(2020) 02 SHI CK 0016

High Court Of Himachal Pradesh

Case No: Criminal Appeal No. 106 Of 2018

Diwakar		APPELLANT
	Vs	
State Of Himachal Pradesh		RESPONDENT

Date of Decision: Feb. 26, 2020

Acts Referred:

- Code Of Criminal Procedure, 1973 - Section 173, 392
- Narcotic Drugs And Psychotropic Substances Act, 1985 - Section 20, 21, 35, 50, 54
- Evidence Act, 1872 - Section 91, 92
- Arms Act, 1959 - Section 7, 25, 25(a)

Hon'ble Judges: Dharam Chand Chaudhary, J

Bench: Single Bench

Advocate: B.B. Vaid, Yudhbir Singh Thakurt

Final Decision: Allowed

Judgement

Dharam Chand Chaudhary, J

1. 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 opinions 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 PW8 HC Bhupender Singh accompanied by PW9 HHC Tara Chand, C. Vinay Kumar and HHG Jeet Ram

while on Naka at Sheer Galu near Paltoj towards Naggar-Jana road apprehended the appellant (hereinafter referred to as the accused) and on

suspicion, when search of the black coloured back pack Ext. P-2 he was carrying on his back, the substance Ext.P4 allegedly charas weighting 1.512

Kg. was recovered therefrom.

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 in both the

judgments. Since this Court has to give its opinion about the dissenting view of the matter taken by the Judges constituting the Division Bench,

therefore, discussing the facts of the case and elaboration of the evidence recorded by learned trial Court 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 convicted the accused for the commission of the

offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the Ã¢â‚¬ÒNDPS ActÃ¢â‚¬â„¢ in

short). He has been sentenced to undergo rigorous imprisonment for ten years and also to pay fine of Rupees one lac for the offence he committed.

The accused, therefore, being aggrieved and dis-satisfied with the findings of conviction and sentence recorded by learned trial Court has preferred

the present appeal in this Court.

6. In the first judgment, learned Judge of this Court has agreed with the findings of conviction and sentence recorded by learned trial Court and

dismissed the appeal. The brother Judge in the second judgment has, however, taken a contrary view of the matter and accepted the appeal, hence

quashed the findings of conviction and sentence recorded against the accused on the ground that for want of cogent and reliable evidence, no such

finding could have been recorded.

7. The present is a case where the prosecution besides the official witnesses namely HHC Tara Chand PW9, HC Bhupender Singh PW8 and HHC

Jeet Ram, the members of police patrol has also associated Shri Rajender Kumar PW6 as an independent witness. In the first judgment, the evidence

as has come on record by way of the testimony of PW9 Tara Chand and the I.O. PW8 HC Bhupender Singh has been accepted as legal and valid.

Though PW6 Rajender Kumar, the independent witness has turned hostile to the prosecution except for having admitted his signature on the consent

memo Ext.PW8/A, personal search memo Ext.PW8/B, Recovery memo Ext.PW8/C, arrest memo Ext.PW8/J and memo of search of the accused

Ext.PW8/K. However, in the first judgment an opinion has been formed that he having admitted his signatures on these documents, he has witnessed

the search and seizure on the spot and a presumption to this effect can be drawn against him under Sections 91 and 92 of the Indian Evidence Act.

Even the aid of Sections 91 and 92 taken in the first judgment to support such findings is also not legally admissible as the provisions contained

thereunder are not at all attracted in the given situation. The NCB Form Ext.PW2/A, the entries Ext.PW2/K in the Malkhanna register qua deposit of

the recovered charas and Ext.PW2/C the R.C. whereby the case property was deposited in the Forensic Science Laboratory as per the 1st judgment

also corroborates the prosecution case. The report Ext.PW8/M received from the Forensic Science Laboratory has also been relied upon in the first

judgment for forming an opinion that the recovered substance was charas. On compliance of Section 50 of the NDPS Act, in the first judgment after

discussion it has been held that the present being a case of recovery of the charas from back pack, the strict compliance thereof was not required.

8. Now if coming to the second judgment, the infirmities such as there was no mention in daily diary rapat No. 14 Ext.PW7/A that the I.O. was having

kit. It is doubtful that the printed NCB proformas, torch, cloth parcels, seal Ã¢â‚¬ËœTÃ¢â‚¬â„¢, sealing wax, thread and needle were available with the I.O.

