In the High Court of Himachal Pradesh, Shimla.

Cr. Appeal No.389 of 2022

(A) Narcotic Drugs and Psychotropic Substances Act, 1985 Section

20(b)(ii)(C)–Recovery of Charas–Commercial quantity–Non- production of the seized contraband during the trial–The appellant

was convicted under Section 20(b)(ii)(C) of the Act for possessing 2

Kg of Charas–Appeal against conviction–Contention that the non- production of case property before the Trial Court is fatal for

prosecution case–Held–The case property has to be produced physically and proved in accordance with law by either making it as mark or exhibit–Further held–Test memos not prepared at the time of recovery but on the next day-The preparing of seizure memo at a place other than scene of recovery makes the seizure defective and more it creates a serious doubt–Conviction set aside–Appeal allowed. (Paras 22, 25 and 29)

(B) Narcotic Drugs and Psychotropic Substances Act, 1985 Section 20(b)(ii)(C)–Non-production of the seized contraband during the trial– To Proof–Held–It is incumbent upon the prosecution to establish that the contraband substance was seized from the appellant–The best way to prove such seizure to produce contraband material before the learned trial Court and mere oral evidence to establish seizure of the contraband substance from the appellant was not sufficient. (Para 24)

Cases referred:

(1) Jitendera vs. State of M.P. (2004) 10 SCC 562.

(2) Ashok alias Dangra Jaisal vs. State of Madhya Pradesh, (2011) 5 SCC 123.

(3) Gorakh Nath Prasad vs. State of Bihar (2018) 2 SCC 305.

(4) Mangilal vs. State of Madhya Pradesh, 2023 INSC 634.

(5) Yash Pal alias Sonu vs. State of H.P., Latest HLJ 2023 (HP)(2) 1375. Parties represented by:

For the Petitioner: Mr. Ajay Kochhar, Senior Advocate with Mr. Varun Chauhan, Mr. Anubhav Chopra and Mr. Bhairav Gupta, Advocates. For the Respondents: Mr. Ashwani Pathak, Senior Advocate with Mr. Dev Raj, Advocate.

Justice Tarlok Singh Chauhan, Judge:- The appellant/convict has filed the instant appeal against the judgment and order dated 29.9.2022 passed by the learned Special Judge, Mandi, whereby the appellant has been convicted and sentenced to undergo rigorous imprisonment for

a period of 12 years and to pay a fine of Rs.1,20,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of 2 years and 2 months for the commission of offence punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985(in short, “the Act”).

2. Briefly stated, the case of the complainant, is that secret information, Ext. PW2/A was received by PW-2 Ashok Kumar Prajapati on 07.12.2018 that one person namely Murari Lal, appellant herein, would be carrying a considerable quantity of charas kept in a light pink and grey coloured bag and boarding bus from Anni bus stand to deliver the charas to someone near Aut tunnel.

3. This information was placed before PW-6 Ashish Kumar Ojha and accordingly, a team consisting of Ashok Kumar Prajapati, Sepoy Mohit, Sepoy Surjeet Singh, Sepoy Parvender Singh PW-5, driver Kulwinder Singh and Ashish Kumar Ojha was constituted.

4. The NCB team reached Anni bus stand at 11:00 am and mounted surveillance. The appellant boarded the bus bearing registration No. HP-06A-9314 with the light pink and grey coloured backpack.

5. The NCB team followed the bus and when the bus reached the Aut tunnel at 4:45 pm, the appellant got off the bus and waited for someone. However, when no one came, the appellant tried to board the bus. The NCB team cordoned him and the team member introduced themselves.

6. Thereafter, the NCB team shared the secret information with the

appellant. The backpack of appellant was checked and during the search, a black- coloured substance was recovered from the bag. A small quantity was tested with

a drug detection kit and the test was found positive for charas. Charas was weighed with the help of an electronic weighing scale and the same was found to be 2 kg.

