



IN THE HIGH COURT OF HIMACHAL PRADESH,

SHIMLA.

Cr. Appeal No.143 of 2011.

Judgment reserved on: 6th May 2016

Decided on: 28th June 2016

State of H.P.

....Appellant

Versus

Mousam Deen and another

...Respondents

Coram

***The Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge.
The Hon'ble Mr. Justice Chander Bhusan Barowalia, Judge.***

Whether approved for reporting?¹ Yes

**For the petitioner: Mr. D.S. Nainta and
Mr. Virender Verma, Additional
Advocate Generals**

For the respondents: Mr. Ramesh Sharma, Advocate.

Dharam Chand Chaudhary, J.

Learned Special Judge, Fast Track Court,
Chamba, has acquitted the accused Mousam Deen and
Madho Ram of the charge under Sections 20, 25 and 29
of the Narcotic Drugs and Psychotropic Substances Act,

¹ Whether reporters of Local Papers may be allowed to see the judgment? *Yes.*

1985, hereinafter referred to as "the Act" in short, vide judgment dated 29.10.2010, passed in Sessions Trial No.16/2010, under challenge in this appeal.

2. The complaint is that learned trial Court has not appreciated the evidence available on record in its right perspective and to the contrary based the findings on hypothesis, surmises and conjectures. The testimony of the prosecution witnesses has been discarded for untenable reasons, particularly when they had no enmity with the accused persons. The use of Motorcycle No.HP-44-1787 for the commission of offence is duly proved from the evidence as has come on record by way of the testimony of its registered owner PW-5 Nand Lal and the application Ext.PW5/A, he filed for release of the same. The findings that the case property had reached well before 11.55 p.m. are wrong, as in view of Rapat Ext.PW2/C, the case property was brought to Police Station at 11.15 p.m. The re-sealing was completed by 1.00 a.m. i.e. on

18.1.2010, the following day. The independent witnesses PW-6 Parveen Kumar and PW-7 Hem Raj have falsely deposed while in the witness box and undue weightage should have not been given to their testimony. The cogent and reliable evidence having come on record by way of the testimony of the official witnesses PW-8 HC Virender, PW-9 HC Kewal Krishan and the I.O. PW-13 HC Kartar Singh has also been wrongly ignored and brushed aside. The prosecution has proved its case against the accused persons with the help of cogent and reliable evidence and as such there was no occasion to the trial Court to have given the benefit of doubt to the accused. The impugned judgment, therefore, has been sought to be quashed and set aside and both the accused convicted for the offence they committed.

3. On 17.1.2010 around 9.30 a.m., Police Party headed by ASI Nasib Singh, HC Kartar Singh (PW13), HC Virender Singh (PW8), HHC Kewal Krishan (PW9)

and Constable Mohammad Aslam, left the Police Station for laying "Nakka" and also patrolling in the area towards village Koti, Kandla and Badoh side. Rapat No.3 Ext.PW1/A was entered in this regard in Rapat Rojnamcha. The Nakka was laid at Gunnu Nullah. They started checking the vehicles. A Motorcycle bearing Registration No.HP-44-1787 arrived at the place of Nakka around 2.50 p.m. The same was being driven from Badoh side to Chamba. Both the riders were carrying bags on their back. They were signalled to stop the motorcycle. The person driving the motorcycle, however, did not stop the same and fled away towards Chamba side. The motorcycle was chased with a private vehicle. Around 200 metres away from Kandla, there was a sharp curve. When the motorcyclist applied brakes, the motorcycle skidded and fell down. PW6 Parveen and PW7 Hem Raj, the passersby got attracted to the sound of skidding of the motorcycle. Therefore, they came to the place where

the motorcycle had skidded. The motorcyclists were overpowered by the police. On inquiry, the rider disclosed his name as Mousam Deen (accused No.1); whereas the pillion rider Madho Ram (accused No.2). They both were informed by PW-13 HC Kartar Singh that since they did not stop the motorcycle and rather fled away from the place of *Nakka*, therefore, there is suspicion that they are in possession of some narcotic substance and carrying the same, hence their search is required. They were also apprised vide memos. Ext.PW6/A and PW6/A-1 qua their legal right of being searched before a Magistrate or a Gazetted Officer. They, however, opted for their search by the police itself. On this PW-13 and other official witnesses including the independent witnesses PW-6 Parveen Kumar and PW-7 Hem Raj had given their search to the accused persons first. Nothing was recovered from them and a memo. Ext.PW1/C was prepared in this regard. It is thereafter, the personal search of the