PW8. The provisions contained under Section 50 of the NDPS Act have been discussed in this judgment also and it is concluded that the present being

a case of chance recovery and contraband allegedly charas recovered from the back pack and not during personal search of the accused, the consent

of the accused before his search was not required to be obtained. The glaring inconsistencies, discrepancies and contradictions in prosecution

evidence have also been taken note of in this judgment. Learned Judge has taken note of the statement of PW9 HHC Tara Chand to the effect that

the photographs were clicked in the evening time and not during night. The photos have been compared with the statement made by PW9 and an

opinion formed that the same were clicked in the dark before the said witness left the spot at 7:20 P.M. with Rukka. The time of recording Rukka is

7:20 P.M. According to PW9 the photographs were taken before he left the spot with rukka. In the documents Ext.PW3/A there is no mention that

the police party left police post, Patlikuhal vide rapat Ext.PW7/A in vehicle No. HP-34-9273. The IO. PW8 has, however, stated that the police party

went to the spot in vehicle No. HP-34-9273 a private car. PW9 HHC Tara Chand has also stated that they went to the spot in private vehicle. PW8

the I.O. has further stated that the vehicle was of HHG Jeet Ram accompanying the police patrol but said Jeet Ram has not been examined.

9. The second judgment deals with the matter qua the independent witness PW6 Rajender Kumar having turned hostile to the prosecution in detail and

records a finding that irrespective of he admitted his signature on the documents the same does not support the prosecution case qua recovery of the

contraband allegedly charas from physical and conscious possession of the accused. In the second judgment an opinion has been formed that the trend

of writing of documents Ext.PW8/A, Ext.PW8/B, Ext.PW8/C, Ext.PW8/D, Ext.PW8/J and Ext.PW8/K amply demonstrate that these documents

have been written after obtaining signatures of the independent witness thereon. Therefore, the 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 doubt and as such while allowing the

appeal and setting aside the findings of conviction and sentence the accused has been acquitted of the charge framed against him under Section 20 of

the NDPS Act.

10. In this backdrop and to form an opinion based upon the given facts and circumstances of the case and also the evidence available on record, this

Court has heard Mr. B.B.Vaid, learned counsel representing the appellant-convict and Mr. Yudhbir Singh Thakur, learned Deputy Advocate General

representing the respondent-State.

11. The first and foremost point for consideration is as to whether irrespective of the independent witness has turned hostile to the prosecution and

except for admitting his signature on the documents, referred to hereinabove, he has not supported the prosecution case at all, his statement still can be

relied upon to bring guilt home to the accused or not? The answer to this poser in all fairness and in the ends of justice would be in negative because

while denying the entire prosecution case in the witness box being wrong and giving an explanation that he had put his signature on blank papers, he

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 such a statement as has been made by PW6

Rajender Kumar in this case. 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:

Ã¢â‚¬Â¦...As noticed above, there are two sets of witnesses, i.e. independent and officials. The independent witnesses no doubt have admitted their

presence on the spot, however, as per their version they were not present there at the time when search and seizure had taken place and rather at a

stage when the contraband, allegedly Charas, was allegedly lying there in a bag. PW-2 Purshotam while stating that the accused in their presence had

disclosed his name as Raj Kumar, resident of Jallandhar before the Police, also admits the presence of accuse don the spot. They, however, have not

supported the prosecution case qua the manner in which the search and seizure has taken place on the spot and turned hostile.

The official witnesses no doubt have supported the case as disclosed from the perusal of the final report filed under Section 173 Cr.P.C. and the

documents annexed therewith. However, in view of the evidence having come on record, by way of testimonies of the independent witnesses and the

official witnesses, there emerge two possible views on record. It is well settled at this stage that in a case where on the basis of evidence available on

record two possible views emerge on record, the view favouring the accused has to be believed and the benefit of doubt to be given to him and not to

the prosecution. Otherwise also, in the Act, there is provision of stringent punishment if an offender is found to have committed the office.

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 suport 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:

Ã¢â‚¬Å“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., Ã¢â‚¬Ëœproof 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 Ã¢â‚¬Ëœwider 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:

Ã¢â‚¬Å“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.Ã¢â‚¬â€‹

[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

Ã¢â‚¬Ëœpreponderance 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.Ã¢â‚¬â€‹

12. 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 PW8 HC Bhupender Singh had nabbed the accused at the place of occurrence in the presence of the only independent

witness PW6 Rajender Kumar as he has not supported this part of the prosecution case at all as during his lengthy cross-examination conducted by

learned Public Prosecutor he has denied all the suggestions given to him being incorrect meaning thereby that he was not at all present on the spot nor

the charas recovered from the back pack, allegedly he was carrying with him. The documents Ext.PW8/A, Ext.PW8/B, Ext.PW8/C, Ext.PW8/D,

Ext.PW8/J and Ext.PW8/K as per his version were not reduced into writing in his presence and rather his signature were obtained on blank papers.

