

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

% **Judgment reserved on: 22.05.2015**
Judgment delivered on: 30.11.2015

+ **CRL.A. 1370/2010**

CHAND SINGH Appellant
Through: Mr. Mukesh Kalia & Tushar Sharma,
Advocates
versus

THE NARCOTICS CONTROL BUREAU Respondent
Through: Mr. Satish Aggarwala, Advocates.

+ **CRL.A. 349/2011**

JASBIR SINGH Appellant
Through: Mr. Samrat Nigam, Ms. Ankita M.
Bahl & Ms. Ayshwarya Chandar,
Advocates.
versus

THE NARCOTICS CONTROL BUREAU Respondent
Through: Mr. Satish Aggarwala, Advocates

+ **CRL.A. 546/2011**

NARENDER SINGH JAKHAR Appellant
Through: Mr. Mukesh Kalia & Tushar Sharma,
Advocates.
versus

THE NARCOTICS CONTROL BUREAU Respondent
Through: Mr. Satish Aggarwala, 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 15.09.2010 passed by Sh. Sanjiv Jain, Special Judge, NDPS in S.C. No. N-48/08, convicting Appellant Chand Singh, Appellant Jasbir Singh and Appellant Narender Singh Jakhar 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 17.09.2010, 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. Since common arguments have been advanced by learned counsel for the appellants appearing in these appeals, they are being recorded in common, and could be dealt with accordingly in this common judgment.

2. The brief facts as taken note of in the impugned judgment are that information was received by R.R. Kumar (PW-4), Superintendent, Narcotics

Control Bureau (hereinafter referred as 'NCB') that two persons, namely, Chand Singh and Jasbir Singh involved in trafficking of hashish would come to collect charas from Narinder Singh Jhakhhar, driver of funeral van HR-68-1558, near Hero Honda showroom, Peeragarhi, New Delhi on 31.12.2005 between 1800 to 1900 hours. The information was reduced in writing and forwarded to the Zonal Director who directed to take necessary action. Search authorization was issued in favour of Sh, R.K. Yadav (PW-1) I.O.

3. A raiding party comprising of R.K. Yadav (PW-1), Vikas Kumar (PW-2), N.S. Yadav (PW-5), Avinish Kumar (PW-6), P.C. Khanduri (PW-10) and Manoj Kumar proceeded to the spot in a government vehicle and reached there at 1800 hours. One independent witness namely Nafe Singh was joined. At about 1835 hours they located a funeral van no. HR-68-1558 which was parked in the service lane near Hero Honda showroom, Udyog Nagar, Peera Garhi. Some gunny bags were being unloaded from the van into a Marshal Jeep no. HR-13-A-0170. The raiding party encircled both the vehicles and the occupants, namely, appellant Narender Singh, appellant Chand Singh and appellant Jasbir Singh. On seeing the officers, they tried to run but they were apprehended. The NCB officers told them about the information and served 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. On search, two gunny bags marked as A and B were found in the jeep HR-13-A-0170 and five gunny bags marked as C to G were found in the van HR-68-1558. All the seven bags on checking were found to contain dark brown, dry and hard substance which, on testing, gave positive for charas. All the three appellants were

given summons under Section 67 of the Act to accompany the officers along with the vehicles to the NCB office. They reached the office at 2020 hours. There all the bags were again checked. The bags marked A to F were found to contain 20 packets each (wrapped in khaki colour tape). The bag mark G was found containing 28 packets. Each packet had four slabs. On weighing, each packet was found to be of one kilogram totaling to 148 kilograms. Two samples of 25 grams each were taken out from each bag and sealed with the seal of NARCOTICS CONTROL BUREAU – DZU 1 and given mark A-1, A-2 to G-1, G-2. All the seven plastic bags with remaining charas were put in different seven plastic bags. Test memo in triplicate was prepared. The bags, samples and vehicles were seized. From the vehicles, some documents were recovered. A panchnama was drawn.

4. The prosecution claimed that summons under Section 67 of the Act were issued to all of the appellants 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 Superintendent. The case property was deposited in the malkhana. The samples along with the forwarding letter and test memo were sent to CRCL through Hawaldar Shiv Rattan Singh. As per report dated 18.04.2006 the samples were found to contain Tetrahydro Cannabinol with their purity i.e. A1 – 12.0%, B1 – 10.6%, C1 – 10.3%, D1 – 10.0%, E1 – 11.4%, F1 – 9.6%, and G1 – 11.6%. After investigation, complaint was filed against the accused persons under Sections 20, 23 and 29 of the Act.

5. The charge under Section 29 read with Section 20 (b) (ii) C of the Act was framed against the 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. R.K. Yadav, Investigating Officer/Intelligence Officer, NCB, DZU, N. Delhi
- ii. PW-2: Sh. Vikas Kumar, Intelligence Officer, NCB, DZU, N. Delhi
- iii. PW-3: Sh. R.P. Meena, Chemical Examiner, JNCH, Laboratory, Nhavasheva, Distt. Raigarh (Maharashtra)
- iv. PW-4: Sh. R.R. Kumar, Superintendent, NCB, DZU, N. Delhi
- v. PW-5: Sh. N.S. Yadav, Intelligence Officer, NCB, DZU, N. Delhi
- vi. PW-6: Sh. Avinash Kumar, Intelligence Officer, NCB, DZU, N. Delhi
- vii. PW-7: Sh. Shiv Ratan Havaladar, NCB, DZU, N. Delhi
- viii. PW-8: Sh. S.K. Mittal, Assistant Chemical Examiner, CRCL, N. Delhi
- ix. PW-9: Sh. Anil Kumar Joshi, Assistant Secretary, District Red Cross Society, Panchkula, Haryana
- x. PW-10: Sh. P.C. Khanduri, Intelligence Officer & Malkhana Incharge, NCB, DZU, N. Delhi

7. Thereafter, statements of the appellants were recorded under Section 313, Cr.P.C. wherein they controverted the entire prosecution case and pleaded their innocence. They denied their presence at the spot and the recovery, and stated that the contraband substance was planted on them. They were taken to the NCB office where signatures were taken on several blank and printed papers under threat and fear. Appellant Chand Singh stated that he was called by a person when he was working in his fields. Appellant Chand Singh stated that the statement of Bijender Singh (Ex. PW-1/V) is totally false, as he is his political enemy and he opposed his election when he was elected as Sarpanch of his village. He had been falsely implicated at the instance of Bijender Singh in connivance with the NCB officials. The search authorization (Ex. PW-1/A) is a manipulated document. He stated that the statement recorded (Ex. PW-5/A) with respect to the admission of recovery, seizure and other incriminating facts was false since the signatures were taken on blank papers and few lines were recorded under fear and threat. He also denied knowing the other appellants. Appellant Jasbir Singh stated that he was picked up from his village. The statement (Ex. PW-2/A) was not his statement. He denied giving any statement to the NCB officials. Appellant Narender Singh stated that he was asked by the NCB officials to carry a dead body from Panchkula to Delhi in the funeral van. He stated that he had not given any statement to the NCB officials. He was forced to write a few lines and the same were being used against him.

8. In defence, the appellants produced Ravi Singh Bains as DW-1, Territory Manager, Sales, Hero Honda Motors Ltd. He stated that as of 31.12.2005, Ex. DW-1/1 and Ex. DW-1/2 show that the company had 12

showrooms in Delhi. He further stated that there had never been any authorized showroom at Udyog Vihar, Peeragarhi.

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

10. Learned counsels for the appellants submit that there is infirmity with respect to the secret information (Ex. PW-2/E). It does not mention the vehicle number and make of second vehicle i.e. Marshall Jeep – HR-13A-0170 in which appellant Chand Singh and appellant Jasbir Singh would come to collect the delivery of Charas from appellant Narinder Singh. The information written was incomplete.

11. It has been pointed out by the learned counsels that the notice given under Section 50 (Ex. PW-1/B) of the Act, wherein the appellant Chand Singh had only stated that he did not want his search and the vehicle's search in presence of Gazetted Officer, did not state anything with respect to the search before a Magistrate. Thus, he was not given an option to be searched in front of a Magistrate. It is further submitted that the seizure memo (Ex. PW-1/E) does not record that notice under Section 50 was given to the appellants. The giving of notice under Section 50 of the Act (Ex. PW-1/B) is not stated by Nafe Singh in his statement recorded under Section 67 of the Act (Ex. PW-5/A). R.K. Yadav (PW-1), I.O. deposed that *"It is correct that no notice U/s 50 was again given in the office of NCB at R.K. Puram."* It is also submitted that Arrest Memo/Jamatalashi (Ex. PW-5/C) of appellant Chand Singh does not show that notice under Section 50 was recovered from him. Even the complaint (Ex. PW-2/E) does not make a

mention of compliance of Section 50 of the Act. Thus, the giving of notice under Section 50 is doubtful. Moreover, the recovery memo (Ex. PW-1/E) was only attested by R.K. Yadav (PW-1) and Nafe Singh. It was not attested by any other official witnesses who are claimed to have been present at the time of recovery. Furthermore, Nafe Singh was not even examined in the Trial Court.

