(2024) 12 SHI CK 0022

High Court Of Himachal Pradesh

Case No: Criminal Appeal No. 376 Of 2007

Jitender Chaudhary		APPELLANT
	Vs	
State Of H.P.		RESPONDENT

Date of Decision: Dec. 10, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 313, 437A
- Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 20, 42, 43, 50 52A, 52A(1), 52A(2), 52A(3), 52A(4)

Hon'ble Judges: Vivek Singh Thakur, J; Rakesh Kainthla, J

Bench: Division Bench

Advocate: Vijay Kumar Arora, Bhoop Singh Thakur, Lalita Sharma, Gaurav Kumar, Hitansh Raj, Varun Chandel

Final Decision: Allowed

Judgement

Rakesh Kainthla, J

1. The present appeal is directed against the judgment and order dated 21.09.2007 passed by learned Special Judge, Mandi (learned Trial Court) vide

which the respondent (accused before learned Trial Court) was convicted of the commission of an offence punishable under Section 20 of Narcotic

Drugs and Psychotropic Substances Act (in short â€˜NDPSâ€™ Act) and sentenced to undergo rigorous imprisonment for 10 years, pay a fine of

₹1,00,000/- and in default of payment of fine to undergo further imprisonment for three months. (Parties shall be referred to in the same manner as

they were arrayed before the learned Trial Court for convenience).

2. Briefly stated, the facts giving rise to the present appeal are that the police presented a challan against the accused before the learned Trial Court

for the commission of an offence punishable under Section 20 of the NDPS Act. It was asserted that ASI Yog Raj (PW9), HHC Balwant Singh

(PW2), Uday Chand and Constable-Prakash Chand were present at Shyam Ganga on 05.04.2006 for nakabandi and traffic checking duties. A

motorcycle bearing registration No. HP-06K-3885 came from Kullu, which was signalled to stop. The police demanded papers from the driver. The

registration certificate of the motorcycle showed its registration number as HR-06K-3885, whereas the bike displayed the registration number HP-

06K-3885. The police became suspicious and enquired about the names and addresses of the motorcycle riders. The driver revealed his name as

Devinder Singh, and the pillion rider revealed his name as Jitender Chaudhary. Their search was conducted, during which Charas was found in the

backpack being carried by Jitender Chaudhary concealed beneath the clothes. The police weighed the charas and found its weight to be 6 kgs. Two

samples of 25 grams each were taken for chemical analysis. The samples were put in different parcels, and each parcel was sealed with six

impressions of seal â€˜Câ€™. The parcels were marked as A1 and A2. The remaining charas was also sealed in a parcel, and the parcel was marked

as â€˜Aâ€™. Seal impression (Ext. â€˜PBâ€™) was taken on a separate piece of cloth. NCB-I form (Ext. PR) was filled, and a seal impression was

put on the form. The seal was handed over to Balwant Singh (PW2) after the use. Charas was seized vide memo (Ext. PC). Jacket (Ext. P7),

Sweater (Ext. P8), Pants (Ext. P9), Shirt (Ext. P11), towel (Ext. P12), underwear (Ext. P13) and Vest (Ext. P14) of accused Devinder and jacket

(Ext.P15) Pants (Ext. P16), Shirt (Ext. P17), and Vest (Ext. P18) of Jitender were seized vide memo (Ext. PH). ASI-Yog Raj (PW9) prepared the

rukka (Ext. PJ) and sent it to the police station Sadar through Constable Prakash Chand for the registration of the FIR. FIR (Ext. PM) was registered

in the Police Station. ASI-Yog Raj conducted the investigation on the spot. He prepared the site plan (Ext. PS) and recorded the statements of

witnesses as per their version. He arrested the accused vide memos (Ext. PG and PF). He brought the case property and the accused to the police

station and produced them before SHO-N.K. Sharma (PW10). N.K. Sharma re-sealed the sample parcels and the bulk parcel with seal â€˜Hâ€™.

He obtained the seal impression on the NCB-I form (Ext. PR) as well as the piece of cloth. He handed over all the articles to MHC-Nand Lal (PW7),

who made an entry at Sr. No. 859 of the malkhana register (Ext. PN) and deposited the case property in malkhana. MHC Nand Lal handed over the

sample parcel to Constable Mehar Chand (PW3) on 07.04.2006 with a direction to carry it to CTL Kandaghat vide RC No. 55/2006. ASI Yog Raj

(PW9) prepared the special report and handed it over to Prakash Chand with a direction to carry it to Dy.S.P. Prakash Chand handed over the special

report to Kishan Chand Dy.S.P. (PW5) on 07.04.2006 at 10:15 am. Dy. SP Kishan Chand made an endorsement on the special report and handed it

over to his Reader, Sant Ram (PW4), who made an entry at Sr. no. 12 in his register. The result of the analysis (Ext. PR/1) was issued in which it

was mentioned that the exhibit contained the contents of charas. Statements of the witnesses were recorded as per their version, and after the

completion of the investigation, the challan was prepared and presented before the Court.

