

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 14.05.2015
% **Judgment delivered on: 15.07.2015**

+ **CRL.A. 1023/2010**

ASHOK KUMAR Appellant
Through: Mr. Biswajit Kumar Patra, Advocate
versus

THE NARCOTICS CONTROL BUREAU Respondent
Through: Mr. B.S. Arora & Mr. Mohit Arora,
Advocates.

+ **CRL.A. 794/2010**

TRILOKI SINGH Appellant
Through: Mr. M. Shamikh, Advocate.
versus

THE NARCOTICS CONTROL BUREAU Respondent
Through: Mr. B.S. Arora & Mr. Mohit Arora,
Advocates

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. These appeals are directed against the common judgment dated 23.04.2010 passed by Sh. Sanjiv Jain, Special Judge, NDPS in S.C. No. N-104/08, convicting Appellant Ashok Kumar and Appellant Triloki Singh for the offences punishable under Section 20 (b) (ii) C and Section 29 read with

Section 20 (b) (ii) C of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as 'the Act') and the order on sentence dated 23.04.2010, sentencing them to undergo rigorous imprisonment for a period of ten years and to pay fine of Rs. 1,00,000/- and in default thereof, to undergo simple imprisonment for a period of six months for offence punishable under Section 20 (b) (ii) C of the Act. Further, they were sentenced to undergo rigorous imprisonment for a period of ten years and to pay the fine of Rs. 1,00,000/- and in default thereof, to undergo simple imprisonment for a period of six months for offence punishable under Section 29 read with Section 20 (b) (ii) C of the Act. Both the sentences were directed to run concurrently. The appellants were given the benefit of Section 428 Cr.P.C.

2. The brief facts as taken note of in the impugned judgment are that a secret information was received by R.R. Kumar (PW-2) Superintendent, NCB that three persons namely Ashok Kumar, Ajay Pratap and Triloki Singh were likely to come near Dr. Karni Singh Shooting Range at Suraj Kund, Tuglakabad Road to deliver a huge consignment of Charas to some trafficker on 22.06.2006 at around 1400 hours in a black Scorpio with the registration number UP 31K 4455. The information was put up before the Zonal Director.

3. Sh. R.R. Kumar (PW-2) called Sh. Ajay Kumar (PW-1), I.O. and told him about the information and issued search warrant in his favor. A team under Ajay Kumar (PW-1) proceeded to the spot and reached there at 1300 hours. On the spot, one Madan Lal Aggarwal was joined as an independent witness. At about 1400 hours, they noticed the Scorpio which came from the

side of Suraj Kund. It stopped at the gate of the shooting range, being driven by the appellant Triloki Singh. Co-accused Ajay Pratap Singh and appellant Ashok Kumar were on the rear seat. The persons on the rear seat got down from the Scorpio and waited for someone. When both of them sat in the vehicle, it started moving towards Delhi, the team intercepted the vehicle and encircled all of them. The team told them about the information and gave them their introduction and served upon them notices under Section 50 of the Act, apprising them of their legal right to be searched before a gazetted officer or a magistrate, on which they recorded their refusal. They were also shown the search warrant. On search of the Scorpio, nine white plastic bags which contained black colour solid substance in packets, duly wrapped with brown / yellow colour tape, weighing 246.00 kilograms were recovered. A small quantity from all the bags was taken out and tested with the field testing kit which gave positive result for Charas. The bags were given mark A to I and weighed with the help of spring balance. Two samples of 25 grams each were taken out from each bag and given corresponding mark A1, A2 to I-1, I-2. The bags and the samples were sealed with the seal of 'NARCOTICS CONTROL BUREAU DZU' using paper slips. Test memo in triplicate was prepared on which same seal impression was appended. A temporary RC and insurance policy was also recovered from the dash board of the vehicle and the case property was seized.

4. The prosecution claimed that summons under Section 67 of the Act were issued to all of them to appear in the NCB office where they tendered their statements admitting their role and their complicity in trafficking of

Charas. They were arrested. Statement of panch witness was also recorded. The seizing officer and the arresting officer submitted their reports under Section 57 of the Act to the senior officers. The case property was deposited in the malkhana. The samples along with the forwarding letter and test memo were sent to CRCL through Bhavnesh Kumnar Sepoy. As per report dated 28.08.2006 the samples mark A-1, B-1, C-1, D-1, E-1, F-1, G-1, H-1 and I-1 were found to be of Charas with its THC content 6.8, 6.0, 6.5, 5.9, 7.0, 6.5, 6.4, 6.7 and 6.5 respectively. After investigation, complaint was filed against the accused persons under Section 20 and 29 of the Act.

5. The charge under Sections 20 (b) (ii) C and 29 of the Act was framed against the appellants. Co-accused Ajay Pratap Singh was also charged under Section 25 of the Act. During the course of trial, co-accused Ajay Pratap Singh absconded and was declared a proclaimed offender on 07.01.2009. Trial proceeded against the two appellants. They pleaded “not guilty” and claimed trial.

6. The following witnesses were examined by the prosecution to establish its case:

- i. PW-1: Sh. Ajay Kumar, Investigating Officer/Intelligence Officer, NCB, DZU, N. Delhi
- ii. PW-2: Sh. R.R. Kumar, Assistant Enforcement Officer, Enforcement Directorate HQ office, N. Delhi
- iii. PW-3: Sh. P.C. Khanduri, Intelligence Officer/Malkhana incharge

- iv. PW-4: Sh. Akhilesh Kumar Mishra, Intelligence Officer, NCB, DZU, N. Delhi
- v. PW-5: Sh. Manoj Kumar Aggarwal, Intelligence Officer, NCB, DZU, N. Delhi
- vi. PW-6: Sh. S.K. Mittal, Asst. Chemical Examiner, CRCL, N. Delhi
- vii. PW-7: Sepoy Bhuvnesh Kumar
- viii. PW-8: Sh. K.K. Singh, Lab Asst., CRCL, N. Delhi
- ix. PW-9: Sh. H.K. Pandey, Field Officer, Cabinet Secretariat, Government of India, N. Delhi
- x. PW-10: Sh. Avnish Kumar, Intelligence Officer, NCB, DZU, N. Delhi

7. Thereafter, statements of the appellants were recorded under Section 313 Cr.P.C. Both the appellants denied all allegations and stated that they were being falsely framed. They stated that no notice under Section 50 of the Act was given and all the documents were manipulated as per the convenience of the department. Appellant Ashok Kumar denied the knowledge of the search of the vehicle, claiming that he was not present at the spot and no recovery was affected from him. He stated that he did not know co-accused Ajay Pratap Singh and appellant Triloki Singh. He claimed he was forced to sign on blank papers. He further stated that no case under the Act was pending against him and only a case under Section 489 IPC was pending. Appellant Triloki Singh stated that at the relevant time, co-

accused Ajay Pratap was driving the vehicle who had called him in the office where he was falsely framed. He further stated that it was disclosed by co-accused Ajay Pratap Singh to the NCB officials that he was the driver. Co-accused Ajay Pratap Singh had guards but on the relevant date of arrest, the guards were not present. He admitted to the fact that the temporary RC and insurance policy was recovered from the dash board of the car and was seized vide memo Ex. PW-1/G. He had also received summons. Both the appellants chose not to lead any defence evidence.

8. The learned Special Judge convicted the appellants and sentenced them in the terms noted hereinabove.

9. The panch witness Madan Lal Aggarwal was not examined during the trial, as he was not traceable. However, he was subsequently traced and examined as a prosecution witness when the trial of the co-accused Ajay Pratap Singh proceeded. As noticed above, Ajay Pratap Singh had earlier absconded, and his case was separated. Subsequently, he surrendered and the trial in his case was undertaken. During pendency of these appeals the fact that Madan Lal had been traced and examined as a witness during the trial of Ajay Pratap Singh was brought to the notice of this Court. Accordingly, this Court vide order dated 14.10.2014 directed that Madan Lal be examined by the learned Special Judge, NDPS, New Delhi in these two cases as well. Accordingly, Madan Lal was examined as PW-11 and was thereafter cross-examined as well. The testimony of Madan Lal has been placed on record and has been relied upon during the course of arguments.