accused was conducted. Nothing incriminating was recovered from their personal search and also on the search of the motorcycle. PW-13 HC Kartar Singh when searched the bag of Mousam Deen, carrying on his back, Charas weighing 6.500 Kgs, kept in a polythene bag, was recovered therefrom. It is thereafter, the bag being carried by accused Madho Ram was searched and Charas weighing 5 Kgs, kept in a plastic bag, was recovered. The Charas recovered from both the accused was wrapped in plastic bags and put in the same bags which both the accused were carrying on their back. Both the bags were parcelled in a piece of cloth and sealed with 5 seals of impression "K". Specimen of seal "K" Ext.PW2/A was taken separately. The recovered Charas was taken into possession vide memos. Ext.PW6/B and Ext.PW6/D. NCB Form Ext.PW13/C and Ext.PW13/D were completed in triplicate on the spot itself. Impressions of seal "K" were also put thereon. The seal after its use

was handed over to PW-7 Hem Raj. It is thereafter, Rukka Ext.PW13/A was prepared and sent to Police Station for Registration of FIR. On the basis whereof FIR Ext.PW10/A was recorded by ASI Mukesh Kumar, PW-10. A copy thereof Ext.PW12/C was sent separately through PW-9 HHC Kewal Krishan to S.P. Office Chamba. The accused were apprised about the grounds of arrest vide memos. Ext.PW6/F and Ext.PW6/G. Their personal search was also conducted vide memos. Ext.PW6/H and Ext.PW6/J. All the documents were prepared on the spot in the presence of official as well as both the independent witnesses i.e. PW6 Parveen Kumar and PW-7 Hem Raj, who have signed the same.

4. The map Ext.PW13/B was also prepared on the spot. Special Report Ext.PW12/B and Ext.PW13/E, in duplicate, was prepared and sent to the office of S.P. Chamba through PW-9 HHC Kewal Krishan. The statements of the witnesses PW7 Hem

Raj (Ext.PW13/F) and that of PW-6 Parveen Kumar (Ext.PW13/G) were also recorded alongwith the statements of other official witnesses. The case property was produced at 11.55 p.m. alongwith both accused before PW-10 ASI/SHO Mukesh Kumar, Police Station Chamba. He resealed the same with seal "H" and the facsimile of the seal was taken on the NCB Form. The case property thereafter was handed over to MHC, Police Station, Chamba alongwith the seal and NCB Form. Memo. Ext.PW 2/B was prepared in this regard. Rapat Ext.PW2/C qua re-sealing of the case property was entered in the Rojnamcha.

5. On 18.1.2010, PW-11 HC Pawan Kumar vide RC No. 5/2010 had handed over the parcels, containing the recovered Charas duly sealed with seals "K" and "H" alongwith NCB Forms in triplicate to PW-3 Constable Joginder Singh, who deposited the same in FSL Junga on 20.1.2010 in the same condition. On receipt of the report Ext.PX from FSL, Junga and

completion of the investigation, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

6. Both the accused came to be tried by learned Special Judge, Fast Track Court, Chamba. Learned trial Court on going through the report and also the documents annexed therewith, prima-facie found involvement of both accused in the commission of offence, punishable under Section 20 of the Act and charge against them was framed accordingly. They, however, pleaded not guilty to the charge and claimed trial. The prosecution, therefore, has produced the evidence in support of the charge framed against each of them.

7. As already discussed, PW-6 Parveen Kumar and PW-7 Hem Raj are the independent witnesses; whereas PW-8 HC Virender, PW-9 HHC Kewal Krishan, PW-10 ASI Mukesh Kumar and PW-13 HC Kartar Singh, the I.O. being the members of police raiding party are

the official witnesses. Remaining witnesses PW-1 Constable Rajesh Kumar, PW-2 constable Deepak Kumar, PW-3 Constable Joginder Singh, PW4 ASI Kuldeep Singh, PW-11 MHC Pawan Kumar and PW-12 HC Subhash, who in one way or the other remained associated with the investigation of the case, have also been examined in order to substantiate the charge against the accused persons. Besides, the reliance has also been placed on the documentary evidence, as aforesaid.

