



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr. Appeal No. 258 of 2011.
Reserved on : 10th March, 2017
Decided on: 22nd May, 2017

State of H.P.

.....**Appellant.**

Versus

Surender Kumar

.....**Respondent.**

Coram

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

Whether approved for reporting?¹Yes.

**For the appellant : Mr. D.S. Nainta & Mr. Virender Verma,
Addl. A.G.**

For the Respondent : Mr. Ajay Kochhar, Advocate.

Dharam Chand Chaudhary, J. (oral).

Learned Special Judge (Presiding Officer,
Fast Track Court), Solan, District Solan vide judgment
dated 15.2.2011 passed in case No. 17FTC/7 of 2009,
while arriving at a conclusion that there is no
compliance of the provisions contained under Section
50 of the Narcotic Drugs and Psychotropic Substances
Act, hereinafter referred to as 'the Act', nor cogent

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

and reliable evidence produced by the prosecution to show that the contraband allegedly recovered from the respondent, hereinafter referred to as the accused, was charas and also that the evidence available on record is contradictory in nature, has acquitted the accused of the charge framed against him under Section 20 of the Act. ◇

2. The legality and validity of the impugned judgment has been questioned on the grounds *inter alia* that cogent and reliable evidence produced by the prosecution has been appreciated by learned trial Judge in a slip shod and perfunctory manner and as a result thereof, based its findings on hypothesis, surmises and conjectures. The reasoning given by learned trial Court while acquitting the accused of the charge is manifestly unrealistic, unreasonable and also unsustainable. The present being a case of recovery of the charas from the bag the accused was carrying on his right shoulder, therefore, Section 50 of the Act was not applicable in the present case. Also

that learned Court below has erroneously ignored the reports of chemical examiner Ex.PW-10/E and Ex.PW-10/F because in view of the presence of tetrahydrocannabinol (THC) in the sample sent for analysis, the same was that of charas. Also that learned Court below should have not discarded the prosecution evidence having come on record by way of testimony of constable Surender Singh PW-1, HC Yadav Chand PW-2 and the I.O. Santosh Thakur, PW-11, who all were present on the spot during the course of search and seizure conducted there. The acquittal of the accused in the case in hand is stated to be in utter disregard of the evidence having come on record by way of their testimonies. There being no material contradiction nor any omission in the prosecution evidence, learned trial Court has erroneously given weightage to the admissions such as the seal used for sealing the parcels containing the recovered charas and sample parcels not produced

in evidence and failure to associate independent witnesses etc. etc.

3. The facts of the case in a nut-shell are that PW-11 ASI Santosh Thakur accompanied by PW-1 Constable Surinder Singh, PW-2 HC Yadav Chand and PW-3 Naresh Kumar vide Rapat Rojnamcha Ex.PW-11/A left police Station, Solan at 9.00 p.m. in search of a proclaimed offender towards Ghundidhar, Pajo, Shanti, Jatoli side. The police went upto Marridin Factory. On way back, when reached near Kali Mata temple, Shanti at 10.30 p.m. the accused was noticed coming on foot from opposite direction. He was holding a bag on his right shoulder. On seeing the police party, he turned back and tried to flee away. He, however, was overpowered and apprehended by the police there. On inquiry about his antecedents, he disclosed his name and address etc.

4. PW-1 Constable Surender Singh and PW-2 HC Yadav Chand were associated as independent

witnesses. Since the I.O. PW-11 suspected that the accused may be in possession of some narcotic drugs or psychotropic substances, therefore, he was apprised that the search of his bag and person is required. The accused was also apprised that if he wants to give his search to a gazetted officer or the magistrate that is his legal right. The consent memo Ex.PW-2/A was reduced into writing. The accused, however, opted for his search to be conducted by the police official present there. It is thereafter, PW-11 opened the bag Ex.P-1, the accused was carrying on his right shoulder. In one of the portion of the said bag, Towel Ex.P-5, Jean Pants Ex.P-6, T-Shirt Ex.P-7 were recovered. In other portion of the bag one polythene bag Ex.P-8 was found kept. On opening the bag Ex.P-8, brown colour substance in the shape of stick was recovered. The I.O. on the basis of his experience as well as by way of its smell has identified the same to be charas. The identification memo Ex.PW-1/D, was prepared in this regard. Constable Devender Kumar