12. Learned counsels submit that the compliance of Section 50 is mandatory. Reliance is placed on *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*, (1994) 6 SCC 569, wherein it was observed that the compliance of Section 50 of the Act is mandatory, and the searching officer is obliged to inform the person to be searched that, if he so requires, he shall be produced before a Gazetted Officer or a Magistrate. It is further submitted that there existed no reason for the appellants to deny their right to be produced before a Magistrate.

13. Learned counsels for the appellants submit that the arrest of the appellants was made without a proper authorization. The search authorization (Ex. PW-1/A) only authorizes the Intelligence Officers to conduct the search of the appellants, but not to arrest them.

14. It is further submitted by the learned counsels that no independent witness belonging from same area was associated during the recovery proceedings. Moreover, Nafe Singh, the independent witness who was present at the time of recovery of the contraband was not examined in court. Furthermore, no other independent witness was produced by the prosecution though, it is claimed that a crowd had gathered at the spot. It is also pointed

out that the only explanation provided by the prosecution is that Nafe Singh could not be traced at the given address. The fact that no efforts were made by the NCB officials to trace him clearly brings the story of prosecution in a cloud of doubt.

15. On the aspect of samples not being representative, it is submitted by the learned counsels that samples were not drawn as per the proper procedure. Recovery memo (Ex. PW-1/E) discloses that seven gunny bags were recovered from both the vehicles. When the gunny bags were opened, six of them (A to F) contained 20 packets each, and every packet was found containing four slabs. The seventh gunny bag ('G') was found containing 28 packets and every packet was found containing four slabs. Each packet was weighed and was found to be 1 kilogram. Thereafter, two samples were taken from each gunny bags totaling to 14 samples of 25 grams each. R.K. Yadav (PW-1) deposed as follows:

“Two samples of 25 grams were drawn and taken from each gunny bag and was kept in a plastic polythene in total and the mouth of each polythene bag was stapled. The samples drawn were marked A1, A2 to G1 and G2. In all 14 samples were taken out which were kept in a plastic polythene bag and same was put in a white envelope which were sealed with the seal of “NARCOTICS CONTROL (sic.) BUREAU DZU 1” over a paper slip which was signed by me by all the three accused persons and by the public persons.”

16. Learned counsels submit that seven bags contained in total of 148 packets i.e. 592 slabs, and only two samples taken were taken to each bag and not from each packet. It is not disclosed as to which particular packets the samples were taken from. In the recovery memo (Ex. PW-1/E), the

weight of each slab recovered from the packets was not mentioned. Each packet was approximately 1 kilogram, which contained 4 slabs, yet nowhere in the recovery memo, it is mentioned whether the weight of each slab was 250 grams. It is quite possible that one slab was 100 grams or any other weight. Merely taking two samples from each bag does not establish the nature of the entire material seized. Reliance was placed on *Basant Rai v. State*, 191 (2012) DLT 403, wherein it was observed that if the proper procedure is not followed in the taking of samples of the seized contraband, then the benefit should go in the favour of the accused. The samples taken must represent the whole of contraband to sufficiently substantiate that the said quantity had been recovered. The officers ought to have collected the samples properly to ascertain whether the illicit contraband was found in all packets contained in the gunny bags. Therefore, the samples taken and sent to CRCL were not representative.

17. It is further submitted by the learned counsels that the possibility of tampering of the seized contraband cannot be ruled out. Reliance is placed on *Abdul Ghaffar v. State (Delhi Administration)*, 68 (1997) DLT 155, wherein it was observed that when a public witness was present along with the raiding party, there was no reason for the Investigating officer not to hand over the seal to the public witness. In the present case, the seal was not given to the independent witness after use and it was retained by I.O.

18. On the aspect of the statements recorded under Section 67 of the Act, learned counsels points out that the summons (Ex. PW-1/K) issued to appellant Chand Singh under Section 67 of the Act state the date as 31.12.2005, whereas the statement (Ex. PW-5/A) under Section 67 was

recorded on 01.01.2005. In addition, the said statement (Ex. PW-5/A) of appellant Chand Singh is not in his handwriting. There is no explanation as to why the said statement was not recorded in the handwriting of the appellant. As disclosed in the statement itself, he had studied till 9th standard. Thus, he could have written the statement himself. The supplementary statement of the appellant was written in his own handwriting.

19. Learned counsels submit that the appellants were in custody when the statements under Section 67 of the Act were recorded. As per the record, they appeared in the office in pursuance of the summons under Section 67 NDPS Act. Their arrest was made after the statements, and on the basis of material collected during investigation. He submits that to say that the appellants were not in custody is misplaced and incorrect, since, all the proceedings were carried out while the appellants were in the custody of the NCB officials. The appellants were already in custody when the statements were recorded on 31.12.2005 and the formal arrest had been shown on paper later. Therefore, the said statement recorded under Section 67 of the Act cannot be relied upon by the prosecution.

20. On the aspect of possession and conscious possession, it is submitted by learned counsels that the burden to prove the possession of the contraband substance with the appellant was on the prosecution. Reliance is placed on *Noor Aga v. State of Punjab & Anr.*, (2008) 16 SCC 417, wherein it was observed that the burden to prove the foundational facts lies on the prosecution. In the present case, it was for the prosecution to prove the possession of charas with the appellants beyond reasonable doubt. The

question of establishing conscious possession does not even arise, since possession has not been established in the first place.

21. Learned counsels submit that it cannot be believed that the contraband substance was tested at the spot, as the same has never been proved by the prosecution. Even the usual procedures were not followed by the NCB officials. R.K. Yadav (PW-1) in his cross-examination stated that:

“No document was prepared in respect of the positive test came with the test Field Test Kit, however, later on it was prepared in the office as mentioned in the Panchnama. We did not take the photographs of the vehicles parked there. Vol. There was heavy rush at the spot. I do not remember as to how much time we took in the entire proceedings conducted at the spot. We did not inform to any of the Police Station on the day of incident. We did not weigh the bags seized at the spot of their interception. It is also correct that no counting of the packets in each bag was made at the spot. No seal was put on the bags seized at the spot.”

22. He further stated:

“The accused persons were not arrested at the spot in spite of the fact to become aware regarding the contents of the bags as large crowd had been gathered there. Thereafter we went to the office alongwith the accused persons and witness and the contraband recovered there. No proceedings were carried out at the spot including the preparation of test memo.”

23. Vikas Kumar (PW-2) in his cross-examination stated that:

“We had not made any testing report near Hero Honda showroom and the gunny bags were not sealed at the spot near Hero Honda showroom and the said bags were not weighed at the spot of inception. I myself had not told any of the accused about their legal rights or if they want their search to be conducted in presence of Gazetted Officer / Magistrate. I also

cannot tell as to which of the accused person was firstly made aware of the above stated rights.”

24. It is submitted that usual procedures with respect to the recovery and seizure were not followed. Moreover, the appellants were not arrested on the spot in spite of the contraband having been recovered from them.

25. Learned counsels submit that discrepancies exist in the testimony of R.K. Yadav (PW-1). In his cross-examination, he deposed that:

“After the completion of the proceedings, the official seal was not handed over to any independent witness. We completed all the proceedings in the basement of our office till 11.45 p.m. I do not know as to whether the independent witness- Nafe Singh left the office immediately after the completion of proceedings or stay there however he was summoned by serving the notice U/s 67 NDPS Act.”

26. The appellants submit that R.K. Yadav (PW-1) clearly stated that the proceedings were carried on till 11:45 pm in the basement of the office. However, the office of NCB does not have a basement. Therefore, the story of the prosecution with respect to the recovery, and proceedings held thereafter are concocted and cannot be believed.

27. Learned counsels further submit that the appellants were not apprehended from the said spot on the relevant date. The statements of prosecution witnesses are inconsistent with respect to the location of the vehicles, as well as the location of Hero Honda showroom. In fact, the Learned Trial Court Judge has gone to the extent of introducing his own knowledge with respect to the existence of Hero Honda Showroom. Paragraph 20 on page 20 of the judgment reads as follows:

“The accused have produced DW1 who has stated that there did not exist any authorized showroom of Hero Honda showroom in 2005 but I myself while passing on that route has observed a Honda showroom on the right side of the road after crossing Peeragarhi chowk from Punjabi Bagh.”

28. On the other hand, Mr. Satish Aggarwala, Learned Special Public Prosecutor (SPP) for NCB submits that non-recording of vehicle number of the second vehicle in the secret information (Ex. PW-2/E) is explained by R.R. Kumar (PW-4) in his cross-examination. He deposed as follows:

“It is correct that there is no reference of Marshall (sic.) Jeep bearing No.HR 13A 0170 in the secret information. Voluntarily at the time of issue of search warrant (sic.) the number and the detail of the other vehicle i.e. Marshall (sic.) Jeep was conveyed (sic.) to me telephonically by the informer and that is why the search authorization was issued in respect of both the vehicles. I received this information at about 4.00pm. It is correct that I have not mentioned the fact of receipt of telephonic information in respect of Marshall (sic.) Jeep also in my secret information nor it was discussed with the senior officers.”

