

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

Cr. Appeal No. 32/2009

Cr.M.A. No. 41/2009

Date of Decision: 18. 07.2014

Mohd. Naseer

v.

State and ors.

Coram:

Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge

Hon'ble Mr. Justice Janak Raj Kotwal, Judge

Appearing counsel:

For Appellant (s) : Mr. Sunil Sethi, Sr. Advocate with
Mr. Mohsin Bhat and
Mr. Ashwani Khajuria, Advocates.

For respondent(s) : Mr. H. A. Siddiqui, AAG.

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| (i) | Whether to be reported in Press, Journal/Media: | Yes/No |
| (ii) | Whether to be reported in Journal/Digest: | Yes |

Per Kotwal-J.

1. This appeal is by one Mohd. Naseer, who has been convicted under section 20(b) (ii) (c) of The Narcotic Drugs and Psychotropic Substances Act, 1985 for (short the NDPS Act) by learned 3rd Additional Sessions Judge, Jammu vide judgment dated 12.05.2009 and vide order of the even date has been sentenced to undergo rigorous imprisonment for a period of 12 years and to pay a fine of Rs. 2,00,000/-
2. Heard. We have perused the record.
3. The case of the Prosecution as projected before the trial court, briefly, is that on 10.05.2006 the appellant

(hereinafter the accused) came to be accosted in the course of routine checking by a police party headed by PW-Matlub Hussain Shah, Head Constable, at Police Naka point, Bhatindi. Accused was coming on foot and was carrying a black colour bag. The bag on checking was found containing lot of charas like substance and Indian currency. The accused on enquiry introduced himself as Mohd. Naseer s/o Mohammad Hafeez r/o Sagrawat, Tehsil, Darhal, District, Rajouri. The Head Constable despatched a docket to SHO Police Station, Bahu Fort giving the detail of the occurrence and stating that offence under Section 20 NDPS Act has been committed and also made a request for the presence of the Sub Divisional Police Officer, City, East, Jammu (for short the SDPO) and Incharge of the concerned Police Post on spot. On the basis of this docket, FIR No.53/2006 under section 20 NDPS Act was registered at Police Station, Bahu Fort, Jammu and investigation was entrusted to PSI Shakti Devi, Officer Incharge, Police Post, Bhatindi (PW-11). The Investigating Officer (I.O.) reached at the place of occurrence and on her request the SDPO also reached there. The SDPO wrote and read out to the accused a notice (Ex. PW-AA) regarding search of the bag, who consented for search by the SDPO saying that the latter was a Gazetted Officer and may search the bag. The accused signed the notice. The SDPO then ordered the I.O. to search the bag in his

presence. Charas wrapped in maize-cone leaves and Indian currency worth Rs. 1, 35, 700/- were recovered from the bag. The charas was weighed and found weighing 1 Kg. and 400 gms. Sample weighing 50 gms was separated from the charas and sealed on spot for chemical examination. It was marked as 'A'. The sealing was done by using a ring bearing mark 'T' which was kept on superdari of PW Tasleem Tariq. The charas and the currency were seized on spot and recovery-cum-seizure memo (Ex.PW-RK) was prepared. Accused was arrested for commission of offence under section 20 of NDPS Act. The chemical examination report about the sample was obtained and commission of offence under section 20 of NDPS Act was established against the accused.

4. On completion of investigation, charge sheet against the accused was laid before the trial court. Accused pleaded not guilty to charge under section 20 of NDPS Act framed by the learned trial court on 13.09.2006 and claimed to be tried. Prosecution entered its evidence and examined 13 witnesses, namely, Anwar Ali (PW-1), Yash Paul (PW-2), Maqsood Ali Shah (PW-3), Bashir Ahmad (PW-4), Tasleem Arif (PW-5), Abishekh Khajuria (PW-6), Iqbal Singh (PW-7), Ravinder Kumar Anand (PW-8), Rajinder Gupta (PW-9), Subash Singh (PW-10), Shakti Devi (PW-11), Shakeel Ahmed (PW-12) and Mohd Rafiq (PW-13). Learned trial court also recorded statement of

the accused in terms of section 342 Cr. PC and the accused produced one witness, namely, Mohd Hussain in his defence.

