

(2008) 02 P&H CK 0328

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 56-DB of 2005

Raghubir Singh @ Bhira and
others

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: Feb. 28, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 162, 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15(C), 25, 42, 42(1), 42(1)(2)

Hon'ble Judges: Sham Sunder, J; J.S. Khehar, J

Bench: Division Bench

Advocate: K.S. Dhaliwal, for the Appellant; S.K. Hooda, D.A.G., Haryana, for the Respondent

Final Decision: Allowed

Judgement

Sham Sunder, J.

This appeal is directed against the judgment of conviction and the order of sentence dated 17.12.2004 rendered by the Presiding Officer, Special Court, Kurukshetra vide which the accused/appellants were convicted and sentenced as under:

Name of the convict	Convicted for the offence	Sentence awarded
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Raghubir Singh Bhari @	u/s 25 of the Narcotic Drugs and Psychotropic Substances Act	1985.	RI for a period of 12 years and to pay a fine or Rs. 1 lacs in default of payment of fine to further undergo RI for a period of two years.
Lambar Ram	U/s 25 of the Narcotic Drugs and Psychotropic Substances Act	1985.	RI for a period of 12 years and to pay a fine or Rs. 1 lacs in default of payment of fine to further undergo RI for a period of two years.
Sadha Singh	U/s 25 of the Narcotic Drugs and Psychotropic Substance Act	1985.	RI for a period of 15 years and to pay a fine of Rs. 1.5. lacs in default of payment of fine to further undergo RI for a period of three years.

Jaswant Singh @ Jassa	U/s 25 of the Narcotic Drugs and Psychotropic Substance Act	1985.	RI for a period of 20 years and to pay a fine of Rs. 2 lacs in default of payment of fine to further undergo RI for a period of four years.
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2. The facts, in brief, are that on the night intervening 7.11.1996 and 8.11.1996, Som Nath, Sub Inspector, Police Station, Guhla, along with ASI, Balwan Singh, Satbir Singh, Head Constable and other police officials was present at the Tilla of Village Agondh, in connection with patrol duty. At about 2.00 A.M., on 8.11.1996, Som Nath, Sub Inspector received a secret information, that the accused were transporting poppy straw, in tractor-trolley No. HNQ-3958 concealed under the fodder (parali) from the side of Village Nanhera (Punjab) and if a picket was held at the unmetalled path (kacha rasta) leading from Village Nanhera to village Dabankheri, etc. they could be arrested, with the contraband. On receipt of this information, he joined Mahipal, Head Constable and other police officials of police post Ramthali, in the raiding party, and reached in the area of Village Dabankheri, on Nanhera-Dabankheri unmetalled path (kacha rasta). At about 4.15 A.M., a tractor-trolley came from the side of Punjab border after crossing Gaghar river on the unmetalled path. When the tractor-trolley reached near the picket, it was signalled to stop. It was stopped. On seeing the police party, four persons alighted from the tractor-trolley, and ran towards the fields. They were chased and identified as accused Raghbir Singh, Jaswant Singh, Sadha and Lambar, but they could not be apprehended. The driver of the tractor-trolley namely Laftain Singh, was apprehended at the spot. Eicher tractor No. HNQ 3958 along with its trolley, was checked. The trolley was found loaded with fodder (parali). DSP Sajan Kumar was informed through wireless message, about the facts of the case, and requested to reach the spot. He reached the spot, after some-time. In his presence, search of the trolley was conducted which resulted into the recovery of 17 gunny bags each containing 35 kgs. poppy straw. A sample of 200 grams was separated, from each bag. The samples and the remaining poppy straw, were converted into separate parcels, and sealed with seals bearing impressions SN, belonging to Som Nath, S.I. and "SS" of Sajjan Singh, Dy Superintendent of Police. Specimen impressions of the seals were prepared. Seal of Som Nath, Sub Inspector, after use, was handed over to

