



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.
Cr. Appeal No. 56 of 2017.

Reserved on: 10.7.2019.

Decided on: 5.9.2019.

Prem Chand

.....Appellant.

Versus

State of H.P.

.....Respondent.

Coram

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

The Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge.

Whether approved for reporting?¹

Yes.

For the appellant

: Ms. Sheetal Vyas, Advocate.

For the respondent

: Mr. Narender Guleria, Addl. Advocate General.

Dharam Chand Chaudhary, J.

Appellant herein is a convict. He has been convicted by learned Addl. Sessions Judge (Special Judge) Kullu, District Kullu, H.P. for the commission of offence punishable under Section 20 of the Narcotic Drugs and Psychotropic substances Act, 1987 (hereinafter referred to as the ND & PS Act in short) and sentenced to undergo rigorous imprisonment for 10 years and to pay Rs. 1,00,000/- as fine vide judgment dated 16.12.2016 passed in Sessions Trial 25 of 2015.

2. The allegations against the appellant (hereinafter referred to as the accused) in a nut shell are that on 6.1.2015 around 5:00 PM, when apprehended by the police of Police Post Jari, PS Sadar Kullu near Village

¹ Whether the reporters of the local papers may be allowed to see the Judgment? yes.

Chowki, 3 km. ahead of dam site, Manikaran, District Kullu, was found in conscious and exclusive possession of charas weighing 1197 grams (1 kg 197 grams) un-authorisedly and thereby committed offence punishable under Section 20 of the ND & PS Act.

3. Now, if coming to the factual matrix, the prosecution case as disclosed from the report filed under Section 173 Cr.P.C. in a nut shell is that on 6.1.2015, police party headed by PW-12 ASI Dharam Chand, In-charge Police Post Jari (Investigating Officer) and comprising PW-10 HHC Lal Singh, Constable Nitish Kumar, Constable Nitin Kumar and PW-11 Const. Naveen Kumar left the Police Post towards Village Chowki, Dam side etc. for patrolling at 2:00 PM. Rapat in daily diary Ext. PW-2/A was entered by PW-12 ASI Dharam Chand in the daily diary. The police party when reached at a place 3 kms. away from Village Chowki towards Malana Dam site, laid Naka around 3:00 PM. The accused was noticed walking on the road around 5:00 PM. He was going towards Jari side and carrying a black coloured rucksack on his back. On seeing the police, he became perplexed and took reverse turn and started walking. He was nabbed and on enquiry by PW-12 ASI Dharam Chand disclosed his name as Prem Chand son of Sh. Sui Ram, resident of Village Malana. A suspicion arose in the mind of PW-12 ASI Dharam Chand that accused may have some contraband in his bag and as such it was deemed appropriate to conduct the search of his bag. The spot, however, was secluded in a forest and there was no habitation at least up to a distance of 3 kms. Irrespective of it, PW-11 Const. Naveen Kumar was deputed to find out some persons for being associated as witnesses. This witness, however, returned to

the spot after 15-20 minutes without finding anyone available there. The I.O. PW-12 ASI Dharam Chand associated PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar present on the spot as witnesses. The rucksack Ext. P-8 with inscription "HP" the accused carrying on his back was opened by PW-12 ASI Dharam Chand. Another carry bag of beige colour with inscription "ELITE" was found kept therein. On opening this bag, 4 polythene zipper pouches Ext. P-2 to P-5 were found and each of the pouch was containing charas in the shape of squares, plates and bars Ext. P-6. The recovered charas was weighed with electronic scale in the I.O. Kit and found 1197 grams. It was repacked firstly in the brown coloured carry bag and thereafter in the rucksack and thereafter put in a cloth parcel. The memo Ext. PW-10/B was prepared by PW-12 ASI Dharam Chand regarding identity of the recovered contraband allegedly charas. The photographs Ext. P-1 to P-6 were also clicked. The parcel containing the recovered charas was sealed with 6 seals of impression "T". Facsimile of seal "T" was taken on 4 pieces of cloth at 3 places each Ext. PW-10/C. NCB form Ext. PW-4/A was filled in triplicate. Seal "T" was handed over to PW-10 HHC Lal Singh vide memo Ext. PW-10/E. The recovered charas was taken into possession vide seizure memo Ext. PW-10/D. It is thereafter rukka Ext. PW-12/A was scribed by PW-12 ASI Dharam Chand and handed over to PW-11 Const. Naveen Kumar to take the same to the Police Station for registration of FIR. PW-11 Const. Naveen Kumar handed over the rukka Ext. PW-12/A to PW-8 SHO Neel Chand in Police Station Sadar Kullu on 6.1.2015 itself. PW-8 SHO Neel Chand in turn has registered FIR Ext. PW-8/A and

handed over the case file to PW-11 Const. Naveen Kumar with a direction to take it back to the spot and hand over the same to I.O. there. ◇