5. Learned trial court after appraisal of the evidence and record held that prosecution has succeeded in proving that the accused was in possession of 1 kg. and 400 gms. of charas, which was recovered from him and that commission of offence punishable under section 20 (b) (ii)(c) of NDPS Act was established. Learned trial court, therefore, convicted and sentenced the accused. Hence this appeal.
6. The conviction and sentence have been assailed, firstly, on the ground that the evidence led by the prosecution is not sufficient to prove the search of and recovery of any substance, much less the contraband, namely, charas, from the bag of the accused. Mr. Sunil Sethi, learned Senior Advocate, appearing for the accused, sought to point out, what he called glaring, contradictions and discrepancies in the prosecution evidence regarding coming to and accosting of the accused at the Police Naka. In particular, Mr. Sethi pointed out that most of the witnesses have stated that accused was found coming on foot, whereas according to PW Abishekh Khajuria, he has come by an auto. Mr. Sethi also sought to point out discrepancy in the

evidence in regard to the person having conducted search of the bag.

7. We, having perused and appraised the testimonies of the witnesses, who have deposed in regard to the occurrence, are not persuaded to entertain any doubt as regards the accused's approaching the Police Naka point, Bhatindi carrying a bag, search of his bag by the police and the bag containing Indian currency worth Rs. 1,35,700/ and a charas like substance wrapped in maize-cone leaves. To this extent, we find good consistency and reliability in the evidence rendered by the eye witnesses, namely, Anwar Ali, HC No. 785 (PW-1), Yash Paul Ct. No. 1482 (PW-2), Maqsood Ali Shah, Ex. 144 (PW-3), Abishekh Khajuria, Ct. No. 3065 (PW-6), and Subash Singh SGC No. 1403 (PW-10) and the corroborative evidence provided by the FIR (Ex.PW-MR). We have also taken note, as it was pointed out to us by Mr. Sethi, that the two civilian witnesses, namely, Bashir Ahmad (PW-4) and Tasleem Arif (PW-5) have not supported the prosecution case and have been declared as hostile witnesses. We, however, are not persuaded to agree with the submission of Mr. Sethi that in the wake of the independent (civilian) witnesses having not supported the prosecution case, evidence rendered by other witnesses cannot be relied upon for the reason that they are police personnel and interested witnesses. We rather do not subscribe to the view that evidence of

police personnel should always be treated with suspicion and discarded. Such evidence can be relied upon and even made basis of conviction if upon scrutiny it is found reliable and trustworthy.

8. We on reading of the statement of accused recorded by the learned trial court in terms of section 342 Cr. P.C. find another reason for safely relying upon the evidence of the eye witnesses in regard to the search of the bag possessed by the accused and the bag containing Indian Currency and charas like substance.
9. The accused, while consistently refuting the prosecution evidence to the extent of the recovery of charas from his bag, has admitted that an amount of Rs. 1, 35,700/- was recovered from his bag and pleaded that he had come to Jammu from his house at Poonch and that the police apprehended him at Bhatindi morh and took him to Police Station, where he was told that said money was stolen property. This say of the accused would remove any doubt as regards the reliability of the prosecution evidence relating to the accused having been accosted by the police, the bag he was carrying having been searched by the police and the bag containing charas like substance wrapped in maize-cone leaves. Contradictions and discrepancies here or there sought to be pointed out by learned appellant's counsel deserve no importance.

10. The next ground canvassed by Mr. Sethi relates to compliance of section 50 of the NDPS Act before conducting search of the bag of the accused. Mr. Sethi would say that the notice (Ex. PW-AA), which as per the prosecution case was issued to the accused by PW Rajinder Gupta, SDPO, on its plain reading would show that the requirement of section 50 was complied with in breach thereof, inasmuch as the SDPO had made a suggestion to the accused to consent for his search by the SDPO instead of informing him about his right to be searched in presence of a Gazetted Officer or a Magistrate. Mr. Sethi would thus say that a recovery pursuant to a search conducted in breach of section 50 is suspect and vitiates conviction. In support Mr. Sethi relied upon the Constitution Bench judgment of the Supreme Court in State of Punjab v. Baldev Singh, (1999) 6 SCC 172.

11. Per contra, submission of Mr. H. A. Siddique, learned AAG, was that as the search was that of a bag and not the person of the accused so compliance of section 50 of NDPS Act did not arise as section 50 applies only in case of search of a person and not his belongings like a bag, brief case etc. Mr. Siddiqui would say further that section 50 was not attracted also for the reason that recovery was effected in a routine search without there being a search with prior information that the accused

was possessing some contraband and offence under the NDPS Act was committed. Mr. Siddiqui submitted further that even if it is presumed for the sake of argument that section 50 was not complied in accordance therewith, no prejudice can be said to have been caused to the accused as prosecution has proved by reliable evidence that contraband was recovered from the bag of the accused.

12. Sub Section (1) of section 50 NDPS is relevant in context of the question raised and it reads:

“50. Conditions under which search of person shall be conducted.-

(1) When any officer duly authorised under section 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.”