3. The learned Trial Court charged the accused with the commission of an offence punishable under Section 20 of the NDPS Act, to which, the

accused pleaded not guilty and claimed to be tried.

4. The prosecution examined 11 witnesses to prove its case. HC-Rajeev Kumar (PW1) proved the entry in the daily diary. HHC Balwant Singh

(PW2) is the witness to recovery. Constable Mehar Chand (PW3) carried the sample parcel to CTL Kandaghat. Constable Sant Ram (PW4) was

posted as a Reader to Dy.S.P., to whom the special report was handed over by Dy.S.P. Kishan Chand (PW5). SI-Bhagat Singh (PW6) signed the

FIR. HHC Nand Lal (PW7) was working as MHC, with whom the case property was deposited. Balkar (PW8) is the owner of the motorcycle, who

proved that he had handed it over to Devinder Singh for visiting Manali. ASI Yog Raj (PW9) effected the recovery and conducted the investigation.

NK Sharma (PW10) was working as SHO, who re-sealed the case property. Narender Kumar (PW11) prepared the challan.

5. The accused, in their statements recorded under Section 313 of Cr.P.C., denied the prosecution case in its entirety. Accused-Jitender stated that

the motorcycle was intercepted at Pandoh Dam Bridge. No charas was recovered from his possession. He was taken to police post-Pandoh for

interrogation. Accused Devinder Singh stated that Jitender had met him at Kullu and took a lift on the motorcycle. The police stopped the motorcycle

at Pandoh and asked him to produce the documents. He produced the documents. The police went through the registration certificate and said that he

had tampered with the registration number. He replied that he had borrowed the motorcycle from his maternal uncle, and he had not checked the

number plate of the motorcycle. No recovery was effected from him. Statement of HHC Nand Lal (DW1) was recorded in defence.

6. Learned Trial Court held that the statements of official witnesses corroborated each other. Minor contradictions in the testimonies of the

prosecution witnesses were not sufficient to discard them. The accused had filed an application before the learned Judicial Magistrate, First Class-II,

Mandi, for the return of the clothes. It was a chance recovery, and the provisions of Section 42 of NDPS did not apply to the present case. Failure to

join independent witnesses was not fatal to the prosecution case. Section 50 of the NDPS Act did not apply to the present case because the recovery

was effected from the backpack and not the personal search of the accused. Minor variation in the weight of the charas was not significant. The

report of the analysis showed that the sample was of charas; hence, the accused were convicted and sentenced as aforesaid.

7. Being aggrieved from the judgment and order passed by the learned Trial Court, the accused filed an appeal before this Court asserting that the

learned Trial Court had not properly appreciated the evidence led before it. The statement of ASI-Yog Raj (PW9) was doubtful because he had not

prepared even a single document in his hand. He had only attested the documents, which is highly suspicious. The prosecution had not associated any

independent witness, which casts doubt on the prosecution case. The link evidence was missing. The police had failed to comply with the mandatory

provisions of the NDPS Act. The report of analysis did not establish that the sample was of charas. Therefore, it was prayed that the present appeal

be allowed and the judgment and order passed by the learned Trial Court be set aside.

8. This Court held that the report of analysis was not as per the judgment in Sunil Kumar versus State of H.P. Latest HLJ 2010 HP 207a nd other

judgments; hence, the accused were acquitted.

9. Being aggrieved from the judgment of this Court, the State filed an appeal before the Honâ€™ble Supreme Court of India. The Honâ€™ble

Supreme Court held that the judgment of Sunil Kumar (supra) was contrary to Heera Singh versus Union of India, 2020 SCC online SC 38.2

This Court had acquitted the accused merely on the ground of the defect in the report of the analysis and had not examined the other contentions

raised by the accused. Therefore, the matter was remitted to this Court for disposal as per the law.

10. We have heard Mr Vijay Kumar Arora, learned Senior Counsel assisted by Mr Bhoop Singh Thakur, Ms Lalita Sharma, Mr Gaurav Kumar and

Mr Hitansh Raj, learned counsel for the appellant/accused and Mr Varun Chandel, learned Additional Advocate General, for the respondent/State.

