

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.1207 of 2016

Arising Out of PS. Case No.-13 Year-2012 Thana- ECONOMIC OFFENCES, BIHAR
District- Patna

(Against the judgment of conviction dated 3.11.2016 and order of sentence dated 15.11.2016 passed by Sri Ram Surat, Addl. Sessions Judge-VII, Patna in Special Case No. 22/2012 (arising out of Economic Offence P.S. Case No. 13/2012))

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Avinash Kumar S/o Sri Sunil Kumar @ Sunil Kumar Jaiswal resident of Village - Chandee, P.S. - Badh, District - Patna at present mohalla - Jakkanpur, P.S. - Jakkanpur, District - Patna.

... .. Appellant/s

Versus

The State of Bihar through Economic offence, Bihar, Patna.

... .. Respondent/s

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with

Criminal Appeal (DB) No. 71 of 2017

Arising Out of PS. Case No.-13 Year-2012 Thana- ECONOMIC OFFENCES, BIHAR
District- Patna

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Manoj Sharma Son of Shtrudhan Sharma, Resident of Village- Road no. 10, Rajendra Nagar, P.S.- Kadamkuan, District- Patna.

... .. Appellant/s

Versus

1. State of Bihar
2. The Zonal Director, Narcotics Control Beaur, Patna.

... .. Respondent/s

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with

Criminal Appeal (DB) No. 15 of 2017

Arising Out of PS. Case No.-13 Year-2012 Thana- ECONOMIC OFFENCES, BIHAR
District- Patna

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Sujit Kumar, son of Awadhesh Kumar Chaudhary, Resident of village- Khirauna, P.S.- Rahui, District- Nalanda.

... .. Appellant/s

Versus

The State Of Bihar Through Economic Offences, Bihar, Patna.

... .. Respondent/s

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Appearance :

(In Criminal Appeal (DB) No. 1207 of 2016)

For the Appellant/s : Mr. Yogesh Chandra Verma, Senior Advocate
Mr. Ansul
Mr. Ansh Kumar,
Mr. Bhaskar Shankar
For the Respondent/s : Mr. V.N.P SINHA, Sr. Advocate (EOU)UNIT
Ms. Soni Srivastava

(In Criminal Appeal (DB) No. 71 of 2017)

For the Appellant/s : Mr. S.N.P. Sinha, Sr. Advocate,
Ms. Rashmi Bharti,
Mr. Jitendra Narain Sinha
For the Respondent/s : Mr. Abhimanyu Sharma

(In Criminal Appeal (DB) No. 15 of 2017)

For the Appellant/s : Mr. Dr. Brahma Deo Prasad
For the Respondent/s : Mr. Abhimanyu Sharma

**CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR
MANDAL**

and

HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA)

Date : 21 -12-2017

Avinash Kumar (A-1) of Cr. Appeal (D.B.) No. 1207 of 2016, Sujit Kumar (A-2) of Cr. Appeal (D.B.) No. 15 of 2017 and Manoj Sharma (A-3) of Cr. Appeal (D.B.) No. 71 of 2017 have been convicted by the learned Trial Court under Sections 20(b),(ii)(c), 21(c) and 23(c) of the Narcotic Drugs and Psychotropic Substance Act (for short 'N.D.P.S. Act') vide judgment of conviction dated 3.11.2016 rendered in Special Case No. 22 of 2012.

2. On the basis of self written report (Ext.2) made by P.W.1 Jai Narayan Prasad, Economic Offence Unit (for short 'E.O.U'), the case