13. The compliance/noncompliance of section 50 of the NDPS Act is a frequently raised question in cases under the said Act. In *State of Punjab v. Balbir Singh*, (1994) 3 SCC 299, a two-judge Bench of the Supreme Court has laid down as principle no. 1 in para 25 of the reporting that if a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in normal course of investigation into an offence or suspected offence as provided under the provisions of CrPC and when such

search is completed, at that stage section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. A Constitution Bench of the Supreme Court in Baldev Singh (Supra) after exhaustive survey of the decisions in the matter including that in Balbir Singh (supra), have concluded in para 57 of the reporting:

- 1) That when an empowered officer or a duly authorised officer acting on prior information is about *to search a person* it is *imperative* for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making search. However such information may not necessarily be in writing
- 2) The failure to *inform* the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.
- 3) That a search made by an empowered officer, on prior information, without informing the person that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded *only* on the basis of the possession of the illicit article recovered from his person, during such search conducted in violation of the provisions of Section 50 of the Act.
- 4)
- 5)
- 6)
- 7)
- 8)
- 9)

10) ”

14. In Baldev Singh (supra) the Constitution Bench has also observed (para 12 of the reporting) that ‘on its plain reading Section 50 would come into play only in the case of the search of a person as distinguished from search of any premises etc.’ In number of other pronouncements the Supreme Court has held that the question of compliance of section 50 of the NDPS Act is relevant only where search of a person is involved and the section is not attracted or applicable where search of a person is not involved. Search or recovery from a bag, brief case, container etc. or premises does not come within the ambit of section 50. (Refer Madan Lal v. State of HP (2003) 7 SCC 467, Gurbaksh Singh v. State of Haryana (2001) 3 SCC 28 & Kalema Tumba v. State of Maharashtra (1999) 8 SCC 257).
15. It is now well settled as a principle that compliance of section 50 of the NDPS Act, that is, informing the accused about his right to be searched before a Gazetted Officer or a Magistrate and if he so opts to conduct the search before a Gazetted Officer or a Magistrate, is imperative, if authorised officer intends to search a *person* with prior information as contemplated under the Act but not in a case where search of a *person* is conducted without any such information. Compliance of section 50 would not arise in a case of a routine

search by a police officer or other authorised officer or a search in normal course of investigation of an offence or suspected offences, even if said search leads to recovery of contraband as defined under the NDPS Act. Besides, compliance of section 50 would be imperative only in a case of search of a *person* and not search of or recovery from premises, a bag, brief case, container etc.

16. Mr. Siddique, learned AAG has a point in saying that section 50 of the NDPS Act is not attracted as it was a routine search of the bag possessed by the accused and not of his person. The question, whether section 50 has been complied with as per its requirement or not, however, can still be raised in this case without raising question whether section 50 was attracted or not. This is because the officer taking up the search, that is, Rajinder Gupta, SDPO (PW-9), when he was called at the naka point indeed had the information that the bag of the accused might be containing charas and the accused might have committed offence under the NDPS Act and had felt the necessity to invoke section 50 and issued option notice. Once the officer had taken the view that section 50 should be complied with, the only question that can be raised is whether compliance was duly made or not. Such is the recent view taken by the Supreme Court in a similar fact situation in *Gurjant Singh v State of Punjab*, 2013 (7) Supreme 489.

16.1 In Gurjant Singh's case (supra) a tractor trolley was intercepted and stopped by SHO of the Police station. The driver of the tractor trolley tried to slip away but was over powered by the SHO and other police officials. The SHO checked the trolley of the Tractor and found three gunny bags lying inside the trolley. The SHO informed the driver that he intended to search the gunny bags as he suspected some incriminating articles in the gunny bags. The SHO further informed the driver that, if he so desires, the search could be conducted in presence of a Gazetted Officer or a Magistrate. The driver is stated to have expressed his consent that the search may be conducted in presence of some Gazetted Officer or a Magistrate. The SHO after recording statement of the driver and getting his signature called Deputy Superintendent of Police of the area on spot. The SHO then searched the gunny bags lying in the tractor trolley, which was found to contain poppy husk. FIR, thus, was registered and after investigation charge sheet against the driver was filed in the court.

16.2 Before the trial court, it was contended on behalf of accused/driver that there was clear violation of sections 42 and 50 of the NDPS Act inasmuch as the search was not conducted in presence of a Gazetted Officer or a Magistrate. It was inter alia contended that

the Dy. SP was not a regularly promoted Dy. SP but was only an inspector in the category of Own Rank Pay.

16.3 The trial court while relying upon the judgment in Balbir Singh's case took the view that there was no necessity to comply with section 50 of the NDPS Act and on that basis, did not go into the question whether the Dy. SP was a competent Gazetted Officer in whose presence a valid search could have been effected or not. High Court of Punjab and Haryana in appeal upheld the view taken by the trial court.