11. Mr. Vijay Kumar Arora, learned Senior Counsel for the appellant/accused, submitted that the prosecution failed to associate independent

witnesses. There was non-compliance with Section 50 of the NDPS Act. Link evidence is missing. FIR Number on the NCB-1 form and other

documents was mentioned before the registration of FIR. The seal was not produced before this Court, which is fatal and material witnesses were not

examined. He relied upon the judgments in Sanjeev Kumar vs. State of H.P., Latest HLJ 2018 HP 1447, State of H.P versus Bhagi Ram, Latest

HLJ 2016 HP 463, State of Punjab versus Baldev Singh, AIR 1999 SC 2378, Joginder Singh vs. State of HP, Latest HLJ 2018 (2) HP 1039,

State of HP versus Rakesh, Latest HLJ 2018 HP 214, State of HP Vs. Deep Ram, Latest HLJ 2019 (HP) (Supple) 660, Jitender Kumar vs.

State of H.P., Latest HLJ 2012 HP 74, State of H.P. vs. Suresh Kumar, 2023 (1) Cr. L.J. 577, State of H.P. vs. Anil Kumar, Latest HLJ 2015

HP 341, Ashok Kumar vs. State of H.P, Latest HLJ 2022 (1) HP 50) and Sanju vs. State of H.P., Latest HLJ 2023 (2) HP 101 in2 support of

his submission.

12. Mr Varun Chandel, learned Additional Advocate General for the respondent/State, supported the judgment and order passed by the learned Trial

Court. He submitted that the learned Trial Court had rightly held that it was a case of chance recovery and it was not possible to associate

independent witnesses in the present case. The recovery was effected from the backpack, and the provisions of Section 50 of the NDPS Act do not

apply to the present case. The sample seals were produced before the Court, and the Court had specifically noticed that the seal impression on the

case property was intact. The prosecution is not required to examine all the witnesses. Therefore, he prayed that the present appeal be dismissed.

13. We have given considerable thought to the submissions made at the bar and have gone through the records carefully.

14. It is the specific case of the prosecution that the police intercepted a motorcycle bearing registration No. HP-06K-3885 while patrolling. The

documents were checked, and a discrepancy was found between the registration number mentioned on the registration certificate and the one

displayed on the motorcycle. The accused have not disputed in their statements recorded under Section 313 of Cr.P.C. that the motorcycle was

intercepted by the police; however, they have mentioned a different place where the motorcycle was intercepted. Further, the statement of accused

Devinder Singh also shows that the police had pointed out the discrepancy on the spot, to which he replied that the motorcycle belonged to his uncle.

The copy of the registration certificate (Ext. PO-1) shows the registration certificate as HR-06K-3885. Balkar (PW8), the owner of the motorcycle,

also states that the registration number of the vehicle was HR-06K-3885. Thus, the prosecution version regarding the interception and the discrepancy

in the registration number of the motorcycle is duly established.

15. ASI-Yog Raj (PW9) stated that he became suspicious of the discrepancy in the motorcycle number and checked the backpack being carried by

the accused. While dealing with a similar case of a chance recovery, it was laid down by the Hon'ble Supreme Court in Kashmira Singh Versus

State of Punjab 1999 (1) SCC 130 that the police party is under no obligation to join independent witnesses while going on patrolling duty and the

association of any person after effecting the recovery would be meaningless. It was observed:

â€œ3. Learned counsel for the appellant has taken us through the evidence recorded by the prosecution as also the judgment under appeal. Except for the comment

that the prosecution is supported by two police officials and not by any independent witness, no other comment against the prosecution is otherwise offered. This

comment is not of any value since the police party was on patrolling duty, and they were not required to take along independent witnesses to support recovery if and

when made. It has come in the evidence of ASI Jangir Singh that after the recovery had been effected, some people had passed by. Even so, obtaining their counter-

signatures on the documents already prepared would not have lent any further credence to the prosecution version.â€

16. In similar circumstances, it was laid down by this Court in Chet Ram Vs State Criminal Appeal no. 151/2006 decided on 25.7.2018 that when

the accused was apprehended after he tried to flee on seeing the police, there was no necessity to associate any person from the nearby village. It

was observed:-

Â â€œ(A)appellant was intercepted, and search of his bag was conducted on suspicion, when he turned back and tried to flee, on seeing the police. Police officials

did not have any prior information, nor did they have any reason to believe that he was carrying any contraband. They overpowered him when he tried to run away

and suspected that he might be carrying some contraband in his bag. Therefore, the bag was searched, and Charas was recovered. After the recovery of Charas, there

was hardly any need to associate any person from the nearby village because there remained nothing to be witnessed.