was registered. It is alleged that Gopal Paswan (P.W.9), then posted as Dy.S.P., Special Task Force (for short 'S.T.F.') got a secret information about the clandestine sale of Heroine/*charas* in the city of Patna. The information was transmitted to the higher official of the E.O.U. A raiding team consisting of Police Personnels of two different wings of the Police Force namely S.T.F. and E.O.U. was constituted by him. The team went to the reported busy place in the township of Patna and kept waiting. At about 2.15 p.m., A-1 and A-2 reached there on motorcycle. They were intercepted by the raiding team. On query, they disclosed their identity. A search was carried out of the cloth bag hanging with the handle of their motorcycles. 8 straps each containing 220 grams of heroine cleverly concealed in the cavities of the cloth bag were recovered from the bag of the motorcycle of A-2. It is stated that samples being 25 grams from each packet was drawn and seizure memo were prepared. A copy was handed over to A-2. In all, 1760 grams of *charas* was recovered from the bag. Samples from the straps were drawn. Thereafter, the bag held by the A-1 was searched. Similarly, 8 strips in the bag each containing 220 grams of heroine/*charas* like substance were recovered and samples in the similar manner were drawn and sealed. A seizure memo (Ext.B) was drawn in presence of 02 independent witnesses and a copy was given to the A-2 and his signature was obtained. Such seizure was made in presence of two independent witnesses namely P.W. 6 and 7. On their



disclosure, the team first went to co-accused Surendra Paswan and interrogated. On the basis of interrogation and disclosure made by him, the team went to the rented room of the A-3 where he was present. After completing the formalities, the search of the room occupied by the A-3 was carried out and 49 such cloth bags were found stacked beneath the bed of A-3. 17 pouches/strips of heroine/*charas* like substance were also recovered from behind the hanging portrait on the wall of the room. The total weight of the narcotic substance recovered from his room was 12 kg 820 grams. Samples were accordingly drawn in presence of A-3, the witnesses and the members of the raiding team. On the basis of the written report, an F.I.R. was drawn at 9.30 p.m.. The same was dispatched to the Court on the following day.

3. P.W.11 being the S.I. of E.O.U. took over as the Investigating Officer. The samples sealed in packets were presented before the Special Court (Ext.4) for sending them for the chemical analysis. Under the order of the Court(Ext.3 and 3/1), the samples were sent to the Forensic Science laboratory, Patna and Central Revenue Control Laboratory, Kolkata (for short 'F.S.L., Patna' and 'C.R.C.L., Kolkata' respectively). The report submitted by the F.S.L., Patna (Ext.5) dated 8.10.2012 was produced before the Court on 12.10.2012 whereas the report submitted by the C.R.C.L., Kolkata (Ext. 6 dated 31.10.2012) was received on 21.11.2012. Both the reports found the sample



narcotic/contraband substance. After concluding the investigation, P.W.11 laid the charge-sheet on 26.11.2012 whereon cognizance was taken. The case came on the file of the learned Trial Judge for disposal.

4. To bring home the charge, the prosecution examined 14 P.Ws. P.W.-1 is the Inspector of E.O.U. and the informant of the case. P.W.2 is the Sub-Inspector of Police. P.W.3 Sub-Inspector of Police, S.T.F., P.W. 4 Sub-Inspector S.T.F., P.W.-5 Sub-Inspector, S.T.F., P.W.8, Sub-Inspector, S.T.F., P.W.-9 Dy.S.P. S.T.F., P.W.10 (Sub-Inspector, E.O.U.), P.W.11 (I.O.), P.W.13 (Constable, S.T.F.) and P.W.14 (Constable, S.T.F.) besides other constituted the raiding team. These P.Ws have narrated as to what happened when the two appellants (A-1 and A-2) were first searched at the Smriti Park in the township of Patna whereafter the room of the A-3 was searched at Rajendra Nagar, Patna. On analysing the evidence, both oral and documentary, produced at the trial by the prosecution, the Trial Court held the charges duly proved.

5. We have heard Mr. Y.C. Verma, learned Senior Counsel assisted by Mr. Ansul in support of Cr. Appeal (D.B.) No. 1207 of 2017 and Cr. Appeal (D.B.) No. 15 of 2017, Mr. Suraj Narayan Prasad Sinha, learned Senior Counsel assisted by Ms. Rashmi Bharti in support of Cr. Appeal (D.B. No. 71 of 2017 and Mr. Vishwanath Prasad Singh, learned Senior Counsel and Special P.P. assisted by Ms. Soni Srivastava, Counsel for E.O.U..