7. The charas was transparent heat sealed in polythene and kept in a white cloth bag after sealing it with seal impression of NARCOTICS CONTROL BUREAU CHANDIGARH (4) and marked as Lot A. Packing material along with backpack was kept in another cloth bag and it was sealed with three impressions

of NARCOTICS CONTROL BUREAU CHANDIGARH (4), it was marked as Lot P. These were seized vide seizure memo Ext. PW2/B by Ashok Kumar Prajapati and Ashish Kumar Ojha and Parvinder Singh were its witnesses. The appellant also put his signature on the memo. The appellant was brought to the office of NCB Mandi.

8. A notice under Section 67 of the Act was served upon him. Crime No. 18/2019 was obtained from Superintendent NCB Chandigarh by Ashok Kumar Prajapati. The appellant made a statement under Section 67 of the Act, Ext. PW6/A, wherein he confessed his guilt and stated that he was going to deliver the charas to one Leelu.

9. The appellant was arrested vide memo Ext. PW2/D. His search was conducted and a memo, Ext. PW2/E was prepared. Information regarding the arrest of the appellant, Ext. PW2/F was given to his brother. Ashok Kumar Prajapati filed an application, Ext. PW2/H for conducting the medical examination of the appellant and obtained the MLC, Ext. PW2/I.

10. Ashok Kumar Prajapati filed an application, Ext. PW2/J for drawing the sample before learned JMFC Court No. 2 Mandi. The Court prepared the inventory Ext. PW2/K. Two samples were drawn each weighing 26 grams and marked as A1 and A-2. The samples were kept in the envelope after putting them in a plastic packet. Each envelope was sealed with four seals of JMIC Court No. 2 Mandi. The remaining bulk parcel was sealed with five seals JMIC Court No. 2 Mandi. Photographs Ext. PW2/L1 to Ext. PW2/L8 were taken. The Court passed an order Ext. PW2/M. A test memo Ext. PW2/N was prepared in triplicate. The sample seal Ext. PW2/O was taken on a separate piece of cloth, which was signed by, learned JMFC Court No. 2 Mandi. A report under Section 57 of the Ext. PW2/B was prepared which was handed over to Ashish Kumar Ojha. Ashok Kumar Prajapati handed over the parcels bearing Lots A and P and samples A-1 and A-2 to Ashish Kumar Ojha. Memo Ext. PW2/Q was prepared.

11. Ashish Kumar Ojha sent the sample marked as A-1 for the chemical test to Central Revenue Control Laboratory and obtained the receipt (Ext. CW1/A). The receipt was handed over to Ashish Kumar Ojha, who deposited the remaining parcel namely Lot A, Lot P and sample A-2 with Malkhana In-charge Kuldeep Sharma PW-7, who in turn issued the Godown receipt Ext. PW6/B and made the entries in the malkhana register.

12. The sample was analyzed by Dr Purnima Mishra PW-1 and Smt. Rekha Saxena. It was found to be positive for charas. Report Ext. CW1/B was issued.

13. After completing all codal formalities, the challan was presented before the Court and on finding sufficient evidence, charge was framed against the appellant under Section 20 of the Act, to which he pleaded not guilty and claimed trial.

14. In order to prove its case, the complainant examined as many as 8 witnesses. Statement of the appellant was recorded under Section 313 Cr.P.C., wherein he denied every incriminating circumstance against him and claimed false implication.

15. The learned Special Judge, after evaluating the oral as well as documentary evidence, convicted and sentenced the appellant, as aforesaid. 16. It is vehemently argued by Mr. Ajay Kochhar, learned Senior Advocate, assisted by Mr. Anubhav Chopra, Advocate, that the findings recorded by the learned Special Judge are totally perverse and being contrary to evidence on record are liable to be set aside and therefore the appellant deserves honourable acquittal.

17. On the other hand, Mr. Ashwani Pathak, learned Senior Advocate assisted by Mr. Dev Raj, Advocate, would argue that the appellant has been convicted and sentenced for serious and heinous crime and, therefore, such findings being based on evidence on record warrant no interference and therefore, the appeal be dismissed.