It is by now well settled that non-association of independent witnesses or non-supporting of the prosecution version by independent witnesses where they are

associated, by itself, is not a ground to acquit an accused. It is also well-settled that the testimony of official witnesses, including police officials, carries the same

evidentiary value as the testimony of any other person.

The only difference is that Courts have to be more circumspect while appreciating the evidence of official witnesses to rule out the possibility of false implication of

the accused, especially when such a plea is specifically raised by the defence. Therefore, while scrutinising the evidence of official witnesses, in a case where

independent witnesses are not associated, contradictions and inconsistencies in the testimony of such witnesses are required to be taken into account and given due

weightage unless satisfactorily explained. Of course, it is only the material contradictions and not the trivial ones, which assume significance.â€ (Emphasis supplied)

17. It was laid down by the Honâ€™ble Supreme Court of India inR aveen Kumar v. State of H.P. (2021) 12 SCC 557t hat non-association of

independent witnesses will not be fatal to the prosecution case. However, the Court will have to scrutinise the statements of prosecution witnesses

carefully. It was observed:

Â â€œ19. It would be gainsaid that the lack of independent witnesses is not fatal to the prosecution case. [Kalpnath Rai vs. State, (1998) AIR SC 201] However,

such omissions cast an added duty on Courts to adopt a greater degree of care while scrutinising the testimonies of the police officers, which, if found reliable can

form the basis of a successful conviction.â€

18. This position was reiterated in Rizwan Khan Versus State of Chhattisgarh (2020) 9 SCC 627, wherein it was observed:

â€œ8.2 Having gone through the entire evidence on record and the findings recorded by the courts below, we are of the opinion that in the present case, the

prosecution has been successful in proving the case against the accused by examining the witnesses PW3, PW4, PW5, PW7 and PW8. It is true that all the aforesaid

witnesses are police officials, and two independent witnesses who were Panchnama witnesses had turned hostile. However, all the aforesaid police witnesses are

found to be reliable and trustworthy. All of them have been thoroughly cross-examined by the defence. There is no allegation of any enmity between the police

witnesses and the accused. No such defence has been taken in the statement under Section 313, Cr.P.C. There is no law that the evidence of police officials, unless

supported by independent evidence, is to be discarded and/or unworthy of acceptance.

It is settled law that the testimony of the official witnesses cannot be rejected on the grounds of non-corroboration by an independent witness. As observed and

held by this Court in a catena of decisions, examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily

fatal to the prosecution case [see Pardeep Kumar (supra)].

In the recent decision in the case of Surinder Kumar vs. State of Punjab (2020) 2 SCC 563, while considering a somewhat similar submission of non-examination of

independent witnesses while dealing with the offence under the NDPS Act, in paragraphs 15 and 16, this Court observed and held as under:

15. The judgment in Jarnail Singh vs. State of Punjab (2011) 3 SCC 521, relied on by the counsel for the respondent-State also supports the case of the

prosecution. In the aforesaid judgment, this Court has held that merely because the prosecution did not examine any independent witness would not necessarily lead

to a conclusion that the accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved merely on account of their official

status.

16. In State (NCT of Delhi) vs. Sunil, (2011) 1 SCC 652, it was held as under (SCC p. 655)

It is an archaic notion that actions of the police officer should be approached with initial distrust. It is time now to start placing at least initial trust in the actions and

the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law, the

presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even

by the legislature.

Applying the law laid down by this Court on the evidence of police officials/police witnesses to the facts of the case in hand, referred to hereinabove, we are of the

opinion as the police witnesses are found to be reliable and trustworthy, no error has been committed by both the courts below in convicting the accused relying

upon the deposition of the police officials.â€

19. Similar is the judgment of this Court in Balwinder Singh & Anr. Vs State of H.P., 2020 Criminal L.J. 1684, wherein it was held:-

Â â€œ3. (iii) Learned defence counsel contended that in the instant case, no independent witness was associated by the Investigating Officer; therefore, the

prosecution case cannot be said to have been proved by it in accordance with provisions of the Act. Learned defence counsel, in support of his contention, relied

upon titled Krishan Chand versus State of H.P.,2017 4 CriCC 531

3(iii)(d). It is by now well settled that prosecution case cannot be disbelieved only because the independent witnesses were not associated.â€