16.4 The question involving compliance of section 50 of the NDPS Act was raised before the Supreme Court in reference to judgment in Balbir Singh (Supra) and Baldev Singh (Supra). Their Lordships held that when once the SHO felt the need to invoke the provisions of section 50 and thereby provided an opportunity to the accused for holding a search in presence of a Gazetted Officer or a Magistrate, the conclusion of the trial court in having held that sections 42 and 50 were not applicable to the case, was a total misunderstanding of the legal provisions. It is useful to quote the relevant portion of the judgment in Gurjant Singh.

"16..... The most crucial aspect of the case was that P.W. 6 noticed three gunny bags lying in the tractor of the appellant and felt that some incriminating substance was kept in those gunny bags. P.W. 6, therefore, took the view that before effecting search of the gunny bags, the necessity

of affording an opportunity to the appellant to conduct the search in the presence of a Gazetted Officer or a Magistrate was imperative. In other words, after noticing three gunny bags, PW 6, as an investigating officer, felt the need to invoke the provisions of Section 50 and thereby provide an opportunity to the appellant for holding any search in the presence of a Gazetted officer or a Magistrate. When once PW 6 could assimilate the said legal requirement as stipulated under Section 50 of the NDPS Act, we fail to understand as to how principle No. 1 in paragraph 25 of the decision reported in Balbir Singh (supra) could be applied. Unfortunately, the trial Court failed to understand the said principle set out in Balbir Singh (supra) in the proper perspective while holding that neither section 42 nor section 50 was attracted to the facts of this case.

17. On the other hand even according to the prosecution, namely, the investigating officer himself, i.e PW 6, a search was required after apprehending the appellant alongwith the tractor and the gunny bags and such search had to be necessarily conducted in accordance with section 50 of the NDPS Act. It was further the case of the prosecution that such a step was pursued by calling upon the appellant to exercise his opinion and after affirmatively ascertaining whether he wanted any search to be conducted in the presence of the Gazetted Officer, only then P.W.3 was summoned, in whose presence the search operation was held. Therefore, the conclusion of the trial Court in having held that Sections 42 and 50 were not applicable to the case on hand was a total misunderstanding of the legal provisions in the light of the facts placed before it and consequently the conclusion arrived at for convicting the appellant was wholly unjustified.”

17. In the case on hand, it is the prosecution case that bag was in possession of the accused and the police personnel at the naka on checking the bag had found it containing a charas like substance. In the docket

dispatched by Matlub Hussain Shah, Head Constable, to the police station, on the basis whereof FIR was registered, which has been proved before the trial court as Ex. PW MR by SHO of the Police Station, PW Mohd Rafiq, it was clearly stated that the bag was containing a charas like substance. Search of the bag, therefore, undisputedly was conducted on prior information that the bag might be containing charas and offence under the Act might have been committed. The SDPO, PW Rajinder Gupta, who was called on spot, had, therefore, invoked section 50 of NDPS Act by issuing a notice (Ex PW-AA) to the accused. The question thus arising is whether section 50 was complied with as per the requirement thereunder or not, notwithstanding whether such compliance was imperative or not.

18. We, having scrutinized the evidence on the point, cannot but hold that section 50 of the NDPS Act has not been complied with in accordance with the requirement thereunder. What is clear on plain reading of section 50 is that the person to be searched (accused) has a right to be searched before a nearest Gazetted Officer of any one of the departments mentioned in section 42 of the NDPS Act or before a nearest Magistrate and a further right to be informed about this right before his search. What is required under section 50 is, to inform the person to be searched that he has a right to be searched

before a Gazetted Officer of any of the departments mentioned in section 42 or before a Magistrate and if the said person opts to be so searched, the officer conducting the search will have to bring that person before any of the above mentioned Gazetted Officers available nearest or before a nearest Magistrate. The officer intending to conduct the search must unequivocally inform the person to be searched about his right under section 50. If the said person opts to avail this right, it will, however, be open to the officer intending the search to produce him before any of the above mentioned Gazetted Officers or before a Magistrate, whosoever, is available nearest. It will also be legal if services of any such Gazetted Officer or of a Magistrate are secured on spot. Right of the accused does not extend to choosing between the Gazetted Officer and the Magistrate. It is simply a right to be searched before a Gazetted officer or a Magistrate and to be informed about that right.