was asked to arrange for weights and scale. He brought the same. The recovered charas when weighed was found 650 grams. PW-11 has resorted to sealing and sampling process in the presence of the official witnesses, he associated to witness the search and seizure. After separating 50 grams charas from the recovered bulk for sample, i.e. 25-25 grams each, the remaining bulk i.e. 600 grams was sealed in a parcel of cloth with seal having impression 'S'. The parcels were also sealed with the same seal. The seal was handed over to PW-2 Yadav Chand for safe custody vide memo Ex.PW-2/B. The recovered charas along with sample parcels was taken into possession vide recovery memo Ex.PW-1/B. NCB Forms Ex.PW-10/C was prepared in triplicate. The samples of seal 'S' Ex.PW-1/A, Ex.PW-11/B, and Ex.PW-11/C were drawn on a piece of cloth. The sample parcels were marked as A-1 and A-2 whereas parcels containing recovered charas A-3.

5. Rukka Ex.PW-1/C was prepared by PW-11 and the same along with case property NCB Forms, sample of seal 'S' was forwarded to Police Station, Solan through constable Surinder Singh PW-1. On the basis of Rukka FIR Ex.PW-5/A was registered. During the course of further investigation on the spot, the I.O. has prepared the site plan Ex.PW-11/E. The accused was arrested and arrest memo Ex.PW-11/D was prepared. Information regarding his arrest was given to his relatives over telephone. In the Police Station, the case property along with sample parcel, NCB Forms and seizure memo was handed over to PW-10, Jagdish Chand, SHO, who resealed the same with seal 'R'. The resealing certificate is Ex.PW-10/D. The report entered in the daily diary in this regard is Ex.PW-10/J. PW-10 handed over the case property along with NCB forms to Kehar Singh, PW-5 MHC Police Station, Solan. PW-5 has entered the case property and the documents i.e. NCB forms, seizure

memo and sample of seals in the Malkhana register, extract whereof is Ex.PW-11/G.

6. The I.O. PW-11, on completion of the investigation on the spot, returned to police station and entered rapat Ex.PW-11/F, in daily diary in this regard. Special report Ex.PW-4/A was also prepared by PW-10 and forwarded the same to Superintendent of Police, Solan. One of the sample parcels was forwarded to Forensic Science Laboratory, Junga on 18.3.2009 through Constable Rakesh Kumar, PW-8. Subsequently, another sample parcel and parcel containing the recovered charas duly sealed with seals 'S' and 'R' were also forwarded to Forensic Science Laboratory, Junga on 22.8.2009, through HHC Krishan Dutt PW-7. The reports of chemical examiner Ex.PW-10/E and Ex.PW-10/F were received. It is thereafter; PW-10 has prepared the report under Section 173 of the Code of Criminal Procedure and filed the same in the trial Court.

7. Learned trial Judge on appreciation of the report filed by the police and documents annexed therewith has found a prima facie case under Section 20 of the Act made out against the accused and charge was framed accordingly. He, however, pleaded not guilty to the charge and claimed trial.

8. The prosecution in support of its case has examined 11 witnesses in all. As pointed out at the very outset that the material prosecution witnesses are PW-1 Constable Surinder Singh, PW-2 HC Yadav Chand and PW-11 ASI Santosh Thakur, the I.O.