Ram Pal, ASI, whereas the seal belonging to the DSP, after use, was kept by him. The sealed parcels and the tractor-trolley bearing No. HNQ 3958 were taken into possession, vide memo Ex.PC attested by the witnesses. Ruqa Ex. PE was sent to the Police Station, on the basis where of, FIR Ex. PE/1 was registered. Laftain Singh, accused, was arrested vide arrest memo Ex. PG after apprising him of the grounds of arrest. Rough site plan Ex.PF of the place of recovery, was prepared at the spot. On return to the Police Station, the case property along with samples, was deposited with the M.H.C. The samples along with specimen seal impressions were sent to the Forensic Science Laboratory, Madhuban, through Mahavir Singh, Constable. The samples sent to the Forensic Science Laboratory, on analysis, were found to be of poppy straw. Accused Raghbir Singh, Jaswant Singh, Sadha and Lambar were arrested later on. After the completion of investigation, the challan was presented.

3. On their appearance, in the Court of the Committing Magistrate, the accused were supplied the copies of documents, relied upon by the prosecution. After the case was received by Commitment, charge u/s 15 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 against Raghbir, Sadha and Laftain Singh, accused u/s 25 against Lambar Ram and Raghbir, accused, was framed to which they pleaded not guilty, and claimed judicial trial.

4. The prosecution, in support of its case, examined Mahabir Singh, PW-1, Tara Chand, Sub Inspector, PW-2, Ishwar Singh, Head Constable, PW-3, Sajjan Singh, DSP, PW-4, Som Nath, PW-5, Head Constable, Roshan Lal, PW-6, Brij Mohan, PW-7, Shamsher Singh, Constable, PW-8, Ram Pal, PW-9, and Dr. S.K. Nagpal, Senior Scientific Officer, F.S.L., Madhuban, PW-10. The Additional Public Prosecutor for the State, tendered into evidence, the report of the Forensic Science Laboratory and thereafter closed the same.

5. The statements of the accused u/s 313 of the Code of Criminal Procedure, were recorded. They were put all the incriminating circumstances, appearing against them, in the prosecution evidence. They pleaded false implication. It was further stated by them that they had no concern, whatsoever, with the alleged recovery, and had nothing to do with the tractor-trolley in question. They were taken by the police, from their houses, and falsely involved in this case. The accused, however, examined Lakhwinder Singh, DW-1 and Buta Singh, DW-2, in their defence.

6. When the case was fixed for the remaining defence evidence of the accused, Laftain Singh, one of the accused, absented from the proceedings. His presence could not be procured, despite repeated efforts, and, ultimately, he was declared proclaimed offender, vide order dated 7.6.2004.

7. After hearing the Additional Public Prosecutor for the State, the Counsel for the accused, and, on going through the evidence, on record, the trial Court, convicted and sentenced the accused, as stated hereinbefore.

8. Feeling aggrieved, against the judgment of conviction and the order of sentence, the aforesaid appeal, was filed by the appellants/accused.

9. We have heard the learned Counsel for the parties, and have gone through the evidence, and record of the case, carefully.

10. The learned Counsel for the appellants, at the very outset, contended that the alleged recovery was effected at about 4.00 A.M. on 8.11.1996, when there was complete darkness and, as such, the identity of the accused, who allegedly ran away from the spot could not be established. He further contended that though, it was stated by the prosecution witnesses that the accused were known to the officials of the raiding party, yet besides their bald statements, in that regard, no cogent and convincing evidence was brought on record, to prove this factum. It was further contended that the identification parade, for establishing the identity of the accused, as perpetrators of crime, was required to be held, during the course of investigation but it was not held. It was further contended that the alleged recovery was effected, in pursuance of the secret information, received by the concerned SHO, but the mandatory provisions of Section 42 (1) and (2) of the Act, were not complied with. It was further contended that the link evidence, in the instant case, was totally incomplete. It was further contended that even the affidavits tendered by the formal witnesses, were not put to the accused, in their statements u/s 313 Cr.P.C. It was further contended that the ownership of the tractor-trolley was not proved. It was further contended that the trial Court, was wrong in recording conviction and awarding sentence.

