

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. A. No. 554 of 2016
Reserved on: 21.08.2018
Decided on: 31.08.2018

Khem ChandAppellant.

Versus

State of H.P.Respondent

Coram

The Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge.

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?¹ Yes

For the appellant: Mr. Vivek Sharma, Advocate.

**For the respondent: Mr. Vikas Rathore and Mr.
Narinder Guleria, Addl. A.Gs.**

Dharam Chand Chaudhary, Judge.

Appellant herein is a convict. He has been convicted by learned Special Judge, Kullu, District Kullu, H.P. for the commission of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'NDPS Act' in short) and sentenced to undergo rigorous imprisonment for a term of 10 years and to pay Rs.1,00,000/- as fine vide judgment dated 14.06.2016 passed in sessions trial No. 15(15-A) of 2015.

¹ Whether the reporters of Local Papers may be allowed to see th judgment? Yes.

2. The allegations against the appellant (hereinafter referred to as the 'accused') in a nut-shell, are that on 20.11.2014 around 5.55 p.m. when apprehended by the police of Police Station, Bhunter, District Kullu near Kamand-dhar was found in conscious and exclusive possession of charas weighing 2kg 100grams.

3. Now, if coming to the factual matrix, the prosecution case as per report filed under Section 173 Cr.P.C is that on 20.11.2014 PW-7 Inspector Tenzin accompanied by HHC Joginder Singh, HHC Nanak Chand and Constable Davinder Prasad (PW-5) left SIU, Kullu for patrolling towards Bhunter side at 2.30 p.m. Rapat No. 5 (Ext. PW-9/A) was entered in this regard in the rojnamcha. The police party had gone up to a place known as 'Shondhadhar'. On its way back, when reached at Kamand-dhar about 5.30 p.m., the accused was spotted coming on foot from Diyar side at about 5.55 p.m. He was carrying a bag with him. The police party stopped the vehicle there and apprehended the accused. On inquiry, the accused disclosed his name and other antecedents to the police. He got frightened. PW-7 Tenzin, the I.O. of this case had asked the accused about the contents of the bag which was having inscription '*Prem*' on it. He revealed that there were potatoes in the bag. The I.O. further asked him

as to why he got frightened on seeing the police, the accused failed to give satisfactory answer. This has raised suspicion that the accused may be carrying some incriminating substance in the bag. The I.O. associated PW-5 Constable Davinder Prasad and HHC Nanak Chand as witnesses and it is in their presence the bag the accused was carrying with him checked. On its checking, ball shaped black coloured substance wrapped in poly wrappers was found kept therein. On the basis of his experience and on smelling it, PW-7 found the recovered substance to be charas. The identification memo Ext. PW-7/A was accordingly prepared in the presence of the witnesses. The recovered charas was weighed with the help of electronic weighing scale available with the I.O. and found to be 2kg 100grams.

4. The recovered charas was kept back in the same bag and sealed in a parcel of cloth with nine seals of impression 'H'. The sample of seal Ext. PW-5/B was drawn separately and the seal after its use retained by the I.O. in his own custody. He filled NCB-I forms Ext. PW-4/E in triplicate. The recovered charas was taken into possession vide seizure memo Ext. PW-5/A.

5. It is thereafter rukka Ext. PW-4/A was prepared and handed over to PW-5 to deliver the same in Police

Station, Bhunter. On the basis of rukka, FIR Ext. PW-4/B was registered by PW-4 SI Bhag Singh. He made the endorsement on the rukka Ext. PW-4/C and handed over the case file to PW-5 for being taken to the I.O on the spot. The parcel containing the case property was also produced before PW-4. He re-sealed the same with three seals of impression 'M', drawn the sample seal 'M' on a piece of cloth Ext. PW-4/D and also filled relevant columns of NCB-I forms. The case property was deposited with officiating MHC Ms. Pinki Devi (PW-1) along-with NCB forms, samples seals 'H and 'M' and also the copy of seizure memo. PW-7 also prepared the spot map Ext. PW-7/B and recorded the statements of prosecution witnesses as per their version.