4. The I.O. PW-12 ASI Dharam Chand has prepared the spot map Ext. PW-12/B. He had recorded the statements of the witnesses under Section 161 Cr.P.C. The accused was arrested vide arrest memo Ext. PW-10/F and the information qua his arrest was given to his father Sui Ram, as he desired. On 7.1.2015, at about 12:30 PM, the case property was handed over by PW-12 ASI Dharam Chand to PW-8 SHO Neel Chand, PS Sadar Kullu along with seizure memo and NCB form. He re-sealed the case property by affixing 3 impressions of seal "A". Column Nos. 9 to 11 of NCB-1 form were also filled by PW-8 SHO Neel Chand and handed over to PW-4 MHC Gajender Pal along with sample of seals, NCB form and seizure memo etc. for safe custody in the malkhana. Consequently, PW-4 MHC Gajender Pal entered the same in malkhana register. The special report Ext. PW-9/A was prepared by PW-12 ASI Dharam Chand and personally handed over the same to Addl. Superintendent of Police, Nihal Chand. On 8.1.2015, PW-4 MHC Gajender Pal handed over the sealed parcel, sample of seal, NCB form and seizure memo to PW-1 Const. Mahesh Kumar vide RC No. 12 of 2015 Ext. PW-4/C and directed him to deposit the same in FSL, Junga for chemical analysis. PW-1 Const. Mahesh Kumar deposited the case property with FSL Junga for chemical analysis on the same day and handed over the receipt on RC to PW-4 MHC Gajender Pal on his arrival in the Police Station. The report of FSL is Ext. PX. On 26.1.2015, Const. Suresh Kumar who had gone to deposit the case property of FIR No. 22/2015 have

brought the case property of this case from the FSL and handed over the same to the MHC.

5. On completion of the investigation, PW-8 SHO Neel Chand has prepared the final report under Section 173 Cr.P.C. and filed the same in the Court.

6. Learned trial Judge has framed the charge under Section 20 of the ND & PS Act against the accused who pleaded not guilty to the same and claimed trial. The prosecution in support of its case has examined 12 witnesses in all.

7. The material prosecution witnesses are PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar because the search and seizure having taken place on the spot at the instance of I.O. PW-12 ASI Dharam Chand has been witnessed by both of them.

8. The remaining witnesses i.e. PW-1 Const. Mahesh Kumar who handed over the case property vide RC No. 12/15 by PW-4 MHC Gajender Pal, PW-2 Sanjay Kumar, who proved the report Ext. PW-2/A vide which the police party headed by ASI PW-12 ASI Dharam Chand left for patrolling towards village Chowki and Dam side, PW-3 HC Rakesh Kumar, who has proved the certificate Ext. PW-3/A qua writing rapat Nos. 25 & 26 and also FIR on computer in the Police Station, PW-4 MHC Gajender Pal, the Addl. MHC to whom the sealed parcel containing the case property, another sealed parcel containing rucksack, samples of seal "A" & "T", NCB form in triplicate were handed over by PW-8 SHO Neel Chand for safe custody in the malkhana, PW-5 LC Saroj who has proved rapat Nos. 25 & 26 Ext. PW-5/A and Ext. PW-5/B

and also the certificate Ext. PW-5/C, PW-6 HHC Khub Ram who has proved the rapat No. 25 dated 8.1.2015 (Ext. PW-6/A) and rapat No. 28 dated 26.1.2015 (Ext. PW-6/B), PW-7 Const. Suresh Kumar, who on 23.1.2015 went to FSL, Junga to deposit the case property pertaining to FIR No. 22/15 and when returned on 26.1.2015 brought back the same and handed over to PW-4 MHC Gajender Pal, PW-8 SHO Neel Chand recorded the FIR Ext. PW-8/A on 6.1.2015 on receipt of the rukka Ext. PW-12/A brought to him by PW-11 Const. Naveen Kumar, he resealed the two parcels brought to him by PW-12 ASI Dharam Chand on 7.1.2015, the I.O. filled in relevant columns of NCB form and thereafter handed over the same to PW-4 MHC Gajender Pal and PW-9 HC Balbir Sharma, the then Reader to Addl. Superintendent of Police, Kullu who has proved the special report Ext. PW-9/A and abstract of the register Ext. PW-9/B, endorsement made thereon by Addl. Superintendent of Police Ext. PW-9/C and affidavit Ext. PW-9/D are formal and the evidence as has come on record by way of their testimony can be used as link evidence.

9. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C. has denied all the incriminating circumstances appearing against him in the prosecution evidence either being wrong or for want of knowledge. According to him, on way back to home with kerosene oil and eatables, he was intercepted by the police near Malana Barrier. He disclosed his antecedents to the police in Police Post Jari. The independent witnesses were available and vehicles were plying on the road. All the documents were tampered by the police to implicate him falsely in this case. It has also been pleaded in his defence that he is innocent, poor villager and was carrying

kerosene oil and eatables for winter. He had no charas in his possession. The police implicated him falsely in this case.