9. The remaining prosecution witnesses are formal as PW-3 had taken the special report to the office of Superintendent of Police, Solan, whereas PW-4 ASI Yashwant Singh, who was reader to Superintendent of Police, Solan, has received the special report Ex.PW-4/A and placed before the Superintendent of Police for perusal. PW-5 is HC Kehar Singh, who was posted as MHC, Police Station, Solan at the relevant time. It is he, who registered the FIR

Ex.PW-5/A and retained the case property in Malkhana, when handed over to him by PW-10 Jagdish Chand. One of the sample parcels was also forwarded by him to Forensic Science Laboratory, Junga for analysis, through constable Rakesh Kumar PW-8. HC Sunil Kumar, PW-6 was working as MHC Malkhana on 22.8.2009. He has forwarded the parcels containing the recovered charas and sample parcel to Forensic Science Laboratory, Junga for analysis through HHC Krishan Dutt, PW-7. PW-9 SI Rupinder Kumar has partly investigated the case whereas PW-10 Jagdish Chand was posted as SHO Police Station, Sadar, Solan from March 2009 to October 2009 and it is he, who had received the case property as well as resealed the same and thereafter deposited with PW-5, the then MHC Police Station, Solan for safe custody.

10. Now if coming to the defence version, the accused in his statement recorded under Section 313 Cr.P.C. has denied the entire prosecution case being

incorrect and stated that two groups of college students had quarreled at Kotla Nalah. He was detained by the police there. The police officials were suspecting him to be one of the boys involved in the quarrel, however, on his protest and as one of the police personnel had received injuries on his person, he was apprehended and this false case planted against him. He, however, opted for not producing evidence in his defence.

11. In the light of the facts and circumstances discussed hereinabove, we have heard Mr. D.S. Nainta, learned Additional Advocate General on behalf of the appellant-State and Shri Ajay Kochhar, Advocate, who is representing the accused in this case.

12. On analyzing the rival submissions, the questions such as compliance of Section 50 of the Act was not required in this case, nor was there any occasion to learned trial judge to have arrived at a conclusion that the contraband recovered from the

accused has not been proved to be charas and that official witnesses were reliable and dependable because despite efforts made, independent witnesses could not be associated, hence their testimony should have been relied upon being not inconsistent and rather worthy of credence, arise for our consideration. The non-production of seal used by the I.O. for sealing the parcels containing the recovered contraband and the sample parcels whether has caused prejudice to the case of the accused or not, has also engaged our attention.

13. In our considered opinion, the acquittal of the accused on the ground that the contraband recovered from the accused has not been proved to be charas is not legally sustainable for the reason that while arriving at such conclusion learned trial Judge has placed reliance on judgment of a Division Bench of this Court in **Sunil** Versus **State of H.P.** and its connected matters, **Latest HLJ 2010 (HP) 207**. As a matter of fact, a larger Bench of this Court in **State of**

Himachal Pradesh versus **Mehboob Khan, 2014, Cr. L.J. 705,**

(FB), while holding that the law laid down in **Sunil's**

case supra is not the correct law, has overruled the

same and answered the reference made to it as

follows:-

a. After taking into consideration Section 293 of the Code of Criminal Procedure, Sections 45 and 46 of the Indian Evidence Act and the Law laid down by the apex Court as well as various High Courts discussed in detail hereinabove, we conclude that on account of non-consideration of the same by the Division Bench, which has rendered the judgment in **Sunil's** case, correct law on the expert opinion and the reports assigned by the scientific expert after analyzing the exhibit has not been laid down.

b. We further conclude that on account of non-consideration of various reports of the United Nations Office on Drugs and Crime including Single Convention on Narcotic Drugs, 1961 and to the contrary placing reliance on the text books, which basically are on medical jurisprudence, the Division Bench in **Sunil's** case failed to assign correct meaning to 'charas' and 'cannabis resin', the

necessary constituents of an offence punishable under Section 20 of the NDPS Act.

c. In view of the detailed discussion hereinabove, the Division Bench while deciding **Sunil's** case supra has definitely erred in taking note of the percentage of tetrahydrocannabinol in three forms of cannabis i.e. Bhang, Ganja and Charas and hence, concluded erroneously that without there being no reference of the resin contents in the reports assigned by the Chemical Examiners in those cases, the contraband recovered is not proved to be Charas, as in our opinion, the Charas is a resinous mass and the presence of resin in the stuff analyzed without there being any evidence qua the nature of the neutral substance, the entire mass has to be taken as Charas.