10. Learned counsels for the appellants submit that there is discrepancy with respect to the secret information (Ex. PW-2/A) recorded by R.R. Kumar (PW-2), and the recovery memo (Ex. PW-1/G) prepared by Ajay Kumar (PW-1) as well as his statement. The secret information (Ex. PW-2/A) disclosed the names of three persons that they would be coming to Dr. Karni Singh Shooting Range in a Black Scorpio (UP-31K-4455) with a huge consignment of Charas. Ajay Kumar (PW-1) deposed that the secret information (Ex. PW-2/A) was received by R. R. Kumar (PW-2), who did not give him a copy of the same. The prosecution witnesses who were party to the raid and seizure proceedings deposed that three persons had come in the Scorpio. Ajay Kumar (PW-1) deposed as follows:

“I was called by Sh. R.R. Kumar, Suptd, NCB and he discussed with me a secret information received by him that three persons namely Ajay Pratap Singh, Triloki Singh and Ashok Kumar Jaiswal are likely to come today i.e. 22.06.06 to deliver huge quantity of hashish at Doctor Karni Singh Shooting range at Surajkund, Tughlagabad by black colour Scorpio Jeep bearing registration No. UP-31K-4455.”

11. However, in his cross-examination he deposed as follows:

“It is correct that in recovery memo which is prepared by me I had mentioned the fact “that two persons Ajay Pratap and Ashok Kumar Jaiswal are likely to come to Dr. Karni Singh Shooting Range”. ”

12. It is argued that there is variation in the statements of Ajay Kumar (PW-1), since he initially mentioned three persons would be coming in the Scorpio vehicle, but later, he recorded that as per the secret information (Ex. PW-2/A), two persons would be coming in the Scorpio. Furthermore, in the

recovery memo (Ex. PW-1/G) he recorded that secret information was received in the office of the Superintendent that two persons viz. Ajay Pratap and Ashok Kumar are indulging in the business of obtaining Charas from Nepal and supplying the same in Delhi and various other States. The said recovery memo (Ex. PW-1/G) does not mention the name of Triloki Singh as the driver of the vehicle. R.R. Kumar (PW-2) in his examination-in-chief deposed along the same lines as Ajay Kumar (PW-1). He, *inter alia*, stated as follows:

“the secret information is Ex. PW2/A which bears my signature at point A and that of the Zonal Director at point B. I can identify the signature of the zonal director as I have seen him signing on many official documents during my tenure.”

13. Moreover, Madan Lal (PW-11) stated that Ajay Pratap was sitting on the driving seat, but the case of prosecution is that Triloki was driving the vehicle. The recovery memo (PW-1/G) as well as the testimonies of Ajay Kumar (PW-1) and R. R. Kumar (PW-2) show material discrepancies. In addition to that, the said discrepancies suggest that Section 42(1) of the Act was not complied with. The lacunae in the investigation done by the Narcotics Bureau casts a doubt over the whole recovery proceedings conducted.

14. On the aspect of non-compliance of Section 41(2) of the Act, learned counsels submit that Ajay Kumar (PW-1) deposed that R.R. Kumar (PW-2), Superintendent authorised him to conduct the search, and constitute a search party to search the vehicle and to take any other necessary action. R.R. Kumar (PW-2) deposed that he had issued authorization of search (Ex. PW-1/A) in favour of Ajay Kumar (PW-1) with the direction to search the

vehicle. Search Authorization (Ex. PW-1/A) under Section 41(2) proves that the authorization is in favour of Ajay Kumar (PW-1) only to search the vehicle. Avnish Kumar (PW-10) arrested the Appellant Ashok Kumar and Manoj Kumar Aggarwal (PW-5) arrested the Appellant Triloki Singh without any authorization under the provisions of the Act. He places his reliance on *State of Punjab v. Balbir Singh*, (1994) 3 SCC 299. It is argued that the arrest of the appellant without any authorization is, thus, unlawful and in violation to the provisions of the Act.

15. It is further submitted that Sections 52 and 57 of the Act were not complied with. Ajay Kumar (PW-1) in his cross-examination stated that they did not deposit the case property in the nearest police station, and R.R. Kumar (PW-2) in his cross-examination stated that he did not tell his officers – who were entrusted with search authorization, to contact the local police station on the way. P.C. Khanduri (PW-3) deposed that a police station is situated in close vicinity of the place of apprehension. The police officers ACP and DCP are gazetted officers, and they were not contacted by the I.O. Akhilesh Kumar Mishra (PW-4) stated that he did not ask the I.O. to inform the local police station or to deposit the case property. Manoj Kumar Aggarwal (PW-5) in his cross-examination stated that they did not approach any Gazetted Officer after the notice was served. They also did not contact the nearest police station. It is argued that from the testimonies of the aforesaid prosecution witnesses, it emerges that none of them complied with the necessary provisions of the Act by depositing the case property in the nearest police station, or notifying about the arrest of the appellants. In this

regard, learned counsels place their reliance on **Balbir Singh** (supra) wherein it is held that:

“The provisions of Section 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the application of evidence regarding arrest or seizure as well as on merits of the case.”

16. On the aspect of non-compliance of Section 100(4) of Cr.P.C., learned counsels submit that Manoj Kumar Aggarwal (PW-5) stated that no efforts were made by them to rope in the public witness from the Dr. Karni Singh Shooting Range, which is about 5-10 meters away from the place of occurrence, or to get the respectable inhabitants of the locality as public witnesses. P.C. Khanduri (PW-3) deposed that during the stay of one hour, while waiting for the car, they did not enter in the premises of the shooting range. The appellants are entitled to benefit of doubt if, at a reasonable time of the day, the prosecution fails to join any credible public witness or fails to make any efforts to secure the same. As far as Madan Lal Aggarwal (PW-11) is concerned, the said witness does not satisfy the conditions as prescribed under Section 100(4) of the Cr.P.C. since the said witness is not a respectable inhabitant of the said locality, nor is he educated enough to understand English before signing the same. Although compliance of Section 100(4) Cr.P.C. is not mandatory in nature, endeavour should have been made to comply by it. The raiding team had sufficient time to acquire competent public witnesses, given that Dr. Karni Shooting Range was in

close vicinity. Any personnel from the Shooting Range could have been called to be a witness to the proceedings. The non-compliance of this provision may not, by itself, be sufficient to prove the innocence of the appellants; however, it brings the investigation and recovery proceedings in a cloud of doubt.

17. The learned counsels submit that the appellants were not in conscious possession of the contraband substance. It was for the prosecution to prove that the appellants had conscious possession of the contraband. The I.O., Ajay Kumar (PW-1) does not depose to this effect. He submits that no prosecution witnesses were examined on this point to prove the conscious possession of the contraband by the appellants. It is argued that the Learned Trial Court exceeded its jurisdiction while observing in paragraph 26 of the impugned judgment – on the aspect of conscious possession, as follows:

“26. In the instant case all the accused had come in a Scorpio Car. From the car the contraband/charas was recovered. Their statements recorded u/s 67 NDPS Act show that they knew one another from before and they knew that they were carrying charas in the vehicle. All these facts show their complicity in the commission of offence.”

18. Moreover, no question was put to the appellants under Section 313 Cr.P.C. with respect to the conscious possession of the contraband recovered. He relied on the judgments in ***Inder Dev Yadav & Ors. v. State (NCT of Delhi)***, 2014 LawSuit(Del.) 1662, ***Avatar Singh v. State of Haryana***, 2007 Cr.L.J. 4478 and ***Dilbagh Singh v. D.R.I.*** decided on 14.05.2009 (Crl. Rev. P. 517/2008) in support of the above submission.

19. Learned counsels submit that since the appellants were not in physical possession of the contraband on their body, it cannot be said that they were in conscious possession of the drug. Moreover, no question was put to the appellants during the trial, to ascertain whether they were in conscious possession of the drug. There exists no cogent or reliable evidence to suggest that the drug was under the exclusive control and possession of the appellants. Thus, it cannot be said that the aspect of conscious possession is proved beyond reasonable doubt.

20. It is further submitted by the learned counsels that the possibility of tampering of the seized contraband cannot be ruled out. He relies on the statement of Ajay Kumar (PW-1) who, in his cross-examination, deposed as follows:

“It is correct that we did not deposit the case (sic.) property in the nearest police station malkhana and we did not make any compliance section 50, 55, 56, 57 and 67 NDPS Act. I myself did not arrest the accused by they were arrested by my colleagues so I cannot say at what time they were arrested when their statement were recorded.”

21. Madan Lal Aggarwal (PW-11), the independent witness deposed that the quantity recovered in his presence was 43 kilograms in *toto*, whereas the case of the prosecution is that a total of 246 kilograms of Charas was recovered by them. He did not identify both the appellants in Court. Madan Lal (PW-11) was doubtful about the size of the bags allegedly containing the Charas. According to his perception, the bags produced in the Court were bigger than the bags recovered in his presence. Therefore, the quantity of contraband produced before the court could also not be substantiated. It was

further pointed out from the examination-in-chief and cross-examination of Madan Lal (PW-11) that 2-3 days after the incident, he was again shown the three persons and the sealed Kattas. Neither any entry was made in the Malkhana Register to this effect, nor any other prosecution witnesses disclosed the same.