10. Learned Trial Judge, on appreciation of the oral as well as documentary evidence and taking into consideration the arguments addressed on behalf of the prosecution as well as in defence of the accused, has concluded that charas weighing 1197 grams has been recovered from the conscious and exclusive possession of the accused. He, therefore, has been convicted and sentenced as pointed out at the outset.

11. The legality and validity of the impugned judgment has been questioned on the grounds, *inter alia*, that the impugned judgment is against law and facts of the case. The same is based on surmises and conjectures which has resulted in miscarriage of justice to the accused. Contradictory versions having come in the statements of prosecution witnesses have erroneously been made basis while recording the findings of conviction and sentence against him. The case property was tampered with when dispatched from the malkhana to FSL, Junga for testing. The story of the prosecution is usual as is being concocted by the Himachal Pradesh Police in most of the cases registered under the ND & PS Act. The search of the rucksack allegedly carried by the accused was conducted in the manner which is contrary to the statutory requirements. The prosecution has failed to prove that the contraband allegedly recovered is charas within the meaning of ND & PS Act. The report Ext. PX of the laboratory is inconclusive to hold that the substance allegedly recovered falls within the scope of prohibited substances under the ND & PS Act. It is only the police personnel were associated to witness the

search and seizure. Since the present allegedly is a case of chance recovery, the Investigating Officer should have associated the independent witnesses. The investigation was conducted in the police station and not at the spot. The link evidence is missing. The seal used for sealing the parcel containing the recovered substance was not produced in the Court. The trial Court allegedly failed to appreciate the evidence available on record in its right perspective. The impugned judgment, as such, has been sought to be quashed and set aside and the accused acquitted of the charge framed against him.

12. Ms. Sheetal Vyas, Advocate, learned counsel representing the accused has argued that in the given facts and circumstances when the spot is a secluded place in forest, having no evidence of any source of light, the investigation could have not been conducted there as by 5-5:20 PM, it was already dark being month of January. There being no evidence that torch or search light was available with police officials, the plea of the defence that investigation has been conducted in the Police Post is nearer to the factual position. The photographs having clicked in sunlight falsify the prosecution case. It has also been argued that in the rapat Ext. PW-2/A there is nothing that the police party had the I.O. kit, the empty parcel, cloth and seal etc. The burden to prove so, therefore, was on the prosecution that too in a case of chance recovery. The non-production of the seal in the Court is also stated to have resulted in miscarriage of justice to the accused. Independent witnesses, could have been easily associated because as per the prosecution evidence itself, the employees and labour reside at Dam site at village Chowki having their shops situated nearby. It has, therefore, been urged that no case against

the accused is made out and the findings of conviction as recorded by learned trial Court against him are not legally sustainable.

13. On the other hand, Mr. Narender Guleria, learned Addl. Advocate General while repelling the arguments addressed on behalf of the State has pointed out from the testimony of material prosecution witnesses PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar that the same is consistent and worthy of credence. They both have corroborated each and every aspect of the prosecution case. The I.O. PW-12 ASI Dharam Chand also lends corroboration to their testimony. The I.O. PW-12 ASI Dharam Chand had deputed PW-11 Const. Naveen Kumar in search of someone available nearby for being associated as independent witness, however, PW-11 Const. Naveen Kumar returned alone after 15-20 minutes as no one was available nearby. According to learned Addl. Advocate General, the present is a case where the I.O. made all efforts to trace out someone for being associated as independent witness but of no avail. The prosecution is stated to have proved its case against the accused beyond all reasonable doubt. The impugned judgment, as such, is stated to be well reasoned, hence calls for no interference by this Court.

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

- i) Is the present a case where witnesses could have been easily associated to witness the search and seizure but PW-12, the Investigating Officer has failed to do so intentionally and deliberately and as a result thereof the proceedings qua search and seizure of the contraband from the conscious and exclusive

possession of the accused have vitiated and as such the impugned judgment is not legally sustainable ?

ii) Is the evidence as has come on record by way of testimony of official witnesses i.e. PW-10 HHC Lal Singh and PW-11 Constable Naveen Kumar is not consistent and rather contradictory in nature, hence not worthy of credence?

iii) Whether the inconsistencies, contradictions and other procedural irregularities, if any, in the prosecution evidence renders the prosecution case qua recovery of contraband allegedly charas from the conscious and exclusive possession of the accused doubtful?

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

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

witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available...."