d. There is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to hold that the sample is that of Charas. The law laid down by the Division Bench in Sunil's case that 'for want of percentage of tetrahydrocannabinol or resin contents in the samples analyzed, the possibility of the stuff recovered from the accused persons being

only Bhang i.e. the dried leaves of cannabis plant, possession of which is not an offence, cannot be ruled out', is not a good law nor any such interpretation is legally possible. The percentage of resin contents in the stuff analyzed is not a determinative factor of small quantity, above smaller quantity and lesser than commercial quantity and the commercial quantity. Rather if in the entire stuff recovered from the accused, resin of cannabis is found present on analysis, whole of the stuff is to be taken to determine the quantity i.e. smaller, above smaller but lesser than commercial and commercial, in terms of the notification below Section 2 (vii-a) and (xxiii-a) of the Act.

e. We have discussed the Single Convention on Narcotic Drugs, 1961 in detail hereinabove and noted that resin becomes cannabis resin only when it is separated from the plant. The separated resin is cannabis resin not only when it is in 'purified' form, but also when in 'crude' form or still mixed with other parts of the plant. Therefore, the resin mixed with other parts of the plant i.e. in 'crude' form is also charas within the meaning of the Convention and the Legislature in its wisdom has never intended to exclude the

weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to be some other neutral substance and not that of other parts of the cannabis plant. Once the expert expressed the opinion that after conducting the required tests, he found the resin present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert nor would it be appropriate to embark upon the admissibility of the report on any ground, including non-mentioning of the percentage of tetrahydrocannabinol or resin contents in the sample.

f. We are also not in agreement with the findings recorded by the Division Bench in **Sunil's** case that "mere presence of tetrahydrocannabinol and cystolithic hair without there being any mention of the percentage of tetrahydrocannabinol in a sample of charas is not an indicator of the entire stuff analyzed to be charas" for the reason that the statute does not insist for the presence of percentage in the stuff of charas and mere presence of tetrahydrocannabinol along with cystolithic hair in a sample stuff is

an indicator of the same being the resin of cannabis plant because the cystolithic hair are present only in the cannabis plant. When after observing the presence of tetrahydrocannabinol and cystolithic hair, the expert arrives at a conclusion that the sample contains the resin contents, it is more than sufficient to hold that the sample is of charas and the view so expressed by the expert normally should be honoured and not called into question. Of course, neutral material which is not obtained from cannabis plant cannot be treated as resin of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in 'crude' form or 'purified' form. In common parlance charas is a hand made drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the forms of cannabis is to be considered as a contraband article. No concentration and percentage of resin is prescribed for 'charas' under the Act.

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 h. xxx xxx xxx."

14. Therefore, in a nut-shell as per the law laid down by the Larger Bench of this Court in **Mehboob**

Khan's case supra, in a case of recovery of charas, presence of tetrahydrocannabinol and cystolithic hair in a sample of charas reveals that the same contains resin contents and as such, sufficient to hold that the sample is of charas. The resin obtained from the cannabis plants may be in 'crude' or 'purified' form and charas is hand made drug, made from the extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the form of cannabis is to be considered as a contraband article. Therefore, the acquittal of the accused on the ground that the contraband recovered from him is not proved to be charas, is not legally sustainable for the reason that the reports of chemical examiner Ex.PW-10/E and Ex.PW-10/F make it crystal clear that tetrahydrocannabinol and cystolithic hair were very much present in the sample as well as in the entire bulk analyzed in the laboratory.

15. The compliance of Section 50 of the Act is not required in the case in hand for the reason that

the documentary evidence i.e. seizure memo Ex.PW-1/B and the Rukka Ex.PW-1/C, leave no manner of doubt that it is the search of the bag Ex.P-1, the accused was holding on his right shoulder conducted and besides his clothes, in one of the portion of the bag, charas, which was kept in a polythene bag, was recovered from another portion of the bag. The present, as such, is not a case of recovery of the charas during the course of personal search of the accused.