29. The learned SPP submits that the Section 50 of the Act was duly complied with. Reliance is placed on the statement of R.K. Yadav (PW-1), who deposed as follows:

“I served upon them the notice U/s. 50 of N.D.P.S Act upon all the three persons for conducting the search of his person and their vehicle. I informed them that this was their right to have their search before any Gazetted officer or Magistrate as their legal right. All the three persons had denied that they does not want the presence of Gazette officer or a Magistrate before conducting the search and informed me that the search of their vehicle and in person can be conducted by any officer of NCB. The fact had been endorsed by the accused persons on the

notice U/s. 50 of NDPS Act given to them in their own hand writing.”

30. The notice given under Section 50 endorses the refusal of the appellants to be searched in front of a Gazetted Officer. He submits that, in fact, the compliance of notice under Section 50 of the Act was not required to be met, since the recovery was not to be affected from the person of the appellants themselves, but the vehicles. R.K. Yadav (PW-1) deposed that:

“On the search of the vehicle, I alongwith my officers found that two plastic gunny bags were found lying in a vehicle No. HR-13/A-0170 martial jeep and five plastic gunny bags were found in vehicle no.HR-68-1558.”

31. Even otherwise, Section 50 was duly complied with, as substantiated from the statements of official witnesses and the three notices served upon the appellants (Ex. PW-1/B, Ex. PW-1/C and Ex. PW-1/D).

32. He further submits that Section 42 of the Act is not applicable as the secret information (Ex. PW-2/E) was not required to be reduced in writing. Even otherwise, prosecution witnesses have explained that telephonic information had been recorded. The search authorization was in respect of two vehicles – which is clearly endorsed on the secret information (Ex. PW-2/E).

33. It is also submitted by the learned SPP that a reasonable explanation has been provided by R.K. Yadav (PW-1) in his cross-examination regarding the non-joining of other public witness. He stated that:

“We contacted two-three public persons at that time. Only one person agreed to become witness in this case. I had noted the

names and addresses of other person whom I had contacted at that time. Nafe Singh was not known to any of us prior to the date of incident. I did not try to find out the place where Nafe Singh was residing after the incident.”

34. On the aspect of seal not given to the independent witness, learned SPP submits that the cases relied on by the appellants pertain to police, other than the NCB. However, in the present case, there were paper seals which were signed by the appellants. The seals were intact till the samples were tested at the CRCL.

35. Learned SPP further submits that even though Nafe Singh – independent witness, was not examined, the case of the prosecution cannot be disbelieved. It was for the defence to establish that there was a deliberate endeavour to keep the said independent witness away from the cross-examination. The appellants in the statement recorded under Section 313 Cr.P.C. had stated that they have been falsely implicated. However, it is not shown from the record that there was any motivation for false implication of the accused/ appellants with such a huge quantity of charas. It is also not established through any evidence, that the NCB officers had any enmity against any of the appellants.

36. On the aspect of tampering of the seized contraband, learned SPP submits that the seized property could not have been tampered with. At the time of seizure, signatures of all the appellants were taken on the paper slips attached to the samples. He relies on the statement of R.K. Yadav (PW-1) who deposed that:

“On weighing each packet were found to contain one Kilogram of Charas. In total the quantity of Charas recovered was 148 kg. of Charas. Two samples of 25 grams were drawn and taken from each gunny bag and was kept in a plastic polythene in total and the mouth of each polythene bag was stapled. The samples drawn were marked A1,A2,to G1 and G2. In all 14 samples were taken out which were kept in a plastic polythene bag and same was put in a white envelope which were sealed with the seal of “NARCOTICS CONTROL(sic.) BUREAU DZU 1” over a paper slip which was signed by me by all the three accused persons and by the public persons. All the seven recovered gunny bags alongwith recovered charas were again put in a different six white colour gunny bags and one in yellow colour separately and mouth of gunny bag were closed tiedly with the help of plastic rope and same were sealed with the seal of “NARCOTICS CONTROL BUREAU DZU 1” over a paper slip signed by me, all three accused persons and by panch witness who put their thumb (sic.) impression pasted on the cardboard. I also prepared the test memo in triplicate.”

37. He further stated that:

“At this stage, the seven white colour envelopes are produced in the court duly sealed over a paper slip of the envelopes. There are four seals on each of the envelope. The seal with which all are sealed is of Narcotics Control Bureau DZU-1. The four seals on each envelope are affixed on both end of the envelopes. The seals are intact.”

38. Therefore, if the samples had been tampered with, the seals would not be found intact. Furthermore, P.C. Khanduri (PW-10), member of the raiding party and Malkhana incharge deposed as follows:

“On 1.1.2006 sh. RK Yadav IO deposited the case property, samples, test memos and the above two vehicles in the malkhana. I made entry in the register at sl no. 27 in my own

handwriting. The copy of which running into three pages is already Ex. PW1/Y.”

39. S.K. Mittal (PW-8), chemical examiner deposed as follows:

“On 31.3.2006 the seven sample packets mark A1 to G1 were taken out from the strong room by sh. Shyam Singh under my supervision and direction. All the seals affixed on the sample packets were checked and it was found that the samples were sealed with the seal having impression as given on the test memo and the same were intact. The impression of the seal affixed on the sample packet were of impression NARCOTICS CONTROL BUREAU DZU 1.”

40. R.P. Meena (PW-3), chemical examiner deposed that *“On recommendation of Sh. R.S. Malhotra, chemical examiner I received all the seven sample packets after checking the seals which were found affixed on the sample packets in the intact condition”*.

41. The learned SPP submits that it is evident from his statement that the samples received were not tampered with, since the seals were found in intact condition. It is also pointed out that the seal movement register (Ex. PW-1/J) and malkhana register (Ex. PW-1/Y) further substantiate that the case property had not been tampered with. The link evidence evidently shows that the samples had not been tampered with at any stage of the proceedings.

42. Learned SPP submits that the weight of charas seized from the appellants cannot be doubted. He places reliance on the statement of R.K. Yadav (PW-1) who deposed that *“The solid substance i.e. Hashish/Charas having 20 kg are taken out from the one plastic bag which were 20 in number i.e. slab of 1 kg each”*. Vikas Kumar (PW-2) deposed that *“Every*

packets were containing four slabs, on weighing one packet it was found to be one kg approximately and in total 148 kg of the charas was recovered". Therefore, if 20 kg substance is recovered from one bag, it is logical to deduce that each slab was 1 kilogram in weight. Moreover, Section 58 of the Evidence Act, 1872 provides that no fact need to be proved in any proceeding to which the parties agree to admit at the hearing, or before the hearing. Since the appellants have admitted in their statement under Section 67 of the Act that the entire quantity was charas, then there was no occasion to send the same for testing to CRCL. It is also pointed out that in the application made for re-examination of seized drugs, the appellants did not state that the report of CRCL does not pertain to the entire quantity, or represent the entire quantity. During that stage, no grievance was raised with respect to the taken samples not being representative.

43. Learned SPP further submits that the statements recorded under Section 67 of the Act are, in fact, the statements that were voluntarily given by the appellants. Perusal of the same reveals that the appellants have disclosed information to which only they are privy to. The statement of appellant Chand Singh is as follows:

"Q: Give a detailed description of the 148 kgs of charas that was recovered from you on 31st December 2005?"

A: This whole event was planned by me with the help of Mohan. My friend and Jasbir Singh @ Haali from village Rewadi Khedi, District-Jhajhar, Haryana was also part of this event. We planned to bring charas from Nepal by a vehicle. On 20-12-2005, both of us (Jasbir and Chand Singh) travelled to Raksol, Bihar by Samparkranti Express (2nd class). Mohan came to railway station and took us to his home. We stayed there till 25-

12-2005, during our stay we met a person named Rajan who was from Nepal and after speaking to him, I gave Rs. 1,45,000/- as advance to Mohan for 150 kg of Charas. The money was arranged by me and my friend Jasbir. The remaining amount was to be given after 10-15 days of the sale of the material. Jasbir called Narendra Singh to bring a vehicle. on 23-12-2005 Narendra Singh along with the vehicle left for Bihar. Narendra Singh was told to contact Mohan as soon as he reached Bihar. I left Raksol, Bihar on 25-12-2005 along with Jasbir in an AC coach and reached Delhi on 26-12-2005. After reaching, Jasbir kept in touch with Narendra Singh to keep a track of his position. On 31-12-2005 Jasbir told me that Narendra Singh has reached Delhi with Charas and is standing on Peeragarhi-New Rohtak road. After which, Jasbir and I left in my Marshall Jeep HR 13 A 0170 to the designated spot as told by Jasbir. After reaching the said spot, I searched for Narendra who was standing in a service lane near Hero Honda show room (Udyog Nagar). I parked my Marshall Jeep near Narendra Singh's vehicle which was a funeral van numbered HR 68 1558 in a manner that my vehicle's back was facing his vehicle's back and started transferring charas from the funeral van to my jeep. We unloaded 2 kattas of charas when we were surrounded by some people who claimed to be the officers of Narcotics Control Bureau .they stated that they have information that there is charas in our vehicle and we want to conduct search of the both the vehicles. After hearing this, I attempted to run but they used adequate force and stopped me. Then the officials checked all the kattas of charas and took the sample and tested the same, thereafter, asked us to come to office of Narcotics Control Bureau along with the material. We, along with the officers went to RK Puram where the office of NCB was situated. We reached the office of the NCB at about 8 p.m. After reaching the parking of the office, the charas was weighed and found to be 148 kg. Two samples out of every kattas was taken and all the kattas were sealed and panchnama was made. All these procedures were done in our presence which lasted till 11:45 pm."