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

16. Ms. Sheetal Vyas, learned counsel representing the accused has placed reliance on the following extract of the judgment of the Apex Court in **Krishan Chand vs. State of H.P., AIR 2017 SC 3751**, to persuade this Court to form an opinion that in search and seizure independent witnesses allegedly could have been easily associated had efforts been made by the I.O. PW-12 ASI Dharam Chand and as such the trial has vitiated:

"15. From the evidence which has come on record, it is quite clear that the place, where the accused is alleged to have been apprehended, cannot be said to be an isolated one as the house of Govind Singh DW-2 is situated on the edge of Patarna bridge. Thus the version of the complainant PW-6 that independent witnesses could not be associated as it was an isolated place does not inspire confidence. Moreover, from the evidence of Govind Singh PW-2 the case of the prosecution regarding apprehension of the accused, at Patarna bridge, while being in possession of bag containing 7 kgs of charas, becomes highly doubtful because had he been so apprehended by the police, this fact was to come to his notice, for the reason, that his house is situated at the edge of the bridge in which he resides alongwith his family.

17. In our opinion, the High Court failed to appreciate that the harsher is the punishment, the more is the strictness of proof required from the prosecution and that failing to associate independent witnesses at the time of recovery created a dent in the case of prosecution.

18. As rightly pointed out by the counsel for the appellant that the High Court failed to appreciate that in the absence of independent witnesses, the evidence of the police witnesses must be scrutinized with greater care

especially when police witnesses contradicted themselves on the issue as to in whose hand writing the seizure memo, the arrest memo, consent memo and the NCB form were written and the evidence adduced by the prosecution is not reliable."

17. The ratio of the judgment in **Krishan Chand's case** supra is, however, not attracted in the case in hand for the reason that PW-10 HHC Lal Singh, PW-11 Const. Naveen Kumar and PW-12 ASI Dharam Chand, all have stated in one voice that PW-11 Const. Naveen Kumar was deputed by the I.O. in search of independent witnesses. He went towards village Chowki and came back after 15-20 minutes alone. He told the I.O. that no person was available who could have been brought by him to the spot for being associated as independent witness. It is after that the I.O. as per his version associated them (PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar) as witnesses to witness the search and seizure. No suggestion has been given either to PW-10 HHC Lal Singh or PW-11 Const. Naveen Kumar that the I.O. did not depute PW-11 Const. Naveen Kumar in search of independent witnesses. Even, no such suggestion has been given to PW-12 ASI Dharam Chand, the I.O. that he did not depute PW-11 Const. Naveen Kumar in search of independent witnesses. Interestingly enough, PW-11 Const. Naveen Kumar was questioned about the site towards which he had gone in search of independent witnesses and as per opening sentence of his cross-examination, it has come that he went in search of independent witnesses towards village Chowki. Therefore, the prosecution case that PW-11 Const. Naveen Kumar was deputed in search of independent witnesses towards village Chowki and he returned alone after 15-20 minutes as well as apprized the I.O. that no one was available who could

have been brought by him to witness the search and seizure, stands satisfactorily proved on record. Be it stated that all the three material prosecution witnesses i.e. PW-10 HHC Lal Singh, PW-11 Const. Naveen Kumar and PW-12 ASI Dharam Chand have been cross-examined to the effect that two Projects, namely, Malana (I) and Malana(II) are in existence in that area, dam site of both these projects are different, 5-6 more Power Projects are situated within the radius of 30-35 kms. from Jari, road to Malana is through, the vehicles are being plied on this road from dam side and village Chowki and that at the dam site labour and employees of the projects also reside. The suggestions so put to them have been admitted being correct. However, the answers to the suggestions so put to all the three witnesses do not substantiate the plea of the defence in any manner for the reason that as per the clarification given by the I.O., no vehicle came on this road and at the spot during the period search and seizure has taken place and that the dam site is 3-4 km. away from the spot. The suggestions that Naka was laid at the barrier adjacent to Malana (I) project and Police Post Jari has been denied being wrong by all of them in one voice. It has also been denied that village Chowki was at a distance of 2-3 kms. From Police Post Jari which according to the testimony of PW-10 HHC Lal Singh is 1 kms. He has self stated that the distance between the spot and Police Post Jari is 5-6 kms.. As per the statements made voluntarily by PW-11 Constable Naveen Kumar and PW-12 ASI Dharam Chand, the I.O. it is 1-1½ kms. The police, therefore, was 3-4 kms. away from Malana(I) project, whereas 1-1½ kms. from Police Post Jari. As per the suggestion given in defence, the shops were also situated in village Chowki and

not ahead of that towards the spot. The evidence, therefore, leads to the only conclusion that though efforts were made by the I.O. PW-12 ASI Dharam Chand to associate the independent witnesses, however, the spot being in forest and secluded place, no habitation within the radius of 2-3 kms. and even beyond that also, it was not possible for the I.O. to have associated independent witnesses. The ratio of the judgment of the Apex court in **Makhan Singh's case** supra that independent persons are not available at all places and at every time for being associated as witnesses by the I.O. at the time of search and seizure is fully attracted in the given facts and circumstances of this case.