6. The accused was apprised about the offence he committed and grounds of arrest and thereafter arrested vide memo Ext. PW-7/B. The Police party returned to the police station and entries in this regard were made in the rojnamcha vide rapat Ext. PW-8/A. The '*jamatalashi*' of the accused was also conducted by PW-7. The officiating MHC (PW-1) had entered the case property in register No.19 of malkhana at Serial No. 23, the abstract whereof is Ext. PW-1/A. On 21.11.2014, after filling the columns of NCB forms, regular MHC Gian Chand (PW-6) had sent the parcel of case property (Ext. P-1) along with NCB forms, sample of

seals 'H' and 'M' as well as other relevant documents to FSL, Junga vide RC Ext. PW-6/A. Constable Jai Singh (PW-2) has deposited the case property in the laboratory and obtained the receipt of RC. On his return to police station, he handed over the receipt to PW-6 Gian Chand.

7. The Investigating Officer has prepared the special report Ext. PW-3/A and submitted the same to the then Additional S.P. Kullu, Shri Nihal Chand. He after having made endorsement thereon handed over the same to the Reader HC Nirat Singh (PW-3). HC Nirat Singh had entered the special report in the relevant register, the abstract whereof is Ext. PW-3/B. On 21.11.2015, LHC Manoj Negi (PW-10) brought the case property from the laboratory with result Ext. PW-7/D from FSL, Junga and handed over the same to MHC police station, Bhunter. As per report Ext. PW-7/D, the contents of exhibit were found to be an extract of cannabis and sample of charas. On the completion of investigation, the investigating agency has filed the challan in the Court.

8. Learned trial Judge has framed the charge under Section 20 of the NDPS Act against the accused who pleaded not guilty to the same and claimed trial. The prosecution in support of its case has examined 10 witnesses in all.

9. The material prosecution witnesses are PW-5 Constable Davinder Prasad and PW-7 Inspector Tenzin because while the search and seizure has been conducted by PW-7 the I.O, it is PW-5 who has witnessed the same.

10. The remaining prosecution witnesses i.e. LHC Pinki Devi (PW-1), Constable Jai Singh (PW-2), HC Nirat Singh (PW-3), SI Bhag Singh (PW-4), HC Gian Chand (PW-6), LC Urmila (PW-8), Constable Vijay Kumar (PW-9) and LHC Manoj Negi (PW-10) are formal because before Pinki (PW-1), PW-4 Bhag Singh had produced the parcel containing recovered charas along with sample of seals 'H' and 'M', copy of seizure memo and NCB forms in triplicate, which she had entered at Serial No. 237 of register No. 19. She has proved the abstract thereof, which is Ext. PW-1/A. Similarly, Jai Singh has taken the case property to FSL, Junga and deposited the same there in safe custody. PW-3 Nirat Singh, the Reader of Additional S.P. Kullu has proved the special report Ext. PW-3/A and the entries in the register Ext. PW-3/B. Sub Inspector Bhag Singh, the then SHO/PS, Bhunter registered the FIR Ext. PW-4/B on the receipt of rukka Ext. PW-4/A. He has also made the endorsement Ext. PW-4/C on the rukka and after re-sealing the parcel containing the case property with three seals of 'M' drawn the sample thereof on a piece of cloth Ext. PW-

4/D. He also filled the relevant columns of NCB forms Ext. PW-4/E. HC Gian Chand had forwarded the case property vide RC No. 265/14 Ext. PW-6/A to FSL, Junga through Constable Jai Singh. He also completed column No. 12 of NCB forms Ext. PW-4/E before the case property sent to the laboratory. Lady Constable Urmila has proved the rapat rojnamcha Ext. PW-8/A, whereas, Constable Vijay Kumar Ext. PW-9/A. PW-10 LHC Manoj Negi had brought the case property and the report from FSL, Junga and handed over the same to MHC Police Station, Bhunter.

11. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C has denied the incriminating circumstances appearing against him in the prosecution evidence put during such examination either being incorrect or for want of knowledge. As per his plea raised in defence, the prosecution witnesses have deposed falsely against him and that a false case has been registered against him.

12. DW-1 Inder Singh he examined in his defence has stated that his house is near Kamand-dhar 'Nallah' above the road where he is residing for the last 10 years with his family. House of one Bhim Singh is also situated there at a distance of 100-150 meters. He has been examined by the accused in his defence to discredit the

prosecution story on account of non-joining of independent witnesses.