The bare perusal of the trend of writing of the document Ext.PW8/A reveal that the same has been squeezed in the end whereas gap in theend of

docment Ext.PW8/C between its contents and the sgnature of witnesses and accused. Similarly, in Ext.PW8/B there is not much space between the

contents of the documents written and the signature of the witnesses. Similar is the position with respect to the arrest memo Ext.PW8/J and personal

search memo Ext.PW8/K. Therefore, it would not be improper to conclude that the signatures of PW6, the so called independent witness, were taken

on blank papers and it is because of that an effort has been made to adjust the contents of the documents taking into consideration the space available.

Therefore, the statement of

PW6 Rajender Kumar that his signature were obtained on blank papers appear to be nearer to the factual position. The statement of this witness has,

therefore, demolished the entire prosecution case.

13. It is significant to note that the accused herein belongs to Uttrakhand (U.P.) whereas PW6 Rajender Kumar is a local resident of village Nathan,

Tehsil and District Kullu. He cannot be said to have any acquaintance with the accused so as to believe that it is for this reason he has deposed falsely

in the witness box to help the accused. There is nothing on record to show that PW6 has made a false statement for some oblique purpose or

extraneous considerations. Therefore, brother Justice Chitkara has rightly refused to place reliance on the statement of PW6 Rajender Kumar in order

to record findings of conviction against the accused.

14. True it is that in a case where an independent witness has turned hostile to the prosecution, however, the official witnesses have supported the

same, their testimony cannot be discarded if otherwise inspires confidence. However, in that situation, the testimony of such official witnesses is

required to be scrutinized with all circumspections and precaution. In this regard, I am drawing support from the judgment rendered by a Co-ordinate

Bench of this Court in State of H.P. Versus Rajesh Dhiman and another, 2012(3) Shimla Law Cases.

15. Now if coming to the case in hand, the only official witness examined by the prosecution is PW9 HHC Tara Chand. Though HHG Jeet Ram and

C. Vinay Kumar were also the members of the police patrol, however, they have neither been associated to witness the search and seizure nor

examined as witness. The only official witness, therefore, is Tara Chand PW9. His statement is not consistent and rather he has contradicted the

police case and also improved his version while in the witness box. In this regard, it is pointed out from his statement in cross-examination that he had

no idea as to when he reached in Police Station and the time when he left the spot with Rukka. He also have no idea as to at what time the police

party finally returned from the spot on completion of the investigation there nor the name of the person driving the vehicle in which they had gone to

the spot, disclosed. According to him they had checked the vehicles on the way and passers by on the spot, however, this is not the prosecution case.

He has also not aware about the distance between Sheer Galu from Paltoj nor as to when they reached on the spot.

16. The accused, according to him, was seen on the spot at 4:40 P.M. However, as per the version of the I.O. PW8 the independent witness Rajender

Kumar had already arrived at the spot at 4:35 P.M. He is also not aware of qua the time taken for verification of the antecedents of the accused and

antecedents of the independent witness Rajender Kumar. He is also not aware about the time when the contraband allegedly charas recovered from

the accused. According to him, it was evening time when the case property sealed and not dark. The photographs, however, show that the same were

clicked in dark. The photographs were clicked in his presence, however, he did not remember as to who had clicked the same. Though he had taken

lift from the spot, however, according to him, do not remember the name of the driver, number and nature of the vehicle particularly when the vehicle

as per the version of I.O. PW8 was that of HHG Jeet Ram, one of the members of the police patrol. Therefore, the statement of PW9 that he do not

remember the name of the driver and nature of the vehicle speaks in plenty about the correctness of the statement ibid. He also do not remember as

to how much time was taken for registration of FIR and preparation of file and at what time he left Police Station, Manali with case file to the spot.

Though he had taken lift from police station, however, he do not remember the name of the driver and type of the said vehicle. The FIR number,

according to him, was there on Ext.PW6/B scribed by the I.O. with blue ink. The I.O., however, has stated that initially in this document the FIR

number though was scribed with red ink, however, later on, written the same with blue ink. What necessitated the I.O. to do so also remained

unexplained.

17. The I.O. PW8 though cannot be taken as a witness to the search and seizure. However, he has also contradicted the prosecution case as

according to him PW6 Rajender Kumar arrived at the spot at 4:35 P.M. whereas as per the prosecution case he arrived there after the accused

intercepted at 4:40 P.M. why this witness has not recorded the time etc. in the statement of PW9 Tara Chand when the same find mention in various

documents including Rukka also rendered the prosecution story doubtful.