6. Learned counsel for the appellants has tried to demolish the prosecution story of raid by joint team and recovery of *charas* from the possession of the appellants on the grounds that (i) there is no written order about constitution of raiding team (ii) Once the learned Trial Court has disbelieved the half of the prosecution story, he ought not to have convicted the appellants relying upon the same evidence. Further argument of learned counsel for the appellants is that apart from the above fact, the investigation is against the well settled norms as one of the members of the raiding party has conducted the investigation in this case which has been deprecated by Hon'ble Apex Court in the case of ***Megha Singh versus State of Haryana*** reported in ***AIR 1995 SC 2339*** and also in another case of ***State by Inspector of Police, NIB, Madurai, Tamil Nadu versus Rajangam*** reported in ***(2010) 15 SCC 369***

7. Further argument of learned counsel for the appellants is that the N.D.P.S. Act is stringent and punishable with minimum sentence of 10 years and also imposition of huge fine and there is reverse burden of proof against the accused persons. Considering that aspect of the matter, the law provides some safeguards in the N.D.P.S. Act itself under Sections 41, 42, 50, 52, 52A and 57 of N.D.P.S., Act and other provisions which are mandatory in nature but in the present case, there is non-compliance of above provisions of the N.D.P.S., Act. Further stretching the above contention, learned counsel for the appellants



argued that Sub-Section (2) of Section 42 of N.D.P.S. Act provides that the information must be written down by the officer, who has received the information prior to raid and in case of urgency if it is not possible, the information regarding the same be sent to the superior officer within 72 hours, but in the present case, there is nothing available to show that either information was noted down or the same was sent to the superior officer even after the conducting of raid. In support of his contention, learned counsel for the appellants has referred Constitution Bench judgment in the case of *Karnail Singh versus State of Haryana* reported in (2009) 8 SCC 539, judgment reported in (2009) 16 SCC 332 (*State of Orissa versus Laxman Zena*), case of *Directorate of Revenue and Anr versus Md. Nisar Hoda* reported in (2008) 2 SCC 378 as well as the judgment of Hon'ble Apex Court in a case of *State of Punjab versus Balbir Singh* reported in (1994) 3 SCC 299.

8. In contra, Mr. Vishwanath Prasad Singh, learned Senior Counsel assisted by Ms. Soni Srivastava, Counsel for E.O.U. has supported the findings of guilt. Counsel for the E.O.U. has outlined the broad canvass of the prosecution case depicting the time constraint under which the entire exercise was undertaken by the prosecution. P.W.9 is the Dy.S.P., S.T.F.. According to him, at 12.45 p.m. on 30.08.2012, he received a confidential information that deal of huge sale of narcotic drugs was likely to take place near the Buddha Smriti Park in the



township of Patna. An oral information was immediately given to the higher police officers as also to the E.O.U.. Almost all witnesses have deposed to this effect. He constituted a team of S.T.F. personnels and reached E.O.U. at 1 o'clock. By the time, P.W.1 had also informed orally the senior Police Officers manning E.O.U.. At the E.O.U., a joint raiding team consisting of the officials of S.T.F. and E.O.U. was constituted by P.W.9 which will appear from evidence of P.W.9 and P.W.2. Soon thereafter, as per the evidence on record, they left for the place where such deal was reported to be made. By 2 p.m., they reached the said place and kept a vigil. Within 15 minutes thereof, A-1 and A-2 reached the speculated place on motorcycle and suspecting their activities, they were apprehended. As about pre and post information, although orally given to superior police officers has been deposed by almost all witnesses in particular, P.Ws. 1, 9 and 11 have spoken about the same. It is submitted that the team was purposely constituted bigger in size as according to the secret information received, a big deal of sale of narcotic drug or psychotropic substance was going to be struck. As about proper sealing of the samples, it has been urged that the same was carried out with all precautions and complying with the provisions of the N.D.P.S. Act. Reference in this regard was made to the evidence of P.Ws.1, 2, 9 and 11.