22. Learned counsels submit that there exists a discrepancy with respect to the colour of the case property, and the cross-examination of Ajay Kumar (PW-1) revealed the same. The packet produced in the court contained 'brown' colour substance, though, in the recovery memo, the colour of the substance was given as 'black'. S.K. Mittal (PW-6), chemical examiner, in his report (Ex. PW-1/N) found the substance in the form of 'greenish brown' colour mass. To this the Trial Court observed that *"The packet produced before the Court is brown in colour though in the recovery memo the colour of the contents is mentioned as black."* P.C. Khanduri (PW-3) deposed that *"All the bags were found containing blackish colour substance wrapped with yellow/khaki tape."* He further submits that Ajay Kumar (PW-1), P.C. Khanduri (PW-3), Akhilesh Kumar Mishra (PW-4), Manoj Kumar Aggarwal (PW-5) stated the colour of the substance was 'black'.

23. On the aspect of testing of the contraband, Ajay Kumar (PW-1) stated that he did not take formal training for using the testing kit. He also stated that some chemical was added to the sample for the purpose of conducting the test, but he did not know which chemical was added. He further stated that on the basis of some chart contained in the testing kit, the test was conducted. However, the said chart was not exhibited before the Trial Court. Ajay Kumar (PW-1) deposed that the chemical reaction, or change in colour

of the tested sample was not mentioned in the seizure memo, or in the complaint, to establish that the recovered contraband was Charas. Thus, there exists a discrepancy with respect to the colour of the substance recovered, as well as the size of the bags recovered from the vehicle. Furthermore, Ajay Kumar (PW-1) deposed that the case property was not deposited in the nearest Malkhana exchange, and the essential details regarding the testing of the contraband were not disclosed in the seizure memo or in the complaint. All this is indicative of the fact that the case property may have been tampered with.

24. Learned counsels further submit that Section 50 of the Act casts a duty on the investigating officer to inform the apprehended person that he has a right to be searched in presence of a Gazetted Officer, or a Magistrate. In the present case, P.C. Khanduri (PW-3) deposed as follows:

“Sh. Ajay Kumar informed all the three persons about the secret information and served separate written notices to them informing their legal rights that if they desired their search can be conducted before a Gazette Officer/Magistrate.”

25. He submitted that to enquire whether the accused “desired” that they be searched before a gazetted officer or Magistrate, is not the same thing as informing them of their right to be so searched in compliance of Section 50. Thus, Section 50 has not been properly complied with.

26. Learned counsels submit that the statement of the appellants recorded under Section 67 of the Act were not voluntary, which is evident from the fact that the appellants retracted the statements on 02.11.2006 (in the case of Appellant Ashok Kumar) and 12.08.2006 (in the case of Appellant Triloki

Singh), before the learned Trial Court. He further submits that a statement recorded under Section 67, if later retracted, cannot be a basis of conviction. He places reliance on the judgment of *Dilbagh Singh* (supra), wherein the circumstances were similar to the present case regarding the retraction of statement recorded under Section 67 of the Act. In that case, the accused made a statement under Section 67 on 09.09.2007, and it was retracted on 26.09.2007 i.e. 17 days later. Subsequently, it was filed in court on 08.10.2007 i.e. 12 days later. The court held that the delay in retraction of the statement is not detrimental to the defence of the accused. Reliance has also been placed upon *Tofan Singh v. State of Tamil Nadu*, 2013 (12) SCALE 552.

27. In the present case, both the appellants had retracted their statements recorded under Section 67 of the Act on account of them being non-voluntary. Therefore, these statements cannot be made the sole basis of conviction. Moreover, the statement of Madan Lal Aggarwal (PW-11) under Section 67 was recorded on 24.06.2006, whereas the incident was of 22.06.2006. This, collectively, casts a doubt on the veracity of the story put up by the prosecution.

28. Learned counsels further submit that non-examination of material witnesses is detrimental to the case set up by the prosecution. N.S. Yadav was a member of the raiding party as per Ajay Kumar (PW-1), P.C. Khanduri (PW-3), Akhilesh Kumar Mishra (PW-4) and Manoj Kumar Aggarwal (PW-5). R.K. Yadav was also a member of the raiding party, but was not named by P.C. Khanduri (PW-3) & Manoj Kumar Aggarwal (PW-5). Hawaldar Jagdish Chand, member of raiding party was not named by

Akhilesh Kumar Mishra (PW-4). Malkeet Singh, the driver of the vehicle was not named by Ajay Kumar (PW-1) and H.K. Pandey (PW-9). The non-examination of the aforesaid witnesses casts a doubt on the story set up by the prosecution. The establishment of recovery proceedings as per the procedure – which lays down safeguards against abuse of power, are essential to any investigation done under the Act, and the aforesaid witnesses should have been examined by the prosecution to establish the recovery, beyond reasonable doubt.

29. On the other hand, Mr. B.S. Arora, learned Special Public Prosecutor for the Narcotics Control Bureau submits that the presence of Appellant Triloki Singh at the spot at which the raid was conducted and contraband recovered cannot be disputed. In his statement recorded under Section 313 Cr.P.C., he admitted his presence at the site, and stated as under in answer to a question:

“Q- It is further in evidence against you that during the search of Scorpio a temporary RC was recovered from the dashboard vide Ex PW1/E and Ex. PW1/E1, insurance policy of the vehicle vide Ex PW1/F which was seized vide memo Ex PW1/D. What you have to say?”

Ans: - It is correct

Q- It is further in evidence against you that the proceedings were concluded on the same day till 1730 hours. PW 1 issued you and your co-accused summons u/s 67 NDPS Act as well as panch witnesses at the spot directed you to report at the NCB Office i.e. Ex PW1/I Ajay Pratap Singh (PO) Ex PW1/J (Triloki Singh) Ex PW1/K (Ashok Kumar) Ex PW1/L(Madan lal Aggarwal). PW1 seized the contraband and the vehicle and came at the office wherein they deposited the case property,

vehicle and two copies of test memo with the Malkhana incharge P.C. Khanduri and also deposited the seal with the seal in charge PW2. What you have to say?

Ans. It is correct that I was given summons u/s 67 of the NDPS Act after the proceedings conducted to Ajay Pratap Singh who disclosed me as a driver of the vehicle.

Q21 Do you want to say anything else.

Ans. I was appointed as a driver to Ajay Pratap Singh but at the relevant time, Ajay Pratap Singh was himself driving the vehicle. Ajay Pratap Singh was provided guards but on the relevant date as the arrest of the Ajay Pratap Singh the guards were not present. I was on leave. Ajay Pratap Singh called me at the office and I am being falsely framed. No NDPS case is pending against me”

(Emphasis supplied)

30. Learned SPP further submits that there was due compliance of Section 42 of the Act, as the secret information (Ex. PW-2/A) was reduced into writing by R.R. Kumar (PW-2) and was put up before the Zonal Director. He submits that although there is some discrepancy between the information received and recorded as secret information, and in the recovery memo (Ex. PW-1/G) dated 22.06.2006 – where there was only mention of only two persons and not three, but the same has been explained by Ajay Kumar (PW-1)/I.O. He, in his cross examination, has stated as under:

“The secret information was received by Sh. R.R. Kumar and it was not in my knowledge at that time. When the secret information was received I was not aware of it. Vol. It was discussed by Sh. R.R. Kumar superintendent. It is correct that before discussions with me what was the content of the secret information I was not aware. The content of the secret information was read over before the witness. He did not gave

me written secret information or its copy. It is correct that in recovery memo which is prepared by me I had mentioned the fact “that two persons Ajay Pratap and Ashok Kumar Jaiswal are likely to come to Dr. Karni Singh Shooting Range”. Vol. He discussed about secret information with me and told me that two persons namely Ajay and Ashok will be travelling in the scorpio car along with Driver. The information was with respect to three persons.”

31. Though, there is some discrepancy in the particulars of the recovery memo (Ex. PW-1/G), same is not material in nature, and does not strike at the root of the prosecution’s case. In the present case, the discrepancy is minor in nature. It could be on account of a communication error between Ajay Kumar (PW-1) and R.R. Kumar (PW-2), since the written secret information was not seen by him, but only heard. The minor discrepancy is not sufficient to attract the finding of non-compliance of Section 42 of the Act.

32. Learned SPP submits that there was due compliance of section 55 of the Act because, as per Section 53 of the Act, every intelligence officer of the Narcotics Control Bureau was conferred with the powers of the officer in-charge of a police station for the investigation of offences under the Act. In the present case, the appellants were arrested by Avnish Kumar (PW-10) and Manoj Kumar Aggarwal (PW-5), who were intelligence officers of the NCB. The appellants were arrested and searched by the officer empowered under Section 53, thus satisfying the requirement of Section 55 of the Act. He relies on the judgment of the Supreme Court in **Hardip Singh v. State of Punjab**, AIR 2009 SC 432 and **Karnail Singh v. State of Rajasthan**, (2000) 7 SCC 632 in support of his submission.