44. It is also submitted by the learned SPP that there exist nothing on record to show that the appellants were in custody when statement was recorded under Section 67 of the Act. Even if the appellants were in custody, it does not render the statements or the process illegal.

45. It is further submitted by the learned SPP that although the appellants were produced before the court on 02.01.2006 on an application filed by the NCB seeking judicial remand, no retraction application was filed by the appellants. The appellants did not retract the statement at the earliest opportunity. This clearly suggests that the retraction was made on account of legal advice received, and same is an afterthought. The retraction application was filed by appellant Chand Singh and appellant Jasbir Singh on 16.01.2006. Narender Singh did not even file any retraction statement which strengthens the case of the prosecution. The retractions, therefore, cannot be read in evidence.

46. On the aspect of possession and conscious possession, learned SPP states that Sections 35 and 54 raise a statutory presumption in favour of prosecution. The possession of the contraband substance was established from the link evidence as well as the statements of all the prosecution witnesses. Therefore, the Court must draw the presumption that the appellants were in conscious possession of the contraband substance. Reliance is placed on *M. Prabhulal v. The Assistant Director, DRI*, AIR 2003 SC 4311.

47. Learned SPP submits that R.K. Yadav (PW-1) and Vikas Kumar (PW-2) have both deposed on the same lines with respect to the spot of recovery. Vikas Kumar (PW-2) deposed as follows:

“The officers had kept their surveillance of the vehicle as mentioned in the information and located the vehicle bearing no. HR 68 1558 (Funeral van) which was intercepted in the service lane near Hero Honda showroom near New Rotak Road, Delhi. It was found that some persons were unloading some gunny bags from HR 68 1558 in another vehicle bearing registration no. HR 13A 0170 (Marshall Jeep).”

48. In his cross-examination, he stated that:

“The said Hero Honda showroom was in existence towards the left side of the main Rohtak Road when we start from Peeragarhi towards Rohtak.... .. I cannot tell about the front faces of the stationary vehicles as to in which direction they were standing. It was around 1 ½ meter distance between the two stationary vehicles. It took around one hour to complete the process of tracing vehicles and conducting the proceedings near Hero Honda showroom. I cannot tell the size of the plastic bags which have been stated to be found in marshall jeep.”

49. N.S. Yadav (PW-5), another official witness to recovery and seizure of the contraband substance. He stated that:

“It took around 20-25 minutes to reach the two vehicles which were parked. The Hero Honda showroom was on the right side of the road on which we proceeded to trace the stationary vehicles. The office vehicle was not removed by us from Peeragarhi Chowk where it was initially parked. The distance of the Hero Honda showroom from Peeragarhi chowk was within 500 meters.”

50. Avinash Kumar (PW-6), in his cross-examination deposed that:

*“Hero Honda agency is about 1 km from Peeragarhi Chowk. ...
... . The light was sufficient enough to conduct the
proceedings at the spot. I don’t remember if the vehicle light
was used or not. So far I remember Hero Honda Agency was on
the side from Punjabi Bagh to Rohtak. Jeep was facing towards
Rohtak.”*

51. Therefore, the spot of recovery cannot be doubted as all the prosecution witnesses have deposed on the same lines.

52. He further submits that minor contradictions are bound to occur in any case. It is to be seen whether such contradictions are material in nature and go down to the root of the case. In the present case, contradictions between the official witnesses are minor in nature.

53. Learned SPP submits that if the appellants were innocent then it is difficult to understand so as to why they would try to flee away when the NCB officials approached them. In his cross examination, R.K. Yadav (PW-1) stated that *“The occupants of the vehicle started running as soon as we started towards them. Accused Narender Singh Jhakkar was present in his vehicle and did not run (sic.)”*

54. He further submits that the MLCs of appellants do not show any injury. Therefore, it cannot be said that the statements or any other proceedings were conducted based on coercion.

55. Learned SPP submits that the due process was followed and the letter to Red Cross Society (Ex. PW-1/Z) substantiates the story of prosecution. Moreover, Anil Kumar Joshi (PW-9), Assistant Secretary of Red Cross Society deposed that the appellant Narender Singh Jhakkar was the driver of

the funeral van belonging to the Red Cross Society. He had also brought the original documents i.e. registration certificate (Ex. PW-1/G) and insurance certificate (Ex. PW-1/G1) pertaining to the funeral van no. HR 68 1558. Therefore, the identity of the driver of the said funeral van can also not be doubted.

56. Lastly, learned SPP submits that Nafe Singh, independent witness has explained in his statement recorded under Section 67 (Ex. PW-5/A) that he is illiterate and this is the reason N.S. Yadav (PW-5) is taking his statement as per his wish. Therefore, the reason as to why he did not write it himself is abundantly clear, and a defense that he did not write his own statement has no merit.

57. I have carefully perused the impugned judgment, considered the submissions of learned counsels on either side, perused the record and evidence laid in the case.

58. It was argued by the learned counsels for the appellants that there is an infirmity with respect to the secret information (Ex. PW-2/E) as it does not mention the vehicle number and make of second vehicle i.e. Marshall Jeep – HR-13A-0170 in which appellant Chand Singh and appellant Jasbir Singh had come to take the delivery of the contraband substance. On the other hand, Learned SPP had relied upon the statement of R.R. Kumar (PW-4), wherein the so-called infirmity is explained. Perusal of the statement made by R.R. Kumar (PW-4) reveals that the secret information (Ex. PW-2/E) was conveyed to him through an informer telephonically. It is correct that the vehicle number of the second vehicle is not written. However, the

information pertaining to the identity of appellants Chand Singh and Jasbir Singh – who were travelling in the second vehicle, such as their residential address, is stated. Therefore, non-mention of the vehicle used by the appellants Chand Singh and Jasbir Singh itself does not vitiate the proceedings, or cast a doubt on the case of the prosecution. The statement of Anil Kumar Joshi (PW-9) further corroborates the information contained in the secret information (Ex. PW-2/E). He deposed that the driver of the funeral van, bearing number HR 68 1558, was appellant Narender Singh Jhakkar. Thus, in my opinion, there is sufficient evidence on record to suggest that the secret information (Ex. PW-2/E) contains no infirmity.

59. On the aspect of compliance under Section 50 of the Act, it was submitted by the learned counsels for appellants that appellant Chand Singh had only stated on his notice (Ex. PW-1/B) that he did not want his search, and the vehicle's search, to be conducted in the presence of a Gazetted Officer, and did not state anything with respect to the search before a Magistrate. Therefore, he was not informed about his right to be searched before a Magistrate. Consequently, he should have been searched before a Magistrate. I find no merit in this submission of learned counsels. Perusal of the said notices (Ex. PW-1/B, Ex. PW-1/C and Ex. PW-1/D) reveals that the appellants were apprised of their right to be searched before a Gazetted Officer, or a Magistrate. In reply to the notice, the appellant wrote that he did not want to be searched before a Gazetted Officer. R.K. Yadav (PW-1) clearly deposed that the notices were given to all the appellants, and their denial of being searched before a Gazetted Officer or a Magistrate had been endorsed by the appellants on the said notices in their handwriting. This is

sufficient to show that the appellants were made aware of their right of being searched before an appropriate authority, and the opportunity was given to the appellants to get the search conducted before a Gazetted Officer/Magistrate, before the search was undertaken. If the appellants did want the search to be conducted before a Magistrate, they would have stated so while declining to be searched before a Gazetted Officer. Therefore, the compliance of Section 50 stands established.

60. It was also argued by the learned counsels that the seizure memo (Ex. PW-1/E) does not find any mention that the notice under Section 50 was given to the appellants. It is also argued that Arrest Memo/Jamatalashi (Ex. PW-5/C) of appellant Chand Singh does not show that the notice under Section 50 was recovered from him. The complaint (Ex. PW-2/E) also does not mention of the compliance of Section 50. The omission to mention the factum of the notice given under Section 50 in the arrest memo, seizure memo, or the complaint does not in any way suggest that the notice or any other document was fabricated. The recording of the factum of issuance of the notice under Section 50 in the subsequent documents is not a necessity. Learned counsels placed reliance on *Ali Mustaffa Abdul Rahman Moosa* (supra). There can be no quarrel with the proposition that the compliance of Section 50 of the Act is mandatory in nature, and it places an obligation on the investigating agency to inform the person being searched of his the right of being searched before a Magistrate or a Gazetted Officer. However, the said judgment does not help the case of the appellants since, it stands established that the appellants were, indeed, apprised of their rights.