16. It is well settled at this stage that in the case of recovery of the contraband during the search of vehicle or container or bag or some premises, the compliance of Section 50 of the Act is not required to be made. We are drawing support in this regard from the judgment of Hon'ble apex Court in **Kulwinder Singh and another vs. State of Punjab, (2015) 6, Supreme Court Cases, 674**. The relevant portion of this judgment reads as follows:-

“20. The next contention that has been raised by the learned counsel for the appellants relates to non-compliance of Section 50 of the NDPS Act. It is undisputed that the bags containing poppy husk were seized from the truck. Thus, it is not a case of personal search of a person. In *Megh Singh v. State of Punjab*, it has been held that Section 50 only applies in case of personal search of a person, but it is not extended to a search of a vehicle or a container or a bag or premises.

21. In *State of H.P. v. Pawan Kumar*, it has been held that:-

“10. We are not concerned here with the wide definition of the word “person”, which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense

manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilised society. Therefore, the most appropriate meaning of the word "person" appears to be "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilized society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare

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cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothings and also footwear.

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed

on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

Similar view has been expressed in *Jarnail Singh v. State of Punjab* and *Ram Swaroop v. State (Government of NCT of Delhi)*

22. In view of the aforesaid, the submission that non-compliance of Section 50 vitiates the conviction, leaves us unimpressed."

17. Similar is the view of the matter taken by the Hon'ble apex Court in ***State of Rajasthan*** versus ***Parmanand and another (2014) 5 SCC 345*** and in ***Yashihey Yobin and another*** versus ***Department of Customs, Shillong (2014) 13 Supreme Court Cases 344.***

The relevant extract of this judgment reads as follows:

"9. The language employed "any person" under [Section 50](#) of the Act would

naturally mean a human being or a living individual unit and not an artificial person. It would not bring within its ambit any non-living creature viz.; bags, containers, briefcase or any such other article. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be a part of the body of a human being. The scope and ambit of [Section 50](#) was examined in considerable detail in the case of [State of Haryana v. Suresh](#), AIR 2007 SC 2245 and in a three judges bench decision in [State of Himachal Pradesh v. Pawan Kumar](#), 2005 4 SCC 350, wherein it is observed that when a person is not searched, only the bag, container or the suitcase is searched, the provisions of [Section 50](#), cannot be pressed into service. The items like bag, briefcase, or any such article or container, etc. are not a part of a human being as it would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. In

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common parlance it could be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. but it is not possible to include these articles within the ambit of the word "person" defined in Section 50 of the Act.

10. This position in law is settled by the Constitution Bench in the case of State of Punjab v Baldev Singh, AIR 1999 SC 2378 and in Megh Singh v. State of Punjab, 2003 8 SCC 666, where application of [Section 50](#) is only in case of search of a person as contrasted to search of premises, vehicles or articles. But in cases where the line of separation is thin and fine between search of a person and an artificial object, the test of inextricable connection is to be applied and then conclusion is to be reached as to whether the search was that of a person or not. The above test has been noticed in the case of [Namdi Francis Nwazor v. Union of India and Anr.](#), (1998) 8 SCC 534, wherein it is held that if the search is of a bag which is inextricably

connected with the person, Section 50 of the Act will apply, and if it is not so connected, the provisions will not apply. It is when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that the bag was not found on the accused person."

18. This Court has also taken similar view of the matter while placing reliance on the judgments supra, in **Cr. Appeal No.181 of 2015**, titled **Arun Kumar versus State of Himachal Pradesh**, decided on 21.10.2016.

19. If the evidence qua this aspect of the matter is seen, the I.O. PW-11 and official witnesses PW-1 and PW-2 are categorical while making statement in the witness-box that the charas was recovered during the search of the bag Ex.P-1, the accused was carrying on his right shoulder. Their testimonies find

corroboration from documentary evidence i.e. seizure memo Ex.PW-1/B and the Rukka Ex.PW-1/C. True it is that in the consent memo Ex.PW-2/A, the I.O. PW-11 had suspected and apprised the accused about his suspicion that he may be in possession of some contraband, therefore, his search along with bag was required to be conducted. The charas was recovered during the search of the bag Ex.P-1. The personal search of the accused, no doubt, was conducted vide memo Ex.PW-2/C, however, after the recovery of the charas from his bag, which, as a matter of fact, is required to be conducted before the arrest of an offender in order to ensure that he may not take anything in his possession including some dangerous article when after arrest lodged in police lock up or Judicial custody.