13. Learned trial Judge on appreciation of the oral as well as documentary evidence and taking into consideration and arguments addressed on behalf of the prosecution as well as in defence has concluded that charas weighing 2kg 100grams has been recovered from the conscious and exclusive possession of the accused. He, therefore, has been convicted and sentenced as pointed out at the out set.

14. The legality and validity of the impugned judgment has been questioned on the grounds inter-alia that learned trial Court has based its findings on surmises and conjectures, as the evidence available on record has not been appreciated in its right perspective. Learned trial Court has failed to appreciate that cogent, reliable and trustworthy evidence inspiring confidence has not been brought on record by the prosecution. The prosecution story that the police party on way back to Bhunter apprehended the accused at Kamand-dhar has erroneously been relied upon being not proved at all on record. The factum of PW-5 and PW-7 being official witnesses interested in the prosecution case, their testimony is also erroneously relied upon. The police party was traveling in

a private vehicle is also not established on record. The police has failed to give any explanation as to why the prosecution witnesses could not be associated by learned trial Court. The non-production of seal has rendered the prosecution story doubtful, however, learned trial Court has not appreciated this aspect. The contradictions pointed by the defence were ignored without assigning any reasons. The prosecution case that rukka was sent and FIR registered on the basis thereof has also not been proved. The trial Court has also failed to appreciate that the I.O. PW-7 Tenzin was inimical with the accused and it is for this reason a false case has been planted against him. The evidence produced by the accused in his defence has been ignored without assigning any reason. The statement of the accused under Section 313 Cr.P.C was not recorded as per settled legal principles. The link evidence was also not complete besides there being no compliance of provisions contained under Section 52, 55 and 57 of the NDPS Act, hence no findings of conviction could have been recorded against the accused. Being so, the impugned judgment has been sought to be quashed and the accused acquitted of the charge framed against him.

15. Mr. Vivek Sharma, learned counsel representing the appellant-convict has argued that non-

joining of independent witnesses irrespective of were available nearby to the spot has rendered the prosecution story highly doubtful. The testimony of official witnesses PW-5 Constable Davinder Prasad allegedly a member of police patrol and PW-7 Tenzin the I.O is not consistent and rather full of contradictions such as qua the location of the spot and its distance from Kullu and Bhunter etc. etc. They, according to learned counsel, have improved their version while in the witness box. Therefore, the contradictions and improvements in the statements of PW-5 and PW-7 according to Mr. Sharma goes to the very root of the prosecution case. No reason has been assigned for non compliance of the provisions contained under Section 50 of the NDPS Act, this has also rendered the prosecution case highly doubtful. The evidence available on record allegedly has not been appreciated in its right perspective. Cogent and reliable link evidence has also not come on record suggesting the involvement of the accused in the commission of alleged offence.

16. On the other hand, learned Additional Advocate General while repelling the arguments addressed on behalf of the appellant-convict has pointed out from the statements of the material prosecution witnesses PW-5 and PW-7 that their version is consistent and worthy of

credence. Merely that they are official witnesses, their testimony, cannot be ignored. The prosecution has also connected the accused with the commission of offence with the help of cogent and reliable link evidence. Therefore, the impugned judgment, which according to learned Additional Advocate General, is well reasoned calls for no interference in this appeal.

17. Considering the rival submissions made on both sides, following points arise for determination in the present appeal:-

- i) Is the present a case where witnesses could have been easily associated to witness the search and seizure but PW-7, the Investigating Officer has failed to do so intentionally and deliberately and as a result thereof the proceedings qua search and seizure of the contraband from the conscious and exclusive possession of the accused has vitiated and as such the impugned judgment is not legally sustainable ?
- ii) Is the evidence as has come on record by way of testimony of official witnesses i.e. PW-5 Constable Davinder Prasad and PW-7 Inspector Tenzin is not consistent and rather contradictory in nature, hence not worthy of credence?
- lii) Whether the inconsistencies, contradictions and other procedural irregularities, if any, in the prosecution evidence renders the

prosecution case qua recovery of contraband allegedly charas from the conscious and exclusive possession of the accused doubtful?