8. Learned trial Judge on appreciation of the oral as well as documentary evidence has, however, arrived at a conclusion that the independent witnesses have not supported the prosecution case and that the statements of the official witnesses besides contradictory in nature are also inconsistent and as they have improved their earlier version, two possible views emerge on record. The accused were therefore

given the benefit of doubt and consequently acquitted of the charge.

6. There are two sets of witnesses examined by the prosecution in order to sustain the charge against the accused persons i.e. PW6 Parveen Kumar and PW7 Hem Raj, the independent witnesses. They have been examined to prove the manner in which the search and seizure has taken place on the spot; whereas PW8 HC Virender, PW9 HHC Kewal Krishan and the I.O PW-13 HC Kartar Singh, are the official witnesses. Another material witness examined by the prosecution is PW-5 Nand Lal. The witnesses examined in the 3rd set are PW-1 Constable Rajesh Kumar, who has entered Rapat Rojnamcha Ext.PW1/A qua departure of the police party for patrolling and laying Naka; PW-2 Constable Deepak Kumar has been examined to prove the production of the case property by PW-13, the I.O., before SHO and re-sealing thereof; PW-3 Constable Joginder Singh, had taken the parcel containing the

case property to FSL, Junga to get the same analyzed there; PW-4 Kuldeep Singh, while acting as officiating SHO, Police Station, Chamba, has prepared the Challan and presented the same in the Court; PW-10 ASI Mukesh Kumar, before whom the case property was produced. had re-sealed the same; PW-11 Pawan Kumar, the MHC, Police Station Chamba, with whom the case property was deposited by PW-10, the officiating SHO and PW-12 HC Subhash, Reader to S.P. Chamba, who has proved the copy of Special Report Ext.PW12/A. These witnesses, therefore, remained associated in one way or the other during investigation of the case and as such examined to link remaining evidence available on record.

7. The re-appraisal of the evidence so produced by the prosecution reveals that although PW-5 Nand Lal, who is the owner of motorcycle No.HP-44-1787, has not supported the prosecution case to the effect that his motorcycle was taken on that day by accused

Mousam Deen, yet, in the given facts and circumstances, he has intentionally and deliberately withheld the factual position from the Court and may be to help the accused persons for some extraneous consideration for the reason that in his cross-examination he has admitted that application Ext.PW5/A for the release of the motorcycle was filed by him in the Court. He has also admitted his signature on this document. True it is that he has denied that his motorcycle was misused by accused Mousam Deen and that he had given the same for being used by the said accused. It is also denied by him that the said accused was nabbed alongwith his motorcycle. According to him, the motorcycle was sought to be released on the ground that in case the same remains in police custody, its condition was likely to be deteriorated. The contents of the application Ext.PW5/A, however, falsify his testimony because in the application it is mentioned that accused Mausam

Deen is his friend and that they are residents of same Illaqua. On the day of occurrence, i.e. 17.1.2010, accused Mausam Deen came to him and borrowed motorcycle from him at the pretext that his sister was seriously ill and taken to Civil Hospital, Chamba for treatment and that he intends to go to Chamba to know about her well being. He, therefore, on the request of said accused had given motorcycle to him. He came to know from a news item published in "Dainik Jagran" that the said accused and one more person have been nabbed by the police with Charas and that his motorcycle was also impounded. The contents of the application Ext.PW5/A further reveal that the motorcycle was handed over by him to accused Mausam Deen for its lawful use with the understanding that the same will not be misused. It is with these submissions, he had sought the release of the motorcycle from police custody. The motorcycle was

accordingly released in his favour. The Supurdari bond is Ext.PW5/B.