18. We have heard the learned counsel for the parties and have also gone through the records of the case carefully.

19. As observed above, the complainant in order to prove its case examined witnesses. However, initially only 7 witnesses were cited and examined i.e. PW-1 to PW-7 and thereafter an application was preferred by the complainant under section 311 Cr.P.C to place on record godown register and destruction certificate of the contraband, which was allowed vide order dated 12.08.2022. This application was in fact filed after the appellant had been examined under Section 313 Cr. P.C. It was then that PW-8 Sepoy Lokinder Kumar was examined only for the purpose of placing on record the godown register and destruction certificate.

20. The learned senior counsel for the appellant has argued the following points:-

(i) The case property not produced in the court.

(ii) Absence of link evidence.

(i) The case property not produced in the court

21.1 It is case of the complainant itself that initially two lots i.e. LOT A and LOT P were prepared. In lot A, the alleged contraband was sealed and in Lot P, the packing material was sealed. The complainant during the proceedings under section 52-A of the Act produced the case property before the learned JMIC, Mandi for certification in compliance to the provisions contained in this section. Two samples each of 26 grams were drawn from the bulk parcel and marked as sample A-1 and A-2. Sample A-1 was sent to CRCL, New Delhi and the remaining bulk along with sample A-2 was handed over to PW-2 Ashok Kumar Prajapati. The bulk contraband was destroyed as per rules as is evident from the destruction certificate placed on record Ext.PW-8/?.

21.2 Further, it is not in dispute that during the entire course of the trial, the case property was not produced and only packing material i.e. backpack Ext P-2 and carry bag Ext P-3 were produced. There were as many as three spot witnesses, as per the complainant, comprising of PW-2 Ashok Kumar Prajapati, PW-5 Parvinder Singh, Sepoy and PW-6 Ashish Kumar Ojha.

21.3 As a matter of fact PW-6 when cross-examined admitted that the case property had not been shown to him in the court, relevant portion whereof reads as under:- "It is correct that I have not seen the LOT-A and sample parcel A-1 & A-2 in the court."

21.4 To the similar effect is statement of PW-5, who states "It is correct that parcels were not seen by me in the court."

21.5 As observed above, the case property was also not shown or produced during the deposition of PW-2 Ashok Kumar, the seizing officer.

21.6 In addition to the aforesaid, it also needs to be noticed that at the time of recording of the statement of the appellant under Section 313 Cr. P.C., the appellant was never confronted with the case property as it was never produced before the court.

21.7 It also needs to be noticed that it is only in the statement of PW-8, who was cross-examined subsequently, that there is a reference that he had brought the samples which as per the observation of the court were seen and returned.

21.8 However, statement of PW-8 does not carry case of the prosecution any further, rather is of no help for the following reasons:-

a) During the entire trial, the case property was not produced in the court,

more particularly, while examining spot witnesses i.e. PW-2, PW-5 & PW- 6.

b) PW-8, who had subsequently been examined and alleged to have brought samples, was never served for that purpose as the application filed and allowed by the Court was for specific purpose i.e. for placing on record the godown register and the destruction certificate.

c) The alleged samples were never marked or exhibited by the court.

d) Even when the samples were produced, there was no observation of the court that the case property was bearing samples A-1 & A-2 and sealed with the seal of JMIC, Mandi to connect the same with the present case.

e) PW-8 is an alien to the case as he has never dealt with the case property and the only person who could have identified and certified the case property could be at best PW-2 Ashok Kumar Prajapati or the learned JMIC who remained associated during proceedings of section 52- A of the Act when the samples were drawn.

f) PW-2 never certified the alleged sample brought by PW-8 to be the same samples as had been drawn during the proceedings before the Magistrate under Section 52-A of the Act. Even otherwise, the samples could not have been produced on record in view of the order passed by the court under section 311 Cr.P.C and for this purpose, the same were never marked or exhibited and it is for this reason that PW8 was never cross-examined regarding samples.

g) The complainant has not been able to furnish any explanation on record as to how PW-8 landed at Mandi and deposed before the Court when admittedly he had not been sent to Mandi along with samples and the other records but was sent from Chandigarh to Amritsar as finds mention in authority letter PW-8/C.