Points No. 1 to 3.

18. All the points have been taken up for consideration together. It is well settled at this stage that joining the independent persons to witness the search and seizure in a case of this nature is in the interest of fair trial, however, one should not lose sight of the fact that independent persons are not available at all places and at every time for being associated as witnesses by the Investigating Officer to witness the search and seizure. The support in this regard can be drawn from the judgment of the Apex Court in ***Makhan Singh V. State of Haryana (2015) 12 SCC 247***, which reads as follows:-

“.....In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places and at all times. Independent witnesses who live in the same village or nearby villages of the accsued are at times afraid of to come and depose in favour of the prosecution. Though it is well settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available....”

It is held so by this Court also in ***Criminal Appeal No. 165 of 2011 titled State of H.P. V. Balkrishan, decided on 27th February, 2017.***

19. In a normal course, in a case of this nature where there is provision of severe punishment against an offender, greater care and caution is required to be taken while appreciating the evidence on record and holding an accused guilty. The legal principles in this regard have also been settled by the Apex Court in ***Noor Aga V. State of Punjab and another, 2008*** and ***State of Punjab V. Baldev Singh (1999) 3 SCC 977***, taken note of by learned trial Court also in the impugned judgment. Therefore, such being the settled legal position, of course, as per the requirement of provisions contained under Section 100 and 108 of the Code of Criminal Procedure, it is the duty of the I.O. to conduct search and seizure in the presence of independent witnesses, however, whether someone was available for being associated as independent witness on the spot or not, need reappraisal of the given facts and circumstances and the evidence available on record.

20. It is not the prosecution case that PW-7 has made effort to join the independent person to witness the search and seizure. Both PW-5 and PW-7 have stated that

no effort was made nor any police official deputed in search of independent person for being associated as witness at the time of search and seizure had taken place on the spot. The explanation in this regard as forthcoming is that since there was no prior information qua the illicit trafficking of the contraband, therefore, being a case of chance recovery independent witnesses could not be associated. The explanation so forthcoming is not only reasonable but plausible also for the reason that the police team headed by Inspector Tenzin PW-7 was on routine checking and detection of crimes. The accused spotted at the place of recovery all of sudden and asked to stop. On suspicion, the search of the bag he was carrying with him conducted in the presence of PW-5 and HHC Nanak Chand, another member of the police patrol and ball shaped black coloured contraband allegedly charas was recovered. The I.O. on the basis of his experience has found the same to be charas. Both PW-5 and PW-7 have stated in one voice that no vehicle came there when the search and seizure was being conducted. They both have denied the suggestion that at a little distance from the spot, there were residential houses. Although, they admitted the existence of 'Nallah' at some distance (1.5 kilometer away from the spot as per PW-5), however, denied that two

houses, one of Nimat Ram and another of Bhim Singh were situated nearby the 'Nallah'. It is also denied that Nimat Ram and Bhim Singh were residing in those houses. However, the accused in his defence has neither examined said Nimat Ram nor Bhim Singh and rather examined one Inder Singh, whose name was never suggested to PW-5 and PW-7 in their cross-examination. Therefore, learned trial Judge has rightly refused to place reliance on the testimony of DW-1 Inder Singh. The facts thus remain that no habitation was there nearby Kamand-dhar where the accused was apprehended nor it is proved that houses of Nimat Ram and Bhim Singh were situated near the 'Nallah', which otherwise was also at a distance of 1.5 kilometers away from the spot. The place rather was isolated. It is proved so even from the perusal of the spot map prepared by the I.O. The present, as such, is a case where independent witnesses were not available. The ratio of the judgment of the Apex Court in **Makhan Singh's** case cited supra, is attracted in the case in hand.