11. On the contrary, learned Counsel for the respondent, contended that since, the accused were already known to some of the officials, who were members of the raiding party, they were identified, at the spot, though, they succeeded in running away. It was further contended that since the accused were already known to the members of the raiding party, and even their names were recorded in the Ruqa, sent from the spot, the question of holding test identification parade, did not at all arise. It was further contended by the learned Counsel for the respondent that though, the provisions of Section 42(1) and 42(2) of the Act were not complied with, yet, no prejudice was caused to the accused and, as such, the merits of the case were not affected. It was further contended by the Counsel for the respondent that the link evidence, in this case, was complete.

12. Coming to the identification of the appellants/accused, as the alleged perpetrators of crime, no doubt, in the Ruqa Ex.PE, on the basis of the information supplied by the informer, the names of accused Laftain @ Bittu s/o Jeet Siongh, Raghbir Singh @ Bhira s/o Udham Singh, Jaswant Singh, @ Jassa s/o Udham Singh, Sadha Singh s/o Talu Singh and Lambar Ram s/o Sardara Ram were recorded. The informer informed the Police party that they were coming in a tractor-trolley, wherein, bags containing poppy straw were loaded. It was further recorded, in the Ruqa, that accused Bittu, Bhira, Jassa, Sadha and Lamber were known to the

co-officials who were members of the raiding party. Som Nath, Sub Inspector, PW-5, in his statement, stated that he along with his co-officials identified the four accused, who ran away as Raghbir alias Bhira, Jaswant Singh alias Jassa, Sadha and Lambar. During the course of his cross examination, he was asked, as to how he knew these accused earlier. He stated that they were registered as bad characters of the Police Station, and were smugglers, and on account of that reason, he knew them earlier. He further stated that he only remained posted as SHO, Police Station Guhla from August, 1996 to 30.11.1996 i.e. for a period of three months, and earlier to that, he never remained posted in Police Station, Guhla, in which the instant case was registered. No register from the Police Station, was produced showing that the names of the accused were entered therein, as bad characters. No evidence was also brought, on record, that these accused were earlier arrested by Som Nath, Sub Inspector, in the capacity of SHO, ASI or Head Constable and recovery of contraband was effected from them. Ram Pal, Sub Inspector, PW-9, another member of the raiding party, during the course of his cross examination, stated that he joined Police Station, Guhla only 2/3 months, prior to the alleged recovery. He further stated that he did not know, if he had ever joined in any investigation, against any of the accused, prior to this case. He, however, voluntarily stated that he knew them earlier. He could not disclose the source, as to how he knew these accused earlier. No other evidence was produced by the prosecution, with regard to the establishment of the identity of the accused, as alleged perpetrators of crime. From the statements of both these police officials, it could be concluded that the names of the appellants/accused, were recorded, in the Ruqa, only on the basis of the information, divulged to them, by the informer. They did not know the accused personally or otherwise, earlier. They had not arrested them, in any other case. None of the two had ever joined, in any other investigation, in any other case, against the accused. Since, no register of the Police Station, was produced, that these accused were registered, as bad characters, the bald statement of Som Nath, Sub Inspector, in this regard, could not be relied upon. Had any reliable evidence been produced, on the record, that the accused were known to both the police officials earlier, the matter would have been different. Since, these accused were not known to both these police officials, or any other police official, who was a member of the raiding party, earlier to the present occurrence, it was well nigh impossible for them, to identify them on a dark night at 4.00 A.M. on 8.11.1996. The statements of both these witnesses, regarding the identification of the appellants/accused, who allegedly ran away, are not at all reliable. In these circumstances, it was imperative, on the part of the Investigating Officer, to hold identification parade during the course of investigation, to pin-point their identity, as the alleged perpetrators of crime. However, no such effort was made by the Investigating Officer. It was held in [Budhsen and Another Vs. State of U.P.](#), that facts which establish the identity of an accused person, are relevant u/s 9. As a general rule, the substantive evidence of a witness is a statement made in the Court. The evidence of mere identification of the accused person, at the trial, for the first time, is from its very nature, inherently of a