22. It is more than settled the case property has to be produced physically and proved in accordance with law by either making it as mark or exhibit. In coming to such conclusion, we are duly supported by the judgments of the Hon'ble Supreme Court, which read thus:

23.1 In Jitendera vs. State of M.P. (2004) 10 SCC 562, the Hon'ble Supreme Court held as under:-

"5. The evidence to prove that charas and ganja were recovered from the possession of accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW7),

Angadsingh (PW8) and sub-Inspector D.J. Rai (PW6), there is no independent witness as to the recovery of the drugs 12 from the possession of accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect it with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused. Although, the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, "nonproduction of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that

these commodities should be produced." The High Court relied on Section 465 of the Cr. C.P. to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused. 6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the prossession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchanama is nothing but a document written by the concerned police officer. The suggestion made by the defence in cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the Investigating Officer was also not examined. Against this background, to say that, despite the pancha witnesses having turned hostile, the non-examination of the Investigating Officer and non- production of the seized drugs, the conviction under the NDPS, Act can still be sustained, is far fetched."

23.2 In Noor Aga vs. State of Punjab, (2008) 16 SCC 417, the Hon'ble Supreme Court held as under:-

"89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-`-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan

[(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.

91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

92. Omission on the part of the prosecution to produce evidence in this behalf must be linked with second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court. Respondents contended that the same had been destroyed. However, on what authority it was done is not clear. Law requires that such an authority must flow from an order passed by the Magistrate. Such an order whereupon reliance has been placed is Exhibit PJ; on a bare perusal whereof, it is apparent that at no point of time any prayer had been made for destruction of the said goods or disposal thereof otherwise. What was necessary was a certificate envisaged under Section 110(1B) of the 1962 Act. An order was required to be passed under the aforementioned provision providing for authentication, inventory etc. The same does not contain within its mandate any direction as regards destruction.

95. The High Court proceeded on the basis that nonproduction of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution. Even for the said purpose the retracted confession on the part of the accused could not have been taken recourse to. 96. The last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin were also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52A of the Act. 97. Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect of the prosecution's endeavour to prove the fact of possession of contraband from the appellant. This aspect of the matter has been considered by this Court in Jitendra v. State of U.P. [(2004) 10 SCC 562], in the following terms : "In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly

where the offence is punishable with a stringent sentence as under the NDPS, Act."

23.3 To the similar effect is the judgment passed by the Hon'ble Supreme Court in Ashok alias Dangra Jaisal vs. State of Madhya Pradesh, (2011) 5 SCC 123.

23.4 In Gorakh Nath Prasad vs. State of Bihar (2018) 2 SCC 305, the Hon'ble Supreme Court held as under:- "6. In the facts of the present case, the independent witnesses with regard to the search and seizure, PW-2 and PW-3, having turned hostile deposing that their signatures were obtained on blank paper at the police station, the mere fact of a FSL Report (Exhibit 8), being available is no confirmation either of the seizure or that what was seized was Ganja, in absence of the production of the seized item in Court as an exhibit. The nonproduction of the seized material is therefore considered fatal to the prosecution case. The issue whether there has been compliance with Sections 42 and 50 of the NDPS Act loses its relevance in the facts of the case."

23.5 The Hon'ble Supreme Court, in Mangilal vs. State of Madhya Pradesh, 2023 INSC 634, after relying upon the judgments in Jitendra and Noor Aga (supra), held that in the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantity of contraband was seized from the possession of the accused. The best evidence would have been the seized material which ought to have been produced during the trial and marked as material object.