21. Now if coming to the second limb of the argument that the evidence as has come on record by way of the testimony of PW-5 and PW-7, the official witnesses is not consistent and rather contradictory, hence inspire no confidence, it is worthwhile to mention here that even if it

is so, the prosecution cannot succeed in this case, because it is well settled at this stage that the evidence of official witnesses, if consistent and inspire confidence cannot be ignored and rather relied upon to record the findings of conviction against the accused. The reliance in this behalf can be placed on the judgment of the Apex Court in ***Girija Prasad V. State of M.P. (2007) 7 SCC 625***, in which it has been held that the testimony of official witnesses is as much good as that of independent person, however, close scrutiny of their statements is required and the same can be relied upon after having all circumspection and caution. Learned trial Judge has also placed reliance on the judgment of the Apex Court in ***Govindaraju alias Govinda V. State by Srirampuram Police Station and another, (2012) 4 SCC 722***, in which it has been held that whenever the evidence of the official witnesses after careful scrutiny inspire confidence and is found to be trustworthy it can form basis for recording findings of conviction against the accused and non-association of some independent person to witness the search and seizure is not fatal to the prosecution case. The relevant extract of this judgment reads as follows:-

“We are certainly not indicating that despite all this, the statement of the police officer for recovery and other matters could not be believed and form

the basis of conviction but where the statement of such witness is not reliable and does not inspire confidence, then the accused would be entitled to the benefit of doubt in accordance with law. Mere absence of independent witnesses when the investigating officer recorded the statement of the accused and the article was recovered pursuant thereto, is not sufficient ground to discard the evidence of the police officer relating to recovery at the instance of the accused. [See (Govt. of NCT of Delhi) v. Sunil.] Similar would be the situation where the attesting witnesses turn hostile, but where the statement of the police officer itself is unreliable then it may be difficult for the court to accept the recovery as lawful and legally admissible. The official acts of the police should be presumed to be regularly performed and there is no occasion for the courts to begin with initial distrust to discard such evidence.”

22. Now if coming to the case in hand, PW-5 and PW-7 both are police officials, hence official witnesses. Whether their testimony inspire confidence and could have been relied upon to record the findings of conviction against the accused need reappraisal of the statement made by them while in the witness box. They both are categorical and have stated in one voice that police party left the office of SIU, Kullu on 20.11.2014 at 2.30 p.m. Rapat in daily diary entered in this behalf is Ext. PW-9/A. PW-7 who was posted as Incharge, SIU Kullu at that time

accompanied by HHC Joginder Singh, HHC Nanak Chand and Constable Davinder Prasad (PW-5) proceeded to Bhunter side and had gone up to Shondhadhar in private car of PW-7. They returned from Shondhadhar and while on the way from Shondhadhar to Diar, they reached at Kamand-dhar around 5.55 p.m. The police party noticed one person going towards Diyar side. PW-7 stopped the vehicle and inquired the name and other antecedents of the accused. He disclosed his name as Khem Chand. Both of them have identified the accused to be the same person who was apprehended by them on that day in the Court. The accused was having mud coloured bag having inscription 'Prem' on it in his hand. PW-7 asked about the contents of the bag. The accused told that he was carrying potatoes in the bag. When all this was being inquired into from him, he got perplexed and frightened also. PW-7 asked the reason therefor. The accused, however, could not give any satisfactory reply. Both PW-5 and PW-7 while in the witness box are categorical while stating so in the witness box.

23. The further case of the prosecution is that the accused got perplexed and this has resulted in suspicion in the mind of the I.O. PW-7 and search of the bag became necessary. Therefore, PW-7 has associated PW-5,

Constable Davinder Prasad and HHC Nanak Chand, who were the members of the police patrol and checked the bag in their presence. In the bag, ball shaped black coloured substance wrapped in poly wrappers was found kept. The same on checking was found to be cannabis. The I.O. prepared the identification memo Ext. PW-7/A. It is thereafter, the recovered charas was weighed with electronic weighing scale and found 2kg 100grams. The same was put back in the bag in the same manner in which it was taken out and the bag thereafter parcelled in a cloth parcel and sealed with nine seals of impression 'H'. The parcel was taken in possession vide recovery memo Ext. PW-5/A. The impression of seal 'H' Ext. PW-5/B was drawn separately on a piece of cloth. NCB forms Ext. PW-4/E was prepared in triplicate and seal 'H' embossed thereon also. PW-7 retained the seal in his own custody. Both witnesses have supported the prosecution case in this regard also in one voice.