33. On the aspect of conscious possession, Mr. Arora submits that the onus was on the appellants to show that they were not in conscious possession of the contraband. The said onus was not on the prosecution, particularly in the facts of the case. The contraband was seized from the car in which the three accused were travelling, and it was a private vehicle. All the accused were known to each other, and they did not show that they, or any of them, was not in conscious possession. Once possession is established, then the person who claims that he was not in conscious possession has to establish it, since that is a matter within his/ her special knowledge. Sections 35 and 54 of the Act give statutory recognition to this position, as it raises a legal presumption against the accused. In this regard, reliance is placed on *Madan Lal v. State of Himachal Pradesh*, (2003) 7 SCC 465. It was held in this case, that once possession is established, it is for the accused to show that they were not in conscious possession of the illicit substance in the logical background of Sections 35 and 54. In fact, in this case, the driver was held to be on the same footing as the other occupants of the vehicle. This position was reaffirmed by the Supreme Court in *Megh Singh v. State of Punjab*, (2003) 8 SCC 666. It is submitted that the legal presumption available under Sections 35 and 54 of the Act arises in the facts of the present case. The onus to prove that the appellants were in possession of the seized contraband lies on the prosecution. Once the possession is established, the onus shifts on the appellants to prove that they were not in conscious possession. In the present case, the appellants have not discharged the onus placed upon them by virtue of Sections 35 and 54 of the Act. Therefore, the court must presume that they were in conscious possession of the contraband.

34. Learned SPP submits that there was no delay in sending the samples for chemical examination, because the contraband was seized on 22.06.2006 and till 23.06.2006 NCB officials were busy with further investigation of the case. 24.06.2006 and 25.06.2006 were holidays and the samples were sent on 26.06.2006 and, as such, there was no delay in sending of the samples for examination. He relies on the judgment in **Hardip Singh** (supra), wherein the Supreme Court held that even the delay of 40 days is not detrimental to the case of the prosecution, since it did not cause any prejudice to the appellant as the seals were in intact condition, therefore, ruling out any possibility of tampering with the seized substance.

35. Mr. Arora submits that some differences in the description of colour of the substance recovered from the possession of the appellants, in the statements of prosecution witnesses, was due to their different perception of the colour. Learned SPP relies on the judgment of **Tikkam Ram v. State of Himachal Pradesh**, 2014 CriLJ 2758, wherein the FSL report indicated the colour as “dark green” and PW-3 stated it to be black. PW-6 stated it to be black and brown, and PW-7 stated it to be dark green. Such a contradiction was not held to be of significance.

36. Learned SPP submits that the recovery of the Narcotics from the appellants was duly proved when the samples were sent to CRCL and as per report dated 28.07.2006 (Ex. PW-1/N) samples gave positive result for Charas. Therefore, argument that at the time of recovery, the samples were not tested properly does not hold good, and it is the final result of the chemical analysis which would be relevant and binding, as per Section 293 Cr.P.C.

37. Learned SPP submits that both the appellants in their statement under Section 67 of the Act had admitted about their involvement and had disclosed facts personal to them, which are known only to them. The Appellant Ashok Kumar, *inter alia*, disclosed in his statement under section 67 that he took the Scorpio car on rent, which he had taken many times on rent on previous occasions for the supply of Charas. He took the phone number of co-accused Ajay Singh from Appellant Triloki Singh and then they decided the time and spot of delivery. He even disclosed his scheme, from which they could earn a lot of profit. Co-accused Ajay Singh agreed to the preposition and on 20.06.2006, appellant Ashok Kumar took the Scorpio car which was driven by Triloki Singh. They met Ajay Singh and together reached Bihar. Nine kattas were put in the Scorpio Car which had Charas in them. They took the Charas and reached Dr. Karni Singh Shooting Range, Tughlakabad, Surajkund Road at 2.00 pm to meet the supplier. Similarly, the Appellant Triloki Singh disclosed in his statement under Section 67 that on 20.06.2006, he along with appellant Ashok Kumar went to Lucknow where they met co-accused Ajay Singh. On the way, appellant Ashok Kumar and co-accused Ajay Singh took 9 white bags from some persons. Thereafter, all three of them reached Delhi via Kanpur. He admitted that the bags contained Charas. He disclosed that before this instance, he had supplied Charas four times between Bihar and U.P. along with Appellant Ashok Kumar and Raj Kumar. For this, in addition to the fare, he used to get Rs. 1000. These disclosures show that the statements recorded were made by the appellants; were not written by the officers of their own, and the same were consciously made by the appellants. Learned SPP relies on ***Rehmatullah v. NCB*** (Crl. Appeal no. 90 of 2005 decided by Delhi High

Court on 18.07.2008), wherein it was held that a conviction can be based on the statement recorded under Section 67 of the Act. He further submits that the only stand taken by the Appellant Ashok Kumar – regarding his statement recorded under Section 67, was that he was forced to sign blank papers. This is belied from the disclosure of information of which only the appellant Ashok Kumar was aware. Mr. Arora further submits that Appellant Triloki Singh in his statement recorded under Section 313 Cr.P.C. had only stated that he did not give any statement voluntary, and he was forced to write the statement on the dictation of the NCB officials. However, he does not explain how facts known to him, and unknown to the prosecution, came to be recorded in his statement – if the same was not voluntarily made.

38. Learned SPP further submits that in this case, besides Madan Lal Aggarwal (PW-11), there were other official witnesses i.e. Ajay Kumar (PW-1), P.C. Khaduri (PW-3), Akhilesh Kumar Mishra (PW-4), Manoj Kumar Aggarwal (PW-5) who have duly proved the recovery of the contraband from the possession of the accused persons. The argument of the defense does not hold good that there are no other public witnesses, and except recovery and statement of the appellants under Section 67, there is no evidence to connect the appellants with the recovery of the contraband. Learned SPP relies on *State of Haryana v. Mai Ram*, (2008) 8 SCC 292, wherein it was observed that the ultimate question to be looked into is whether the evidence of the official witness suffers from any infirmity. It was further observed that the prosecution's case cannot be held to be vulnerable for non-examination of persons who were not official witnesses.

The same was reaffirmed by the Supreme Court in *M. Prabhulal v. The Assistant Director, DRI*, AIR 2003 SC 4311 and in *Ram Swaroop v. State*, AIR 2013 SC 2068. The Supreme Court relied on *State, Govt. of NCT of Delhi v. Sunil and Another*, (2001) 1 SCC 652, wherein it was held that:

“.....Hence, when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.”

39. The aforementioned official witnesses along with Madan Lal Aggarwal (PW-11) have sufficiently established the recovery and therefore, the recovery of the contraband from the appellants stands proved.

40. Mr. Arora further submits that the appellants were duly identified by the intelligence officer of NCB when they appeared before the Court, and even Madan Lal Aggarwal (PW-11) after 8 years of the incident had stated that he is not sure whether the accused persons present in the court were the same as involved in the incident, as almost 8 years had passed, and he had seen the persons only for a short period of time. But he had confirmed in his statement that there were three persons.

41. Lastly, learned SPP submits that 246 kilograms of the Charas has been recovered from the possession of the appellants, which was being carried in a Scorpio Car belonging to one of the co-accused Ajay Pratap Singh and this fact is duly proved by the Registration Certificate and insurance policy recovered from the Scorpio Car and, as such, the question of implanting such a huge quantity of the contraband by the NCB does not arise at all. The Supreme Court of India in ***State of Punjab v. Balwant Rai***, (2005) 3 SCC 164, held that the question of implanting a huge quantity of the drug does not arise. The High Court of Himachal Pradesh in ***Sanjeev Kumar v. State of HP***, 2004 (2) ShimLC 443, held that:

“It is not believable that the police would implicate an innocent person in such a serious case by planting a huge quantity of charas on his person. There was no enmity between the police and the accused nor one is suggested. The police have no axe to grind in implicating the accused.”

42. Therefore, it cannot be accepted that Narcotics Control Bureau officials implanted a huge quantity of 246 kilograms of Charas in the vehicle occupied by the appellants.

43. In his rejoinder, learned counsels for the appellants submit that the conscious possession of Charas is not proved. He relies on the judgment of ***State of Punjab v. Hari Singh***, 2009 (4) SCC 200, wherein it was held that conscious possession is a sine qua non for conviction. It was further observed that if the court fails to put the requisite questions to the accused during examination under Section 313 Cr.P.C., it would result in injustice to the accused if he is found guilty of an act or omission without affording him the opportunity to explain the same.

