IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr. Appeal No. 46 of 2010
Reserved on: 28.02.2020.
Decided on: 29.02.2020.

State of Himachal Pradesh. .....Appellant.

Versus

Ashok Kumar & anr. .....Respondents.

Coram

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

Whether approved for reporting? Yes.

For the appellant	:	Mr. Narender Guleria, Addl. AG.
For the respondents	:	Mr. Satyen Vaidya, Senior Advocate with Mr. Varun Chauhan, Advocate.

Per Dharam Chand Chaudhary, Judge.

This appeal has been heard by a Division Bench of this Court. Both the Judges constituting the Division Bench are divided in their opinion, hence dissenting judgments came to be delivered on 5.7.2019. As per the order of the same day passed by the Division Bench, the record of the appeal was placed before the Chief Justice of this Court in terms of the provisions contained under Section 392 of the Code of Criminal procedure.

The Chief Justice as per order dated 29.7.2019 has ordered to place the same with the opinion of the Judges constituting the Division Bench before this Court for recording its opinion after such hearing as deemed appropriate.

2. The present is a case where the I.O PW10 SI Ram Pal, Additional SHo, Police Station, Dharampur, District Solan accompanied by ASI Jai Gopal PW3, HC Kedar Nath PW1, C. Yash Pal PW2 and C. Kamal Kumar PW11 was patrolling in Kasauli Chowk, Suki Johri, Dharampur Bazar area on 17.12.2008, around 8:00 P.M. Daily diary entry No. 40-A Ext.PW7/F in this regard was entered in the rapat rojnamcha of the police station. Around 10:45 P.M. at Kasauli Chowk the police nabbed two young men (allegedly the accused persons) near rain shelter. On seeing the police, they started running towards Kasauli road by holding one sling each of black duffel type bag with them. Such an unusual conduct on their part resulted in suspicion in the mind of PW10, who nabbed them with other members of the police party. On inquiry, they revealed their names and other antecedents. On checking the bag, besides clothes, a photocopy of voter identity card, contraband allegedly *Charas* weighing 4 K.G. and 500 grams was recovered from a white plastic bag kept in other green colored polythene bag having mark “Amrit Cloth House Bus Stand Nirmand”.

3. There is no need to detail all the facts and also the evidence available on record because the same have been discussed in detail, particularly, in the judgment rendered by bother Anoop Chitkara, J., one of the members constituting the Division Bench. Otherwise also, this Court has to give its opinion about the dissenting view of the matter taken by the Judges constituting the Division Bench to discuss the facts of the case and elaboration of the evidence available on record again would unnecessarily overburdened this judgment, of course, the facts of the case and also the evidence available on record would be referred to hereinafter in this judgment as and where it is required to do so.

4. I have carefully gone through the dissenting judgments rendered in the matter by brother Sureshwar Thakur, *J*, hereinafter referred to as the first judgment and brother Anoop Chitkara, *J*, hereinafter referred to as the second judgment, vis-a-vis the facts of this case and also the evidence available on record.

5. As a matter of fact, learned trial Court on appreciation of the evidence available on record has concluded that inconsistency and infirmity occurred in the prosecution case probabilizes the defence version that none of the accused were apprehended carrying the contraband in the bag and trying to flee away on Kasauli road. The defence version that the

contraband allegedly *Charas* was found unclaimed in the bus and the accused who belong to Anni, District Kullu were falsely implicated in this case is nearer to the factual position. The accused, as such, were given the benefit of doubt and consequently, acquitted of the charge under Section 20 of the NDPS Act framed against each of them.

6. In the first Judgment, learned Judge while dis-agreeing with the findings recorded by learned trial Court has accepted the appeal and convicted both the accused for the commission of the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substance Act. The brother Judge in the second judgment has, however, taken a contrary view of the matter and while dismissing the appeal has affirmed the findings of acquittal recorded by learned trial Court.