61. In any event, the above submission of the appellants does not hold water. It was submitted by the learned SPP that the compliance of Section 50 of the Act is not required to be met, since the search was not of the person of the appellants themselves, but the vehicles. I find merit in this submission, since it is settled position of law that the compliance of Section 50 is only insisted in cases where a personal search of the apprehended person is to be carried out, but not when it is made from any other public place. In the case of *Madan Lal and Anr. v. State of Himachal Pradesh*, (2003) 7 SCC 465, while citing *Kalema Tumba v. State of Maharashtra and Anr.*, 2000 CriLJ 507, *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 and *Gurbax Singh v. State of Haryana*, 2001 CriLJ 1166, it was observed that:

“16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance.”

62. From the above discussion, it is evident that the appellants were, firstly, apprised of their rights before the search. Even if it were to be assumed that the notices given under Section 50 of the Act were defective in nature, the same is not relevant, as personal search of the appellants was not essential, and the recovery was not effected from the person of the appellants.

63. Learned counsels for the appellants submitted that the arrest of the appellants was made without a proper authorization. The search authorization (Ex. PW-1/A) only authorized the Intelligence Officers to conduct the search of the appellants, but not to arrest them. Even if it is to be considered that the search authorization did not authorize the intelligence officers to arrest the appellants, Section 43 of the Act empowers every intelligence officer of NCB to arrest at a public place or in transit. A clear distinction exists between Section 42 and Section 43 of the Act. Section 42 reads as follows:

“42. Power of entry, search, seizure and arrest without warrant or authorisation.-

(i) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V A of this Act is

kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V A of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under subsection (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

(Emphasis Supplied)

64. Section 43 reads as follows:

“43. Power of seizure and arrest in public place.-Any officer of any of the departments mentioned in section 42 may (a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V A of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.-For the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”

(Emphasis Supplied)

65. The distinction between Sections 42 and 43 of the Act was elaborately explained by the Punjab and Haryana High Court in ***Dharminder Kumar v. State of Punjab***, 2002 SCC OnLine P&H 762, in the following way:

“10. While Section 42 empowers the officers of the specified departments to carry out search, seizure and arrest in any building, conveyance or enclosed place, Section 43 deals with the similar power of seizure and arrest in public places. Powers under both these sections can be exercised if the concerned

officer has reason to believe that some offence relating to narcotic drugs or psychotropic substances has been committed. Section 49 is another section in the series which empowers officers to stop and search animals and conveyance used for illegal transport of narcotic drugs or psychotropic substances. The words building, conveyance and enclosed place as used in Section 42 have been used for the specific purpose of protecting the persons who are living in the buildings, conveyance and enclosed place. The Legislature in its wisdom considered proper to draw a demarcating line between building, conveyance and enclosed place on one side and public place or in transit on the other side. The words have been specifically mentioned to show the demarcating line between the two otherwise, the legislature could have used any place instead of narrating the words 'building, conveyance of enclosed place'. Even a private open place does not fall within the purview of Section 42 unless it is enclosed. So, this demarcating line will have to be kept in mind. Under Section 43 of the Act, the words used are 'any public place or in transit'. The requirement of recording of information in writing and communicating it to superiors is intended to protect the possible harassment to residents and to maintain personal liberty and human dignity. The term conveyance used in Section 42 is to be understood as ejusdem generis to the terms building or enclosed place. It is not every conveyance whether in public or private that would fall within the scope of Section 42 of the Act. A conveyance in a public place would fall within Section 43 of the Act and Section 49 gives powers to the empowered officer to stop such conveyance for the purpose of search.

11. The Constitution Bench of the Hon'ble Supreme Court in State of Punjab v. Baldev Singh. 1999 SC 237 has held that the material difference between the provisions of Section 43 and Section 42 is that Section 42 requires recording of reasons of belief and of opinion writing with regard to commission of offence before conducting search and seizure whereas Section 43 does not contain any provision and empowers the officer under Section 43 of the Act for seizure of the article etc. and arrest of the person who is then in possession of narcotic drug

and psychotropic substance in a public place where such possession appears to him to be unlawful. The Division Bench of the Gujarat High Court in Surajmal Kania Lal Sonik v. State of Gujarat, 1991 Cr C.J. 1483 has considered the scope and ambit of Sections 42 and 43 of the Act. Such Division Bench has relied upon the findings recorded by earlier Division Bench and held to the following effect:-

“Section 43 gives plenary power to the officers to seize in a public place or in transit any narcotic drug or psychotropic substance and to detain and search any person, whom he has reason to believe has committed the offence. The only restriction is that such powers can be exercised by the officer of any Department mentioned in Section 42. The Police Department is specifically mentioned in Section 42 and as stated above, even under Section 42 the Police Inspector in charge of the Police Station is empowered to exercise the powers under Section 42. Police Inspector Patil was therefore, an authorised officer to exercise the power and take action for seizure, detention, search and arrest under Section 43 NDPS Act.”

In our view, therefore, the provisions of Section 41 and 42, NDPS Act are not applicable, but the provisions of Section 43, NDPS Act are applicable for any search and seizure of the narcotic drug in a conveyance etc. and detaining and searching any person in a public place. We are fortified, in our view, by the judgment of this Court in Aslambhai Ibrahimhai Memon v. The State of Gujarat, Criminal Appeal No.844 of 1988, delivered by a Division Bench of this Court, consisting of M.B. Shah and B.S. Kapadia, JJ. on October 5, 1989, in which the learned Brother Judges, on considering the relevant provisions of Sections 41 and 43 NDPS Act, observed:-

“Thus, the intention of the Legislature in Section 41 and 42 is different as revealed from the language of sections as stated above from the one

in Section 43 which authorises any officer of the departments mentioned in Section 42 for search, seizure, arrest and detention in any public place or in transit in respect of any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed and, alongwith such drug or substance, any animal or conveyance or article is liable to be confiscated under the Act, or any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under Chapter IV relating to such drug or substance.

Thus, Section 42 speaks about search and seizure from any building, conveyance or enclosed place, while Section 43 speaks about the search and seizure from public place or in transit. It is important to note that the wordings of Sections 41 and 42 with regard to information taken, in writing have been deliberately omitted by the Legislature in Section 43 and in our view, that has been done so advisedly inasmuch as the Police Officer empowered under Section 42 may get information with regard to the person in any public place or in transit at the last moment and if he has to undergo the procedure of taking that information in writing and recording the reasons for his belief, possibly such information may not be useful. When that is so, any search or seizure is to be made in any public place or in a vehicle in transit or any person is to be arrested or detained from a public place, it is not intended by the Legislature to take down the said information in writing.

In view of our observations that the provisions of Section 43 NDPS Act are applicable and the

provisions of Sections 41 and 42 are not applicable to the facts of the instant case, and that the provisions of Section 43 NDPS Act, are not violated, it is not necessary for us to refer to certain judgments by the High Courts on the point. We shall, however, refer some of them as they are cited at Bar.”

12. It may be mentioned that the appeal against the said judgment was dismissed by the Hon'ble the Supreme Court in judgment reported as Surajmal Kania Lal Soni v. State of Gujarat. 1994 Supp. (2) Supreme Court Cases 276, where challenge in appeal regarding the compliance of Section 50 of the Act was made but found no favour with the Hon'ble Supreme Court.

13. The distinction between scope of Sections 42 and 43 of the Act has also been considered by the Rajasthan High Court in Deep Chand v. State of Rajasthan, 1996 Cri. L.J. 54. In the said case the conveyance was searched in the street which is a public place and the provision of Section 42 of the Act was found not applicable to such a situation. Kerala High Court has examined this issue in Abdul Azeez v. State of Kerala, 2001 (3) RCR (Cri) 740 and in Palayan v. State of Kerala, 2002(2) RCR (Cri) 857, that under Section 43 of the Act, the empowering Officer has power to seize the articles and arrest of the person who is found to be in possession of narcotic drugs and psychotropic substance in a public place where such possession appeared to be unlawful. The High Court concluded it in paras 10 and 16 of the judgment which reads as under:-

“10. The said decision, according to me, contains clear and categorical declaration of law that the provisions of Section 42(2) will apply only to the case of information relating to the availability of the contraband in a 'building, conveyance or enclosed place' and that the said provisions will not have any application in a case of information

relating to possession of contraband by any person as available in a public place.

16. In the circumstances, I am not persuaded to extend the benefit of non-compliance with Section 42(2) of the NDPS Act and to acquit the accused merely based on the two decisions of the learned Single Judges of this Court. On the basis of the provision of Sections 42(1), 42(2) and 43 of the NDPS Act as also on the basis of the decisions in Baldev Singh, Balbir Singh and Abdul Rashid Ibrahim Mansuri, I am of the humble view that Section 42(2) of the NDPS Act will not apply to a case of information regarding the availability of the contraband in a public place as it happens in the present case. It follows that the accused is not entitled to get an acquittal based on alleged violation of Section 42(2) of the NDPS Act, albeit the prosecution has failed to establish that the information received by P.W.2 was recorded by him and a copy sent to the superior officer in writing before P.W.2 proceeded to the scene of occurrence.”