19. Evidence rendered by PW Rajinder Gupta, SDPO, who in this case was the officer intending search of the bag of the accused, is important on the point. In his testimony before the trial court he has stated that first of all he issued option notice to the accused asking him whether he is prepared to get his bag searched by a Magistrate or by any Gazetted Officer. Without stating anything more, he has proved the execution and contents of the

option notice (EX. PW-AA). He also indentified the signature of accused on this notice. Contextually, evidence rendered by PW Anwar Ali is also important, because he too has proved the contents of the option notice, which was exhibited on the basis of his statement. What he has stated is that the SDPO issued notice to the accused asking him whether he wants himself to be searched by a Magistrate or by a Gazetted Officer and on this the accused replied that SDPO is a Gazetted Officer too and can conduct the search. As against the oral evidence of these two witnesses, the contents of the option notice (EX. PW-AA) would show that the SDPO in fact had informed the accused that his bag is required to be searched, he (SDPO) too is a Gazetted Officer and had then asked him specifically whether he would like to be searched by him (SDPO) or by a Magistrate. The accused, as per this notice had consented his search by the SDPO saying that he too was a Gazetted Officer. Option notice (Ex.PW-AA), which is written in Urdu, in its relevant portion would reads:

“ Aap (name of the accused) ko aaga kiya jata hai ke aap ke bag ke talashi lee jani matloob hai. Raquam bhi gazetted officer hai.

Sawal: Kya aap raquam say talashi karwana chahte hen ya kay kisi magistrate say.

Jawab: Han ji janab bhi gazetted officer hen. Aap muzar key bag ke talashi lay sekte hen koi etraj na hae.”

20. It is seen that the oral evidence rendered by the SDPO and PW Anwar Ali does not match with the contents of the option notice (Ex. PW-AA). It would be, therefore, apt to look into the contents of the option notice because it contains the record of the fact having been made at the time of the occurrence of the fact. The option notice on its plain reading would show that section 50 NDPS Act was not complied with as per the requirement thereunder and whatever done was in breach of the requirement. Accused was not informed about his legal right to be searched before a Gazetted Officer or a Magistrate. The SDPO has rather made a suggestion that accused should get himself searched by him. It is not understandable as to why SDPO should have informed the accused that he was a Gazetted Officer. Accused should have been first informed of his right in the sense as it is and if the accused had desired to be searched before a Gazetted Officer or any Magistrate, further course of action could have been decided by the SDPO. We will thus hold that the Police Officer, Rajinder Gupta, SDPO (PW-9) after taking the view that section 50 of the Act was required to be complied with, had failed to comply with the same as per the requirement thereunder and whatever compliance made by him was in breach of the section.
21. Indisputably, conviction and sentence of the accused is based solely upon the alleged recovery of charas from

his bag. Non-compliance of section 50 of NDPS Act has indeed caused prejudice to the accused and the conviction and sentence vitiate on that score. The element of prejudice rather cannot be raised for determination in a situation where there is clear violation of a mandatory provision of law because non compliance of the mandatory provisions, as one under section 50 in itself is a prejudice to the accused.

22. Besides, the sentence and the conviction have also been assailed on the question of link evidence. Mr. Sethi submitted that even if it is presumed that some charas like substance was recovered from the bag of the accused, prosecution has failed to prove that the said substance was charas and thereby offence under the NDPS Act was committed. Mr. Sethi sought to demonstrate that there is no reliable evidence to prove that sampling and sealing of the said substance was properly done and the main substance and sample, if any, were kept in proper custody to avoid tempering till the sample was analysed by the analyst. Mr. Sethi submitted further that there is no reliable evidence to prove that the FSL report relied upon by the prosecution has any link with the substance recovered from the bag of the accused.

23. We have analysed the evidence in context of recovery, sampling, sealing, custody of the substance and the

sample after recovery and chemical analysis. Mr. Sethi also read out to us some aspects of the prosecution evidence, which according to him were important from defence point of view.

24. PW Shakti Devi, SI, is the Investigating Officer of the case and PW Rajinder Gupta, SDPO, is the Police Officer, who ordered and in whose presence the bag of the accused was searched. Seizure-cum-recovery memo (Ex. PW-RK) was executed by PW Shakti Devi and has been attested by PW Rajinder Gupta. Both of them have stated that the charas weighing 1 kg and 400 gms was recovered from the bag of the accused.
25. PW Rajinder Gupta has stated that on getting a wireless message from Police Post, Bhatandi he had reached at the Naka point, Bhatandi Morh. He had seen the accused there, who was possessing a black colour bag. As regards the search, he has stated that on search of the bag, currency worth Rs. 1, 35,700/ and charas like substance was recovered. The charas was got weighed at nearby shop of a Butcher and its weight was found as 1 kg. and 400 gms. As regards sampling, he has stated that a little of the charas was separated as sample, seizure-cum-recovery memo was drawn on spot, which was attested by him and after that he left the spot. In cross examination, however, he stated that I. O. Shakti Devi was not present on spot, search was conducted by

him and a constable and sample was separated by him. Further, he says that neither the charas nor its sample was sealed in his presence.