7. The present is a case where the prosecution case hinges upon the evidence as has come on record by way of the testimony of official witnesses HC Kedar Nath PW1, C. Yash Pal PW2, ASI Jai Gopal PW3, C. Kamal Kumar PW11 and the I.O. ASI Ram Pal PW10. In the first judgment, the documentary evidence i.e. seizure memo Ext.PW1/A has been heavily relied upon to arrive at a conclusion that the contraband alleged *Charas* has been recovered from the conscious and exclusive possession of the accused as this document bears the signature of the witnesses. Therefore, the presumption that the search and

seizure has taken place on the spot in the manner as claimed by the prosecution stands satisfactorily established and even a presumption to this effect can also be drawn against the accused persons under Sections 91 and 92 of the Indian Evidence Act. Although the aid of Sections 91 and 92 in the given facts and circumstances of this case cannot be drawn. The NCB form Ext.PW7/D, FIR Ext.PW7/E and the entries in the Malkhanna register Ext.PW7/B qua deposit of the case property have also been relied upon. The R.C. Ext.PW7/C, as per the findings recorded in the first judgment, also provides the link evidence. The report Ext.PW9/A qua the opinion that the recovered contraband when analyzed was found *Charas* has also been relied upon. It has also been noticed in the first judgment that the link evidence is complete and as such in terms of this judgment the prosecution has proved its case against the accused beyond all reasonable doubts.

8. The contradictions and inconsistencies in the prosecution evidence pointed out by learned counsel representing the respondents-accused have been held to be minor as per the first judgment, hence not renders the prosecution case doubtful. The defence version that only 50-50 grams *charas* was separated for the purpose of sample, the entire mass cannot be treated to be *Charas* has also been

rejected. The plea raised by the accused persons in their defence has not been discussed nor any opinion formed qua that.

9. Now if coming to the second judgment, the infirmities such as there was no mention in daily diary rapat No. 40-A Ext.PW7/F that the I.O. was having kit when left the police station on patrol duty hence doubtful that the printed NCB proformas, torch, cloth parcels, seal 'N', sealing wax, thread and needle etc. were available with him and the inconsistencies, discrepancies and contradictions in prosecution evidence have also been taken note of in this judgment. Learned Judge at the outset has discussed that the prosecution has examined only official witnesses to prove its case against the accused. In order to prove the link evidence the prosecution has examined MHC Hakam Singh PW7, C. Yash Pal PW2 and HHC Kanshi Ram PW8. Learned Judge who has delivered the second judgment while noticing that PW4Chand Kishore, a Tea Vendor near police station, Dharampur though turned hostile to the prosecution qua its case of bringing weights and scale from him has further observed that had it been so why this witness was not associated as an independent witness also. The defence of the accused that they were travelling in Bus No. HP-03-6080 enroute Shimla to Chandigarh and apprehended at Sanwara where the bus was stopped for having tea etc. by the passengers when an unclaimed bag recovered from the bus and other passengers told

the police that they belong to Anni were taken to Police Station and beaten up there has been held to be reasonable and plausible. The recovery of identity card Ext.P-10 and Ext.P-11 of Milap Chand, one of the accused, from the bag has also been held to be false. Sushil Kumar, the Conductor of Bus No. HP-03-6080 was examined as DW1 by them in their defence. He has also supported their version qua both the accused were travelling in the bus from Shimla to Chandigarh and they were apprehended at Sanwara where the bus stopped for having tea by passengers after it was checked in front of Police Station, Dharampur and one unclaimed bag recovered from its rack. HC Praveen Kumar (DW2) was also examined by the accused in their defence. Accordingly learned Judge having rendered the second judgment formed an opinion that the prosecution has failed to prove its case against the accused beyond all reasonable doubts and as such, while dismissing the appeal, impugned judgment has been affirmed.

