaks qua giving information to the person suspected to be in possession of Narcotic Drug or Psychotropic Substance that he has a legal right to opt for being searched either before a nearby Gazetted Officer or Magistrate and their option to be taken only to this limited extent.

In order to make the prosecution case worthy of credence, the I.O. should make all endeavour to first produce the accused before nearest Gazetted Officer or the Magistrate and conduct his search in the presence of either Gazetted Officer or Magistrate.

(vii) The option under Section 50 of the Act should be given to the person suspected of in possession of Narcotic Drug or Psychotropic Substance in a case of prior information or where such person appears at the place of Nakka all of a sudden and apprehended on suspicion of being in possession of some narcotic drug or psychotropic substance and where his personal search is required.

(viii) In a case of chance recovery, i.e. recovery of Narcotic Drug or Psychotropic Substance during the course of routine checking of any building, conveyance or place, the option under Section 50 of the Act is not required to be given.

(ix) After obtaining option from the person suspected of in possession of Narcotic Drug or Psychotropic Substance and before conducting his search, the Police Officer/ Investigating Officer, who has to conduct the search of such person, should give his personal search first to that person in the presence of the witnesses and to maintain proper record in this regard.

(x) On personal search and search of bag/rucksack etc., such person holding with him, if any Narcotic Drug or Psychotropic Substance is recovered, the Investigating Officer to first weigh the same and then seal the recovered bulk in a parcel with seal of any impression available with him. Besides, obtaining sample of seal on a piece of cloth or any other material of like nature, to hand over the seal to the person associated to witness the search and seizure so that, if required, the same can be produced in the Court during the course of trial. Thereafter, the recovered drug/substance shall be taken into possession by preparing the seizure memo giving all required details therein.

Where the number of persons apprehended is more than one and Narcotic or Psychotropic Substance is recovered separately from them, to mention necessary particulars of the recovered drug/ substance, i.e. its nature, weight and shape etc. separately in the seizure memo, seal the recovered stuff from each of the accused in separate parcels, indicating specifically the weight and the name of the accused from whom the recovery is effected on each and every parcel. Fill-up relevant columns of NCBI form in triplicate separately qua recovery of such drug/ substance from each accused person.

(xi) The Investigating Officer is required to carefully fill information against each and every column of NCB-I form which pertains to him in triplicate on the spot itself and leave the remaining columns to be filled in by the Officer concerned i.e. the Station House Officer or Moherer Head Constable, as the case may be. He should prepare the Rukka, highlighting therein the proceedings conducted by him till that stage and send the same to the Police Station for registration of case.

(xii) On finding involvement of such person in the commission of an offence under the Act, to disclose him the offence he committed and the punishment prescribed thereto in writing and to arrest him thereafter.

(xiii) The Investigating Officer should invariably inform the person whose name and other particulars are furnished by the person arrested qua his arrest and to

reduce into writing the information so given for proof.

(xiv) On the completion of investigation on the spot, the Investigating Officer, in case where the arrest is made and articles seized, pursuant to a warrant produce the person arrested and articles seized without unnecessary delay before the Magistrate, who has issued the warrant and where such person is arrested and articles seized under sub-section (ii) of Sections 41, 42, 43 or Section 44 shall be produced without unnecessary delay before the Station House Officer/Incharge of the Police Station or the Officer empowered under Section 53 of the Act as required under Section 52 of the Act. Maintain proper record in this regard also.

(xv) In case, the search and seizure is not conducted by the Station House Officer/ Incharge Police Station, the Investigating Officer shall produce the accused along with case property duly sealed in parcel(s), NCB forms in triplicate and sample of seal before the Station House Officer, who shall thereafter reseal the parcel(s) containing the case property with his own seal and fill up the relevant columns of NCB-I form. He shall retain the case property either in his own custody or hand over the same to the Incharge of Malkhana of the Police Station for safe custody. The Station House Officer shall draw the sample of seal he used for resealing parcel(s) and retain/handover the same along with case property, NCB-I form in triplicate and sample of seal used by the Investigating Officer to the Incharge, Police Malkhana. Proper record shall also be maintained in this regard.