26. I. O. PW Shakti Devi, has stated in chief examination that on receiving wireless message from PW Matlub Hussain Shah, Head Constable, she reached on spot. After sometime the SDPO, Rajinder Gupta, also reached there. She has further stated that she searched the bag of the accused under the order of the SDPO. Charas wrapped in maize- cone leaves and currency worth Rs. 1, 35,700/- were recovered from the bag. A weighing balance was procured on spot and the recovered charas was found to weigh 1 kg and 400 gms. 50 grams of charas was separated as sample and the recovered charas and sample were separately sealed. Recovery-cum-seizure memo (Ex. PW RK) was drawn by her, which bears her signature. Sealing was done by using a ring, which was kept on superdari of Tasleem Arif vide superadnama (Ex. PW AA-I).

27. A comparative reading of the evidence rendered by PW Rajinder Gupta and PW Shakti Devi would create a serious concern about the credibility of sealing and sampling of the removed substance. This aspect shall be discussed a little later hereafter, as it would be apt first to look to the other evidence in the same context.

28. PW Anwar Ali, HC, who too was present on spot, has stated that Officer Incharge of the Police Post had reached first, who had called the SDPO. He says that the charas was got weighed from Ghulam Rasool, shopkeeper and on weighing the recovered charas had weighed 1 kg. 400 gms. from which sample weighing 50 gms. was separated.
29. PW Yash Paul, constable, has stated that incharge petrol, Matlub Hussain Shah had called the officer incharge of the Police Post on spot. The officer incharge had come on spot and called the Dy. SP and the SHO. His further say is that charas weighing 1 kg. And 400 gms wrapped in maize-cone leave was recovered from the bag.
30. PW Maqsood Ali Shah, who was also a member of the petrol party, has stated that officer incharge, police post and I.O. had come on spot and they had called the DY. SP also. His statement does not contain much about recovery as he has stated that he continued checking the vehicles.
31. PWs Bashir Ahmad and Tasleem Arif, who are civilians, have not supported the prosecution case and were declared hostile.
32. PW Abishek Khajuria, constable is another witness to the occurrence. He has stated that on search of the bag

of accused charas weighing 1 kg. and 400 gms. was recovered. He, however, has not stated anything about the sampling.

33. PW Subash Singh, SGC is also witness of the occurrence.

He has stated that accused came towards Bhatindi Morh carrying a black colour bag. On the direction of HC, Matloob Hussain Shah, they started checking his bag and saw a black colour substance wrapped in maize-cone leaves inside it. The head constable directed them to keep the bag as it is. Officer Incharge Police Post, Shakti Sharma was called on spot telephonically. Dy. SP also came on spot. PW Shakti Devi told the Dy. SP that there is something in the bag of the accused. The Dy. SP directed Mutloob Shah to check the bag. They got the substance weighed at the shop of Ghulam Rasool and found that it was charas weighing 1 Kg and 400 gms. Rs. 1, 35,700/ were also recovered from the bag. In cross-examination, he has stated that SDPO had given a docket to the accused and obtained his signature on it. Sample weighing 50 gms was separated and sealed on spot.

34. It is seen that there is nothing much and substantial about the process of sampling and sealing in the evidence rendered by the witnesses other than PW Rajinder Gupta, SDPO and the I. O. PW Shakti Devi. However, as indicated above, evidence rendered by PW

Rajinder Gupta and Shakti Devi creates a serious concern as regards the credibility of sampling and sealing of the recovered substance and the sample. Statement of PW Rajinder Gupta in chief examination does not at all indicate the presence of the I. O. PW Shakti Devi on spot. In his cross-examination, he clearly states that PW Shakti Devi was not present on spot, search was conducted by him and a constable, sample was separated by him but sealing of the main substance or the sample was not done on spot in his presence. It is important to note that evidence of PW Rajinder Gupta, SDPO, makes it clear that I. O. PW Shakti Devi had not reached the place of recovery till he left that place after search and recovery and that sealing and sampling was not done in his presence. As against this, the recovery-cum-seizure memo (Ex PW RK) and the statement of PW Shakti Devi would show that the sealing and sampling was done by her on spot and the recovery-cum-seizure memo was attested by PW Rajinder Gupta, SDPO. A serious doubt thus creeps in as regards the factum and the place of sampling and sealing of the sample and the main substance. If the sealing and sampling as per PW Rajinder Gupta was not done in his presence and even the I.O. PW Shakti Devi had not reached there till he left that place, in that case say of the I. O. that sealing and sampling was done on spot and the attestation of the recovery-cum-seizure memo by the SDPO, which also

speaks about sampling, makes the entire process of sampling and sealing suspicious. It would not be possible to believe and hold that sealing and sampling was done on spot in the manner as professed by the prosecution and the possibility of the sampling and sealing, if any, having been done and recovery-cum-seizure memo (Ex. PW RK) having been prepared at some later stage cannot be ruled out. Absence of clear and cogent evidence about sampling and sealing weakens the link between the recovered substance and the material that was sent as a sample for chemical analysis.