44. On the other hand, learned SPP submits that the appellants were in conscious possession of the contraband. He points out the statement of Appellant Ashok Kumar recorded under Section 313 Cr.P.C., wherein question relating to the search of the vehicle and recovery of Charas was put to the accused. Moreover, the statement of Appellant Ashok Kumar recorded under Section 67 of the Act states that he took the Scorpio car on rent, which he had so taken many times on previous occasions for the supply of Charas. He took the phone number of co-accused Ajay Singh from the Appellant Triloki Singh and then they decided the time and spot of delivery. He told them his scheme for earning profits. Co-accused Ajay Singh agreed to the preposition and on 20.06.2006, appellant Ashok Kumar took the Scorpio car which was driven by Triloki Singh. They met Ajay Singh and together reached Bihar. Nine kattas were put in the Scorpio Car which had Charas in them. They took the Charas and reached Dr. Karni Singh Shooting Range, Tughlakabad, Surajkund Road at 2.00 pm to meet the supplier. Appellant Triloki Singh had denied his presence at the site in his statement recorded under Section 313 Cr.P.C. Thus, no question could be put to the appellant about the conscious possession in such a situation.

45. I have carefully considered the submissions of learned counsels for either side, perused the record and evidence laid in the case.

46. The submission of the learned counsels for appellants with regard to the discrepancy in the secret information (Ex. PW-2/A) prepared by R.R. Kumar (PW-2), and recovery memo (Ex. PW-1/G) prepared by Ajay Kumar (PW-1) has no merit, neither does the submission that there is a material variation in the statements of Ajay Kumar (PW-1). Ajay Kumar (PW-1)

initially deposed that he received information that three persons would be coming to Dr. Karni Singh Shooting Range. However, in his cross-examination he deposed that in the recovery memo (Ex. PW-1/G), he mentioned that two persons would be coming. The important fact of the matter is that when the secret information (Ex. PW-2/A) was put down, three persons with names were disclosed. The same information was conveyed to Ajay Kumar (PW-1), who prepared the recovery memo (PW-1/G). It is possible that due to a miscommunication between the two, one of the names was missed out –because the same recovery memo (PW-1/G), while disclosing the chain of events leading to the arrest and seizure of the contraband, does disclose all the three names including a description of where they were sitting in the vehicle. All the other facts – including the make of the vehicle, its registration number and location, as disclosed, were identical in both the secret information (Ex. PW-2/A) and the recovery memo (Ex. PW-1/G). Even if it is considered that before the arrest and seizure, Ajay Kumar (PW-1) was unaware of the involvement of appellant Triloki Singh, this fact alone does not render the recovery proceedings illegal. In fact, the presence of appellant Triloki Singh cannot be doubted. In the statement recorded under Section 313 Cr.P.C., he has clearly admitted that in his presence, the temporary RC and insurance policy was recovered from the dashboard of the vehicle. He also admitted to receiving the summons under Section 67 of the Act. Therefore, a minor discrepancy in the secret information (PW-2/A), and the recovery memo (PW-1/G), is not material in nature, and cannot be held to be detrimental to the case of prosecution. The discrepancies pointed in the statements of Ajay Kumar

(PW-1) stem out of the same discrepancy in recording between the secret information and recovery memo and thus, is not material.

47. On the aspect of non-compliance of Section 42(1) of the Act, learned counsels for the appellants submitted that the non-compliance is on account of the discrepancies. On the other hand, learned SPP submitted that there was due compliance of Section 42 of the Act as the secret information was reduced into writing by R.R. Kumar (PW-2) and was put up before the Zonal Director. Although there is some discrepancy in the recovery memo (Ex. PW-1/G) vis-à-vis the secret information (Ex. PW-2/A), where there was only mention of two persons, but the same was duly explained by Ajay Kumar (PW-1)/I.O. and, he in his cross examination stated that the secret information was received by Sh. R.R. Kumar, and R.R. Kumar (PW-2) did not give him the written secret information, or its copy to him. It was verbally communicated. As noted above, there exists some discrepancy in the particulars recorded in the recovery memo (Ex. PW-1/G), but the discrepancy is not material and does not go to the root of the prosecution's case. The secret information pertained to three persons and, in fact, three persons were found and apprehended with the contraband. Merely because Ajay Kumar (PW-1/I.O.) may have heard, and been under the impression that the secret information was in relation to two persons (and that was recorded in the recovery memo – Ex. PW-1/G) it is neither here nor there. **Balbir Singh** (supra), relied on by the learned counsels for the appellants does not help advance their submission in light of the facts of this case. This decision does not say that if there is discrepancy in the recorded secret information and in the recovery memo – of the kind found in the present

case, the same amounts to non-compliance of Section 42 of the Act. In the opinion of this court, the minor discrepancy is insufficient to attract the charge of non-compliance of Section 42 of the Act.

48. The search authorization (Ex. PW-1/A), under Section 41(2) was in favour of Ajay Kumar (PW-1) to search the vehicle. Herein, it must be mentioned that the power to arrest a person, in respect of whom there is reason to believe that he has committed an offence punishable under the Act, and from whose possession the narcotic drug has been seized, can be arrested under Section 43 of the Act. Therefore, authorization for arrest is not required to be separately issued, or contained in the search warrant.

49. It was also submitted by the counsels for appellants that Sections 52 and 57 of the Act were not complied with. Ajay Kumar (PW-1), R.R. Kumar (PW-2), P.C. Khanduri (PW-3), Akhilesh Kumar Mishra (PW-4), Manoj Kumar Aggarwal (PW-5) in their statements have stated that they did not take the appellants to the nearest police station and neither did they deposit the case property at the nearest police station. They did not approach for any gazetted officer either. On the other hand, learned SPP submitted that there was due compliance of Section 55 of the Act, because as per Section 53 of the Act, every intelligence officer of the Narcotics Control Bureau is conferred with the powers of the officer in-charge of a police station for the investigation of offences under the Act. In the present case, the appellants were arrested by Avnish Kumar (PW-10) and Manoj Kumar Aggarwal (PW-5), who were intelligence officers of the NCB.

50. Section 52 of the Act reads as follows:

52. Disposal of persons arrested and articles seized.-(1) Any officer arresting a person under section 41, section 42 section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under subsection (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under section 53.

(4) The authority or officer to whom any person or article is forwarded under subsection (2) or sub-section (3) shall, with all convenient dispatch, take such measures as may be necessary for the disposal according to law of such person or article.

(Emphasis Supplied)

51. Section 53 reads as follows:

53. Power to invest officers of certain departments with powers of an officer-incharge of a police station.-

(1) The Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of the department of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of the offences under this Act.

(2) The State Government may, by notification published in the Official Gazette, invest any officer of the department of drugs control, revenue or excise or any other department] or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of offences under this Act.

(Emphasis Supplied)

52. Section 55 reads as follows:

55. Police to take charge of articles seized and delivered.-An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

53. Section 57 is as follows:

57. Report of arrest and seizure.-Whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.

54. Learned counsels for the appellants placed their reliance on ***Balbir Singh*** (supra) wherein it is held that the non-compliance or lapses have to be examined to see whether any prejudice has been caused to the accused. Learned SPP relied on ***Hardip Singh*** (supra) and ***Karnail Singh*** (supra), to advance the submission that NCB is a distinct agency and therefore, the

compliance under Section 55 is met by virtue of the fact that NCB officials come within the definition of ‘officer-in-charge of police station’.

55. Section 52(3) states that every person arrested and article seized shall be forwarded without unnecessary delay to either the officer-in-charge of the nearest police station, or the officer empowered under section 53. Section 53 states that the Central or State Government may vest powers with the officers of Narcotics Control Bureau with the powers of officer-in-charge of Police Station for the investigation of the offences under this Act. Section 55 states that the officer in-charge of a Police station shall take custody of seized articles and keep them in safe custody. He shall allow the officer depositing such articles, to affix a seal on the articles. Section 57 states that within forty-eight hours of arrest, the person who makes an arrest shall make a full report of the arrest and seizure to his immediate official superior. Perusal of the aforementioned provisions makes it abundantly clear that the officers of the Narcotics Control Bureau are empowered with the powers of officer-in-charge of a police station. The case property has to be deposited with the nearest police station officer-in-charge only in the case where the person making the arrest and seizure is not an officer-incharge of the police station. However, in the present case, the intelligence officers were empowered under Section 53. Therefore, they were not obligated to take the arrested persons, or deposit the case property, at the nearest police station. The articles were deposited at the Malkhana. Hence, Section 55 was also complied with. The reports were also submitted to the senior officials.