24 This Court in its judgment, authored by one of us Justice Tarlok Singh Chauhan, reported in Yash Pal alias Sonu vs. State of H.P., Latest HLJ 2023 (HP)(2) 1375, while dealing with an identical proposition, where the case property was not produced, held as under:-

23. What is more shocking is that the prosecution even failed to produce the original representative samples S1 to S7 before the court. Once that be so, obviously, the prosecution has failed to connect the contraband produced in the Court with the appellant and has further failed to produce that any contraband much less poppy husk was recovered from the appellant.

24. As per the case of the prosecution, the learned JMIC had drawn seven samples marked as S1 to S7. PW7 of Sunny Kumar took the samples that were marked as S1 to S7 to the FSL and thereafter PW10 brought the sample back to rt the Malkhana. However, the prosecution has failed to produce the samples in Court marked as S1 to S7 and has only placed on record the report of the FSL. It is more than settled that the primary evidence is the samples itself, which have not been produced before the Court and thereby virtually vitiate the entire proceedings initiated against the appellant, where the primary evidence is available and has been withheld, the secondary evidence is to be ignored.

25. It is incumbent upon the prosecution to establish that the contraband substance was seized from the appellant. The best way to prove such seizure to produce contraband material before the learned trial Court and mere oral evidence to establish seizure of the contraband substance from the appellant was not sufficient.

26. Shri J. S. Guleria, learned Deputy Advocate General, would state that the report of the chemical examiner Ex. PX is available on record, which show that the contraband was poppy husk or churapost. However, we find no merit in such contention as it was necessary to establish that the contraband substance was seized from the appellant and the best way to

prove such seizure was to have produced the contraband material before the learned trial Court and mere oral evidence to establish seizure of the contraband substance of from the appellant was not sufficient.

27. In coming to such conclusion, we are duly rt supported by the observations made by the Hon'ble Supreme Court in Vijay Jain vs. State of Madhya Pradesh, 2013 (14) SCC 527, more particularly, paras 10 to 12 thereof, which reads as under:-

10. On the other hand, on a reading of this Court's judgment in Jitendra's case , we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in the case of Ashok , this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the Appellant.

11. In the present case, finding of the trial court that the seized contraband goods were produced in a suitcase is contrary to the evidence of P.W. 11, which is of to the following effect:

81. Note-A big suit case from the Store materials on which No. 466/05 is written has rt been received in a white cloth along with seal of the sealing material. In this the lock is of Nos. and the lock is not getting open because of this A.G.P. Is directed to call some technical person for opening the lock, on this A.G.P. Had called Shri Shakoor who expressed that the lock of Nos. and cannot be opened, it can be broken. In the case, the evidence material is important and therefore it was directed to break the lock, the lock was opened. In the suit case on the opening a big packet

wrapped in cloth was found but the cloth in torn and blue colour polythene is being seen in which clothes are there. The cloth which is rolled on blue colour of polythene there is no seal visible on it, nor any description is being seen, because the cloth is damp and has been in contaminated condition and is torn and no note is marked on it. In the polythene there are 5 pants and 5 shirts which are in wet condition. 111. Today I cannot say that in what colour bag the rest of the substance was packed in the bag. The material which was seized from Vijay Jain out of it two samples 25-25 gms. were made and marked B1 and 32 which were shown to the witness when he said that they were taken out from the material found with Vijay Jain on site. No other packet except the two samples and rest of material were made on the site. The said both the of packets which have been submitted in the court are sealed and on them the seizure chit is not affixed showed the B1 B2 packet and asked that the seal of Police Station is affixed then the witness said the seal of Police Station is affixed then the witness said that it is the seal of Tehsildar Indore. Leaving aside rest of the substance and mobile the other seized material

from Vijay is submitted in the Court. This is true that I had not given the mobile for sealing to the Incharge of Stores. Today I cannot say that where that mobile is.