20. It is apparent from the seizure memo Ex.PW-1/B and the Rukka Ex.PW-1/C that the search of the bag was conducted first and charas recovered therefrom. Otherwise also, the consent memo

Ex.PW-2/A is suggestive of that the accused in so many words was apprised about his legal right of being searched before a Magistrate or a gazetted officer. Being so, the findings that the I.O., has failed to comply with the mandatory provisions enshrined under Section 50 of the Act otherwise are also legally unsustainable and as such acquittal of the accused of the charge on this score is based upon hypotheses and conjectures.

21. True it is that the independent witnesses have not been associated by the I.O. in this case. There is, however, explanation therefor because PW-1 while expressing his ignorance that there situated houses and shops nearer to the temple of Kalimata at a distance of 40 meters and Jogindra Central Co-operative Bank is also situated there has voluntarily stated that the accused was apprehended at a lonely place. As per the version of I.O. PW-11 in his cross-examination, efforts were made to associate the witnesses on the spot, but no one was willing to do so.

Pradeep Kumar resident of Shanti, however, had handed over only weights and scale to them for weighing the contraband.

22. True it is that the search was conducted at Shanti near the temple of Kalimata. It was suggested to PW-1, PW-2 and PW-11 that Pujari resides in the temple with his family, however, they expressed their ignorance. The I.O. PW-11 admits the existence of building of Jogindra Central Bank adjoining to temple and shops also. PW-2 also admits the existence of houses and shops and the building of Bank nearby. They both, however, expressed their ignorance qua distance thereof from the spot. PW-1 has expressed his ignorance qua existence of the houses and shops nearby the spot. They all had expressed their ignorance qua existence of house of one Bhagwan Singh, hotel of Sadi Ram and house of Ram Rattan, Advocate are situated nearby the temple. Even if the shops and houses were in existence nearby the spot, being odd hour, as the accused was apprehended at

10.30 p.m., no one would have come to assist the police in conducting the investigation on the spot because experience shows that as per the latest trend, no one like to come forward to assist the police in conducting the investigation even during day time, how one can expect that the local residents having houses and shops nearby to have come forward and associate the police to conduct the investigation that too during odd hours. Pradeep Kumar, no doubt, was there because as per prosecution case, the weights and scale were brought from him. Though the police could have asked him to associate as an independent witness, however, its failure to do so will be fatal to the prosecution case, in case it is ultimately concluded by us that the official witnesses on account of so called inconsistencies or contradictions are not dependable.

23. True it is that the I.O. was required to have maintained record in this regard and in the event of efforts made to associate someone from the locality

in the investigation of the case and his/her refusal to do so, to have taken action under Section 100(8) of the Code of Criminal Procedure, however, as noticed supra, it is due to odd hours any such exercise seems to be not conducted.

24. Otherwise also, the present is not a case where no one is associated to witness the search and seizure because the official witnesses PW-1 and PW-2 were present there and in the absence of the independent witnesses, the I.O. PW-11, had associated them as witnesses and conducted the search and seizure in their presence. As such the approach of the I.O. in the matter cannot be termed as illegal for the reason that the apex Court in **Makhan Singh** versus **State of Haryana, (2015) 12 SCC 247**, has held that it is not always possible to join independent persons to witness the search and seizure at all places and at every time. At occasions, the independent persons even show their reluctance also for being associated as witness. Also that official

witnesses, if associated, in such an eventuality, if make trust worthy and consistent statement while in the witness-box, have to be termed as much good as any other independent person. The relevant extract of this judgment 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....."