18. On the other hand, in **Krishan Chand's case**, cited by learned defence counsel, the house of DW Govind Singh was situated at the edge of Patarna bridge, the place of recovery, therefore, it is in this backdrop, the apex court has held that efforts were not made to associate the independent witnesses. True it is that as per the settled legal principles reiterated by the apex Court in **Krishan Chand's case**, cited supra when harsher is the punishment, the degree of proof required from the prosecution must also be high. In the case in hand, this principle, however, is not attracted as the official witnesses PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar have supported the prosecution case in one voice and their testimony even could not be shattered in their cross-examination also.

19. The apex Court in **Noor Aga V. State of Punjab and another, 2008 and State of Punjab V. Baldev Singh (1999) 3 SCC 977**, has also held that if the law provides for severe punishment against an offender, greater care

and caution is required to be taken while appreciating the evidence on record and holding the accused as guilty. In view of such being the settled legal position, of course, as per the requirement of provisions contained under Section 100 and 108 of the Code of Criminal Procedure, it is the duty of the I.O. to conduct search and seizure in the presence of independent witnesses, if available. In the case in hand, the evidence discussed hereinabove leads to the only conclusion that the I.O. PW-12 ASI Dharam Chand though has made efforts to associate independent person to witness the search and seizure, however, no one was available nearby and as such, the search of the rucksack being carried by the accused was conducted in the presence of police officials PW-10 HHC Lal Singh and PW-11 Constable Naveen Kumar. Irrespective of the present being not a case of prior information of illicit trafficking of contraband and rather the accused was spotted at the place of recovery all of a sudden, though the question of association of independent witnesses would have arisen after the recovery of the incriminating substance i.e. charas, however, the I.O. before resorting to the search of the rucksack of the accused deputed PW-11 Constable Naveen Kumar in search of the independent witnesses, however, when no one could be traced out, it is PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar who were associated to witness the search and seizure. The present, as such, is a case where independent witnesses were not available.

20. Above all, it is well settled at this stage that evidence of official witnesses being consistent and inspiring confidence cannot be ignored and rather relied upon to record the findings of conviction against the accused. The reliance in this behalf can be placed on the judgment of the Apex Court in

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

“We are certainly not indicating that despite all this, the statement of the police officer for recovery and other matters could not be believed and form the basis of conviction but where the statement of such witness is not reliable and does not inspire confidence, then the accused would be entitled to the benefit of doubt in accordance with law. Mere absence of independent witnesses when the investigating officer recorded the statement of the accused and the article was recovered pursuant thereto, is not sufficient ground to discard the evidence of the police officer relating to recovery at the instance of the accused. [See (Govt. of NCT of Delhi) v. Sunil.] Similar would be the situation where the attesting witnesses turn hostile, but where the statement of the police officer itself is unreliable then it may be difficult for the court to accept the recovery as lawful and legally admissible. The official acts of the police should be presumed to be regularly performed and there is

no occasion for the courts to begin with initial distrust to discard such evidence.”

21. Now, if coming to the question as to whether the testimony of the official witnesses PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar inspires confidence and could have been relied upon to record the findings of conviction against the accused, they both have stated in one voice that the police party headed by PW-12 ASI Dharam Chand left the police station for patrolling towards village Chowki and dam side at 2:00 PM. They laid naka at a place ahead of 3 km. from village Chowki towards Malana dam side. At about 5:00 PM the accused was spotted coming from Malana dam side and going towards Jari side having rucksack on his back. On seeing the police party, he at once turned behind and tried to go back. He was nabbed at a distance of 20 paces. On being asked to disclose his antecedents by ASI Dharam Chand, he disclosed his name Prem Chand son of Sui Ram, resident of village Malana. As per their version, the place where the accused was nabbed was forest and isolated one. At that time, no one was present there for being associated as independent witness. On the other hand, police party had suspicion that the accused may be carrying some illegal substance in his bag. The I.O., therefore, deputed PW-11 Constable. Naveen Kumar in search of independent witnesses. None was, however, available. PW-11 Constable Naveen Kumar returned alone after about 15-20 minutes. On this I.O. associated PW-10 HHC Lal Singh and PW-11 Constable Naveen Kumar as witnesses to witness search and seizure on the spot. I.O. PW-12 ASI Dharam Chand gave his personal search to the accused vide memo Ext. PW-10/A, however, nothing incriminating could be recovered from this witness. It is