56. With regard to the submission of the appellants, that Section 100(4) of Cr.P.C. was not complied with, it is noticed that Manoj Kumar Aggarwal

(PW-5) deposed that no efforts were made by them to include the public witness from the Dr. Karni Singh Shooting Range – which is about 5-10 meters away from the place of occurrence. P.C. Khanduri (PW-3) deposed that during the stay of one hour, waiting for the car, they did not enter in the premises of the shooting range. Madan Lal Aggarwal (PW-11) was asked to join the recovery proceedings before the apprehension of the appellants. Therefore, sufficient safeguards were taken by the NCB officials to comply with Section 100(4) Cr.P.C. Even if the submission of the learned counsels for the appellants is considered that no other public witnesses were included in the investigation, the same is a mere irregularity, which does not vitiate the proceedings. In **Balbir Singh**, (supra), citing **Sunil Kumar v. State**, 1964 SCR (7) 70, it was observed that:

*“the Delhi High Court while considering the scope of Section 42 of the NDPS Act and Section 100(4) of CrPC observed that **failure to associate independent persons in the search in a given situation would not affect the prosecution case in toto and the same cannot be thrown out or doubted on that ground alone.**”*

(Emphasis supplied)

57. On the aspect of conscious possession, it is to be first ascertained whether the appellants were in possession of the contraband substance. In **Mohan Lal v. State of Rajasthan**, 2015 (5) SCALE 330, the Supreme Court held:

“The term “possession” consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or the intent which has reference to exercise of the said control.”

58. The definition of possession given in Black's Law Dictionary is as follows – "*having control over a thing with the intent to have and exercise such control*" (Oswald v. Veigel, 219 Kan. 616, 549 p.2d568, 569). The concept of possession as established in English Law (The Concept of Possession in English Law, Oxford Essays on Jurisprudence, Clarendon Press, Oxford) has the following factors:

"(a) degree of physical control exercised by person over a thing, (b) knowledge of the person claiming possessory rights over a thing, about the attributes and qualities of the thing, (c) the persons' intention in regard to the thing, that is, 'animus possessionis' and 'animus domini', (d) possession of land on which the thing is claimed is lying."

59. The law raises a statutory presumption of conscious possession, where physical possession of the contraband has been established. This is a rebuttable presumption, and it would be for the accused to rebut the presumption of conscious possession, once the prosecution has established physical possession of the contraband. The following Sections are relevant on this point.

"35. Presumption of culpable mental state.-(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution."

Explanation.-In this section "culpable mental state" includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.”

54. Presumption from possession of illicit articles.-In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

*(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, **for the possession of which he fails to account satisfactorily.***

(Emphasis Supplied)

60. In *Noor Aga v. State of Punjab and Anr.*, (2008) 16 SCC 417, the Supreme Court observed:

“Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only

when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

61. Therefore, once possession is established by the prosecution beyond reasonable doubt, the court shall presume that the appellants had culpable mental state and have committed the offence.

62. In **Megh Singh** (supra), it was observed that

"The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

As noted in Gunwantlal v. The State of M.P. (AIR 1972 SC 1756) possession in a given case need not be physical

possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

The word 'possession' means the legal right to possession (See Health v. Drown (1972) (2) All ER 561 (HL). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness (1976 (1) All ER 844 (QBD).

Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in Madan Lal and Anr. v. State of Himachal Pradesh (2003 (6) SCALE 483)."

63. Learned counsels for the appellants submitted that the appellants were not in conscious possession of the contraband substance. He further submitted that no prosecution witnesses were examined to this effect. Moreover, from the reading of statement of appellants recorded under Section 313 Cr.P.C., it cannot be said that they were in conscious possession.

64. In the rejoinder, learned counsel for the appellants has relied on ***Hari Singh***, (supra), wherein it was held that conscious possession is a sine qua non for conviction. It was further observed that:

"The word "may" in Clause (a) of Sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the

court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under Clause (b) of the Sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.”

“When the accused was examined under Section 313 Cr.P.C, the essence of accusation was not brought to his notice, more particularly, that possession aspect, as was observed by this Court in Avtar Singha and Ors. v. State of Punjab AIR 2002 SC 3343 ; 2002 (3) BLJR 2369 ; 2002 CriLJ 4330 ; JT 2002 (7) SC 245 ; RLW 2003 (1) SC 42 ; 2002 (6) SCALE 539 ; (2002) 7 SCC 419 . The effect of such omission vitally affects the prosecution case.”

65. The observations made in the aforementioned case have to be viewed in the background facts and circumstances surrounding that case, as a whole. In the said case, the prosecution claimed that police officials were proceeding from one village to another. Three kilometers before reaching the destination, they claimed to have seen three men and two women sitting on the bags lying between the sugarcane fields and a heap of earth. Allegedly, they sought to flee upon noticing the police. Four out of the five persons were apprehended. The apprehended persons were apprised of their right to have the bags searched in front of a gazetted officer or a Magistrate. They asked the bags to be searched in front of a gazetted officer and so, the DSP reached the spot and search was conducted. The apprehended persons were arrested and seized property was sent to the chemical examiner.

66. The accused, Puran Singh claimed that they were falsely implicated in the case and the police officials were inimical towards them. The police

officials had earlier picked up his sons and nephew for which a writ petition of habeas corpus was also filed. Action under the Contempt of Courts Act had also been initiated against two officials and one Inspector Paramjit Singh had been fined Rs.1000 and, in default of payment of fine, he was sentenced to undergo SI for a period of two months. The DSP, Railways had picked up his son and brother-in-law. The brother-in-law was killed and, in that case, his son had appeared as a witness against the police officials. A writ petition had also been filed against the police officials. It was in this background, that the police department was claimed to be inimical towards them. The accused persons argued that no evidence existed to show their conscious possession of the contraband. Moreover, no question regarding possession was put to any of them in their examination under Section 313 Cr.P.C. The Supreme Court, while dismissing the appeal, held that if the Court fails to put the needed question in the recording of statement under Section 313, it would result in injustice to the accused and the same cannot be held against him. There can be no quarrel with the aforesaid proposition of law. But when it comes to its application, the Court would scrutinize the aspect of its compliance in the factual background. While in one case, the Court may be satisfied with a substantive compliance of the said requirement, in another case the Court may entertain doubts about the case of prosecution unless strict compliance is established. In ***Hari Singh*** (supra), due to the earlier history narrated above, the police officials were suspected of implicating the accused persons in a false case. When the accused was examined under Section 313, he was not asked direct questions relating to the possession aspect. Thus, the Supreme Court decided the said aspect in favour of the accused. However, there is a clear distinction in the facts of the

present case. No evidence has been brought on record by the appellants to show that the NCB officials were inimical towards them. Furthermore, several questions relating to the aspect of possession were put to the appellants in their statement under Section 313 Cr.P.C.

67. Perusal of the statement of Appellant Ashok Kumar recorded under Section 313 Cr.P.C. reveals that the question relating to the search of the vehicle and recovery of Charas was put to him. Relevant extract from his statement reads as follows:

“Q. It is further in evidence against you that the NCB officers conducted you and your co-accused personal search but nothing incriminating was recovered. Thereafter search of the vehicle was taken from where 9 plastic colour bags at the back side of the Scorpio were recovered which on opening were containing yellow/brown tape packets containing black solid substance. What you have to say?

A. I do not know anything about the search of the vehicle since I was not there.

Q. It is further in evidence against you that from each packet small quantity of black substance was taken and it on testing with the field testing kit gave positive for hashish (charas) and the packets were given mark A to I and packets were weighed using spring balance. Thereafter two samples each from all the 9 packets were taken out and were given corresponding mark A1, A2, to I-1 and I-2 and on weighing weight of the 9 plastic bags was found to be 246 grams. The samples and the case property was seized using paper slips with the seal of the Narcotics Control Bureau DZU 1, test memo in triplicate was prepared, seizure memo and panchnama Ex PW1/G was drawn which was explained to you and thereafter you put your signatures. The facsimile of the seal used in the

operation was also affixed on the 4th page of seizure memo and on all the test memos. What you have to say?

A. It is incorrect.”

(Emphasis Supplied)

68. The relevant extract from the statement of Appellant Triloki Singh recorded under Section 313 Cr.P.C. reads as follows:

“Q. It is further in evidence against you that the NCB officers conducted you and your co-accused personal search but nothing incriminating was recovered. Thereafter search of the vehicle was taken from where 9 plastic colour bags at the back side of the Scorpio were recovered which on opening were containing yellow/brown tape packets containing black solid substance. What you have to say?