9. Further submission of learned Senior Counsel for E.O.U is



that copy of the F.I.R. as well as the arrested accused persons were produced before the Special Court the following day i.e. on 31.08.2012 itself along with seized articles and samples. It has also been contended that P.W. 11 is not the informant or the person who has seized the articles. He was only a member of raiding party, as such, ratio of judgment of *Megha Singh (supra)* and *State by Inspector of Police versus Rajangam (supra)* is not applicable in the present facts and circumstances of the case.

10. Further submission of learned Senior Counsel for E.O.U is that the facts proved at the trial themselves establish that recovery is from public place i.e. park and not from the house or the room, as such, in the facts and circumstances of the case, Section 42 of the N.D.P.S. Act shall not apply rather it will be covered under Section 43 of the N.D.P.S. Act. So far A-3 Manoj Sharma is concerned, it has been contended that the seizure from his room is in continuation of the first seizure, as such, the same will also be governed according to Section 43 of the N.D.P.S. Act. In support of his contention, learned senior counsel has drawn our attention towards paragraph 12 of the judgment of *Karnail Singh (supra)*. Drawing our attention also towards paragraph 16 of *Karnail Singh (supra)*, it has been submitted that the Constitution Bench of the Hon'ble Apex Court has held that Section 42 of N.D.P.S. Act is not mandatory rather directory in nature. He further pointed out from the



evidence that at the spot itself, the samples were prepared, weighed and sealed and signature of the accused as well as the independent witnesses was taken and the same was produced before the Court of the Special Judge on the very next date whereafter the samples were sent to the F.S.L., Patna and C.R.C.L., Kolkata, under the orders of the Court which will appear from Exts. 3, 3/1, 5 and 6. As such, there is substantial compliance of the provision of Section 52A of the N.D.P.S. Act and the standing order issued under Section 52A of the N.D.P.S. Act.

11. Before examining the rival submissions, we would like to discuss the evidence available on record. P.W. 1 is the informant in this case, and his evidence disclosed that on information by the Gopal Paswan, Dy.S.P., S.T.F. (P.W.9) regarding assemblage of some accused persons in connection with sale and purchase of *charas* at Budha Smriti Park, on the order of the superior officer, a raiding team was constituted and they reached Buddha Smriti Park and apprehended A-1 and A-2 (Avinash Kumar and Sujit Kumar) and notice under section 50 of the N.D.P.S. Act was given to them, motorcycle was searched and, 1760 grams *charas* each had been recovered from bag hanging with the motorcycle of each of the appellants. Two samples of 25 grams each (A/1, A/2 & B/1, B/2) were prepared from contraband seized from A-1 and A-2 separately at the spot itself, signature of witnesses were taken on envelope. Rest of *charas* were marked as 'B'. His evidence further



disclosed that on the information gathered from them, the team first went to co-accused Surendra Paswan and on his disclosure made in course of interrogation, they went to the rented room of A-3 (Manoj Sharma) and from his house total 12 kgs 820 grams *charas* were recovered and samples of 25 grams each from the packets were prepared and sealed and marked as C/1 and C/2. He has proved seizure list as Ext. 1 to 1/3, containing signature of witnesses and accused persons. His evidence further disclosed that the copy of the seizure list was also handed over to the accused persons. In his cross-examination, this witness has categorically stated that the raiding team was constituted under the order of the S.P. (Nawal Kishore Singh). In cross-examination, this witness also disclosed that before their search, the appellants were noticed about the provisions under Section 50 of the Act and after such compliance and with their consent, the search was carried out. For weighing the seized articles, a weighing machine was brought from a '*thelapuller*'. His evidence in cross-examination also discloses that samples of 25 grams each were prepared after taking it out from all and thereafter the signature of accuseds as well as the witnesses were taken on that envelope and the same was closed by putting gum and also sealed with the E.O.U. seal and he also put his signature. His evidence further shows that rest of the seized *charas* were kept in a bag and sealed and all the exhibits and written report were handed over to the Officer-in-



charge. This witness was subjected to rigorous cross-examination by the defence. To a Court query, he has stated that he had also given notice under Section 50 of the N.D.P.S. Act, prior to search of A-3 Manoj Sharma.