weak character. The evidence, in order to carry conviction, should ordinarily clarify, as to how, and, under what circumstances, the witness came to pick out the particular accused person, and the details of the part which the accused played, in the crime, in question, with reasonable particularity. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in the Court, as to the identity of the accused, who are strangers to them, in the form of earlier identification proceedings. There may, however, be exceptions to this general rule, when, for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held, during the course of investigation, with the primary object of enabling the witnesses, to identify persons, concerned, in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses, and also to furnish evidence, to corroborate their testimony in the Court. Identification proceedings, in their legal effect, amount simply to this: that certain persons are brought to jail, or some other place, and they make statements either express or implied that certain individuals whom they point out are persons whom they recognize as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by Section 162 Cr.P.C. The principle of law, laid down, with regard to test identification parade in [Ramanathan Vs. The State of Tamil Nadu](#), was as under:

"Identification parades have been in common use for a very long time, for the object of placing a suspect in a line up with other persons for identification is to find out whether he is the perpetrator of the crime. This is all the more necessary where the name of the offender is not mentioned by those who claim to be eye-witnesses of the incident but they claim that although they did not know him earlier, they could recall his features in sufficient details and would be able to identify him if and when they happened to see him. The holding of a test identification in such cases is as much in the interest of the investigating agency or the prosecution as in the interest of the suspect or the accused. For while it enables the investigating officer to ascertain the correctness or otherwise of the claim of those witnesses who claim to have seen the perpetrator of the crime and their capacity to identify him and thereby fill the gap in the investigation regarding the identity of the culprit, it saves the suspect or the accused from the sudden risk of being identified in the dock by the self same witnesses during the course of the trial. The line up of the suspect in a test identification parade is therefore a workable way of testing the memory and veracity of witnesses in such cases and has worked well in actual practice."

The principle of law, laid down, in the aforesaid authorities, is applicable to the facts of the instant case. The statements of Som Nath and Ram Pal, prosecution witnesses, identifying the accused, for the first time, in the Court, could not be relied

upon. With a view to prove its case against the accused, it was obligatory on the prosecution to establish their identity, as perpetrators of crime beyond a reasonable doubt. No oral or documentary evidence, was produced that Jaswant and Raghbir were the owners of the tractor-trolley at the relevant time. Since, the prosecution miserably failed to establish the identity of the accused beyond a reasonable doubt, as perpetrators of crime, they were not at all connected with the present case. On re-appraisal of the evidence of Som Nath, Sub Inspector, PW-5, and Ram Pal, PW-9, it has been found that the same is not creditworthy, with regard to the identification of the accused. The trial Court was, thus, wrong in relying upon the evidence of these witnesses for holding that the identity of the accused as perpetrators of crime, was established. The submission of the Counsel for the appellants, in this regard, being correct, is accepted.