thereafter, the rucksack having inscription "HP" was searched. On opening the same, carry bag of brown colour with inscription "ELITE" was found kept therein. On opening this bag, 4 polythene zipper pouches Ext. P-2 to P-5 were found kept and each of the pouch was containing charas in the shape of squares, coins and bars Ext. P-6. On the basis of experience and smell, the recovered contraband was found to be charas. The charas was taken out from the polythene zippers. It was fresh charas and its pieces were sticking with each other. The recovered charas was weighed with electronic scale in the I.O. Kit and found 1197 grams. The same was put in 4 same polythene wrappers from which it was recovered. The beige coloured carry bag and rucksack both were packed in another cloth parcel and sealed with six seals of impression "T". The memo Ext. PW-10/B qua the identification of the recovered contraband i.e. charas was also prepared by the I.O. The I.O. filled in the relevant columns of NCB -I form Ext. PW-4/A in triplicate. Sample of seals Ext.W-10/C were drawn on separate piece of cloth. Both sealed parcels were taken into possession vide seizure memo Ext. PW-10/D. The seal after its use was handed over to PW-10 HHC Lal Singh vide memo Ext. PW-10/E. Rukka Ext. PW-12/A was prepared by the I.O. and he deputed PW-11 Const. Naveen Kumar to take the same to Station House Officer, PS Sadar Kullu. The spot map Ext. PW-12/B was prepared. The accused was interrogated and on finding that he has committed the offence punishable under Section 20 of the ND & PS Act has arrested him vide arrest memo Ext. PW-10/F. In the Police Station, FIR Ext. PW-8/A was recorded by PW-8 SHO Neel Chand. PW-11 Constable Naveen Kumar had taken the file to the spot. On completion of the

investigation at the spot, the accused along with the case property was brought to the Police Post Jari and the record of the investigation conducted on the spot. The personal search of the accused was conducted in Police Post vide memo Ext. PW-10/G. Photographs Ext. P-1 to P-6 were clicked. Both of them have identified the parcel Ext. P-1 and Ext. P-2 which were sealed on the spot with 6 seals of impression "T". The same were re-sealed with 3 seals of impression "A" and when returned from FSL, Junga with 3 seals of FSL-II. They have also identified the 4 polythene zippers Ext. P-2 to P-5 containing the charas Ext. P-6. They also identified the rucksack Ext. P-8 and beige coloured carry bag taken out of the parcel Ext. P-7 when opened in the Court. It is thus seen that the scrutiny of statements made by PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar while in the witness-box leads to the only conclusion that the same are consistent, having no contradiction and improvement. There is thus no reason to disbelieve the same nor non-joining of independent person as a witness in this case is fatal to the prosecution.

22. Now, if their statements in cross-examination are seen, as already discussed in para supra, they both have stated in one voice that the police party headed by ASI PW-12 ASI Dharam Chand left for patrolling towards village Chowki and Dam side at 2:00 PM. They laid Naka at an isolated place in the forest 3 kms. ahead of Village Chowki towards Dam side at 3:00 PM. The Projects Malana (I) & (II) are situated in that area adjacent to each other though sites of these dams are different. Other 5-6 Power Projects are also situated within the radius of 30-35 kms. Near and around Jari. They are also categoric that road to Malana leads from Project Malana (I) and village Chowki

and that the vehicles used to ply on this road. They have also stated in one voice that at Dam site, labour and employees reside. They both denied in one voice that Naka was laid at barrier adjacent to Malana (I) Project and the Police Post Jari. They also denied that the accused when apprehended was accompanied by one Budh Ram. It is also denied that the accused was carrying kerosene oil. The suggestion that village Chowki is at a distance of 2-3 kms. from the spot has also been denied by both of them and as they stated at their own, the distance between Village Chowki and the spot is 1-1½ kms. According to PW-10 HHC Lal Singh, the distance between Village Chowki and Police Station Jari is 5-6 kms. The suggestion that charas was not "chakor" in shape has also been denied by them being incorrect. They are in agreement that the dam was not visible from the spot. The dam even is not there in the photographs clicked on the spot. The suggestion that the accused was going to his house with kerosene and eatables, and that one unclaimed bag lying on the spot was planted on him to implicate him falsely on the basis of suspicion has also been denied being wrong. It is also denied by both of them that charas was not recovered from the rucksack, the accused was carrying on his back and that proceedings in this case have taken place in Police Post Jari. According to them, the place where the accused was apprehended is at a distance of 5-6 kms. from Police Post Jari.

23. Therefore, when the testimony of both the official witnesses i.e. PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar is consistent, free from contradictions and improvements, the same has rightly been relied upon by learned trial Court while recording the findings of conviction. The

contentions to the contrary have been raised by learned defence counsel merely for rejection.

24. Now, if coming to the statement of PW-12 ASI Dharam Chand, the I.O., he has said all in his examination-in-chief as has come in the statements of PW-10 HHC Lal Singh and PW-11 Constable Naveen Kumar discussed supra. As a matter of fact, all the three witnesses have supported the prosecution case in one voice. Even the I.O., PW-12 ASI Dharam Chand in his cross-examination has also corroborated the testimony of PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar on all material aspects i.e. the police party left the Police Post at 2:00 PM and reached at the spot at 3:00 PM. According to him, the road leading to Malana village passes through Village Chowki and also the place where the Naka was laid. However, he has clarified that no vehicle came at the place of Naka during the period when search and seizure had taken place. Like PW-10 HHC Lal Singh and PW-11 Constable Naveen Kumar, the I.O. has also stated that there are two Projects in Malana at two different sites i.e. Malana (I) and Malana (II). Village Chowki, according to him though is thickly populated, however, situate at a distance of 3 kms. from the spot. The suggestion that adjacent to Chowki village on the road there exists shop has been admitted by him as correct, however, according to him, no shop exists ahead of Village Chowki. He has also admitted that the labourers and employees are available at Dam site, however, the same according to him is situated at a distance of 3 kms. from the spot. Though, he admitted that no local person nor any labourer/employee of the Malana Project is associated as a witness, however, self stated that Village Chowki and dam