20. This position was reiterated in Kallu Khan Vs State of Rajasthan, AIR 2022 SC 50, wherein it was held: -

â€œ16. The issue raised regarding conviction solely relying upon the testimony of police witnesses, without procuring any independent witness, recorded by the two

courts, has also been dealt with by this Court in the case of Surinder Kumar (supra), holding that merely because independent witnesses were not examined, the

conclusion could not be drawn that accused was falsely implicated. Therefore, the said issue is also well-settled and, in particular, looking to the facts of the present

case, when the conduct of the accused was found suspicious, and a chance recovery from the vehicle used by him is made from a public place and proved beyond a

reasonable doubt, the appellant cannot avail any benefit on this issue. In our view, the concurrent findings of the courts do not call for interference.â€

21. A similar view was taken in Kehar Singh v. State of H.P., 2024 SCC OnLine HP 2825, wherein it was observed:

16. As regards non-association of the independent witnesses, it is now well settled that non-association of the independent witnesses or non-supporting of the

prosecution version by independent witnesses itself is not a ground for acquittal of Appellants/accused. It is also well-settled that the testimonies of the official

witnesses, including police officials, carry the same evidentiary value as the testimony of any other person. The only difference is that the Court has to be most

circumspect while appreciating the evidence of the official witnesses to rule out the possibility of false implication of the accused, especially when such a plea is

specifically raised by the defence. Therefore, while scrutinising the evidence of the official witnesses, in cases where independent witnesses are not associated,

contradictions and inconsistencies in the testimonies of such witnesses are required to be taken into account and given due weightage unless satisfactorily

explained. However, the contradiction must be material and not trivial one, that alone would assume significance.

17. Evidently, this is a case of chance recovery; therefore, the police party was under no obligation to join independent witnesses while going on patrolling duty, and

the association of any person after effecting the recovery would be meaningless.

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19. A similar reiteration of law can be found in the judgment rendered by the learned Single Judge of this Court in Avtar @ Tarri v. State of H.P., (2022) Supreme HP

345, wherein it was observed as under: â€

â€œ24. As regards the second leg of the argument raised by learned counsel for the appellant, it cannot be said to be of much relevance in the given facts of the case.

The fact situation was that the police party had laid the â€˜nakkaâ€™ and immediately thereafter had spotted the appellant at some distance, who got perplexed and

started walking back. The conduct of the appellant was sufficient to raise suspicion in the minds of police officials. At that stage, had the appellant not been

apprehended immediately, police could have lost the opportunity to recover the contraband. Looking from another angle, the relevance of independent witnesses

could be there when such witnesses were immediately available or had already been associated at the place of â€˜nakkaâ€™. These, however, are not mandatory

conditions and will always depend on the fact situation of each and every case. The reason is that once the person is apprehended and is with the police, a

subsequent association of independent witnesses may not be of much help. In such events, the manipulation, if any, cannot be ruled out.â€

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22. A similar reiteration of law can be found in a very recent judgment of the Coordinate Bench of this Court in Cr. A. No. 202 of 2020, titled Dillo Begum v. State of

H.P., decided on 27.03.2024.â€

22. In Sanjeev Kumar (supra), this Court held that the sequence of events created doubt regarding the prosecution case. There were discrepancies,

and the non-association of the independent witnesses was held to be material. Similarly, in Bhagi Ram (supra), the Court held that there were

contradictions in the statements of the witnesses. The police had waited for 10-15 minutes to join independent witnesses, which was not corroborated

by independent evidence, and this was held to be material because of the discrepancies in the statements. Similarly, in Nand Lal (supra), the Court

held that the joining of independent witnesses is essential, but the prosecution case cannot be doubted due to the non-association of independent

witnesses. There was a discrepancy regarding the steps taken to join the independent witness. In Karam Singh (supra), the Court concluded that

nothing took place at the spot in the manner projected by the investigating team, and the non-association of independent witnesses was held to be

material. It was further held that the testimonies of the police officials could not be discarded simply because independent witnesses were not joined

by them. Therefore, the judgments turn on their own facts, and it cannot be held that in a case of chance recovery, the association of independent

witnesses is essential.