16. Thus, it is evident that if seizure is made from any animal, conveyance or article in a public place or in transit then Section 43 of the Act would be applicable. Section 43 and Section 42 of the Act operate in different spheres. Since the conveyance has been specifically included in Section 43 of the Act also, therefore, the conveyance which is found in a public place or in transit would be covered under the provisions of Section 43 of the Act whereas conveyance used in Section 42 of the Act has to be read as conveyance which is other than in a public place. This interpretation is the only harmonious interpretation of Sections 42 and 43 of the Act.”

(Emphasis Supplied)

66. Recently, the Supreme Court has also commented on this distinction on this distinction in ***Mohan Lal v. State of Rajasthan***, (2015) 6 SCC 222.

The Supreme Court observed:

“32. In the present case, the High Court has noted that the information was given to the competent authority. That apart, the High Court has further opined that in the case at hand Section 43 applies. Section 43 of the NDPS Act contemplates seizure made in the public place. There is a distinction between Section 42 and Section 43 of the NDPS Act. If a search is made in a public place, the officer taking the search is not required to comply with Sub-sections (1) and (2) of Section 42 of the NDPS Act. As has been stated earlier, the seizure has taken place beneath a bridge of public road accessible to public. The officer, Sub-Inspector is an empowered officer Under Section 42 of the Act. As the place is a public place and Section 43 comes into play, the question of non-compliance of Section 42(2) does not arise. The aforesaid view gets support from the decisions in Directorate of Revenue v. Mohammed Nisar Holia, (2008) 2 SCC 370 and State, NCT of Delhi v. Malvinder Singh, (2007) 11 SCC 314.”

67. In the present case, the recovery of the contraband substance was made in a public place i.e. service lane of Rohtak road near Peeragarhi Chowk. The submission of the learned counsels has no force, since Section 43 of the Act was applicable. Under Section 43 of the Act, the officers were competent to arrest the appellants, once they were found in possession of charas. Section 43 does not require that prior to the arrest, the information be reduced to writing and be produced before a superior officer, or that prior authorisation be obtained.

68. Learned counsels submitted that no independent witness belonging from same area was associated during the recovery proceedings. Nafe Singh,

the independent witness who was present at the time of recovery of the contraband was also not examined in court. It was further submitted that no other independent witness was produced by the prosecution, though a crowd had gathered at the spot. The explanation provided by the prosecution is that he could not be traced at the given address. Learned SPP submitted that a reasonable explanation had been provided by R.K. Yadav (PW-1) in his cross-examination in this regard. Perusal of his cross-examination reveals that he made the efforts to contact two-three public persons, but only one person, viz. Nafe Singh agreed to become a witness. In ***Ajmer Singh v. State of Haryana***, (2010) 3 SCC 746, the Supreme Court has observed:

“19. The learned Counsel for the appellant has submitted that the evidence of the official witness cannot be relied upon as their testimony, has not been corroborated by any independent witness. We are unable to agree with the said submission of the learned Counsel. It is clear from the testimony of the prosecution witnesses PW-3 Paramjit Singh Ahalwat, D.S.P., Pehowa, PW-4 Raja Ram, Head Constable and PW-5 Maya Ram, which is on record, that efforts were made by the investigating party to include independent witness at the time of recovery, but none was willing. It is true that a charge under the Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced.

20. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case

reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence.

21. In the present case, both the trial court and the High Court by applying recognized principle of evaluation of evidence of witnesses has rightly come to the conclusion that the appellant was arrested and Charas was recovered from the possession of the appellant for which he had no licence. We find no good reason to differ from that finding.”

69. I find merit in the submission of the learned SPP that it must be shown by the defense that there was a deliberate endeavour to keep the independent witness away from the cross-examination. Perusal of the record reveals that adequate steps were taken by the Trial Court as well as the investigating agency to bring Nafe Singh, it is evident from the record that summons were issued on 06.03.2010, 23.03.2009, 25.04.2007 and vide orders dated 25.04.2007, 17.12.2007 and 20.02.2008. In ***State of Haryana v. Mai Ram***, (2008) 8 SCC 292, it was observed that the ultimate question to be asked 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 lacuna in the present case is not material in nature, and cannot be said to have caused prejudice to the appellants. In such cases, if the statements of official witnesses corroborate the proceedings conducted, the case of the prosecution cannot be disbelieved. This position 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 appellants – in their statements recorded under Section 313 Cr.P.C., had stated that they have been falsely implicated. However, the appellants failed to show that there was any motivation for their false implication with such a huge quantity of charas. It is also not established through any evidence that the NCB officers had any enmity against the appellants. The Supreme Court in **State, Govt. of NCT of Delhi v. Sunil and Another**, (2001) 1 SCC 652, 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.”

70. The Supreme Court 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 **Sanjiv 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. Police had no axe to grind in implicating the accused.”

71. Therefore, it cannot be accepted that NCB officials implanted a huge quantity of 148 kilograms of Charas in the vehicles occupied by the appellants.

72. It was argued by the learned counsels for the appellants that the samples extracted from the seized contraband substance were not representative, since they were not drawn as per the proper procedure. Perusal of the recovery memo (Ex. PW-1/E) reveals that seven gunny bags were recovered from both the vehicles and when they were opened, six of them (A to F) contained 20 packets each and the seventh gunny bag ('G') was found containing 28 packets. Every packet was found containing four slabs. Each packet was weighed and was found to be 1 kilogram. Thereafter, two samples were taken from each of the gunny bags totaling to 14 samples of 25 grams each. Official witnesses have deposed to this effect in their depositions.

73. Firstly, it was argued that the samples were not extracted from each of the 148 packets containing 592 slabs of Charas. Instead, only two samples were taken from each bag containing the 20 (A-F) or 28 (G) packets. In my opinion, it was not necessary to extract the samples from each of the 592 slabs, since two samples were lifted from each bag at random. This situation is to be seen from a practical perspective. It is not plausible to suggest that in such cases, the officials should extract samples of each slab. It was sufficient that reasonable care be taken to extract the best possible representative

sample from the whole of the seized substance. This is a matter of practice, rather than a point of procedure or law. There is no basis to assume that the packets, from which the samples were not drawn, were containing substance different from that contained in the packets from which the samples were indeed drawn. When all the packets in a particular bag were kept together, without any differentiation, there is no basis to claim that the untested packets contained substance different from the packets which were tested. No rule has been cited by the appellants to claim that samples should have been drawn as per the prescribed procedure.

74. The second argument advanced was that the recovery memo (Ex. PW-1/E) does not mention the weight of each slab contained in the packets. It was also submitted that, it is possible that each of the slab weighed different. Therefore, one cannot assume the slabs to be 250 grams each. Perusal of the record does suggest that the slabs were not individually weighed. R.K. Yadav (PW-1) deposed that *“On weighing each packet were found to contain one Kilogram of Charas”*. He further deposed that *“The solid substance i.e. Hashish/Charas having 20 kg are taken out from the one plastic bag which were 20 in number i.e. slab of 1 kg each.”*. Vikas Kumar (PW-2) deposed that *“Every packets were containing four slabs, on weighing one packet it was found to be one kg approximately and in total 148 kg of the charas was recovered.”*

75. In my opinion, once each packet is weighed and found to be 1 kilogram, each slab was not required to be weighed. It is immaterial whether each slab was 250 grams, less or more. The fact that each packet was weighed and found to be of 1 kilogram, is sufficient. In my opinion, failure

to weigh individual slabs is immaterial. It does not advance the case of the appellants in any way.

76. Thirdly, reliance was placed on ***Basant Rai*** (supra), wherein it was observed that if the proper procedure is not followed with respect to the taking of samples of the seized contraband, then the benefit should go in the favour of the accused. The samples taken must represent the whole of contraband to sufficiently substantiate that the said quantity had been recovered. The facts in respect of the seizure proceedings of the abovementioned case are in clear distinction to the facts of the present case. In the abovementioned case, the officials had recovered 8 packets containing charas. Small quantity of charas was then taken out of each of the 8 packets, mixed together and then divided into two samples weighing 25 grams each. The Court while finding fault with this procedure observed:

“For example, if the 08 packets were allegedly recovered from the appellant and only two packets were having contraband substance and rest 6 packets did not have any contraband; though all may be of the same colour, when we mix the substances of all 8 packets into one or two; then definelty, the result would be of the total quantity and not of the two pieces. Therefore, the process adopted by the prosecution creates suspicion. In such a situation, as per settled law, the benefit thereof should go in favour of the accused. It does not matter the quantity. Proper procedure has to be followed, without that the results would be negative.”