13. The link evidence, in this case, was also not complete, as would be discussed hereinafter. It was the bounden duty of the prosecution to prove through cogent and convincing evidence, beyond a reasonable doubt, that none tampered with the case property, and the samples, until the same (samples) were sent to the Office of the Forensic Science Laboratory, for analysis. If the prosecution fails to prove this factum, by leading cogent and convincing evidence, beyond a reasonable doubt, then its case is bound to dwindle down, on account of the non completion of link evidence. According to Sub Inspector, Som Nath, PW-5, the investigating Officer in this case, he deposited the case property and the samples with seals intact, with M.H.C. Roshan Lal. Roshan Lal, Head Constable, while appearing as PW-6 tendered affidavit Ex. PH. We have perused the original affidavit Ex.PH. The deponent of this affidavit is one Pradhan Singh No. 168 Police Station, Guhla, at that time posted as AEC, Kaithal. It was Pardhan Singh who swore the affidavit Ex. PH. However, this affidavit was signed by Roshan Lal, HC 887, AEC, Kaithal on 3.11.1998. Roshan Lal, Head Constable, did not care to examine this affidavit, before tendering the same into evidence. Since this affidavit was solemnly affirmed by Pradhan Singh, MHC, it could not be said to be the affidavit of Roshan Lal, Head Constable. This affidavit, therefore, could not be taken into consideration, for the purpose of proving that the case property and the samples with seals intact, along with the sample seal impressions were deposited with Roshan Lal, MHC, and the same remained un-tampered with till the same (samples) remained in his custody. Once, the affidavit Ex. PH is excluded from the record, then no evidence is left, as to whether, the samples were handed over to Mahabir Singh, Constable No. 821 of Police Post Ramthali for deposit of the same, in the office of the Forensic Science Laboratory. Roshan Lal, Head Constable, PW-6, during the course of his cross examination in clear-cut terms, stated that in register No. 19 against entry 286, pertaining to this case, no mention of handing over the samples to Constable Mahabir Singh, was made. He further stated that no entry regarding the deposit of the samples in the Forensic Science Laboratory, Madhuban, was made in the register. He further stated during the course of his cross examination, that no mention was made in Register

No. 19 that the Forensic Science Laboratory, Madhuban returned the samples with objections. He further stated that no mention was made, in the said register, that the objections were removed. He further stated that no mention was made in register No. 19, that the specimen seal bearing impression "SN" and "SS" in this case, was deposited with him, along with the case property. Mahabir Singh, Constable, PW-1, also during the course of his cross examination, stated that there was no mention of the fact, in register No. 19 of the Police Station, that he was handed over the samples of this case on 11.12.1996, for depositing the same, in the Office of the Forensic Science Laboratory, Madhuban. He further stated, in his cross examination, that there was no mention of depositing the specimen seal with the MHC, along with the case property on 8.11.1996. He further stated that against entry No. 286 in register No. 19 there was no mention about the objections, raised by the Forensic Science Laboratory, Madhuban. No doubt, the prosecution tried to improve its case, by examining Shamsheer Singh, PW-8, who stated that on 23.12.1996, the samples of this case, were handed over to him, by Roshan Lal for deposit of the same, in the Office of the Forensic Science Laboratory, Madhuban, and he deposited the same in untampered condition. During the course of his cross examination, he stated that his statement u/s 161 was recorded. However, no statement u/s 161 of this witness, was found on the record. Sh. A.K. Nagpal, Senior Scientific Officer, Forensic Science Laboratory, Madhuban, PW-10, stated that the samples were received in the aforesaid laboratory on 23.12.1996, and report Ex. PJ, was submitted in respect thereof. He, however, stated that the objections raised on 11.12.1996, were not recorded, in the record, maintained by the said laboratory. Even if, the affidavit of Mahabir Singh and the statement of Shamsheer Singh, are assumed as correct, link in the chain of prosecution evidence, does not become complete, as there is no evidence of Roshan Lal, M.H.C., PW-6, as stated above, regarding the deposit of the case property and the samples with seals intact with him; regarding the handing over the same on 11.12.1996 to Mahabir Singh, Constable, PW-1 with seals intact and regarding the handing over of the same on 23.12.1996 to Shamsheer Singh, Constable, PW-8. When the sample seal was not deposited with the M.H.C., it is not known, as to wherefrom, the same came and sent to the Forensic Science Laboratory. While examining Roshan Lal, as a prosecution witness, the concerned Additional Public Prosecutor, for the State, did not take care, to peruse the affidavit Ex. PH, so as to find out that the same was defective. Even, later on, no efforts were made, by the Public Prosecutor for the State, to recall Roshan Lal, Head Constable, with the permission of the Court, for getting clarified the matter, as to whether, the affidavit Ex. PH related to him or not. The Additional Public Prosecutor for the State, in our opinion, acted in a very careless manner, in the discharge of his official duties. He was, thus, completely re-miss in the performance of his official duties. In *Dud Nain v. State of (Union Territory), Chandigarh* 1996 (3) RCR (Crl.) 455, it was held that one of the essential facts to be proved affirmatively, by the prosecution, is that right from the stage of seizure till the sample reached the hands of the Chemical Analyst, there was no possibility of