23. It was submitted that the personal search of the accused was also conducted, and it was essential to comply with the requirements of Section 50

of the NDPS Act. This submission is also not acceptable. The Honâ€™ble Supreme Court examined this question exhaustively in Ranjan Kumar

Chhadda versus State of H.P, 2023 (SCC) Online SC 1262: AIR 2023 SC 5164 and held that where the recovery is effected from the personal search

of the bag being carried by the accused, the provisions of Section 50 of NDPS Act do not apply even if the personal search of the accused is

conducted. In view of this binding precedent of the Honâ€™ble Supreme Court, the judgment of this Court cited at the bar cannot be followed.

24. It was submitted that the FIR number was written before the registration of the FIR, which casts doubt on the prosecution case. This submission is

not acceptable. The FIR number has been mentioned in various documents in red ink, whereas the rest of the documents are in blue ink. ASI-Yog Raj

(PW9) stated in his examination-in-chief that the case file was brought to the spot. This was not suggested to be incorrect. It means that the case file

was received by the Investigating Officer on the spot, and thereafter, he recorded the FIR number in a different ink; hence, the submission that the

FIR number was written before the registration of the FIR is not acceptable.

25. It was submitted that the seal was not produced before the Court, and this is fatal to the prosecution case. This submission is not acceptable. It

was laid down by the Hon'ble Supreme Court in Varinder Kumar Versus State of H.P. 2019 (3) SCALE 50t hat failure to produce the seal in the

Court is not fatal. It was observed: -

â€œ6. We have considered the respective submissions. PW10 is stated to have received secret information at 2.45 P.M. on 31.03.1995. He immediately reduced it into

writing and sent the same to PW8, Shri Jaipal Singh, Dy.S.P., C.I.D., Shimla. At 3.05 P.M. PW7, Head Constable Surender Kumar stopped PW5, Naresh Kumar and

another independent witness, Jeevan Kumar, travelling together, whereafter the appellant was apprehended at 3.30 P.M. with two Gunny Bags on his Scooter, which

contained varying quantities of â€˜charasâ€™. PW8, Shri Jaipal Singh, Dy.S.P., C.I.D., Shimla, who had arrived by then, gave notice to the appellant and obtained his

consent for carrying out the search. Two samples of 25 gms. Each were taken from the two Gunny Bags sealed with the seal â€˜Sâ€™ and given to PW5. PW2,

Jaswinder Singh, the Malkhana Head Constable, resealed it with the seal â€˜Pâ€™. The conclusion of the Trial Court that the seal had not been produced in the Court

is, therefore, perverse in view of the two specimen seal impressions having been marked as Exhibits PH and PK. It is not the case of the appellant that the seals were

found tampered with in any manner.â€

26. It was specifically held in Virender Kumar (supra) that when the sample seals were produced before the Court, the conclusion of the Trial Court

that seals were not produced before the Court was perverse.

27. In the present case, the prosecution has produced the sample seals (Ext. PB) and NCB-I form (Ext. PR) bearing the seal impressions before the

Court. The Court had noticed while recording the statement of HHC-Balwant Singh (PW2) that the parcel was sealed with six impressions of seal

â€˜Nâ€™, the other parcel was sealed with seal â€˜Câ€™ at six places, and the seals were intact. The Court had the sample seal with it to compare

the seal impression with the impression on the parcels; hence, the submission that since the seal was not produced before the Court, the prosecution

case became suspect is not acceptable. In Anil Kumar (supra), the prosecution case was full of discrepancies. The contraband was not re-sealed by

the SHO, and the accused was acquitted. It was nowhere held that the failure to produce the seal was the sole reason for acquitting the accused;

hence, this judgment does not apply to the present case.

28. It was submitted that all the members of the raiding party were not examined, and this is fatal for the prosecution case. This submission is not

acceptable. It was laid down by the Honâ€™ble Supreme Court in Pohlu v. State of Haryana (2005) 10 SCC 196t hat the intrinsic worth of the

testimony of witnesses has to be assessed by the Court, and if the testimony of the witnesses appears to be truthful, the non-examination of other

witnesses will not make the testimony doubtful. It was observed: -

â€œ[10] It was then submitted that some of the material witnesses were not examined and, in this connection, it was argued that two of the eye-witnesses named in

the FIR, namely, Chander and Sita Ram, were not examined by the prosecution. Dharamvir, son of Sukhdei, was also not examined by the prosecution, though he was

a material witness, being an injured eyewitness, having witnessed the assault that took place in the house of Sukhdei PW 2. It is true that it is not necessary for the

prosecution to multiply witnesses if it prefers to rely upon the evidence of eyewitnesses examined by it, which it considers sufficient to prove the case of the

prosecution. However, the intrinsic worth of the testimony of the witnesses examined by the prosecution has to be assessed by the Court. If their evidence appears

to be truthful, reliable and acceptable, the mere fact that some other witnesses have not been examined will not adversely affect the case of the prosecution. We have,

therefore, to examine the evidence of the two eyewitnesses, namely, PW 1 and PW 2, and to find whether their evidence is true, on the basis of which the conviction

of the appellants can be sustained. â€

29. Therefore, the prosecution case cannot be doubted due to the non-examination of other witnesses.

30. It is an admitted case of the prosecution that two samples were taken on the spot, out of which one was sent to CTL Kandaghat for examination.