18. Not only this but the statement of PW9 that they went to the spot in a private vehicle goes to show that he has improved his earlier version as

nothing to this effect is there either in the documents prepared by the I.O. nor in daily diary rapat Ext.PW7/A. Therefore, the evidence as has come

on record by way of the testimony of sole official witness HHC Tara Chand is not suggestive of that search and seizure has taken place in a manner

as claimed by the prosecution.

19. The photographs Ext.PW8/H1 to Ext.PW8/H7 on the face of it demonstrate that the same were clicked when it was dark and not in day

light/evening time. Therefore, the photographs also belie the testimony of PW9 HHC Tara Chand that the same were taken in the evening when it

was not dark. Otherwise also as per his version the photographs were taken before his leaving the spot along with Rukka to Police Station, Sadar

Manali for the purpose of getting the FIR registered. The Rukka Ext.PW8/D reveal that the same was reduced into writing at 7:20 P.M. Being the

month of February in Kullu district by 7:20 P.M. the night already sets in motion. Therefore, it is doubtful that the photographs were taken on the spot

and on this score also, the solitary statement of official witness HHC Tara Chand is not sufficient to bring the guilt home to the accused.

20. In daily diary rapat No. 14 Ext.PW7/A there is no mention about the mode by which the police party left police post, Patlikuhal for patrolling in

Jana area. The other documents i.e. the recovery memo Ext.PW8/C and the Rukka Ext.PW8/D as well as special report Ext.PW3/B are also silent

as to by what mode the police party went to the spot. It is for the first time the I.O. PW8 and PW9 have stated that they went to the spot in a private

vehicle. As per the I.O. PW8 the said vehicle was of HHG Jeet Ram. Had the police party left the police post in the vehicle of HHG Jeet Ram, why

he would have not mention so in the documents referred to hereinabove? HHG Jeet Ram has also not been examined. Therefore, an adverse

inference has to be drawn against the prosecution and as such, it would not be improper to conclude that the search and seizure has not taken place in

the manner as claimed by the prosecution. Therefore, in my considered opinion no finding of conviction could have been recorded on the basis of such

evidence available on record against the accused.

21. It is worth mentioning that learned Judge who has delivered the second judgment also emphasized that in daily diary No. 14 Ext.PW7/A there is no

mention that the I.O. PW8 had the I.O. kit with him when left the police post and there being no evidence as to from where the electronic scale, the

printed NCB proformas, torch, cloth parcels, seal Ã¢â‚¬ËœTÃ¢â‚¬â„¢, sealing wax, thread and needles were brought, hence held the sampling and sealing

process to be not proved in accordance with law. Also that for want of printed NCB proformas there was no occasion to the I.O. to have filled-up the

relevant columns thereof on the spot. I am, however, not in agreement with the findings so recorded by brother Anoop Chitkara, J. 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., PW8. Therefore, it would not be improper to conclude

that PW8 I.O. was having the I.O. kit with him. In the kit there use to be kept electronic weighting scale, cloth, thread, needles, wax and also seal as

well as the proforma like NCB and also the blank papers. Therefore, no adverse inference could have been drawn on this score against the

prosecution.

22. True it is that the link evidence taken note of in the first judgment by brother Sureshwar Thakur, J, i.e. NCB proforma Ext.PW2/A, road certificate

Ext. PW2/B qua the deposit of case property in Forensic Science Laboratory, the entries Ext.PW2/C whereby the case property deposited by SI/SHO

Bala Ram PW5 with HHC of the police Station in the Malkhana etc. 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. 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:

Ã¢â‚¬Å“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 :-

'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.

(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 o)bserved 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):

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.Ã¢â‚¬‹

23. The net result of the aforesaid discussion is that the prosecution has miserably failed to prove with the help of cogent and reliable evidence that the

contraband allegedly charas weighing 1.512 Kg. has been recovered from the accused when on 13.2.2015 intercepted by the police of Police Post,

Patlikuhal under Police Station, Manali around 4:40 P.M. at Sheer Galu near Paltoj road on Naggar-Jana road. The prosecution, as such, has failed to

bring the guilt home to the accused beyond all reasonable doubt. The view of the matter taken by Brother Chitkara J. is legally and factually

sustainable. The appeal is, therefore, allowed and the findings of conviction and sentence recorded against the accused are quashed and set aside.