change or tampering with the same. If the prosecution fails to do so, then the link evidence becomes incomplete, and its case is bound to dwindle down. The link evidence was totally incomplete, in this case. Due to this reason, the case of the prosecution, was liable to fail. However, the trial Court, did not take into consideration, this aspect of the matter, and fell into a grave error, in recording conviction and awarding sentence. The submission of the Counsel for the appellants, that since the link evidence was incomplete, the case of the prosecution was bound to fail, carries substance and stands accepted.

14. The affidavits and the evidence of Roshan Lal, MHC, Mahavir Singh Constable and Shamsher Singh, Constable, were not put to the accused, in their statements u/s 313 Cr.P.C. They were, thus, not afforded an opportunity to rebut the same. It is settled principle of law, that every incriminating circumstance, appearing, in the prosecution evidence, should be put to the accused, in their statements u/s 313 Cr.P.C., to afford an opportunity to them, to rebut the same. In case, any incriminating circumstance appearing in the evidence, is not put to the accused, in their statements u/s 313 Cr.P.C., then the same cannot be taken into consideration to hold them guilty. The trial Court was, thus, wrong in taking into consideration the affidavits, referred to hereinbefore, and the evidence of the formal witnesses for coming to the conclusion, that the link evidence was complete.

15. There was complete violation of the provisions of Section 42 of the Act, in this case. Admittedly, the alleged recovery, in this case was effected, in pursuance of the secret information. The said secret information was neither reduced into writing, nor the same was sent, to the Officer Superior by Som Nath, Sub Inspector, as admitted by him in his statement. For determining, as to what is the effect of non-compliance of the provisions of Section 42 of the Act, the same are extracted hereunder, for facility of reference -

"42. Power of entry, search, seizure and arrest without warrant or authorisation.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central excise, narcotics customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset:

(a) enter into and search any such building conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance;

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun set and sun rise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto he shall forthwith send a copy thereof to his immediate official superior."

16. A question before a three Judge Bench of the Apex Court in Abdul Rashid Ibrahim Mansuri v. State of Gujarat 2001 (1) AICLR (SC) 585: 2001 (1) RCR (S.C.) 611, came up for decision, as to whether, the provisions of Section 42, are mandatory, in nature, and mere non-compliance thereof, would vitiate the investigation, and the trial or not. The Apex Court, in the aforesaid case, held that though, non-compliance of the provisions of Section 42 would not amount to vitiating of the investigation, as also the trial, yet the action of the Officer, effecting recovery, on the basis of the unrecorded information, would become suspect, and the resultant position would be one of causing prejudice, to the accused. In the instant case, it is to be seen, as to whether, on account of non-compliance of the provisions of Section 42 of the Act, the action of the Investigating Officer, in affecting the alleged recovery, resulted in causing prejudice to the accused, or not. As stated above, in the first instance, the prosecution failed to prove the identity of the accused beyond a reasonable doubt, as all the accused/appellants allegedly succeeded in running away, at about 4.00 A.M., on the night intervening 7.11.1996 and 8.11.1996 and they were not proved to be earlier known to the police party. Besides that, the link evidence, in this case, as discussed above, was also incomplete, thereby making the case of the prosecution doubtful. Keeping these factors, in view, it can be certainly said that the action of the officer, allegedly effecting recovery, resulted into causing prejudice, to the accused, on account of non-compliance of the provisions of Section 42 of the Act. On account

of this reason also, the case of the prosecution becomes highly doubtful. The trial Court, however, did not take into consideration this aspect of the matter, resulting into miscarriage of justice. The submission of the learned Counsel for the appellants, in this regard, carries substance, and the same is accepted.