8. PW-5 Nand Lal, therefore, is a liar. When he has admitted that Application Ext.PW5/A was made at his instance and portions D to D and E to E thereof are correct, his testimony while in the witness box that he himself was driving the motorcycle on that day to Parel for getting the same serviced there and that he was intercepted at Gunnu Nullah where the police had laid the "Nakka" and that portions A to A, B to B and C to C of Ext.PW5/A are incorrect, leads to the only conclusion that he has deposed falsely while in the witness box to help the accused. This witness, therefore, has rendered himself liable to be dealt with in accordance with law, which aspect of the matter shall be considered and adjudicated upon in the later part of this judgment. However, at this stage, in view of the own statement of PW-5 it would not be improper to conclude that on the day of occurrence, he had given

his motorcycle to accused Mausam Deen. Whether it is this motorcycle which has been used for the purpose of carrying the contraband, allegedly Charas, is a question to be answered in the light of the evidence available on record.

9. The independent witnesses, PW-6 Parveen Kumar and PW-7 Hem Raj, who allegedly got attracted when the motorcycle being driven by the accused at a high speed skidded on a curve and met with an accident, have not supported the prosecution case, because as per their version they were made to put their signatures on blank papers. PW-6 tells us that he is a shopkeeper at village Koti. It is about 3.30 p.m. when he was present in the shop, a scooty arrived there and its rider was speaking in Punjabi language. The scooty was stopped by the police and his signatures were obtained on blank papers as well as on one parcel. PW-7 also tells us that nothing was recovered in his presence and his signatures were also

obtained on blank papers. He has also denied the prosecution story that he alongwith PW-6 was coming from Kandla side and at a distance of 200 metres ahead of Kandla, they got attracted when a motorcycle skidded on a curve and fell down and that the rider and pillion rider of the motorcycle were intercepted by the police. According to him, it was not a motorcycle, but a scooty, which was being plied. This witness has not said anything as to at what place his signatures were obtained by the police on blank papers. When questioned as to whether he used to sign the blank papers, the answer was that normally he does not sign the blank papers. The explanation as forthcoming is that he signed the blank papers on account of terrorized by the police officials. When further cross-examined as to whether any complaint was made by him against the police officials who made him to sign the blank papers under threat or pressure, the answer was in negative.

10. Interestingly, PW6 and PW7 have admitted their signatures on consent memos. Ext.PW6/A & Ext. PW6/A-1; recovery memos. Ext.PW6/B & Ext.PW6/D; personal search memo. of police officials Ext.PW6/C; recovery memo. of motorcycle Ext.PW6/E; arrest memos Ext.PW6/F & PW6/G and memos. Ext.PW6/H & PW6/J qua personal search of the accused persons. All these documents amply demonstrate that there is no question of obtaining the signatures of these witnesses on blank papers. Had their signatures been obtained on blank papers, the proper adjustment of the space over which the contents of these documents have been written and the adjustment of the space for the signatures of these witnesses would have not been possible and in that event the author of these documents would have made the adjustment of the space either by squeezing the contents thereof or broadening the space. The documents demonstrate that no such adjustments have been made while

writing the contents of these documents and the space meant for signature of the witnesses. It is significant to note that both PW6 and PW7 have not divulged as to where they were made to put their signatures on blank papers. It is also not their case that they were made to sign blank papers in the Police Station. No doubt they have denied that the motorcycle skidded on a curve and met with an accident, however, both of them have admitted that a scooty appeared and its rider was a person speaking in Punjabi language. They have not said anything as to where that scooty appeared. In the considered opinion of this Court, both of them have withheld the true facts from the Court for the reasons best known to them. Therefore, PW6 and PW7 seem to have deposed falsely while in the witness box and as such rendered themselves liable to be dealt with and punished, in accordance with law.

11. Learned trial Judge has not appreciated the evidence of PW-5, PW-6 and PW-7 in its right

perspective and rather given undue weightage to their version that their signatures were obtained on blank papers, while extending the benefit of doubt to them.

12. The fact, however, remains that irrespective of the independent witnesses have not divulged true facts while in the witness box, their respective testimony has caused major dent in the prosecution story qua the manner in which, as per the prosecution case, the search and seizure has taken place on the spot.

13. The official witnesses PW8 HC Virender and PW9 HHC Kewal Krishan both have supported the prosecution case, however, as per the findings recorded by learned trial Judge, the evidence as has come on record by way of their testimony, is contradictory in nature, hence not reliable. The findings so recorded are legally sustainable or not need re-appraisal of the testimony of these witnesses.