(xvi) The Incharge Malkhana shall make entries in the Malkhana register qua deposit of case property, NCB-I form and sample of seal used by the Investigating Officer and sample of seal used for resealing the parcel(s) by the Station House Officer/Incharge of Police Station. The Incharge Malkhana shall fill up all columns of Malkhana register and shall also obtain the signature of the Station House Officer/Incharge of the Police Station who has deposited the case property in the register for proof.

(xvii) The Incharge Malkhana while forwarding the sealed parcel(s) containing the recovered Drug/Psychotropic Substance to Forensic Science Laboratory for chemical analysis shall make entries in relevant columns of Malkhana register qua dispatch thereof along with NCB-I form, sample of seal used by the Investigating Officer and sample of seal used by the Incharge Police Station for resealing and also enter the name of the official through whom the same is forwarded to the Laboratory as well as RC number in the relevant column of Malkhana register. The signature of the official to whom the case property is given for being taken to the Forensic Science Laboratory should also be obtained in the register.

(xviii) The RC shall also contain the information qua forwarding of parcel(s) containing the recovered Narcotic Drug or Psychotropic Substance to the Laboratory along with sample of seals used by the Investigating Officer and the Incharge Police Station as well as NCB-I form.

(xix) The Incharge Malkhana/Police Station shall ensure that the case property on its way to Forensic Science Laboratory is not tampered with by anyone in any manner whatsoever and similarly to ensure that the same is brought back from the Laboratory in a sealed and safe condition to the Malkhana. Cogent/reliable evidence be collected in this regard also for being produced to substantiate the prosecution case.

(xx) In order to ensure the fairness of the proceedings, the Incharge Malkhana/Police Station shall ensure that at the time of production of the case property in the Court, the entries are made in the Malkhana register and the same is produced in the Court in sealed and safe condition and brought back to the Malkhana duly re-sealed in the Court as well as re-deposited there in safe condition.

(xxi) The Investigating Officer shall fill-up FIR number etc. in different ink in those memos prepared on the spot before registration of the case in the Police Station after registration of the FIR and receipt of case file by him on the spot from Police Station. The FIR number shall also be filled-up in the remaining memos prepared after the registration of FIR. However, in the memos prepared after registration of the FIR, its number is not required to be mentioned with different ink and rather with the same pen and ink used for reducing into writing the contents of such documents as a whole.

(xxii) The Investigating Officer within 72 hours of the search and seizure and arrest, should invariably prepare special report as contemplated under Section 57 of the Act and forward the same to the Officer superior i.e. Supervisory Officer. The cogent and reliable record in this regard be also maintained for being produced in evidence during the course of trial.

(xxiii) The investigating Officer/Incharge Police Station/Station House Officer and Moharar Head Constable to take all precautions while investigating/dealing with the case as per their respective role in order to remove all doubts qua the manner in which the search and seizure having taken place and the case registered.

42. The above guidelines have been formulated for being followed in its mutatis mutandis by all concerned and the Officers authorised to conduct search and seizure and make arrest in the cases registered under the N.D.P.S. Act. It is made clear that any departure/violation thereof shall entail in penal action, including launching of prosecution under Section 58 of the Act or under Section 211 of the Indian Penal Code and also departmental action against the erring officer/official, who remained associated in one way or other with the investigation, inquiry and trial of the case.

43. So far as the conduct of the Investigating Officer as discussed supra in this judgment, which we have not found above board, it is left open to the high-ups in the Police Department to deal with him and take appropriate action, as deemed fit and appropriate, in accordance with law.

44. An authenticated copy of this judgment be supplied to the Chief Secretary to the Government of Himachal Pradesh and also the Director General of Police for circulation amongst all the Superintendents of Police, Supervisory Officers, Station House Officers and Investigating Officers in the State for compliance in its letter and spirit.

45. The appeal is accordingly disposed of.