site are situated at a considerable distance from the spot and there being no four wheeler vehicle available in the Police Post Jari, it was not possible to associate someone from such a distant place. The distance of Village chowki according to him is 1-1½ kms. from Police Post Jari as has been said by PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar. He has also denied the suggestion that the accused accompanied by one Budh Ram was on his way to home with kerosene oil and that he did not give his personal search to the accused. Like PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar, the I.O. has also denied the suggestion that all the documents and proceedings had taken place in Police Post Jari and not on the spot. The suggestion that the charas was not recovered from the rucksack Ext. P-8, the accused was carrying with him is denied by PW-12 ASI Dharam Chand also being incorrect. He has clarified that the Dam site is not there in the photographs because of its distance from the spot is 4 kms. It has also been denied that rucksack Ext P-8 was lying unidentified and that false case has been registered against the accused. Therefore, the evidence as has come on record by way of the testimony of I.O. PW-12 ASI Dharam Chand also substantiates the prosecution case.

25. The further prosecution case that spot map Ext. PW-12/B was prepared by the I.O. PW-12 ASI Dharam Chand and he has also recorded the statements of the prosecution witnesses find corroboration from the evidence as has come on record by way of testimony of PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar and also from that of I.O. PW-12 ASI Dharam Chand.

26. In this case, the link evidence is also complete as PW-1 Const. Mahesh Kumar has proved the prosecution case qua he having taken the case property to FSL Junga vide RC No. 12 of 2015 Ext. PW-5/C. PW-2 Const. Sanjay Kumar has proved the rapat rojnamcha Ext. PW-2/A which substantiates the prosecution case qua the police party headed by PW-12 ASI Dharam Chand left the Police Post Jari at 2:00 PM towards village Chowki and Dam side for patrolling. PW-3 HC Rakesh Kumar, the MHC, PS Sadar Kullu has supported the prosecution case that rapat Nos. 25 and 26 are computerized and the system was working at that time properly as per certificate Ext. PW-3/A, he issued. PW-4 MHC Gajender Pal was posted as Addl. MHC in Police Station Sadar, Kullu at the relevant time. The case property sealed with six seals of impression "T" and three seals of impression "A" were handed over to him on 7.1.2015 by PW-8 SHO Neel Chand along with another parcel which was also sealed with 6 seals of impression "T". According to him, the sample of seals "A" & "T", NCB form in triplicate and seizure memo were also handed over to him. He retained the same in the malkhana in his safe custody and entry in this regard was made at Sr. No. 1708 of the malkhana register. On 8.1.2015, the case property was sent by him to laboratory through Const. Mukesh Kumar. The case property, according to him was brought back on 26.1.2015 by PW-7 Suresh Kumar from the laboratory who had taken sample of another case, FIR No. 22/15 to the laboratory on 23.1.2015. PW-5 LC Saroj has proved that rapat in the daily diary No. 25 & 26 are computerized and certificate Ext. PW-5/A and PW-5/B according to her are qua functioning of the computer system properly when the

same were entered. PW-6 HHC Khoob Ram, author of rapat No. 45 dated 8.1.2015 and rapat No. 28 dated 26.1.2015 Ext. PW-6/A and PW-6/B has proved the same being recorded as correctly. PW-7 Suresh Kumar has supported the prosecution case qua he having brought the case property back from FSL Junga on 26.1.2015 as he had gone on 23.1.2015 along with sample of the case registered vide FIR No. 22/15 to the laboratory. PW-8 SHO Neel Chand has supported the prosecution case qua he having resealed the parcel containing the contraband with 3 impressions of seal "A" and handed over the same to PW-4 MHC Gajender Pal for safe custody in the malkhana. He has also supported the prosecution case qua he registered the FIR Ext. PW-8/A on the receipt of rukka Ext. PW-12/A brought to him by PW-11 Const. Naveen Kumar. According to him, he filled in column Nos. 9 to 11 of the NCB forms at the time of re-sealing of the parcel containing the charas. On completion of the investigation, he prepared the challan and filed in the Court. PW-9 HC Balbir Singh was posted as Reader to Addl. S.P. Kullu, at the relevant time. He has supported the prosecution case that the special report Ext. PW-9/A was handed over by the I.O. to Addl. S.P. He has also proved the extract of the special report register Ext. PW-9/B in which the entries qua special report Ext. PW-9/A were made. He has also proved the endorsement Ext. PW-9/C made by the Addl. S.P. and the affidavit Ext. PW-9/D sworn in by him. Therefore, the evidence as has come on record by way of testimony of PWs 1 to 9 also supply link and connect the accused with the commission of the offence.