25. Therefore, merely that the I.O. has failed to join the independent person to witness the search and seizure due to the circumstances beyond his

control, the findings of acquittal should have not been recorded particularly when PW-1 and PW-2 were associated as witnesses to witness the search and seizure. ◇

26. The pivotal question, however, would be that the statements made by the official witnesses including the I.O. PW-11 are consistent and without any contradiction as well as inspire confidence. The close scrutiny of the statements made by PW-1 and PW-2 amply demonstrate that they are categorical while telling us that the police party had left the Police Station at 9.00 p.m. on that day in search of a proclaimed offender. Though as per the version of PW-1, the police party was patrolling in that area, however, PW-2 and the I.O. PW-11 have stated that they were in search of some proclaimed offender. PW-1 a constable may have not been in the knowledge of the purpose of patrolling by them. Otherwise also in the rapat Ex.PW-11/A there is specific mention that the police party left the Police

Station in search of a proclaimed offender. PW-1 and PW-2 have also stated in one voice that the accused was noticed coming on foot and while trying to flee away, was overpowered and apprehended, on suspicion. He was apprised about his search required to be conducted and that the charas was recovered during the search of his bag Ex.P-1, which was kept in a polythene bag Ex.P-8. They have also stated in one voice that the scale was brought by Constable Devender and the charas when weighed found 650 grams. They have also deposed about resorting to the sampling and sealing process and also taking into consideration the recovered charas vide seizure memo Ex.PW-1/B. They also tell us that Rukka Ex.PW-1/C was taken along with the case property, sample parcels and other record to the Police Station by PW-1 constable Surinder Singh. Their testimonies in examination-in-chief, therefore, corroborate the prosecution story qua recovery of charas weighing 650 grams from the exclusive and conscious

possession of the accused. They both were subjected to lengthy cross-examination, however, nothing could be elicited therefrom suggesting that they were not present on the spot nor the accused apprehended there and the charas weighing 650 grams recovered from him.

27. In their cross-examination they are categorical about the time when they left the Police Station. They are also categorical about the time when the accused was spotted and apprehended. True it is that there are minor contradiction qua existence of houses, shops etc., nearby the temple of Kalimata because PW-1 has expressed complete ignorance qua this aspect of the matter whereas PW-2 while admitting the existence of the shops and houses nearby the place of recovery could not tell the exact distance thereof from that place. He has also expressed his ignorance qua distance of houses of Bhagwan Singh, Sadi Lal and Ram Rattan Advocate from the spot. However, these contradictions are not

of such a nature, which could have been said to have gone to the roots of the prosecution case. Therefore, we are not in agreement with learned Additional Advocate General that the evidence, available on record has not been appreciated in its right perspective. ◇

28. The I.O. of the case PW-11 has also supported the prosecution case and the manner in which he has conducted the investigation on the spot. There is nothing in his statement to show that the convict, who belongs to village Jorna, P.O. Pulbahal, Tehsil Chopal, District Shimla, a far away place from the spot, was implicated in this case falsely.

29. The evidence as has come on record by way of testimony of remaining prosecution witnesses, who remained associated with the investigation of the case in one way or the other, produce link to the prosecution story because PW-5 HC Kehar Singh, who was posted as MHC Police Station, Solan, had registered FIR Ex.PW-5/A, on receipt of the Rukka

Ex.PW-1/C. The rukka was handed over by PW-1 to this witness whereas as per the testimony of PW-10, the then Inspector SHO Police Station, Sadar, the case property containing three parcels duly sealed with seal impression 'S' along with sample of seal, NCB forms and copy of seizure memo was produced by PW-1 before him, in the presence of PW-5 Kehar Singh. PW-10 also proves the prosecution case qua resealing of the parcels containing the recovered charas and sample parcels with seal 'R', the resealing certificate, which is in his hand and bears his signatures Ex.PW-10/D, and filling of the entries in relevant columns of NCB form Ex.PW-10/C. He handed over the case property along with sample seals, seizure memo and NCB forms to PW-5 Kehar Singh. PW-5 admits so while in the witness-box and further tells us that the case property was retained by him in safe custody in the Malkhana. The extract of Malkhana register Ex.PW-11/G also substantiates the prosecution case in this regard.