10. In this backdrop and to form an opinion based upon the given facts and circumstances and also the evidence available on record, Mr. Satyen Vaidya, learned Senior Advocate assisted by Mr. Varun Chandel, Advocate, has vehemently argued that the view of the matter taken in the second judgment is legally and factually sustainable. On the other hand, Mr. Narender Guleria, learned Additional Advocate General while

arguing that learned trial Court has erred legally and factually while acquitting the accused of the charge has further submitted that the view of the matter taken in the first judgment is the only justifiable view which could have been taken in view of the evidence available on record.

11. It is seen that the present is a case where only official witnesses have been associated and examined during the course of trial. In the first judgment, the oral evidence has not been discussed in detail and the findings of conviction have been based upon the documentary evidence i.e. seizure memo Ex.PW1/A and NCB proforma Ext.PW7/D. No doubt, these documents have been witnessed by the official witnesses. They even have admitted their signature also. The testimony of the official witnesses i.e. HC Kedar Nath PW1, C. Yash Pal PW2, ASI Jai Gopal PW3 and C. Kamal Kumar PW11 has, however, not been discussed nor any opinion formed that their statements are consistent and free from any contradiction or in view of other attending circumstance it is safe to place reliance thereon.

12. Be it stated that the testimony of an official witness is as much good as that of an independent person and if the same inspires confidence can be relied upon to record the findings of conviction against an offence. It is held so by this Court in **Criminal Appeal No. 258 of 2011, titled State of H.P. versus Surender Kumar, decided on May 22, 2017** while

placing reliance on the judgment of the Apex Court in **Makhan Singh** Versus **State of Haryana (2015) 12 SCC 247.**

13. The Apex Court again has held in **Girija Prasad Versus State of M.P. (2007) 7SCC 625** that it is not possible for the investigating agency to associate the independent witness in each and every case and every time/at each place.

14. The present is, however, a case where the search and seizure has taken place outside the police station, Dharampur on the National Highway. As per the prosecution evidence itself the National Highway is a busy road and the vehicles can be seen plying on this road from Shimla side towards Chandigarh/Delhi and to Shimla side also even during odd hours. It remained unexplained as to why the efforts were not made to associate some independent person to witness the manner in which the accused were nabbed and the contraband allegedly *charas* recovered from them and also the seizure as well as other proceedings having taken place on the spot. In case the scale and weight to weigh the contraband was brought from the tea stall of Chand Kishore PW4 situated nearby Police Station, Dharampur, why this witness was not associated to witness the seizure of the contraband allegedly *charas* recovered from the accused and further proceedings having taken place on the spot? Such acts of omission and commission attributed to the I.O. has caused major dent in the prosecution story and

when it is well settled that more heinous the offence committed, the strict is the degree of proof required to record the findings of conviction, no such findings could have been recorded with the help of the evidence as has come on record by way of the testimony of the official witnesses. The law on the issue is also no more *res intergra* as in the judgment authored by a Division Bench of this Court in **Criminal Appeal No. 411 of 2011** on 12th April, 2016, it has been held as under:

> .....Therefore, the proof to connect the accused with the commission of the offence must be beyond all reasonable doubt and the initial burden to bring the guilt home to an accused booked for the commission of an offence under the Act lies on the prosecution. In case the prosecution succeeds to prove the charge beyond all reasonable doubt against the accused, it is only in that situation that the presumption as envisaged under Sections 35 and 54 of the Act can be raised. We are drawing support to substantiate the findings so arrived at form the judgment of Apex Court in ***Noor Aga*** Vs. ***State of Punjab, (2008) 16 SCC 417.*** This judgment reads:
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> > "56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power

to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., ‘proof beyond all reasonable doubt' would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of ‘wider civilization'. The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjab v. Baldev Singh, (1999) 3 SCC 977, it was stated:

> “It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in

> a statute are scrupulously followed.”

[See also Ritesh Chakravarty v. State of Madhya Pradesh JT 2006(12)SC 416].

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high may be, can under no circumstances, be held to be a substitute for legal evidence.

58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is ‘preponderance of probability' on the accused. If the prosecution fails to

prove the Page 15 foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.

60. Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself."

16. Now if coming to the evidence available on record, it has been admitted by PW1 Kedar Nath that road being National Highway remains busy. C. Yash Pal PW2 has also admitted that some shops are in existence on the spot. Though PW3 ASI Jai Gopal has stated that Constable Kamal Kumar (PW11) was deputed in search of the independent witness, however, it is improved version because this was never the case of the prosecution. Therefore, in the second judgment, it has rightly been observed that National Highway,, a busy road, and the time 10.45 P.M., independent witnesses could have been easily associated to witness the search and seizure. Even if it was not possible to do so at least Chand Kishore PW4 who was available there could have been asked to associate with the investigation of the case.

17. Analyzing the given facts and circumstances of this case and also the evidence available on record, it is not proved beyond all reasonable doubt that the police party headed by PW10 SI Ram Pal had nabbed the accused at Kasauli Chowk while on seeing the police they started walking on Kasauli road for the reasons that the plea raised by both the accused in their defence and re-produced in the para-9 of the second judgment coupled with the statement of DW1 Sushil Kumar, the conductor of Bus has has probabilized the defence of the accused.

18. It is worth mentioning that both the accused belongs to Anni, district Kullu. It cannot be imagined by any stretch of imagination that they were standing at Kasauli Chowk, Dharampur that too at 10:45 P.M. The story to this effect has been engineered and fabricated by the police either to save the real culprits or to conceal the true genesis of occurrence. The plea raised by the accused in their defence that they were travelling in Bus No. HP-03-6080 from Shimla to Chandigarh supported by DW1, the conductor of the bus lead to the only conclusion that the search of the bus was conducted by the police outside Police Station, Dharampur. The bag was recovered from its rack. When the police failed to connect the bag from the person who had actually been carrying the same and the same remain unclaimed, the bus was allowed to be taken to its destination. The police nabbed the accused at Sanwara at a stage when it was stopped for having tea by the passengers there.

19. Otherwise also, there is no question of both the accused standing or seeing coming towards Kasauli Chowk, Dharampur as they belong to Anni, District Kullu and there is no link evidence as to why they had come there. It is also worth mentioning that the present is a case of recovery of the contraband allegedly *charas* from the bag which both the accused were carrying by holding its each sling. The charge

against them, therefore, could have been framed under Section 20 of the Act read with Section 29 thereof. The charge has, however, been framed only under Section 20 of the Act alone. It is an illegality which could have been cured by amending the charge suitably, however, it has also not been done.

20. It is surprising to note that the bag with 9-10 Kg. weight including the alleged contraband, two persons i.e. the accused that too when they belong to remote area of District Kullu having hilly terrains and normally the people walk on foot carrying considerable weight with them on their back up to a distance of miles together were not required to carry the same. Therefore, it is difficult to believe that when nabbed both the accused were carrying the bag by holding one slings each thereof.

21. An effort has been made by the prosecution to implicate both the accused with the help of the bag they were allegedly carrying together and recovery of photocopy of voter identity card of accused Milap Chand therefrom. The evidence as has been discussed in the second judgment in detail qua this aspect of the matter is, however, contradictory and inconsistent for the reason that as per the seizure memo Ext.PW1/A, Rukka Ext.PW2/A, Special Report Ext.PW5/A and FIR Ext.PW7/E only one photocopy of voter identity card issued by the Election Commission in favour of accused Milap Chand was recovered