12. P.W. 2 is the Inspector in E.O.U. His evidence also supports the prosecution case about receiving of information at 1 p.m. from P.W. 1 regarding clandestine transaction of sale and purchase of *charas* at Buddha Smriti Park. Thereafter, a joint team was constituted and they have reached the park at about 2 p.m. and about 2.15 p.m., arrested A-1 and A-2 and story of recovery of 1760 grams *charas* each from A-1 and A-2 and thereafter seizure list was prepared of the seized articles. Samples were prepared in two sealed envelopes, copy of which had been handed over to the accused persons. The evidence of this witness also discloses about recovery of 12 kg. 820 grams of *charas* from the house of A-3 (Manoj Sharma).

13. P.W. 9 is the Dy. S.P., S.T.F. (Gopal Paswan) and his evidence discloses that he came to know that gathering of accused persons is expected near Buddha Smriti Park for a transaction of *charas*. Thereafter, he informed the E.O.U. and the higher police officers. A team was constituted. He has also supported the prosecution story of seizure from the appellants and also the preparation of seizure list as well as preparation of samples.



14. P.W. 11 is the I.O. in this case and he has also supported the prosecution case of the recovery of *charas* from appellants and as well as preparation of seizure list and the samples and he has also stated about compliance of Section 50 of the N.D.P.S. Act prior to recovery of *charas*. He has also stated about recovery of *charas* from the house of A-3. Evidence of this witness also discloses that that the accused persons were produced before the Special Court along with the seized articles and samples and a prayer was made for sending the samples to F.S.L., Patna and C.R.C.L., Kolkata for chemical analysis. Paragraph 27 of his cross-examination also shows that the case was supervised by the S.P. Nawal Kishore Singh .

15. Apart from the above, all other prosecution witnesses are police personnel except P.W. 12 (Ashok Kumar Sharma), and are members of raiding party and they have consistently supported the recovery of *charas*, preparation of samples from A-1 to A-3 In spite of their cross-examination, there is nothing to doubt/discredit their evidence regarding recovery from the possession of A-1 to A-3.

16. From perusal of the Lower Court Record, it appears that accused persons were produced in Court on 31.08.2012 i.e. next day of seizure and recovery and on 4.9.2012, I.O. prayed for sending samples to F.S.L. and C.R.C.L. Exts. 3 & 3/1 are letters issued from office of District Judge dated 5.9.2012 sending samples A/1, A/2, B/1, B/2, C/1 &



C/2 to the F.S.L. Patna and C.R.C.L Kolkata.

17. Discussions made above show that evidence of P.Ws are consistent on the point of recovery from the appellants, preparation of seizure list and drawing of samples and sealing thereof. It is well settled that the testimony of official witnesses cannot be discarded for the reasons that they are members of the police party rather their evidence need to be subjected to strict scrutiny and as far as possible be corroborated in material particulars. This view has been affirmed by Hon'ble Apex Court in the case of *Pradeep Narayan Madgaonkar versus State of Maharastra (1995) 4 SCC 255* and by several other decisions also.

18. Contention of appellants that P.W.11 is the I.O. and he was also member of raiding party has vitiated the investigation. We are aware of the judgments of Hon'ble Apex Court in cases of *Megha Singh (supra)* and *Rajangam (supra)* but in those cases, Investigating Officers were either the informant or the person who seized the articles. In the present case, P.W.1 is neither the informant nor he has seized the material exhibit or prepared seizure list or samples in the case. Hence, ratio of the aforesaid judgments in the facts and circumstances of the present case is not applicable in this case. Further the Hon'ble Apex Court in a case of *Hardip Singh versus State of Punjab* reported in *AIR 2009 SC 432* has also held as under in paragraph 14:



“As far as the submission that as Inspector Jarnail Singh was the complainant he should not have been made the investigating officer is concerned we may make reference to the decision of this Court in State v. V. Jayapaul, [(2004) 5 SCC 223], wherein it was held as under:

“We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased”

Concurring with the Courts below we have already held that the version of the defense is nothing more than a got up story of his own whims and caprices, thus in the facts and circumstances of the present case the question of bias does not arise. Sri Jarnail Singh made the recoveries of the opium and seized the same and therefore, he was rightly made the Investigating Officer in the case. The defense case which is found to be a got up story was sought to be made out only during the trial by which time investigation was complete. This contention therefore is also found to be without merit.”