A. It is incorrect.

Q. It is further in evidence against you that from each packet small quantity of black substance was taken and it on testing with the field testing kit gave positive for hashish (charas) and the packets were given mark A to I and packets were weighed using spring balance. Thereafter two samples each from all the 9 packets were taken out and were given corresponding mark A1, A2, to I-1 and I-2 and on weighing weight of the 9 plastic bags was found to be 246 grams. The samples and the case property was seized using paper slips with the seal of the Narcotics Control Bureau DZU 1, test memo in triplicate was prepared, seizure memo and panchnama Ex PW1/G was drawn which was explained to you and thereafter you put your signatures. The facsimile of the seal used in the operation was also affixed on the 4th page of seizure memo and on all the test memos. What you have to say?

A. It is incorrect.”

(Emphasis Supplied)

69. Perusal of the aforementioned statements reveal that questions relating to search and seizure were put to both the appellants, including the details of place where the contraband substance was recovered from inside the vehicle. There is a specific question with respect to the number of packets recovered, as well as the weight of the seized contraband. As the possession of the contraband substance was already established, no question regarding the conscious possession was needed to be put to the appellants.

70. It is also relevant to note that the statement of Appellant Ashok Kumar recorded under Section 67 of the Act narrates the entire incident leading to the arrest and seizure. He also admitted to the 9 kattas of Charas being in the Scorpio car. Although, Appellant Triloki Singh had denied his presence at the site in his statement recorded under Section 313 Cr.P.C., he has also narrated the entire chain of events in the statement recorded under Section 67 of the Act. In the statements recorded under Section 313 Cr.P.C., Appellants Ashok Kumar and Triloki Singh, were put their respective statements recorded under Section 67 of the Act. In my view, all the above mentioned statements are sufficient to establish that the appellants were questioned on the aspect of conscious possession of Charas.

71. The appellants have relied on various other judgments, and I shall deal with them now. Learned counsel firstly relied upon ***Inder Dev Yadav*** (supra), wherein the investigating agency did not make any attempt to ascertain the ownership of the vehicle, or as to how the appellants came to be in possession of the vehicle. It was also not investigated where the contraband was collected from, or to whom it was to be supplied. Furthermore, no investigation was done to ascertain the role of the three

occupants of the vehicle. It was held that whenever a person is arrested with any offending articles, it must be in his exclusive possession. It is obligatory on the part of prosecution to establish by cogent and reliable evidence that the suspect was in exclusive and conscious possession of the contraband article. Mere presence in the vehicle is not sufficient to hold that they had kept the contraband articles, and were aware of it. It is also unclear whether all the appellants were the beneficiaries in the transaction.

72. However, in the said case, there were many inconsistencies with respect to the material facts emerging from the statements of prosecution witnesses. In the present case, there are no inconsistencies with respect to the material facts in the statements of the prosecution witnesses. Thus, this decision does not come to the aid of the appellants.

73. Reliance was placed upon *Avatar Singh* (supra). In this case, no investigation was done regarding the purpose of the two accused travelling in the vehicle carrying the contraband. No particular question had been asked to the accused, if he had loaded the bags in the jeep, or that he was in possession and knowledge of the contents of the bags. Therefore, no presumption under Section 54 was drawn against the accused since possession of contraband was held to be not have been established. In my opinion, this judgment is of no help to the case of the appellants. It can only be applied where possession has not been established by the prosecution. Where the possession is established beyond reasonable doubt, as in this case, and there is no extenuating circumstances, the legal presumption will kick-in, and it shall be for the accused to dislodge the presumption by raising a probable defence. Finally, learned counsels relied upon *Dilbagh Singh*

(supra), wherein the Petitioner-accused was driving the vehicle and co-accused Williams was sitting on the rear seat. Another person coming from another vehicle dropped two black bags on the rear seat of the car. The bags were not given in the possession of the petitioner. Therefore, it was held that it could not be said that he was in possession, or in conscious possession, of the drugs. Raid was conducted by the DRI officials before the car even moved. It was held that the accused could not be said to have transported the drugs. Furthermore, the accused was not in any physical contact with the bags containing the drug in question. Hence, possession within the meaning under Section 21 or 29 was held not to have been established. This judgment is also no help to the case of appellants for two reasons. Firstly, the accused (driver) had retracted the statement recorded under Section 67 at the earliest opportunity, and even if the statement was to be admitted, it only disclosed that the drugs had to be delivered to co-accused Williams. Secondly, the statement of co-accused Williams made no reference to the role of the accused. It is for these collective reasons that the accused was held not to have been in possession of the drug.

74. In the case of ***Madan Lal*** (supra), it was observed that

“In fact the evidence clearly establishes they knew about the transportation of charas, and each had a role in the transportation and possession with conscious knowledge of what they are doing. The accused – appellant Manjit Singh does not stand on a different footing merely because he was a driver of the vehicle.”

75. In the light of *Madan Lal* (supra), appellant Triloki Singh, the driver of the vehicle, is not entitled to benefit of doubt. He shall be considered on the same footing as appellant Ashok Kumar.

76. In the factual scenario of this case, I am of an opinion that the prosecution has established conscious possession of the contraband substance with the appellants beyond any reasonable doubt. The appellants have failed to rebut the statutory presumption laid down under Sections 35 and 54 of the Act, by showing that they were not in conscious possession. Therefore, this court must draw the presumption that the appellants were, indeed, in conscious possession of 246 kg of Charas.

77. On the aspect of tampering of seized contraband, it was submitted by the learned counsels for the appellants that Madan Lal (PW-11), the independent witness, deposed that the total quantity recovered in his presence was 43 kilograms, whereas the case of the prosecution was that a total of 246 kilograms of Charas was recovered by them. He also did not identify the appellants in Court. Madan Lal (PW-11) was of a perception that the bags presented in Court are bigger than the bags recovered in his presence. The recovery memo (Ex. PW-1/G) and the statements of official witnesses corroborate to this effect that the quantity of Charas recovered was 246 kilograms.

78. Perusal of his statement reveals that he recognized the accused Ajay Pratap Singh, but did not recognize the appellants. However, he did state that on the day of the incident, three persons were arrested. Moreover, his account of the day of the incident corroborates the account put forth by the

official witnesses with respect to the details of recovery proceedings. It appears, due to passage of time, his memory has dimmed, but this cannot discredit his testimony in its entirety.

79. There is no merit in the submission of the learned counsels for the appellants that there exists a discrepancy with respect to the colour of the case property. The packet that was produced in the court contained 'brown' colour substance though in the recovery memo, the colour of the substance was given as 'black'. S.K. Mittal (PW-6), chemical examiner, in his report (Ex. PW-1/N) found the substance in the form of 'greenish brown' colour mass. On this aspect, the Trial Court observed that *"The packet produced before the Court is brown in colour though in the recovery memo the colour of the contents is mentioned as black."* P.C. Khanduri (PW-3) deposed that *"All the bags were found containing blackish colour substance wrapped with yellow/khaki tape."* He further submitted that Ajay Kumar (PW-1), P.C. Khanduri (PW-3), Akhilesh Kumar Mishra (PW-4), Manoj Kumar Aggarwal (PW-5) stated the colour of the substance was 'black'. In ***Tikkam Ram*** (supra), the FSL report indicated the colour as "dark green" and PW-3 stated it to be black. PW-6 stated it to be black and brown and PW-7 stated it to be dark green. Such a contradiction was not held to be of significance. In my opinion, the differences in the description of colour of the substance i.e. Charas is only a minor difference. All these are dark colours. Depending on the light condition in which the substance was viewed, it could appear as either black, or brown, or greenish brown. It could also be due to different perception of the colour by different persons. Therefore, this fact by itself does not prove that the seized Charas was tampered with.

80. On the aspect of testing of the contraband, learned counsels for the appellants submitted that Ajay Kumar (PW-1) had no formal training for using the field testing kit. Moreover, the chart on the basis of which the testing is conducted was also not exhibited. Even the chemical change occurred during the test had not been mentioned in the seizure memo. On the other hand, learned SPP submitted that the recovery of Charas from the appellants was duly proved when the samples were sent to CRCL and as per the report dated 28.07.2006 (Ex. PW-1/N) samples gave positive result for Charas. In my opinion, the submission of the learned counsels for the appellants is devoid of merit. Perusal of the record also reveals that there was no delay in sending the samples. The contraband was seized on 22.06.2006, and till 23.06.2006, NCB officials were busy with further investigation of the case. 24.06.2006 and 25.06.2006 were holidays, and the samples were sent on 26.06.2006, which is evident from the receipt of CRCL (Ex. PW-6/A). In **Hardip Singh** (supra), the Supreme Court has held that even the delay of 40 days is not detrimental to the case of the prosecution, since it did not cause any prejudice to the appellant as the seals were in the intact condition. In the present case, the evidence does not show that the seals were tampered with, or broken, therefore, ruling out any possibility of tampering with the seized substance.