35. We have accorded our consideration to the evidence as regards the custody/location of the seized substance and sample, if any, after the time of seizure and alleged sampling on 10.5.2006 up to the time of its production before the Executive Magistrate for resealing on 12.05.2006, in context of the submission of Mr. Sethi, learned Senior Advocate, that evidence in this regard is shrouded in suspicion and it is evident that the seized substance and the sample were not dealt with in the manner as required under section 55 of the NDPS Act. Mr. Sethi sought to demonstrate that undisputedly the substance or the sample were not entrusted to the SHO of the concerned Police Station as required under section 55 and there is no evidence that the sample was deposited even in the '*malkhana*' of the Police Post.

36. I. O. PW Shakti Devi, whose evidence is important on this point, is silent in chief examination as to where she had kept the seized substance and the sample after recovery and sealing. However, in cross-examination, she states that in the intervening period from 10th to 12th May the substance had remained in the custody of 'Munshi Malkhana', PW Iqbal Singh.
37. PW Iqbal Singh, SGC has stated that he was posted at Police Post, Bhatindi. The officer Incharge of the post on 10.5.2006 had handed over to him charas weighing 1 kg. 400 gms and currency worth Rs. 1, 35,700/-. He had kept these things in '*malkhana*' after making entry in the register and later he had handed over these things to the I.O. at the time of filing of the charge sheet. *Malkhana* register was not produced before the trial court. However, PW Iqbal Singh has proved before the trial court a true copy of the concerned page of the register (mark IS) prepared by him, which according to him was attested by the Incharge of the post. Referring to the said copy, he has stated that entry at Sr. No. 23 pertains to currency valuing Rs. 1,35,700/ and charas weighing 1 Kg and 400 gms, which comprised sample weighing 50 gms, connected with FIR No. 53/2006. In cross-examination, he has stated *inter alia* that as per the entry in this copy, sample weighing 50 gms was sent to FSL on 12.05.2006.

38. Even though the original '*malkhana*' register was not produced before the trial court and the I. O. did not explain this aspect in the evidence rendered by her, we have taken time to understand the meaning of the entry at Sr. No. 23 from copy of the registrar (marked IS) and the statement of PW Iqbal Singh. Entry at Sr. No. 23 indeed pertains to the FIR No. 53/2006 of Police Station, Bhau Fort. As per this entry, seven items were deposited in the '*malakhana*' of the police post on 10.05.2006. Charas figures as item No. 2 and the entry in this regard in its English version would read:

| | |
|---|--------------|
| " 2. Charas wrapped in maize-cone leaves: | 1 . 400 kgs. |
| | <u>0- 50</u> |
| | 1 . 350 kg. |

39. Obviously the entry at Sr. No. 23 does not show that two packets containing charas (one of them being the sample) were deposited in the '*malkhana*' and in no case that the sample weighing 50 gms. was deposited in the '*malakhana*'. To say otherwise, deposit of two packets is not evident. Instead entry at item No. 2 of Sr. No. 23 would show that charas weighing 1 kg. 400 gms, less by 50 gms, that is, 1 kg. 350 gms was deposited in the '*malakhana*'. As pointed out by Mr. Sethi, we cannot but take note of the evident pretence in the matter of deposit of the recovered substance or sample in the '*malkhana*'. What could have been deposited in the '*malkhana*' were the two sealed

packets, that is, main substance and the sample and, if deposited, would have been entered in the register accordingly. Entry “charas wrapped in maize-cone leaves” has no coherence with a sealed packet or two. It is thus highly doubtful to believe that the sample, even if and whensoever it was separated and sealed, was ever deposited in the ‘*malakhana*’. Further doubt is created by the entry as regards taking out of 50 gms of charas from the ‘*malakhana*’ on 12.5.2006 for chemical analysis because entry in this regard indicates as if 50 gms of the substance, say charas, was taken out of the total material weighing 1 Kg. 400 gms deposited in the ‘*malkhana*’. It does not indicate that a packet weighing 50 gms was deposited in or taken out of the ‘*malkhana*’.