from the bag. According to PW1 Kedar Nath, it was identity card, recovered from the bag. He has not stated that the photocopy of voter identity card of accused Milap Chand was recovered from the bag. He has not been subjected to cross-examination on behalf of the prosecution. In the parcel containing the case property, however, two photocopies of the voter identity card Ext.P10 and Ext.P11 were recovered. It remained unexplained as to how two photocopies could have been kept in the parcel, particularly when as per the prosecution case only one photocopy was recovered. PW2. C. Yash Pal tells us that one identity certificate was recovered from the bag whereas according to ASI Jai Gopal one photocopy of the identify card issued by the Election Commission in the name of accused Milap Chand was recovered therefrom. The I.O. Ram Pal PW10 has himself contradicted the prosecution case as according to him, two photocopies of Election identity card of accused Milap Chand were recovered from the bag. Such contradictions cannot be said to be minor for the reasons that when only one photocopy of voter identity card was recovered from the bag, how two were taken out when the parcel containing *charas* was opened in the Court. Learned Judge, who has authored the first judgment, has not taken into consideration such inconsistencies and contradictions in the prosecution evidence. On the other hand, on the basis of such evidence only inference which can be drawn

would be that the bag was never sealed in the manner as claimed by the prosecution. At a later stage when opened instead of one, two photocopies of Voter Identity Card were found to be kept therein. Otherwise also, the voter identity card was that of accused Milap Chand. How accused Ashok could have been implicated on the basis thereof also remained unexplained.

22. It is significant to note that *Charas* weighing 50 grams each alone was separated out of the recovered bulk for the purposes of sampling. There is no evidence suggesting that I.O. PW10 had right to take representative sample as there is no evidence that he mixed the entire bulk or separated 50 grams *charas* from various parts of the recovered bulk. Even there is no iota of evidence to show that the entire bulk was sent to Laboratory for analysis. Therefore, the remaining bulk i.e. 4 Kg 400 grams cannot be said to be *Charas*. It cannot also be said on the basis of the report Ex.PW9/A received from Forensic Science Laboratory that the remaining substance which was not at all tested is also *charas*. Learned Judge who has rendered the second judgment has placed reliance on the judgment of the Apex Court in **Gaunter Edwin Kircher** ***Vs.*** **State of Goa, (1993) 3 SCC 145** and has rightly held that at the most the accused could have been convicted only for having the possession of *Charas* weighing 50 grams, small quantity and maximum punishment therefor as prescribed is six months imprisonment.

Such sentence they have already undergone being arrested on 18.12.2008 and released from custody after their acquittal vide impugned judgment dated 20.10.2009.

23. This Court has also held so in judgment rendered in *Criminal Appeal No. 782 of 2008*, titled *State of Himachal Pradesh v*ersus *Naresh Kumar*, decided on June 28, 2019 while placing reliance on the judgment of Single Judge of this Court in **Dhan Bahadur versus State of H.P.** reported in **2009 (2) Shim. L.C 203.**

24. It is worth mentioning that learned Judge who has delivered the second judgment also emphasized that in daily diary No. 40-A, Ex.PW7/F, there is no mention that PW10 had I.O. kit with him when left the police station for patrolling and there being no evidence as to from where the printed NCB proformas, torch, cloth parcels, seal 'N', sealing wax, thread and needles were brought, hence held the sampling and sealing process to be not proved in accordance with law. Also that, there was no occasion to the I.O. to fill-up the relevant columns in NCB proforma on the spot. I am, however, not in agreement with the findings so recorded because taking I.O. kit with him while leaving the police station/police post for patrolling/detection of crime in the area is the routine duty of I.O. It is not required to be recorded any where including the rapat daily diary that the Kit was available with the I.O., PW10. Therefore, it would not be

improper to conclude that PW10 the I.O. was having I.O. kit with him. In the kit there use to be kept electronic weighing scale, cloth, thread, needles, wax and also seal as well as the proforma like NCB and also the blank papers. Otherwise also, the place of recovery is on National Highway outside the Police Station, Dharampur at a distance of 100 meters. Even if the seizure has taken place inside the police station, no illegality or irregularity in such process and further investigation conducted by the police can be attached. Therefore, no adverse inference could have been drawn on this score against the prosecution.