81. Section 50 of the Act imposes a duty on the investigating officer to inform the apprehended person that he has a right to be searched in presence of a Gazetted Officer or a Magistrate. The submission of the appellants is that word used while apprising the appellants of their rights was “desired”,

which is not a correct term to be used in compliance of Section 50 of the Act. P.C. Khanduri (PW-3) deposed as follows:

“Ajay Kumar informed all the three persons about the secret information and served separate written notices to them informing their legal rights that if they desired their search can be conducted before a Gazetted Officer/Magistrate.”

82. The object of Section 50 in the Act is that the apprehended persons are apprised of their right to be searched in front of a gazetted officer, or a magistrate. In the opinion of this court, the above mentioned statement clearly fulfills the object of Section 50. It is evident that the usage of the word “desired” pertained to the decision of the accused after they were informed of their right under Section 50 of the Act. I, therefore, find no merit in this submission.

83. I find no merit in the submission of the learned counsels that the statement of the appellants was not voluntary. He submitted that a statement recorded under Section 67, if later retracted, cannot be a basis of conviction. Reliance was placed on the judgment of ***Dilbagh Singh*** (supra), wherein the court held that the delay in retraction of statement is not detrimental to the defence of the petitioner. Reliance has also been placed upon ***Tofan Singh*** (supra). A statement made by the accused to the investigating authorities must be retracted at the earliest possible opportunity. In the case of ***Dilbagh Singh*** (supra), relied upon the learned counsels for the appellants, the retraction was made within a reasonable time of 17 days. In the present case, the retraction was made approximately 5 months after giving the statement. The statement of accused Ashok Kumar was recorded on 22.06.2006 and was retracted on 02.11.2006. If the statement recorded was not a voluntary

one, the appellants could have retracted it at the earliest opportunity. This casts a doubt over the submission advanced by the learned counsels for the appellants. I am of the opinion that non-retraction of the statement at the earliest opportunity suggests that the said statement was given voluntarily by the appellants. The case of **Tofan Singh** (supra) does not help advance the arguments for the appellants either. This is an order of reference of the legal issue to a larger bench and, therefore, no ratio is discernible. Moreover, the statement of the two accused recorded under Section 67 show that they made disclosure of information to which only they were privy. Had the said statements not been voluntary, these statements would not have been made, as the prosecution witnesses/officers of the NCB were not aware of the same. For instance appellant Ashok Kumar disclosed:

“I was born in the year 1976 in Chanpatia in Bihar. We are three brothers and six sisters. Except for my younger brother, all of us are married. I have two sons and one daughter. I was brought up in a poor household and I have been educated in government school till seventh standard in Bihar. I have studied till 1992. (Illegible sentence). Three years back my mother had expired. From 1992 to 2004, I worked at my father’s shop. From November 2004 to 2005 I stayed at my house and did household work. In November 2005, I came to Noida and stayed in the rented accommodation and I started working in a factory. During this time I met Raj Kumar Vajpayee, who enticed me for an employment option. Raj Kumar told me that he buys coal and sends it in different places and told me that I will have to go in a truck to sell coal in different parts of Bihar. For which, he promised to give me Rs. 6000 per month, I agreed. For the first time, in March 2006, I travelled with him to Bihar where he got the coal loaded in the truck. He told me to get it unloaded at a given address in Lucknow and that he would meet me there itself. (illegible sentence). Raj kumar travelled from Bihar to Lucknow in a Qualis and in the car

there was an illicit substance called Charas. (Illegible sentence). Raj Kumar told me that he transports Charas instead of coal which is a more profitable business. I started supplying Charas with Raj Kumar to various places. Then I came to know that he buys Charas from Sheshnath. My brother is in jail in Mumbai from a few months under an NDPS case. I need money to take care of him. I got greedy and thought that I could also buy the Charas from Sheshnath and sell it on profit. However, I did not have money to buy Charas to a car to supply it. Then, I thought of the person from whom I and Raj Kumar had previously rented a car to supply Charas. I contacted Triloki Singh, the driver of the vehicle and took the number of Ajay Singh, the owner of the vehicle.”

84. Similarly, accused Triloki Singh disclosed:

“I was born on 20.05.1982 in Nayagaon and my father runs a business of Dairy. We are five brothers. I have studied till fifth standard in Government school. In 2001, I got married and I have a 2 and half year old daughter. I work as a taxi driver at the taxi stand. Today, I drove a Scorpio car, no. UP-31K-4455 and reached Dr. Karni Singh Shooting Range, Tuglakabad, Delhi with Ashok Kumar and Ajay Singh..... Previously, I have supplied Charas four times with Ashok and Raj Kumar Vajpayee to different places to Bihar and U.P.”

85. The appellants did not lead any evidence to establish that any portion of their statements recorded under Section 67 of the Act pertaining to their personal and private information was wrong. It was not suggested that such information was imaginary and cooked up by the prosecution. Thus, the possibility of extraction of the statements of the two accused/appellants is ruled out.

86. The submission of the learned counsels for the appellants that non-examination of witnesses is detrimental to the case set up by the prosecution

does not impress this court. Perusal of the record reveals that N.S. Yadav, R.K. Yadav, Hawaldar Jagdish Chand and Malkeet Singh were not named as prosecution witnesses. However, this does not discredit the testimonies of the intelligence officers of the NCB before the court. They have all given corroboratory statements with respect to the recovery proceedings. As already discussed, minor discrepancies are bound to appear in the statements of prosecution witnesses due to lapse of time. In fact, it is not humanly possible for witnesses to remember an event exactly the same way as the other. There could also be a difference in perception, recollection and articulation. Minor discrepancies that do not affect to the root of the prosecution's case are to be ignored. In my opinion, the official witnesses i.e. Ajay Kumar (PW-1), P.C. Khaduri (PW-3), Akhilesh Kumar Mishra (PW-4), Manoj Kumar Aggarwal (PW-5) have duly proved the recovery of the contraband from the conscious possession of the appellants.

87. Learned SPP had relied on the judgment in *Mai Ram*, (supra), wherein it was held that the ultimate question is whether the evidence of the official witness suffers from any infirmity. In the present case, the testimonies of the official witnesses corroborate each other, and with that of the independent witness. It is not even asserted that the officers of the NCB were known to, or harboured any malice against any of the accused. Therefore, the evidence of the official witnesses suffers from no infirmity.

88. He also relied upon the judgments of the Supreme Court in *M. Prabhulal* (supra) and on *Ram Swaroop* (supra), quoting *Sunil and another*, (supra), wherein it was held that the version given by the police officer should be believed to be correct, unless it is shown to be unreliable.

If the court has any good reason to suspect the truthfulness of the statement of the officials, then the court could certainly take into account the fact that no other independent person was present at the time of recovery. In the present case, Madan Lal Aggarwal (PW-11) was present as an independent witness, who has given corroboratory statement to that of the official/prosecution witnesses. His statement is sufficient to establish that the appellants were apprehended with the Charas on the fateful day. His statement reveals that he did not recognize all the appellants in court in 2012. He only recognized Ajay Pratap Singh. But he gave a clear account of the events of the day of the incident which further corroborates with the statements of the official witnesses. Due to passage of time, evidently, he did not remember the faces of the appellants, but this cannot discredit his testimony in its entirety. Thus, the recovery of the contraband substance from the conscious possession of the appellants stands proved.

89. As noted above, the recovery of the 246 kilograms of the Charas stands established. It has also been established that the seized case property was not tampered with, so as to cause any prejudice to the appellants. The arrest and search carried by the NCB officials was as per the provisions of the Act. The conscious possession of the contraband with the appellants also stands proved in this case. I am in agreement with the submission of the learned SPP, that there exists no question of implantation of 246 kilograms of contraband in the possession of the appellants. The observations of Supreme Court in *Balwant Rai*, (supra), and of High Court of Himachal Pradesh in *Sanjeev Kumar* (supra), support the case of the prosecution, that when there exists no enmity between the appellants and the officers of the

NCB, the NCB would get no benefit by implicating the appellants. Even if they were to implant the drugs, there was no need to implant such a huge quantity.

90. Consequently, this Court finds on the basis of the evidence brought on record, that the appellants were involved in transportation of a huge quantity of Charas. Thus, the conviction of the appellants by Trial Court is upheld. Since the quantity of Charas recovered from the possession was 246 kilograms, the minimum punishment has been awarded to the appellants. Thus, the order on sentence is also upheld.

91. For all the aforesaid reasons, I find no merit in these appeals and the same are accordingly, dismissed.

(VIPIN SANGHI)
JUDGE

JULY 15, 2015