77. The process adopted for the extraction of sample is very different to the one used in the present case. In the present case, the officials took out two samples weighing 25 grams each from each of the six bags (A-F) and seventh bag (G), containing 20 and 28 packets respectively. Thus, 14

samples were sent to CRCL for analysis. At no point was the recovered substance mixed together. Therefore, the reports obtained in the present case were different for different drawn samples.

78. Even if it is to be assumed that the duplicate samples were drawn from the same packet contained in each of the seven bags, and the weight of each of those seven packets was 1 kilogram each, then it can be deduced that the appellants were in possession of at least 7 kilograms of charas, which falls within the commercial quantity prescribed under the Act.

79. On the aspect of tampering, it was submitted by the learned counsels that there was a strong possibility that the samples were tampered with. Reliance was placed on *Abdul Ghaffar* (supra). Learned SPP submitted that the seized property could not have been tampered with. At the time of seizure, signatures of all the appellants were taken on the paper slips attached to the samples. He also relied on the statement of R.K. Yadav (PW-1) who deposed that the paper slips attached to the seized substance was signed by him, all the appellants, and the thumb impression of the public witness was also put. The NCB DZU 1 seals were also put on all the seven envelopes produced before the Trial Court. The seals were found intact. He also relied on the statement of P.C. Khanduri (PW-10), member of the raiding party and Malkhana in charge. He deposed that the case property was deposited by R.K. Yadav (PW-1) in the Malkhana and P.C. Khanduri (PW-10) made the entry in the register. The same was exhibited as Ex. PW-1/Y.

80. Furthermore, learned SPP pointed out to the statement of S.K. Mittal (PW-8), chemical examiner, who deposed that seven sample packets were taken out of strong room under his supervision, and all the seals were found intact. In fact, R.P. Meena (PW-3), chemical examiner, also deposed that the seals of the samples were found intact.

81. In view of the above discussed evidence, I find force in the submissions of the learned SPP. The seals which were affixed at the time of seizure were found in intact condition throughout the process. The link evidence clearly establishes that at no point of time, the samples could have been tampered with.

82. The observation of this Court in *Abdul Ghaffar* (supra), has to be read as a whole, and a part of it cannot be read in isolation to the rest. There are clear distinctions, which can be drawn from *Abdul Ghaffar* (supra) and the present case. In the said case, the proceedings conducted by the officials suffered from many material lacunae. Firstly, no endorsement was made by the accused on the notice given under Section 50, whereby he waived his right to being searched before a Magistrate or a Gazetted Officer. In the present case, all the appellants had made an endorsement that they did not want to be searched before a Gazetted Officer. Secondly, the malkhana register did not show that the CFSL form had been deposited. There was no entry in the register to show that the samples were sent to the CSFL. However, in the present case, the malkhana register (Ex. PW-1/Y) shows the relevant entries. The third observation in the said case, on which the learned counsels have relied upon, was that the seals were not handed over to the public witness by the I.O. Instead they were handed over to the constable.

In *Abdul Ghaffar* (supra), the prosecution had failed to establish its case since the testimonies of the official witnesses were not substantiated by cogent evidence. However, in the present case, statements of the official witnesses stand corroborated with respect to the seals being in intact condition.

83. Perusal of the statements of appellants recorded under Section 67 of the Act corroborates with the seizure proceedings, as recorded by the official witnesses. It was also pointed out that none of the appellants made an application for re-examination of seized drugs. At that time, no grievance was raised with respect to the representativeness of the sample. In such a situation, the appellants cannot raise a grievance at this stage, when they did not raise this issue at the relevant time by making an application for re-examination of the samples.

84. I find no merit in the submission of the learned counsels for the appellants that the statements of appellants recorded under Section 67 of the Act were not voluntary. The MLCs of the appellants show no sign of manhandling or physical coercion. Moreover, the appellants have disclosed facts leading to the recovery and personal facts that only they were privy to. Appellant Chand Singh stated as follows:

“Q: Please, introduce yourself.

A: I was born on 12.04.1959 in the village Lowa Khurd, Tehsil Bahadurgarh, District Jhajjar, Haryana. I studied up to 9th standard in the school of the village and quit learning after failing in the 10th standard examination. Afterwards, I started working as a landlord. My father Shri Ram Chander also works as a landlord (farmer) and my mother Smt. Suraj Mukhi had

passed away approximately thirty years ago. I have two brothers and two sisters. Both of my sisters Sunita and Anita are married and my brother Jai Bhagwan who is approximately 42 years old and has studied upto 12th standard and has a truck supplies building materials. My second brother Shri Bhagwan who is approximately 31 years old has studied upto 7th standard and works as a peon in Lowa Khurd High School. Both of my brothers are also married. I had got married in the year 1980 and the name of my wife is Santosh and I have two daughters and two sons. Elder daughter Manisha studies in the third year of B.A. in the Government College, Bahadurgarh and younger daughter Babita studies in 12th standard at Noonamajra. My elder son Pradeep studies in 10th standard in Golden Valley School, Bahadurgarh and younger son Sandeep studies in the 8th standard in same school. I was elected as the Sarpanch of the village Lowa Khurd in the year 2000 and remained Sarpanch till 2005. In the year 1986-1987, we purchased a plot measuring 375 yards in the Shakti Nagar Colony of Bahadurgarh and got a building constructed in the month of June-July, 2005 and started living in Bahadurgarh house since October, 2005. Even my brother Jai Bhagwan lives in this house with me alongwith his family and my younger brother Shri Bhagwan lives in our village house.”

85. Appellant Jasbir Singh stated as follows:

“I was born in village Rewari Kheda in year 1972. I have passed 8th standard from Middle School of the village and passed by High School examination from village Chhara. My father does agricultural work and I also do agricultural work on the same land. We are four brothers and one sister. Suresh does agricultural work. Ranvir is employed in Police. Sumer and Rana Pratap do agricultural work. My marriage took place in year 2003 and my wife’s name is Savita. I have a son namely Aditya whose age is 5 months. I met Chand in village Lowa, District Jhajjar, Tehsil Bahadurgarh around 7-8 years ago.”

86. Appellant Narender Singh stated as follows:

“Q: Tell about yourself.

A: On 10.05.1974, I was born in my village Khanpur Kalan. My father is a farmer. My mother Smt. Sajjan Kaur is a housewife. I have an elder brother whose name is Ramesh @ Charan Singh who is a Havaladar in 14 Batallion, Rajasthan Rifles, Army. I passed my matriculation from government school. After studies, I started farming. In year 2002, I joined Red Cross Society, Panchkula as a driver. Prior to that i.e. in 1997, I worked as a driver in Fire Brigade, Panchkula on temporary basis. In 1991, I got married with Smt. Guddi @ Roshni and I have two children. My elder son namely Arvind is 6 years old and younger son Parveen is 4 and half years old.

Q: What type of work do you do in Red Cross Society?

A: I am a driver of a funeral van bearing registration number HR 68 1558. I ferry dead bodies in a van at different places and its charges @ Rs. 4 per km is deposited in Red Cross.”

87. Thus, there is no merit in the submission that the statements of the appellants recorded under Section 67 were not voluntarily made.

88. It is pointed out that there exists a discrepancy with respect to the date mentioned on the summons (Ex. PW-1/K) issued to appellant Chand Singh under Section 67 of the Act. The summons (Ex. PW-1/K) was dated as 31.12.2005, whereas the statement (Ex. PW-5/A) under Section 67 was recorded on 01.01.2005. In my opinion, the same is not material in nature since the proceedings went late in the night. As the statements reveal, the seizure proceedings went on till 11:45 pm at night. It is possible that by the time the recording of statements was done, it was past mid night. For this reason, a minor discrepancy with respect to the recording of a different date,

that to, of the next day when the proceedings are continuing till mid night is not enough to raise any doubts with respect to the proceedings.

89. It was further argued that the appellants were in custody when the statements under Section 67 were recorded. On the other hand, learned SPP submitted that there exists nothing on record to show that the appellants were in custody at the time of recording of statement. He further submitted that even if it is to be considered that the appellants were in custody, it is immaterial, since they have disclosed such facts in their statements to which only they were privy.

90. I find force in the submission of the learned SPP that there exists nothing on record to suggest that appellants were in custody. However, the submission that it is immaterial whether they were in custody, or not, is not correct. The difference in Section 25 of the Indian Evidence Act, 1872 and Section 67 of the Act is very clear. The former is with respect to the statement made while in custody whereas the latter is with respect to the statement made while not in custody. From this difference, stems the admissibility of the statements. While the statements made in custody are not admissible, the statement made while not in custody is admissible. In **Kanhaiyalal v. Union of India**, (2008) 4 SCC 668, it was observed that:

“43. The law involved in deciding this appeal has been considered by this Court from as far back as in 1963 in Pyare Lal Bhargava's case (supra). The consistent view which has been taken with regard to confessions made under provisions of Section 67 of the NDPS Act and other criminal enactments, such as the Customs Act, 1962, has been that such statements may be treated as confessions for the purpose of Section 27 of the Evidence Act, but with the caution that the Court should

satisfy itself that such statements had been made voluntarily and at a time when the person making such statement had not been made an accused in connection with the alleged offence.