24. As per the further case of prosecution after the search and seizure in the manner as aforesaid has taken place on the spot, the I.O prepared the rukka Ext. PW-4/A. Same along with parcel containing case property, sample seal, copy of seizure memo and NCB forms in triplicate were sent to police station through Constable Davinder

Prasad. Both of them have proved this part of the prosecution case also.

25. The close scrutiny of the statements of PW-5 and PW-7 lead to the only conclusion that the same is consistent without any contradiction and improvement. There is thus no reason to disbelieve the same nor non-joining of some independent persons as a witness is fatal to the prosecution case.

26. Now if their statement in cross-examination is seen, they both have categorically stated that the police party left SIU, Kullu at 2.30 p.m. According to PW-5, they reached at Diar around 4.30 p.m, whereas, as per that of the I.O. PW-7 they reached at Bhunter around 3.00 p.m and it took about 45 minutes to them to reach at Bhunter. Meaning thereby that as per testimony of PW-7, they reached at Diar around 3.45 p.m. There is not much difference and the contradiction, if any, in time to reach Diar is minor because as per the version of PW-5, they reached there around 4.30 p.m., whereas, as per that of PW-7 around 3.45 p.m. Such contradiction, as such, is not fatal to the prosecution case.

27. As per the version of PW-5, the distance of Diar from Kullu is 45-46 kilometers, whereas, that of PW-7, the distance of Diar from Bhunter is 15-16 kilometers. No

suggestion has been given to PW-7 qua the distance between Kullu and Bhunter. Therefore, even if any contradiction qua the distance between Kullu and Bhunter and Bhunter to Diar the same is again not fatal to the prosecution case.

28. As per further version of PW-5, the distance of Sondhadhar from Diar is 6-7 kilometer, whereas, as per that of PW-7, 3-4 kilometer. The contradiction in this regard is also not of such a nature so as to go to the very root of the prosecution case. No doubt, Diyar is a big village having residential houses also, however, as per version of PW-5 its distance from spot i.e. Kamand-dhar was about 4 kilometer. PW-7 has given the distance between Kamand-dhar and Diyar as 3 kilometer. Therefore, village Diyar cannot be said to be in the locality of Kamand-dhar nor was it possible for the I.O. to have sought the presence of some-one to witness the search and seizure from Diyar, that too, when the police had no prior information qua illicit trafficking of the contraband and rather it was a case of chance recovery. Both PW-5 and PW-7 have denied in one voice that houses, tea stall and bus stop were in existence at Kamand-dhar.

29. Both of them have denied the suggestion that nearby Kamand-dhar, two houses are situated viz., one in

hill side and another in valley side of the road. They both are again categoric that no effort was made to associate independent witnesses. As per further version of PW-7, the police party reached at police station, Bhunter at 9.40 p.m., whereas, though no such suggestion was given to PW-5, however, his testimony that the file was handed over by him to the I.O. in police station at 9.50 p.m corroborates the testimony of PW-7, the I.O. qua the timing of arrival of the police party in the police station.

30. The further investigation i.e. preparation of spot map Ext. PW-7/B by the I.O. and recording the statements of the prosecution witnesses under Section 161 Cr.P.C on the spot finds corroboration from his statement while in the witness box as PW-7. The memo Ext. PW-7/C reveals that the accused was arrested after his interrogation.

31. The link evidence is also complete in this case because special report Ext. PW-3/A prepared by PW-7 was produced by him before Additional S.P. Kullu, Shri Nihal Chand. His Reader HC Nirat Singh PW-3 has corroborated this part of the prosecution case while in the witness box. SI Bhag Singh PW-4 was the SHO, Police Station, Bhunter at the relevant time. The parcel containing the case property was produced before him by PW-5 along with NCB forms,

copy of seizure memo, sample of seal and rukka Ext. PW-4/A. He has not only registered the FIR Ext. PW-4/B but also prepared the case file and made endorsement Ext. PW-4/C on the rukka. He has also re-sealed the parcel with three seals of impression 'M' and drawn the sample of seal Ext. PW-4/D separately. He filled in relevant columns of NCB forms Ext. PW-4/E and thereafter the case file was handed over to Constable Davinder Prasad to take the same to the spot, whereas, case property was deposited with PW-1 LHC Pinki. Pinki has corroborated the statement of SI Bhag Singh qua the deposit of sealed parcel with seals 'H' and 'M' handed over to her by the said witness along with copy of seizure memo, NCB forms in triplicate. She entered the same in the malkhana register against Serial No. 237. The abstract of register Ext. PW-1/A is also proved by her with the help of original record brought to the Court. Nothing has come either in the cross-examination of SI Bhag Singh or that of LHC Pinki Devi, which belies the prosecution case.