27. On the other hand, if coming to the statement of accused recorded under Section 313 Cr.P.C., he has admitted his presence on the spot as it has

come in reply to question No. 6 that when apprehended by the police, he was on his way to the village along with kerosene oil and other eatables. The trend of cross-examination of the material prosecution witnesses also substantiate his presence on the spot because a suggestion was given to them that accused was apprehended by the police when he accompanied by one Budh Ram was going to the village with kerosene oil. Said Budh Ram has not been examined by him irrespective of opportunity to produce the evidence in his defence granted by the learned trial Court. Therefore, it cannot be believed by any stretch of imagination that he has been implicated in this case falsely. Otherwise also, huge quantity of charas i.e. 1197 grams could have not been planted by the police upon him.

28. The non-production of seal used by the I.O. is not fatal to the prosecution case because nothing suggesting that any prejudice has been caused thereby to the defence has come on record. As a matter of fact, it has not been suggested to the I.O. PW-12 ASI Dharam Chand that due to non-production of seal, prejudice has been caused to the accused. It has been held so by this Court in Cr. Appeal No. 305/2014 titled ***Sohan Lal vs. State of H.P.***, decided on 2.11.2016.

29. There is also no substance in the arguments addressed by learned defence counsel that in view of there being already sunset at 5:30 PM and dark outside and that there being no evidence that the police official had torch with them, search and seizure and also the documentation could have not taken place on the spot. It is worth mentioning that as per the prosecution evidence which remained uncontroverted, the accused was apprehended at 5:00 PM.

The search of the bag at the most was conducted within 15-20 minutes immediately after PW-11 Const. Naveen Kumar who was deputed in search of independent witnesses returned to the spot alone. The search of the bag, therefore, was conducted around 5:20 PM. As per the plea raised by the accused in his defence, the time of sunset on that day was around 5:30 PM. It is not dark with sunset itself and rather there used to be light for about 1-1½ hours after sunset also. True it is that the rukka Ext. PW-12/A was sent at 7:15 PM to Police Station, meaning thereby that the investigation qua search and seizure was already complete by that time. True it is that by 7:15 PM, it may have become dark outside, however, these days each and everyone is equipped with cell-phones having the facility of torch also. Although, it is not the case of the prosecution that the cell phone with torch facility was available with the police party and used nor the defence has put any such plea, however, as said hereinabove, there being light for 1-1½ hours even after sunset also, therefore, this much time was sufficient to complete search and seizure and also the documentation on the spot. The photographs Ext. P-1 to P-6 reveal on the face of it show that the same were clicked in the evening time as at that time neither there was light nor darkness. The another submission that in rapat Ext. PW-2/A, nothing has come that the police party had investigation kit with them is again without any substance for the reason that the I.O. posted in the Police Station as and when are on patrolling or laying Naka in the area, they invariably take I.O. kit with them.

30. In view of the above, the prosecution has satisfactorily proved that charas weighing 1197 grams (1 kg. 197 grams) has been recovered from the

conscious and exclusive possession of the accused and thereby shifted the burden to prove otherwise upon him. The present, therefore, is a case where presumption as envisaged under Sections 35 and 54 of the Act has to be drawn against the accused.

31. True it is that the accused in order to prove his innocence has raised the plea in his defence that he was apprehended on the spot by the police at a stage when accompanied by one Budh Ram was on his way to his village with kerosene oil and eatables. Also that one unclaimed bag lying on the spot was planted upon him by the police to implicate him in this case falsely. In order to substantiate the plea so raised by accused he should have examined so called Budh Ram accompanying him. He, however, failed to do so irrespective of the opportunity granted by learned trial Court to produce evidence, if any, in his defence. No plausible and reasonable explanation has also come on record as to why the police had planted upon him huge quantity of charas weighing 1197 grams. On the other hand, there being no evidence to the contrary that the police officials were inimical to the accused and it is for this reason they have implicated him falsely in this case, the plea so raised by him in his defence cannot be believed to be true. Therefore, when the accused has failed to prove his innocence, it would not be improper to conclude that the charas weighing 1197 grams has been recovered from his conscious and exclusive possession. The impugned judgment, therefore, cannot be said to be the result of misreading and mis-appreciation of the prosecution evidence. Learned trial Court has rather appreciated the evidence in its right perspective and committed no illegality or irregularity while recording the findings of

conviction and subsequently sentencing the accused to undergo rigorous imprisonment for a period of 10 years and also to pay Rs. 1,00,000/- as fine. The impugned judgment, as such, cannot be said to be legally and factually unsustainable. The same rather deserves to be upheld.

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

(Dharam Chand Chaudhary),
Judge.

September 05, 2019
(karan-)

(Jyotsna Rewal Dua),
Judge.

High Court