44. In addition to the above, in the case of *Raj Kumar Karwal v. Union of India and Ors.*, 1991 CriLJ 97, this Court held that officers of the Department of Revenue Intelligence who have been vested with powers of an Officer-in-Charge of a police station under Section 53 of the NDPS Act, 1985, are not 'police officers' within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence against him. It was also held that power conferred on officers under the NDPS Act in relation to arrest, search and seizure were similar to powers vested on officers under the Customs Act. Nothing new has been submitted which can persuade us to take a different view.

45. Considering the provisions of Section 67 of the N.D.P.S. Act and the views expressed by this Court in *Raj Kumar Karwal's* case (*supra*), with which we agree, that an officer vested with the powers of an Officer-in-Charge of a Police Station under Section 53 of the above Act is not a 'Police Officer' within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the N.D.P.S. Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the N.D.P.S. Act to be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act.

46. There is nothing on record to suggest that the appellant was compelled under threat to make the statement after he had been placed under arrest which renders such statement inadmissible and not capable of being relied upon in order to convict him. On the other hand, there is the evidence of PW9 upon which the High Court has relied in convicting the appellant. It may once again be mentioned that no question in

cross-examination had been put to PW9 in this regard and the version of the said witness must be accepted as corroborative of the statement made by the accused.

47. It may also be recalled that though an application was made for retracting the confession made by the appellant, neither was any order passed on the said application nor was the same proved during the trial so as to water down the evidentiary value of the said statement. On the other hand, in the absence of such evidence on record, the High Court had no option but to proceed on the basis of the confession as made by the appellant under Section 67 of the NDPS Act. Since it has been held by this Court that an officer for the purposes of Section 67 of the NDPS Act read with Section 42 thereof, is not a police officer, the bar under Sections 24 and 27 of the Evidence Act cannot be attracted and the statement made by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. Since a conviction can be maintained solely on the basis of a confession made under Section 67 of the NDPS Act, we see no reason to interfere with the conclusion of the High Court convicting the appellant.”

91. Nevertheless, the aforementioned legal position does not affect the present case, since it is clear from the arrest memo (Ex. PW-1/E) as well as the statements of official witnesses, that the arrest was made after the proceedings had been completed.

92. I find merit in the submissions of the learned SPP that although the appellants were produced before the court on 02.01.2006 on an application filed by the NCB seeking judicial remand, no retraction application was filed by them at the earliest opportunity. The retraction application was filed by appellant Chand Singh and appellant Jasbir Singh on 16.01.2006. This evidently suggests that the retraction statements of the appellant Chand

Singh and the appellant Jasbir Singh are an afterthought. They did not retract the statement at the earliest opportunity. Perusal of the record reveals that appellant Narender Singh did not even file any retraction statement, which goes on to prove the case of the prosecution.

93. On the aspect of conscious possession, it is to be first ascertained whether the appellants were in possession of the contraband substance. As noted above, the possession of the contraband stands established. Thus, the question that now remains to be examined is, whether the appellants were in conscious possession of the contraband substance. The aspect of conscious possession has been given a statutory recognition under the scheme of the NDPS Act under Sections 35 and 54, which read as follows:

“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)

94. 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.

95. In *Noor Aga* (supra), the Supreme Court observed:

“58. 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.

59. 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."

96. 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 under the Act.

97. In ***Megh Singh v. State of Punjab***, (2003) 8 SCC 666, it was observed that:

"9. 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.

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

11. 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.

12. 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)).

13. 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).”

98. Learned counsels for the appellants submitted that the appellants were not in conscious possession of the contraband substance. It is submitted that in the present case, the prosecution has not established the possession of charas with the appellants, beyond reasonable doubt. Thus, the question of conscious possession does not arise, since possession has not been established in the first place.

99. In the present case, possession has been established by the prosecution beyond reasonable doubt. The recovery proceedings have been duly proved beyond shadow of doubt. Perusal of the statements of the appellants as well as the official witnesses reveals that there is a high degree

of corroboration of facts leading to the recovery, seizure and arrest proceedings. As noted above, minor discrepancies in the testimonies of witnesses that do not go into the root of the case of the prosecution cannot be held to vitiate the proceedings conducted. Therefore, it was for the defence to rebut the presumption that the appellants were not in conscious possession of the contraband.

100. However, the appellants have failed to rebut the presumption that they were not in conscious possession. Hence, it stands proved that the appellants were not only in possession, but in conscious possession of seized charas.

101. It was argued by learned counsels that it cannot be believed that the contraband substance was tested at the spot as the same has never been proved by the prosecution. Reliance was placed on the statements of R.K. Yadav (PW-1) and Vikas Kumar (PW-2), wherein they have disclosed that although the seized contraband substance was tested at the spot, no report was made. They also disclosed that the bags were not weighed at the spot. In fact, no proceedings were actually conducted at the spot except the alleged testing.

102. Herein, it must be noted, that they have also disclosed that a huge crowd had gathered at the spot at the relevant time. Therefore, under the circumstances, it was felt by the officials that it would be better if the proceedings are conducted at the office itself. In such a case, it cannot be said that usual procedures were not followed.

103. Learned counsels for the appellants had relied on the statement of R.K. Yadav (PW-1) to suggest that it raises a strong concern with respect to

the authenticity of the proceedings. In his cross-examination, R.K. Yadav (PW-1) deposed that the proceedings were conducted in the basement of the NCB office. It is submitted by the learned counsels that as a matter of fact, the office of NCB does not have a basement at all. Therefore, the story of the prosecution with respect to the recovery and proceedings held thereafter are concocted and cannot be believed. However, the appellants have not claimed in their defence that there is no basement in the NCB office. No such suggestion was given to the prosecution witnesses during their cross-examination. In my opinion, if a finding is to be based on an aspect, it must be made on the basis of cogent evidence brought on record. The statement of the counsels for the appellants does not inspire confidence of this Court. In absence of evidence to this effect, the court cannot rely on an *ipse dixit* of the counsel.

104. Learned counsels submitted that the appellants were not apprehended from the said spot and the statements of prosecution witnesses are inconsistent with respect to the location of the vehicles as well as the location of Hero Honda showroom. The Learned Trial Court Judge had also made an observation from his personal knowledge about the existence of the showroom. On the other hand, learned SPP submitted that R.K. Yadav (PW-1) and Vikas Kumar (PW-2) have both deposed on the same lines with respect to the spot of apprehension and recovery. R.K. Yadav (PW-1), in his cross examination stated that the two vehicles had their back towards each other and the distance between the vehicles was about 1 to 2 feet. Vikas Kumar (PW-2) deposed that the vehicles were parked in the service lane near Hero Honda showroom and that the appellants were unloading the bags

from HR 68 1558. He also stated that there was about 1 and half meter distance between the two vehicles. N.S. Yadav (PW-5) stated that the Hero Honda showroom was on the right side of the road when they approached the vehicles of the appellants. He also stated that the distance between the backside of both the vehicles was 2-3 feet. Avinash Kumar (PW-6), in his cross-examination deposed that the Hero Honda agency is about 1 kilometer from Peeragarhi Chowk and that the Hero Honda Agency was on the side from Punjabi Bagh to Rohtak. Jeep was facing towards Rohtak. It is evident that the prosecution witnesses have all deposed on the same lines. No doubt certain minor inconsistencies exist with respect to the distance between the two vehicles and the exact location of the Hero Honda showroom but they do not affect the case of the prosecution at its root. In this regard the Supreme Court in **C. Muniappan and Ors. v. State of Tamil Nadu**, (2010) 9 SCC 567, observed that:

“85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. (vide Sohrab and Anr. v. The State of M.P., AIR 1972 SC 2020; State of U.P. v. M.K. Anthony, AIR 1985 SC 48; Bharwada Bhogini Bhai Hirji Bhai v. State of Gujarat, AIR 1983 SC 753; State of Rajasthan v. Om Prakash, AIR 2007 SC 2257; Prithu @ Prithi Chand and Anr.

v. State of Himachal Pradesh, (2009) 11 SCC 588; State of U.P. v. Santosh Kumar and Ors., (2009) 9 SCC 626 and State v. Saravanan and Anr., AIR 2009 SC 151).”

(Emphasis Supplied)

105. I find force in the submission of the learned SPP that if the appellants were innocent then it is difficult to understand so as to why they would try to flee away from the spot when the NCB officials approached them. He relied on the cross examination of R.K. Yadav (PW-1), who stated that “*Accused persons tried to run away but they could run. The accused persons caught in their position as we found them on reaching the spot.*”. Perusal of the statements of appellants recorded under Section 67 of the Act reveal the same. Therefore, the statement of R.K. Yadav (PW-1) stands corroborated by the statements of appellants.

106. 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 148 kilograms, the order on sentence is also upheld, as it is the minimum punishment that has been awarded to the appellants.

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

(VIPIN SANGHI)
JUDGE

NOVEMBER 30, 2015