19. In the present case also, there is also nothing available on record to show that I.O. (P.W.11) had any grudge against the appellants or he was prejudiced to them except the bald statements of the appellants under Section 313 Cr.P.C.

20. Appellants have also assailed the conviction on the ground



that on the basis of same evidence, other accused persons were acquitted, hence, they should not have been convicted on the same evidence. However, on close scrutiny of the evidence, it appears, there is consistent evidence of recovery of *charas* from the appellants which is not the case of other acquitted accused persons, and finding the materials not sufficient, they had been acquitted, whereas the case of present appellants is manifestly different and separable from the case of those acquitted. The above contention of appellants does not hold any ground.

21. Learned counsel for the appellants, vigorously pursued the Court about non-compliance of Section 42(2), 52A and 57 of the N.D.P.S. Act on the ground that those are mandatory and their non-compliance has vitiated the trial. However, later on, they have not pursued their argument regarding non-compliance of Section 42 of the N.D.P.S. Act, realizing the recovery is from the motorcycle parked in the public place. On bare perusal of Section 42 of the N.D.P.S. Act, it appears that it is applicable only when the recovery is made from a person, inside room, whereas in the present case, recovery from A-1 and A-2 is from the bag hanged with the motorcycle from a public place i.e. Buddha Smriti Park and not from their person or room, and, as such, there shall be no application of Section 42(2) in the facts and circumstances of the case rather there shall be application of Section 43 of the N.D.P.S. Act. The Constitution Bench judgment in the case of



Karnail Singh (supra) in paragraph 12 has held that *the material difference between the provisions of Sections 42 and 43 is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.*

22. Apart from that, as pointed out by learned Senior Counsel for the E.O.U., paragraph 16 of the *Karnail Singh (supra)*, the Hon'ble Apex Court also held as under:

“ 16. The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policy makers about it. Now for the last two decades police investigation has gone through a sea-change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the Register/Records kept for those purposes in the police station or the respective offices of the authorized officials in the Act if the emergency of the situation so requires. As a result, if the statutory provisions under Section 41(2) and 42(2) of the



Act of writing down the information is interpreted as a mandatory provision, it will, disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers.”

Further, the Hon’ble Apex Court in para 12 in the case of *Sajan Abraham versus State of Kerala* reported in (2001) 6 SCC 692 held as under:

“12. The last submission for the appellant is, there is non-compliance of Section 57 of the Act. He submits under it, an obligation is cast on the prosecution while making an arrest or seizure, the officer should make full report of all particulars of such arrest or seizure and send it to his immediate superior officer within 48 hours of such arrest or seizure. The submission is, this has not been done. Hence the entire case vitiates. It is true that the communication to the immediate superior has not been made in the form of a report, but we find, which is also recorded by the High Court that PW5 has sent copies of FIR and other documents to his superior officer which is not in dispute. Ex. P9 shows that the copies of the FIR along with other records regarding the arrest of appellant and seizure of the contraband articles were sent by PW5 to his superior officer immediately after registering the said case. So, all the necessary information to be submitted in a report was sent. This constitutes substantial compliance and mere absence of any such report cannot be said it has prejudiced the accused. This section is not mandatory in nature. When substantial compliance has been made, as in the present case it would not vitiate the prosecution case. In the present case, we find PW5 has sent all the relevant material to his superior officer immediately. Thus we do not find any violation of Section 57 of the Act.”



23. Further contention of the appellants is that section 52A of the N.D.P.S. Act provides that after the seizure of the articles, any inventory and samples be made in presence of Magistrate and even destruction be made as per order of the Magistrate but there is nothing available on record to show that the provisions has been followed even while preparation of samples, as such, there is complete disregard to the above provisions contained in Section 52A of the N.D.P.S. Act which has found to be mandatory by Hon'ble Apex Court as well as Single Bench of this Court. In support of his above contention, judgments of Hon'ble Apex Court in case of *Union of India versus Mohanlal and Ors* reported in (2016) 3 SCC 379 as well as Single Bench decision of this Court in the case of *Birendra Kumar Sharma vs Union of India* reported in 2013 (3) PLJR 87, case of *Girish Prasad versus Union of India* reported in 2012 (1) Crimes 625 have been cited.