It was laid down by the Honâ€™ble Supreme Court in Simarnjit Singh v. State of Punjab, 2023 SCC OnLine SC 90 6that Section 52A (3)

requires the officer to approach the Magistrate to seek permission to draw representative samples. The samples will then be enlisted, and the

correctness of the list of samples so drawn will be certified by the Magistrate. It means that the entire exercise has to be carried out before the

Magistrate, which has to be certified by him to be correct. It is not permissible to draw samples on the spot. It was observed: -

â€œ8. We have perused the evidence of PW-7 Hardeep Singh, in which he has stated that from the eight bags of poppy husk, two samples of 250 gms each were

drawn and converted into 16 parcels. This has been done immediately after the seizure.

9. In paragraphs 15 to 17 of the decision of this Court in Mohanlal's case (2016) 3 SCC 379, it was held thus:

â€œ15. It is manifest from Section 52-A(2) that upon seizure of the contraband, the same has to be forwarded either to the officer-in-charge of the nearest police

station or to the officer empowered under Section 53, who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for

purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to

draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall, as soon as may be, allow the application. This implies that no sooner the seizure is effected and

the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is, in law, duty-bound to approach the

Magistrate for the purposes mentioned above, including grant of permission to draw representative samples in his presence, which samples will then be enlisted and

the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing samples has to be in the presence and under the

supervision of the Magistrate, and the entire exercise has to be certified by him to be correct.

17. The question of drawing samples at the time of seizure, which, more often than not, takes place in the absence of the Magistrate, does not, in the above scheme of

things, arise. This is so especially when, according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with subsections (2)

and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates the taking

of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.â€

10. Hence, the act of PW-7 of drawing samples from all the packets at the time of seizure is not in conformity with the law laid down by this Court in the case of

Mohanlal 2016 (3) SCC 379. This creates serious doubt about the prosecution's case that the substance recovered was contraband.â€ (emphasis supplied)

31. This position was reiterated in Yusuf v. State 2023 SCC OnLine SC 1328, wherein it was observed: -

â€œ10. In order to test the above submissions, it would be relevant to refer to the provisions of Section 52A (2), (3) and (4) of the NDPS Act. The aforesaid

provisions provide for the procedure and manner of seizing, preparing the inventory of the seized material, forwarding the seized material and getting inventory

certified by the Magistrate concerned. It is further provided that the inventory or the photographs of the seized substance and any list of the samples in connection

thereof on being certified by the Magistrate shall be recognised as the primary evidence in connection with the offences alleged under the NDPS Act.

11. For the sake of convenience, relevant sub-sections of Section 52A of the NDPS Act are reproduced herein below:

â€œ52A. Disposal of seized narcotic drugs and psychotropic substances.-

(1) â€

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the

nearest police station or the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs,

psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks,

numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which

they are packed, country of origin and other particulars as the officer referred to in subsection (1) may consider relevant to the identity of the [narcotic drugs,

psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose

of-

(a) certifying the correctness of the inventory so prepared or

(b) taking, in the presence of such Magistrate, photographs of [such drugs or substances or conveyances] and certifying such photographs as true; or

Â (c) allowing to draw representative samples of such drugs or substances in the presence of such Magistrate and certifying the correctness of any list of samples

so drawn.

(3) Where an application is made under subsection (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Criminal Procedure Code, 1973 (2 of 1974), every court trying an offence

under this Act shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of

samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.â€

12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or

the officer so mentioned under Section 53, the officer so referred to in sub-section (1) shall prepare its inventory with details and the description of the seized

substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its

correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples

so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure

prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the

inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate, and

the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient

compliance with the mandate of sub-section (2) of Section 52A of the NDPS Act.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the

presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so

drawn.

15. In Mohanlal's case (2016) 3 SCC 379, the apex court, while dealing with Section 52A of the NDPS Act, clearly laid down that it is manifest from the said

provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under

Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its

correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would

constitute primary evidence for the purposes of the trial.