32. Now if we peruse the statement of PW-6 Head Constable Gian Chand, regularly posted MHC in Police Station, Bhunter at that time, on completion of relevant columns No. 12 of NCB forms Ext. PW-4/E, he handed over the case property along with documents vide RC Ext. PW-

6/A to Constable Jai Singh (PW-2) with a direction to deposit the same in FSL, Junga. As per his further version, PW-2 had produced the receipt before him when came back after depositing the case property in the laboratory. Jai Singh while in the witness box as PW-2 has corroborated the testimony of PW-6 qua the deposit of case property by him in FSL, Junga in safe condition along with the copy of FIR, copy of Fard (seizure memo), sample of seals 'H' and 'M', NCB forms in triplicate and docket vide RC No. 265 Ext. PW-6/A. Nothing is in their cross-examination also to discredit the case of the prosecution. LC Urmila Devi PW-8 has proved the rapat rojnamcha Ext. PW-8/A, which supports the prosecution case that police party returned to the Police Station, Bhunter at 9.40 p.m. Similarly, PW-9 Constable Vijay Kumar has proved the rapat rojnamcha Ext. PW-9/A, which reveals that police party had left SIU office, Kullu at 2.30 p.m for patrolling and collecting information towards Bhunter side.

33. Therefore, the testimony of the formal prosecution witnesses to establish the link lead to the only conclusion that the accused was apprehended by the police party headed by PW-7 at Kamand-dhar and charas weighing 2kg 100grams recovered from the bag which he was carrying. The parcel in which the recovered charas

sealed was identified by both of them. They have also identified the bag Ext. P-2, the accused was carrying with him. They have also identified the transparent police wrapper Ext. P-3, in which charas Ext. P-4 was wrapped. It is also established from the testimony of PW-5 that parcel when produced by HHC Gopal Chand, Incharge District malkhana in the presence of learned Public Prosecutor and learned defence counsel, the seals except one were found intact. One of seal was slightly broken. Any how, it is nobody's case that the case property when produced in the Court was found to be tempered with.

34. Now if coming to the statement of accused under Section 313 Cr.P.C, there is denial simplicitor to the incriminating circumstances appeared against him in the prosecution evidence without there being any explanation as to what he was doing at Kamand-dhar, if was not carrying the charas. Otherwise also, huge quantity i.e. 2kg 100grams charas could not have been planted by the police.

35. Now if coming to the statement of DW-1 Inder Singh, the accused examined in his defence, as already said hereinabove, no suggestion was given to PW-5 and PW-7 that his house situated nearby Kamand-dhar. Therefore, it is difficult to believe that Inder Singh is having

his house nearby the spot and was residing there with his family.

36. The non-production of seal used by the I.O and PW-4 SI Bhag Singh is not fatal to the prosecution case because nothing suggesting that any prejudice has been caused thereby to the defence has come on record. As a matter of fact, it has not been suggested to the I.O. PW-7 that due to non-production of seal, prejudice has been caused to the accused. It has been held so by this Court in ***Criminal Appeal No. 305/2014 titled Sohan Lal V. State of H.P., decided on 02.11.2016.***

37. In view of the above, the prosecution has satisfactorily proved that charas weighing 2kg 100grams has been recovered from the conscious and exclusive possession of the accused and thereby shifted the burden to prove otherwise upon him. The present, therefore, is a case where presumption as envisaged under Sections 35 and 54 of the Act has to be drawn against the accused. Since he has failed to prove his innocence, therefore, it would not be improper to conclude that the charas weighing 2kg 100grams has been recovered from his conscious and exclusive possession.

38. For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed. Consequently, the impugned judgment is upheld.

(Dharam Chand Chaudhary)
Judge

August 31, 2018
(naveen)

(Vivek Singh Thakur)
Judge