Thus the only evidence before the Court was that in the suitcase in which the contraband goods were allegedly kept when opened, there was only a big packet wrapped in cloth and the cloth was torn and there was a blue coloured polythene in which there were clothes. There is no mention in the evidence of P.W. 11 of any brown sugar having been found in the suit case. There is, however, evidence that samples were prepared of 25.25gms which were shown to the witnesses and were marked B1 B2 but we find that P.W. 3 has stated before the Court in his examination that these samples were not prepared in his presence and P.W. 2 has stated before the Court that the witnesses were not taken to the site where the materials were seized.

12. We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the Appellants and as the evidence of the witnesses (PW 2 and PW3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the Appellants, the judgment of the trial court convicting the Appellants and the of judgment of the High Court maintaining the conviction are not sustainable.

(ii) Absence of link evidence.

25 (a)(i) As per the panchnama Ext PW-2/G, the inventory submitted to the

magistrate while conducting proceedings under section 52-A of the Act, Ext PW- 2/K and in the order of the Magistrate Ext PW-2/M, the seal used was NARCOTIC

CONTROL BUREAU CHANDIGARH (4), but strangely enough PW-2, Seizing officer, in his deposition has stated that NCB, Mandi was having only one seal i.e. Narcotic Control Bureau (4) which was used in the cases as is evidently clear from the following portion of his statement:-

"The office of NCB, Mandi has only one seal Narcotic Control Bureau (4). Same seal was used in other cases."

(ii) There is no explanation on record that the NCB, Mandi was having seal of Narcotic Control Bureau (4), which otherwise ought to have been embossed on the alleged contraband.

25(b) The case property, as per the case of the complainant, was kept by the Superintendent, but then he was member of the raiding party and deposited the case property in the Malkhana at Chandigarh only on 11.12.2018 with PW-7 Kuldeep Sharma. Apart from this, the samples allegedly sent on 09.12.2018 were also handed over to PW-3 by PW-6 by taking out the same from his almirah. There is no explanation on record as to why the case property was not immediately deposited in the malkhana of the NCB at Chandigarh or in the Malkhana of the Police Station, Mandi so as to rule out any possibility of tampering.

25 (c) PW-2 is emphatic in his statement before the Court that the the case was investigated by Investing Officer, Vinay Singh and he was only the seizing officer and on the contrary, Vinay

Singh while appearing as PW-4 in his cross-examination clearly stated that neither he had conducted any other investigation nor had any personal knowledge about the case.

25 (d) Test Memos admittedly were not prepared at the time of the recovery of the contraband and were prepared on the next day i.e. 08.12.2018 and above all, the place of recovery was changed from Aut tunnel to Aut which admittedly as per the statement of PW-2 is at a distance of 3 kms. The preparing seizure memo at a place other than scene of recovery makes the seizure defective and more it creates a serious doubt.

25 (e) It is the specific case of the complainant that after receiving the information that the appellant would be carrying charas and boarding a bus from

Anni bus-stand, the NCB officials after constituting a raiding party headed by PW- 6 Superintendent chased the bus and apprehended the appellant at Aut tunnel

after travelling 4-5 hours journey. But strangely enough, no effort has been made by the NCB to establish that the appellant had actually travelled in the bus. This assumes importance as per the case of the complainant the appellant was personally searched vide memo Ext. PW-2/D and no bus ticket was recovered from his possession and this was admitted even by PW-2 when he states that "I had not recovered the bus ticket during the jamatalashi of the accused."

25 (f)(i) Besides the aforesaid, there are other factors which create serious doubt regarding the appellant having boarded the bus as alleged by the prosecution.

(ii) Firstly, no witness could disclose the route of the bus.

(iii) Secondly, no document was placed on record that the bus No. HP- 06A-9314, reference whereof was there on record actually plied on the

date and the route as claimed by the complainant.

(iv) Thirdly, neither the bus driver nor its conductor or any one of its passengers has been associated to establish that the appellant had actually travelled in the bus.

(v) Fourthly, PW-5 Parvinder Singh Sepoy when crossexamined demolished the case of the complainant by stating that "I had not seen the accused boarding the bus. I cannot tell its route. I cannot tell the distance between Anni and Aut. The bus had stopped on the way to Aut. I cannot tell the number and names of stoppages."