30. PW-5 further substantiates the prosecution case qua forwarding of one of sample parcels to Forensic Science Laboratory, Junga vide RC PW-5/D, through PW-8 constable Rakesh Kumar. PW-8 Rakesh Kumar tells us that the sample parcels was deposited by him in laboratory in safe custody and produced the receipt on RC before Kehar Singh PW-5. Sunil Kumar is PW-6 MHC Malkhana. He had forwarded the parcel containing the recovered charas and another sample parcel to Forensic Science Laboratory, Junga vide RC No.136/09 through PW-7 HHC Krishan Dutt on 22.8.2009. In this regard, he has proved the extract of Malkhana register Ex.PW-5/B also, in which the entries encircled red was made by him in his own hand. He had also proved the prosecution case that three parcels containing the case property and samples was again taken out from the Malkhana by ASI Santosh Thakur on 17.3.2009 for exhibiting the same in the Court, it was re-deposited on the same day at 7.00 p.m. in the Malkhana in safe condition. PW-7

HHC Krishan Dutt has corroborated the statement of PW-6 HC Sunil Kumar while stating that two parcels handed over to him were deposited by him, in the laboratory in safe custody. Therefore, the link evidence as has come on record by way of testimony of the aforesaid witnesses also connects the accused with the commission of the offence.

31. Now if coming to the last point urged by learned defence counsel that non-production of seal 'S' in the Court is fatal to the prosecution case. We are not impressed thereby because what prejudice has been caused to the accused by non-production of the receipt, nothing tangible has brought to our notice. The doubt of learned defence counsel that the case property was tampered with is absolutely baseless for the reason that the parcels containing the case property were firstly taken to Forensic Science Laboratory where the same were found to be duly resealed with seal 'S' and 'R'. We can make a reference in this regard to the reports of chemical

examiner Ex.PW-10/E and Ex.PW-10/F. The chemical examiner, who received these parcels in the Laboratory had recorded his satisfaction qua the sealing thereof and it is thereafter the same were received. Had the parcels been tampered with, the chemical examiner would have not received the same. These parcels were produced in the Court also during the course of trial and opened in the presence of learned Public Prosecutor and learned defence counsel at that time. Had there been any tampering therewith, the same could have been pointed out at that stage also. Therefore, non production of the seal in the Court is not to be treated a circumstance to render the prosecution case doubtful and to arrive at a conclusion that the case property was tampered with. In our opinion, unless and until prejudice caused to the accused by non-production of the seal is shown, the accused cannot seek any benefit on this score. Therefore, the findings recorded by learned trial Judge that the non-production of seal in the

Court has rendered the prosecution story doubtful, are also not legally sustainable.

32. Now if coming to the defence of the accused, the same is neither probable nor reasonable. It cannot be believed by any stretch of imagination that he was present at Kotla Nalah, where two groups of college students quarreled and as he was believed to be a student, hence apprehended in this case falsely. Interestingly enough, he belongs to village Jorna, P.O. Pulbahal, Tehsil Chopal, District Shimla, a far away place from Shamati in District Solan, what he was doing there that too during odd hours, he failed to explain.

33. True it is that the onus to prove its case against the accused is on the prosecution, however, in the given situation where the accused has admitted his presence at the place of occurrence, however, as per his version believing that he is one of the college students, allegedly quarreled at Kotla Nalah, hence implicated falsely, he was under a legal

obligation to have explained his presence during odd hours at that place. He, however, has failed to do so.

Therefore, the only inescapable conclusion would be that he was dealing in the business of charas and was present there in connection with his business. ◇

34. In view of what has been said hereinabove, we find the present a case, where the prosecution has successfully pleaded and proved that on 16.3.2009 at 10.30 p.m., during search of the bag, the accused was carrying on his shoulder, charas weighing 650 grams was recovered from his conscious and physical possession. The prosecution as such has proved its case against the accused beyond all reasonable doubt. The impugned judgment, therefore, is the result of misappreciation of the evidence available on record and also the law applicable in a case of this nature, hence not legally sustainable. We, therefore, allow the present appeal and convict accused Surrender Kumar for the commission of the offence punishable under Section

20 of the Act. The impugned judgment as such is quashed and set aside. Let him to surrender to his bail bonds and produced in this Court on 13.6.2017, for being heard on the quantum of sentence. Production warrant be issued accordingly.

Judgment to continue.

(Dharam Chand Chaudhary)
Judge

May 22, 2017 (ps)

(Vivek Singh Thakur)
Judge.

High Court of H.P.