25. Even the non-production of seal by PW1 HC Kedar Nath is also not fatal to the prosecution case for the reason that the said witness has not been cross-examined by learned defence counsel as to what prejudice thereby has been caused to the accused. Similar view has been taken by this Court in Criminal Appeal No. 305/2014, titled Sohan Lal Vs. State of H.P., decided on 02.11.2016.

26. True it is that the link evidence i.e. entries in the NCB Proforma Ext.PW7/D, Road Certificate No. 113/08 Ext.PW7/C, the entires in the Maalkhana register Ext. PW7/B is there on record, however, such evidence would have some relevancy had the prosecution been otherwise succeeded to prove beyond all reasonable doubt that the contraband allegedly *Charas* has been recovered from the physical and conscious possession of the

accused persons alone. It has been held by the High Court of Bombay in **Rubyana alias Smita Sanjib Bali** Vs. **State of Maharashtra, Crl. L. J. 148** that sine-qua-non for attracting the penal provisions contained under the Act is the recovery of the contraband from conscious and exclusive possession of the accused alone. The relevant portion of this judgment is reproduced here as under:

> "The sine qua non for attracting the penal provisions, viz. Sections 20 and 21 of the N.D.P.S. Act, and Section 25 read with Section 7 of the Arms Act is that the appellant must be found in possession of the contrabands and the fire arms. The term "possession" is not defined in the N.D.P.S. Act. The term "possession" has been judicially construed to mean, in various decisions, as under :-
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> 'Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.
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> (See in this connection Dula Singh v. Emperor, AIR 1928 Lahore 272 : (1928 (29) Cri. L.J. 481), Kuldip Chand v. Emperor, AIR 1934 Lahore 718 : (1935 (36) Cri. L..J 300),

Sunder Singh v. Emperor, AIR 1936 Lahore 738 : (1936 (37) Cri. L.J. 939), and Ram Charan v. Emperor, AIR 1933 All 437 : (1933 (34) Cri. L.J. 930)).

The Apex Court in Supdt. and L. R. v. Anil Kumar Bhunja, (1979) 4 SCC 274: (1979) Cri. L. J. 1390) observed that the test for determining "whether a person is in possession of anything is whether he is in general control of it. "The Apex Court, after examining Salmond's jurisprudence and other earlier decisions rendered by the Court, observed thus (at pp 1392-93 of Cri. LJ) :-

"13. 'Possession' is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of 'possession' uniformally applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of 'possession'. Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Ed. 1966) caused by the fact that possession is not purely a legal concept. 'Possession', implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and

intent to control. (See Dias and Hughes 11th Ed.).

14. According to Pollock and Wright, when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that 'possession' is not a purely legal concept but also a matter of fact, Salmond (12th Ed. page 52) describes 'possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining 'whether a person is in possession of anything is whether he is in general control of it'.

16. In Gunwantilal v. State of H.P. (1973) ISCR 508: (1972) Cri. L.J. 1187), this Court while noting that the concept of possession is not easy to comprehend, held that, in the context of Section 25(a) of the Arms Act, 1959, the possession of a firearm must have, firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical

> possession of the firearm, or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognised that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the facts of each case. In that connection, it was observed (at p 1189 of Cri LJ):
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> In any disputed question of possession, specific facts submitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question."

27. The net result of the aforesaid discussion, therefore, is that the prosecution has miserably failed to prove its case against the accused persons with the help of cogent and reliable evidence that the contraband allegedly *charas* weighing 4Kg 500 grams has been recovered from the exclusive and conscious possession of the accused persons alone when intercepted on 17.12.2008 on Shimla-Chandigarh National Highway out side Police Station, Dharampur, around 10.45 P.M. The prosecution, as such, has failed to bring the guilt home to the accused beyond all reasonable doubt. Therefore, the view of the matter taken by

bother Chitkara J. is legally and factually sustainable. Accordingly the appeal fails and the same is dismissed. The personal bonds executed by each of the accused persons shall stand cancelled and the sureties discharged.

(Dharam Chand Chaudhary),
Judge.

February 29, 2020,
(*vs*)