16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the

inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be

a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.

17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction, and as such, in our opinion, the

conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court, as well as the trial court convicting the appellant and

sentencing him to rigorous imprisonment of 10 years with a fine of ₹ 1 lakh and in default of payment of fine to undergo further imprisonment of one year, is hereby

set aside.â€ (Emphasis supplied)

32. A similar view was taken in Bothilal v. Narcotics Control Bureau, 2023 SCC OnLine SC 498, wherein it was observed: -

Â â€œ15. Admittedly, PW-2 drew two samples from each of the packets of contraband found in the hotel room and kept them in two separate plastic covers. These

covers were sealed, and the remaining contraband was also sealed. Thus, the prosecution claims that the samples were prepared even before the packets were sent to

the Station House Officer. The submission of the learned senior counsel appearing for the appellant in Criminal Appeal 451 of 2011 was that a grave suspicion was

created about the prosecution's case as this action by the PW-2 was contrary to Section 52-A of the NDPS Act.

16. In paragraphs 15 to 17 of Mohanlalâ€™s case (2016) 3 SCC 379, it was held thus:

â€œ15. It is manifest from Section 52-A(2), including (supra) that upon seizure of the contraband, the same has to be forwarded either to the officer-in-charge of the

nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the

Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as

true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall, as soon as may be, allow the application. This implies that no sooner the seizure is effected and

the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is, in law, duty-bound to approach the

Magistrate for the purposes mentioned above, including grant of permission to draw representative samples in his presence, which samples will then be enlisted and

the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing samples has to be in the presence and under the

supervision of the Magistrate, and the entire exercise has to be certified by him to be correct.

17. The question of drawing samples at the time of seizure, which, more often than not, takes place in the absence of the Magistrate, does not, in the above scheme of

things, arise. This is so especially when, according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2)

and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates the taking

of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.â€

17. Thus, the act of PW-2 of drawing samples from all the packets at the time of seizure is not in conformity with what is held by this Court in the case of Mohanlal

(2016) 3 SCC 379. This creates serious doubt about the prosecution's case that the substance recovered was contraband. (Emphasis supplied)

33. This position was reiterated in Mohd. Khalid v. State of Telangana, (2024) 5 SCC 393: (2024) 2 SCC (Cri) 650: 2024 SCC OnLine SC 213

wherein it was observed at page 402:

â€œ26. Admittedly, no proceedings under Section 52-A of the NDPS Act were undertaken by the investigating officer PW 5 for preparing an inventory and obtaining

samples in the presence of the jurisdictional Magistrate. In this view of the matter, the FSL report (Ext. P-11) is nothing but a waste of paper and cannot be read in

evidence. The accused A-3 and A-4 were not arrested at the spot.â€

34. Thus, in view of these precedents, the samples were required to be taken in the presence of the Magistrate and it is impermissible to take the

samples on the spot in the absence of the Magistrate. No reliance can be placed upon the report of analysis obtained after analysing the samples taken

on the spot. In the present case, the samples were not taken in the Magistrateâ€™s presence, and the prosecution case that the recovered suspected

material was charas has not been established.

35. The learned Trial Court did not have the advantage of the judgment of the Honâ€™ble Supreme Court when it decided the case and fell in error

while holding that the samples taken on the spot in the absence of the Magistrate could be used to conclude that the case property was charas; hence,

the judgment and order passed by learned Trial Court cannot be sustained.

36. In view of the above, the present appeal is allowed, and judgment and order passed by the learned Trial Court are set aside. The accused, Jitender

Chaudhary, is acquitted of the commission of an offence punishable under Section 20 of the NDPS Act. The fine amount be refunded to him after the

expiry of limitation, in case no appeal is preferred, and in case of appeal, the same be dealt with as per the orders of the Honâ€™ble Supreme Court.

37. In view of the provisions of Section 437-A of the Code of Criminal Procedure [Section 481 of Bharatiya Nagarik Suraksha Sanhita, 2023

(BNSS)], the appellant/accused is directed to furnish his personal bond in the sum of ₹25,000/- with one surety in the like amount to the satisfaction of

the learned Registrar (Judicial) of this Court/learned Trial Court, within four weeks, which shall be effective for six months with stipulation that in the

event of Special Leave Petition being filed against this judgment, or on grant of the leave, the appellant/accused, on receipt of notice(s) thereof, shall

appear before the Honâ€™ble Supreme Court.

38. Records be sent back forthwith. Pending applications, if any, also stand disposed of.