24. However, the learned counsel for E.O.U. has drawn our attention towards Section 52A of the N.D.P.S. Act and argued that on plain reading of Section 52A of the N.D.P.S. Act, it shall appear, it is with regard to disposal of the contraband articles and it is only after the articles have been seized, samples and the residuary drawn therefrom deposited to the Officer-in-charge of the nearest police station. The compliance of that section is required. Furthermore, Section 52A is not



mandatory rather it is directory in nature. On the other hand, there is substantial compliance of the Standing order no. 1 of 1989 issued under Section 52A of the N.D.P.S. Act. He has also drawn attention towards paragraph 12 of *Sajan Abraham case (supra)* and submitted that a copy of F.I.R. was being sent to the superior officer and it was placed before the Special Judge on the very next day of seizure, as such, there is substantial compliance of Section 52A of the N.D.P.S. Act.

25. In this connection, it is worth mentioning here that Standing Order No. 1 of 1989 was issued under Section 52A of the N.D.P.S. Act by the Central Government with regard to drawal, storage, testing and disposal of samples from seized narcotic drugs and psychotropic substance and clauses 2.1 and 2.2, 3.9 of the aforesaid standing order provide as under:-

“2.1. All drugs shall be properly classified, carefully, weighed and samples on the spot of seizure.

2.2 All the packages/containers shall be serially numbered and kept in lots for Sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.

3.9 Since the early disposal of drugs assumes utmost consideration and importance, the enforcement agencies may obtain orders for pre-trial disposal of drugs and other articles (including conveyance, if any) by having recourse to the provisions of sub-section (2) of section 52A of the Act.”



26. Section 4 of the aforesaid standing order no. 1/89 provides for action to be taken by police and other empowered officers for pre-trial disposal and Clauses 4.1, 4.2 and 4.3 provide detailed provisions relating to preparation of inventory certifying the correctness of inventory in presence of Magistrate, photographs of such drugs or substance and certifying by Magistrate such photographs and other provisions relating to destruction of the seized articles.

27. In the present case, the evidence of P.W.1 manifests that the samples from narcotic drugs had been prepared on the spot of recovery itself in presence of Dy.S.P. (P.W.9), who is a gazetted officer, in duplicate in the presence of seizure list witnesses (P.Ws. 6 and 7) and the appellants from whom the drugs were recovered, which were marked as A/1, A/2, B/1, B/2, C/1 and C/2, i.e. the samples prepared from the seized drugs from each of the appellants. Evidence of P.W.1 also shows that they were sealed with seal of E.O.U.. As such, there appears to be substantial compliance of the Standing Order No. 1 of 1989 regarding preparation of samples. Moreover, in ***Gurbax Singh versus State of Haryana*** reported in ***A.I.R. 2001 SC 1002*** followed by another judgment reported in ***(2005) 8 SCC 725 (Babubhai Odhavji Patel versus State of Gujarat)*** it is held that provision of Sections 52 and 57 are directory and violation of these provisions would not *ipso facto* vitiate the trial or conviction.



28. Learned counsel for the appellants also challenged the genuineness of the report (Ext. 5) on the ground that no details of samples has been mentioned in Ext.5 (Report of F.S.L., Patna) and though it is mentioned in Ext. 6 (report of C.R.C.L., Kolkata) the weight of the sample mentioned in the report (Ext.5) is different from the weight of the sample mentioned in Ext. 3 & 3/1 which was sent to the C.R.C.L., Kolkata and also doubted the same as seal was found broken. Further ground for assailing the report is that though opinion has been given in Exts. 5 and 6 that the samples are *charas* but nothing has been mentioned about detail of the tests on which the aforesaid finding has been reached and submission of learned counsel for the appellants is that the same is not an expert report under Section 45 of the Indian Evidence Act. In that connection, he relied upon decision of the Hon'ble Apex Court in a case of *Safi Ahmad versus State of Rajasthan* reported in *AIR 1999 SC 3318* (paragraphs 17, 18 and 19) and, as such, the conviction based on such report is erroneous.