40. Clinching and categorical evidence as regards the keeping and custody of the seized substance and the sample, if any, should have been provided by the I. O. PW Shakti Devi but she did not say anything in this regard in her chief-examination and whatever said in the cross-examination is too scanty to provide sufficient evidence on this important aspect of the case.
41. We cannot but entertain serious doubt as regards the proof of the fact that the substance produced for resealing before the Magistrate and dispatched for

chemical analysis to the FSL was the sample, if any, of the substance recovered from the bag of the accused, even if it is presumed that such sample was prepared at some point of time. It is seen that as per the prosecution case and the evidence, recovery of the substance from the bag of the accused and the process of sampling and sealing, which, however, is suspicious, had taken place on 10. 5. 2006 at about 2.00 pm. As per the evidence rendered by the I. O. Shakti Devi and PW-8, Ravinder Kumar Anand, Executive Magistrate (Naib Tehsildar, Jandrah) read with certificate (Ex. PW-RK) issued by the latter, one sealed packet was produced for resealing before the said Executive Magistrate by the I. O. on 12.05.2006. Evidence rendered by these two witnesses, which is the only evidence on the point, however, cannot prove beyond doubt that the packet produced for resealing before the Executive Magistrate by the I.O. was that of the sample weighing 50 gms of the recovered substance. Testimony of PW Shakti Devi does not provide clarity in this regard as her say simply is that the seized charas was produced before the Executive Magistrate, whereas the Executive Magistrate says that though he did not weigh the packet produced before him but it might be weighing $\frac{1}{2}$ kg. which indeed is a quantity too high than a sample of 50 gms.

42. On scrutiny of the evidence, as it was pointed out to us, we cannot but entertain a doubt also as regards the fact that the substance received at the FSL was the packet which was resealed by the Executive Magistrate. The doubt stems out from a comparative reading of the evidence rendered by the Executive Magistrate, Ravinder Kumar Sharma (PW-8) and the Scientific Officer of FSL, Jammu, Shakeel Ahmad (PW-12). According to PW-8, when the sealed packet was produced before him on 12.05.2006, it was having three seals of the police, he affixed two seals on it and that he issued certificate authorising the FSL to break open the seals and examine the contents of the packet. He proved the certificate as Ex-PW-RK. As against this, according to PW-12, in chief examination, the packet received by him was supporting five intact seals but in the cross-examination he unequivocally states that all the five seals were those of the Magistrate only. Discrepancy in two statements is clear too. Packet received in the FSL was supporting five seals, all having the impression of the seal of the Magistrate whereas according to the Magistrate, he had applied only two seals to the packet produced before him for resealing.
43. Mr. Siddiqui, learned AAG made an attempt to downplay contradictions and discrepancies saying that they were too minor to have any adverse impact on

proof of the facts sought to be proved and deserve to be ignored. We, however, cannot do so as we are dealing with a serious matter. Prosecution is required to be very careful in conducting trial in criminal cases and more so when the charge against the accused carries heavy punishment. In trial for offences under the NDPS Act, due care should be taken to establish a clear, cogent and reliable link between the recovered substance and the report of the chemical analyst. Unless such a link is established beyond doubt, prosecution cannot succeed in proving that the substance recovered from the accused was a contraband and offence punishable under the Act is constituted. The prosecution must establish beyond doubt that the sample after recovery of the substance had been preserved in a way to rule out possibility of any tampering till it is delivered for chemical analysis.

44. In this case, prosecution has failed to prove by clear and cogent evidence that the sample, if any, was deposited in '*malkhana*' of the police post though the I.O. was required to entrust the same to SHO of the Police Station as required under section 55 of the NDPS Act. Likewise, prosecution has also failed to prove that the said sample was produced for resealing before the Executive Magistrate and forwarded to the FSL for analysis. In the result, the requisite link between the recovered substance and report of the

chemical analyst has not been established and, therefore, it has not been proved beyond doubt that the recovered substance was a contraband, namely, charas.

45. We may sum up thus;

Search has been conducted in violation of section 50 of the NDPS Act even though the officer concerned had felt necessity of invoking the provisions of the said section. Conviction is vitiated on that score for the reasons discussed and stated above. Besides, the evidence led by the prosecution fails to provide reliable link evidence to establish beyond doubt that the substance recovered from the bag of the accused was in fact a contraband, namely, charas.

46. For the aforementioned, we allow this appeal as it has merit and set aside the impugned judgement and order of sentence both dated 12.05.2009. In the result, accused is acquitted. He be released as far as this case is concerned.

47. Record be remitted back to the trial court alongwith a copy of this judgment. Learned trial Court shall take follow up action.

(Janak Raj Kotwal)
Judge

(Mohammad Yaqoob Mir)
Judge