17. The Counsel for the respondent, however placed reliance on [Sajan Abraham Vs. State of Kerala](#), a case decided by a three Judge Bench of the Apex Court to contend that on account of non-compliance of the provisions of Section 42 (1) (2) of the Act, no prejudice was caused to the accused. The facts of the aforesaid authority, are distinguishable, from the facts of the present case. In the aforesaid authority, no doubt, the secret information was received by a Police Officer, when he was in motion, and in these circumstances, it was held by the Apex Court, that had he made an effort, to comply with the provisions of Section 42 of the Act, by recording the secret information, the delay would have been caused, the accused would have escaped and the purpose of the raid would have been defeated. In the instant case, Som Nath, Sub Inspector, was on patrol duty, in the area of Village Agondh, and had held a picket on the tilla of Village Agondh when he received a secret information at about 2 a.m. on 8.11.1996, that the accused were to come from Village Nanhera (Punjab) in a tractor-trolley bearing registration No. HNQ-3958 with a poppy husk loaded therein. It means that the police party was not in motion but was holding a picket. Even the message was sent to the DSP, to reach the spot, as soon as the information was received. The tractor-trolley loaded with poppy husk wherefrom the accused allegedly ran away came at about 4.00/4.15 A.M. It means that there was a gap of 2/2.15 hours, from the time of receipt of secret information, until the arrival of the tractor-trolley, in which poppy husk was loaded. In between, Som Nath, Inspector had sufficient time, to reduce into writing the secret information, received by him, from the secret informer, and send the same to the Officer superior. Even otherwise, only after the arrival of the DSP, that the search of the trolley was conducted. Under these circumstances, it can be said that the secret information, received by Som Nath, Inspector, was neither deliberately reduced into writing, by him, nor was sent to the Officer superior. Deliberate violation of the provisions of Section 42, certainly made the case of the prosecution, highly doubtful. Since the facts of the present case, are distinguishable, from Sajan Abrahams case (supra), therefore, no help can be drawn by the counsel for the respondent, therefrom. The submission of the Counsel for the respondent, must fail, and the same stands rejected.

18. Even the provisions of Section 57 of the Act, were not complied with, by the Investigating Officer, in the instant case. No doubt, the provisions of Section 57 of the Act are directory, in nature, yet that did not mean that the same were required to be observed, more in breach, than in compliance. Sajan Singh, DSP, PW-4, during the course of his cross-examination, admitted that no detailed report, regarding the apprehension of the accused was sent to him by Som Nath. The purpose of sending the detailed report, with regard to the search and seizure to the officer superior, as

per the provisions of Section 57 of the Act, is to ensure that the higher officer, could come to know about all the actions of his juniors, to find out, as to whether the same were genuine or not. No explanation, whatsoever, was furnished, as to why the provisions of Section 57 were transgressed by Som Nath, Sub Inspector, PW-5. Non-compliance of the provisions of Section 57 of the Act, in the peculiar facts and circumstances of the instant case, also cause a cloud of doubt, on the case of the prosecution.

19. No other point, was urged, by the Counsel for the parties.

20. In view of the above discussion, it is held that the judgment of conviction and the order of sentence of the trial Court, are not based on the correct appreciation of evidence, and law, on the point, and as such, perverse and illegal. The same are liable to be set aside.

21. For the reasons recorded, hereinbefore, the appeal is accepted. The judgment of conviction and the order of sentence dated 17.12.2004, are set aside. The appellants shall stand acquitted of the charge. The appellants/accused, if in custody, shall be set at liberty, at once, if not required in any other case.