(vi) Fifthly, in the seizure memo, placed on record, Ext. PW2/B, there is no mention of seal and preparation of parcels.

(vii) The complainant has placed on record, Ext. PW2/P to show compliance of Section 57 of the Act and the same as per its case was sent by PW-2 to PW-6, but surprisingly, there is no mention of preparation of LOT-A, LOT-P, Sample A-1, Sample A-2 as well as the seal used for the same. The complainant has also not placed on record any evidence establishing the fact that the police officials actually travelled in the manner as alleged by it.

(viii) From the conjoint reading of statement of PW-2 Ashok Prajapati and PW-6 Ashish Kumar Ojha, it is revealed that their movement could have

been ascertained from the departure and arrival entries and from the log- book. As regards PW-2, he has categorically stated that "An entry

regarding the arrival and departure of the officials is made in the office. I have not annexed the entry to the present case file." As regards PW-6, Ashish Kumar Ojha, he states that "I was not maintaining the movement register. Self-stated that I had the log book of the vehicle. I have not seen the log book today in the court."

(ix) There is no explanation whatsoever placed on record for placing on record the departure and arrival entries or the log book on record to establish the fact.

25 (g) Even the documents placed on record creates a serious doubt regarding the case of the complainant. As per the case set up by it, the appellant after being apprehended was was brought to the office of NCB at Mandi, where at 7.00 P.M. they started writing the panchnama, which as per Ext. PW-2/J started from 7.00 P.M. till 11:30 P.M., but in case the other documents are perused, the case set up by the complainant appears to be doubtful. The complainant has placed on record one notice Ext PW-2/C that has been issued to the appellant to appear before PW-2 at 7:10 P.M. on 07.12.2018 for getting his statement recorded under section 67 of the Act which as per statement placed on record was written by the appellant from 7:30 P.M. to 9:50 P.M. However, there is no explanation as to how the same person and the appellant could have been present during two proceedings allegedly conducted by them.

This assumes importance because arrest memo PW-2/D shows that he was arrested on 07.12.2018 at 10.00 P.M.

25 (h) In addition to the above, it is intriguing to note that even the search and seizure of the contraband from the appellant took place before 5.00 P.M., but then he was ultimately arrested vide arrest memo, Ext. PW2/D on 7.12.2018 at 10.00 P.M i.e. after five hours.

26. Learned Special Judge has erred in ignoring that the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely being carried away by the heinous nature of the crime or the gruesome manner in which the same was found to have been committed. Mere suspicion, however strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of alleged commission of a crime and graver the charge is, greater should be the standard of proof required.

27. The learned Special Judge has further erred in not considering the fact that the courts while dealing with criminal cases at least should constantly remember that there is a long mental distance between "may be true" and "must be true" and this basic and golden rule only helps to maintain the vital distinction between "conjectures" and "sure conclusions" to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive

appreciation of all features of the case as well as quality and credibility of the evidence brought on record.

28. Unfortunately, the learned Special Judge has not at all appreciated what has been discussed by us and simply has been swayed by irrelevant considerations.

29. In view of the aforesaid discussions and in the given facts and circumstances, it can conveniently be held that the prosecution has not been able to prove its case against the appellant beyond reasonable doubt. Therefore, the impugned judgment and order of conviction and sentence passed by the learned Special Judge are set aside. Consequently, the appellant, in the instant case, is ordered to be released immediately, if not required in any other case.

30. The Registry is directed to prepare release warrant of the appellant. In view of the provisions of Section 437A Cr.P.C., the appellant is directed to furnish a personal bond in the sum of Rs.25,000/- with one surety of the like amount to the satisfaction of the learned trial court, which shall be effective for a period of six months with a stipulation that in an event of an SLP being filed against this judgment or on grant of the leave, the appellant on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

31. The instant appeal is allowed in the aforesaid terms. Pending application(s), if any, also stands disposed of.

32. Send down the records.