14. As per the version of PW-8 and PW-9 on 17.1.2010 around 2.50 p.m. they alongwith I.O. PW-13 Kartar Singh and Constable Mohammad Aslam were present at Gunnu Nullah. They had laid Nakka there. The police party had spotted the accused persons coming on a motorcycle and carrying bags on their back. They were signalled to stop the motorcycle, but its rider accelerated the speed and did not stop the same. The motorcycle was chased and nabbed at a place 5 kilometres away from the place of Nakka where the same fell down while its rider was negotiating a curve in speed. PW-6 and PW-7 were attracted to the place of accident on hearing the noise emanated due to fall of motorcycle. The rider and pillion rider were nabbed by the police and they disclosed their names as Mousam Deen and Madho Ram, respectively.

15. Since the accused had fled away from the place of Nakka, therefore they were suspected to be in possession of some narcotic substance. Hence

their consent was obtained vide memos. Exts. PW6/A and PW6/A-1 for being searched by the police party present there. Consequently, after offering their own search by the police officials and that of also the witnesses to the accused, firstly the search of the bag which was being carried by accused Mousam Deen on his back was conducted and Charas weighing 6.500 Kgs. was recovered from a plastic "Boru" kept therein. Similarly, on search of the bag being carried by accused Madho Ram, Charas weighing 5 Kgs. was recovered therefrom which was also kept in a plastic "Boru". The recovered Charas was sealed in the respective bags with 5 impressions of seal "K" on each parcel and taken into possession in the presence of the witnesses vide recovery memo. Exts. PW6/D and PW6/E. They also took the specimen of seal "K" Ext.PW2/A on a piece of cloth and filled up NCB forms on the spot. The seal after its use, as per this witness, was handed over to Hem Raj. Their testimony also

substantiates the prosecution case qua the Rukka having been sent to Police Station, Chamba and the motorcycle taken into possession vide memo. Ext.PW6/E. They further substantiates the prosecution case qua grounds of arrest disclosed to both the accused vide memos. Exts. PW6/F and PW6/G.

16. The prosecution case that the police party was on patrol duty finds corroboration from the Rapat Rojnamcha Ext.PW1/A. It is PW-1 who has entered this Rapat in the Rojnamcha. The production of the case property before the officiating SHO is established from the statement of PW-2 Constable Deepak Kumar. The same as per the version of PW-2 was produced by the IO PW-13 HC Kartar Singh at 11.30 p.m. It took about 25 minutes to complete the re-sealing process.

17. PW-3 Constable Joginder Singh tells us that the parcels containing the contraband allegedly Charas duly sealed with 5 impressions of seal "K" and 3

that of "H" alongwith NCB Form in triplicate were handed over to him vide RC No.5/2010. He has proved the prosecution case qua deposit of the case property in the same condition in the Malkhana. The report Ext.PX reveals that the contraband sent for analysis, being the extract of cannabis, was Charas. It is thereafter PW-4 ASI Kuldeep Singh, the officiating SHO has prepared the Challan and filed the same in the Court.

18. The fact, however, remains that neither seal "K" nor seal "H" were produced during the course of trial. PW-7 Hem Raj to whom the seal was allegedly handed over after its use, has not supported the prosecution case in this regard. Had the seal been given to said Shri Hem Raj, receipt thereof should have been obtained from him. The non-production of the seal raises suspicion that the recovered contraband was "Charas" alone and not tampered with. Admittedly, one more case was registered on the same day and the

occurrence having taken place in the same area under the Act. The parcels containing the recovered contraband in that case were also sealed/re-sealed with the same seals i.e. "K" and "H". On this score also, the possibility of exchange of the case property of one case with another and tampering the same cannot be ruled out more particularly, when there are contradictions and improvements in the prosecution evidence, hence the same does not inspire confidence.

19. Learned trial Judge has noted such contradictions and improvements in detail. The version of PW-8 HC Virender that the police party had checked 4 vehicles during the period from 2.30 p.m. to 3.30 p.m. seems to be not correct. As per the prosecution case, the accused slipped away from the motorcycle around 2.50 p.m. and the same was chased and then nabbed at a distance of 5 kilometres from the place of Nakka. Therefore, sufficient time was not available with the police party to have checked 4 vehicles before

arrival of the offending motorcycle at the place of Nakka. According to PW-8, all the memos. were not prepared by the time, the Rukka was sent to the Police Station. However, it is not so, because the Rukka reveals that seizure memos. and NCB Forms were also complete by that time. According to PW-8, he had associated HC Kartar Singh (PW-13, the IO of this Case) to witness the recovery effected by him in another case which was registered vide FIR No.11/2010. He failed to disclose the proof of the vehicle in which the motorcycle was brought to police station. There is again no evidence that the vehicle was hired to carry the motorcycle to Police Station. As per further version of PW-8 one more person named Jyoti Parkash accused in FIR No.11/2010 was also apprehended by them and in that case, I.O. of this case PW-13 HC Kartar Singh was associated as one of the witnesses to witness the search and seizure. ASI Naseeb Singh was one of the members of the raiding

party. He was not associated during the investigation of this case and that of FIR No.11/2010. Since said Naseeb Singh had played vital role in nabbing the accused, his non-joining as a witness, renders the prosecution story highly doubtful. On one hand PW-8 has stated that after the investigation of case FIR No.11/2010, the accused and ASI Naseeb Singh were staying in the vehicle, whereas on the other, said Naseeb Singh, as per his version, had already left for the Police Station in a vehicle in which the motorcycle was carried. There is no proof that the motorcycle was brought to the Police Station in the same vehicle.

20. The overwriting in respect of FIR number is there on parcels Exts. P1 and P5 and the same assumes significance when one more case was detected, registered under the Act and investigated on the same day and in the same area. Learned trial Judge has rightly concluded that there was every

possibility of mixing of the case property with that of the other case detected on that day.

21. It has also come in evidence that PW-8 used to be a witness in the cases registered under the Act and investigated by PW-13 HC Kartar Singh; whereas PW-13 in the cases investigated by PW-8. This has also rendered the version of PW-8 highly improbable being an interested witness.

22. If coming to the testimony of PW-9 HHC Kewal Krishan, he was present at the place of occurrence till the stage of reducing the Rukka into writing, because it is he who had taken the same to the Police Station for registration of the case. He delivered the Rukka in the Police Station and a copy thereof at the residence of Superintendent of Police and thereafter handed over the file to the I.O. at 9.15 p.m. at Koti. At what time the I.O. reached at Koti from the place where the accused were nabbed, no explanation is forthcoming. As per his version 5-6 vehicles had

appeared at the place of Nakka by the time, the offending motorcycle arrived there. In this regard, he has contradicted PW-8, because as per his version only 4 vehicles were checked by that time. According to him, ASI Naseeb Singh was on the spot throughout; whereas as per the version of PW-8 said Naseeb Singh had also chased the motorcycle in the vehicle of I.O. PW-13 HC Kartar Singh. Not only this, but Naseeb Singh had also given his search to the accused alongwith other official witnesses. The entries in Malkhana register Ext.PW2/C reveals that the case property was deposited at 11.55 p.m. When the police party had reached at 11.55 p.m. and the parcels thereafter were resealed by the SHO, which might have taken some time, how it was possible to have deposited the case property at 11.55 p.m. itself in the Malkhana.

23. When as per the version of PW-13, the police officials had money and cell-phones with them, why such articles were not disclosed in the search

memo. Ext.PW6/G. The timing he gave qua preparation of various memos., is also not possible. If it is believed that the case property of both the cases was deposited at 11.55 p.m. in the Malkhana, it leads to the only conclusion that the same was brought much earlier as sufficient time would have been taken to re-seal the same. FIR number is not there on certain documents i.e. Exts. PW6/C, PW6/F, PW6/G, PW6/H, PW6/J and spot map Ext.PW3/B. Similarly, FIR number is also not there in the statements of witnesses recorded under Section 161 Cr. P.C. No plausible explanation is forthcoming qua this aspect of the matter also. Since one more case was detected, registered and investigated by PW-8 on the same day and in that very area, the possibility of the case property having been tampered with cannot be ruled out.

24. The present in view of the discussion hereinabove is a case where the independent witnesses, in the opinion of this Court have deposed

falsely, but their testimony casts cloud on the prosecution story and as regards the official witnesses, their evidence is contradictory in nature, that too on material aspects. This has rendered the prosecution story highly doubtful. With such type of evidence available on record it is not possible to record the findings of conviction against the accused. In the criminal administration of justice, the view of the matter favourable to the accused has to be taken and benefit of doubt given to them. Otherwise also, in the Act, there is provision of stringent punishment, if an offender is found to have committed the offence. Therefore, in order to hold an offender guilty of the commission of offence under the Act, cogent, reliable and unimpeachable evidence is required to be produced and proved.

25. The present is even not a case where presumption as envisaged under Section 35 can be raised against the accused for the reason that the

prosecution has failed to discharge initial burden upon it.

26. The crux of what has been said hereinabove, therefore, would be that the charge against both the accused is not proved beyond all reasonable doubt, therefore, they could not have been convicted and sentenced by learned trial Court. They have rightly been given the benefit of doubt and resultantly acquitted of the charge framed against each of them. This appeal, therefore, fails and the same is accordingly dismissed. Consequently, the judgment under challenge to the extent of acquittal of the accused persons is affirmed. Personal bonds furnished by them shall stand cancelled and the surety bonds discharged.

27. Before parting with the case, we would be failing in our duty, if ignore the manner in which PW-5 Nand Lal, the owner of the motorcycle, used for the commission of offence, PW-6 Parveen Kumar and PW-7

Hem Raj, the independent witnesses have conducted themselves while in the witness box. Taking note of the statements, they made while in the witness box, we have prima-facie formed an opinion that they have not disclosed true facts. PW-5 Nand Lal even has made the statement contrary to the averments in application Ext.PW5/A, he filed for release of the motorcycle used by the accused for the commission of the offence. It is further observed that these witnesses have rendered themselves liable to be dealt with in accordance with law and this aspect of the matter has been left open to be considered in this part of the judgment.

28. Section 340 of the Code of Criminal Procedure takes care of such a situation. The provisions contained under the Section *ibid* reveal that if on an application made to it or otherwise, the Court is of the opinion that it is expedient and in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-Section (1) of

Section 195 of the Code, which appears to have been committed in relation to proceeding of a case in that Court, the Court shall hold a preliminary inquiry and after recording a finding that by producing a document or giving a statement in evidence, an offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code is made out, order to make a complaint in writing to a Magistrate of the first class having jurisdiction over the matter.

29. Section 340 of the Code of Criminal Procedure contemplates a preliminary inquiry to be conducted by the Court to form an opinion that it is expedient and in the interest of justice to hold inquiry into the offence which appears to have been committed. It is not mandatory for the trial Court to hold preliminary inquiry, because it has the opportunity to see the witness while in the witness box and to observe his demeanour. We, however, feel that the appellate Court, having no such opportunity to observe

the demeanour of the witness, should hold an inquiry and give an opportunity of being heard to him, before forming an opinion that an offence within the meaning of clause (b) of sub-Section(1) of Section 195 of the Code of Criminal Procedure appears to have been committed by him. It is only thereafter, an order qua filing a complaint, as contemplated under Section 340 of the Code of Criminal Procedure, should be passed.

30. Therefore, before initiating any action against PW-5 Nand Lal, PW-6 Parveen Kumar and PW-7 Hem Raj, we deem it expedient and in the interest of justice to call upon them to show cause as to why an action be not initiated against them in the light of the observations in this judgment. Consequently, there shall be a direction to the Registry to issue show cause notice to all the three witnesses, namely PW-5 Nand Lal, PW-6 Parveen Kumar and PW-7 Hem Raj for **29.7.2016** and the proceedings be registered against them separately. A copy of judgment be also sent to

each of them alongwith show cause notice. Office of learned Advocate General to collect notices from the Registry of this Court for onward transmission to the Superintendent of Police, Chamba, for effecting service thereof upon the witnesses aforesaid well before the date fixed. The record of the trial Court be retained for being referred to at the time of further consideration of the matter, after taking on record the version of the witnesses, to be referred to as 'the respondents' in the proceedings ordered to be drawn separately against them.

**(Dharam Chand Chaudhary),
Judge**

June 28, 2016 (ss)

**(Chander Bhusan Barowalia)
Judge.**