29. On the other hand, the evidence of I.O. disclosed that the accuseds were forwarded to the Sessions Judge along with the seized articles, seizure list, the L.C.R. and other materials before the Sessions Judge on 31.08.2012 and on 4.9.2012, I.O. has filed a petition praying that the permission may be granted for examination of the seized exhibits from F.S.L., Patna and C.R.C.L., Kolkata. It further appears



from Exts. 3 and 3/1 which are the letter written by the Registrar, Civil Court, Patna in pursuance of the order of District Judge that two samples of 25 grams were prepared from the seized articles from all the appellants which have been marked as A/1, A/2, B/1, B/2, C/1 and C/2 and Ext. A/2, B/2 and C/2 were sent to the C.R.C.L., Kolkata and Exts. A/1, B/1 and C/1 have been sent to the F.S.L., Patna. In pursuance of that, report has been received from F.S.L., Patna which is Ext. 5 on 12.10.2012 stating as under:-

“RESULT OF EXAMINATION

All the three blackish brown coloured slab like solid substances contained in the three white coloured paper envelopes marked as A1 to C1 as described above were found to be ‘CHARAS’ containing Tetra Hydro Cannabinol (T.H.C.) as their chief intoxicating ingredient.

‘Charas’ is also known as ‘HASHISH’ is the resinous exudate of the flowering and fruiting tops of the female plant of cannabis sativa.”

Similarly, report of C.R.C.L., Kolkata (Ext.6) also shows as under:-

“ Report: Received one sealed yellow coloured sample packet marked as Memo No. 2709 dt. 05.09.12.Sealed with five (05) red lac seals in intact condition. Impression of seal affixed on the sample packet tallied with the specimen of seal as given on the forwarding letter. On opening the yellow sample packet, three, white paper envelopes were found kept inside. Each of three white paper envelopes sealed with seven (07) red lac seals in broken condition.

On opening the each of the three white paper envelope sample were found kept in yellow coloured auto pressed heat sealed plastic pouch. Each of three sample is in the form of blackish brown sticky mass. Each of three sample responds to the test for resinous extract of plant Cannabis sativa (charas).”



30. No doubt, the gross weight mentioned in Ext. A2 (23.3 gm), B2 (18.1 gm) and C2 (26.1 gm) in the report (Ext.6) varies from the weight of the samples mentioned in the letter Ext. 3/1 but it has to be kept in mind that the weight was taken by a weighing machine of ‘*thelapullar*’ and, as such, there may be some discrepancies in the weight but otherwise the report clearly shows that there is no tempering in the sample and it was found in closed plastic pouch.

31. So far submission of learned counsel for the appellants that no details of the examination is mentioned in the Exts. 5 and 6, as such, reliability of the same cannot be admitted and judgment of ***Safi Ahmed (supra)*** is concerned, on perusal of the judgment, it appears that the Hon’ble Apex Court found the argument regarding the expert evidence misplaced. So far the report of F.S.L., Patna and C.R.C.L., Kolkata in the present case is concerned, the same has been issued by the Senior Scientific Officer of F.S.L. and Chemical Examination Grade-I of the C.R.C.L., Kolkata as well as by the Assistant Chemical Examiner of C.R.C.L., Kolkata and the same is admitted into evidence under Section 293(4) Cr.P.C. which may be used as the evidence even without examination of the examiner. Furthermore, though they have been marked with objection by the appellants, however, nowhere the appellants has prayed for examination of the Chemical Examiner of either F.S.L., Patna or C.R.C.L., Kolkata doubting their findings.



Further, learned Trial Court has also accepted the report and report of C.R.C.L., Kolkata also shows that each of three samples responds to the test for resinous extract of plant cannabis sativa (*charas*).

32. Hence, this Court is not in conformity with submission advanced by learned counsel for the appellants that the finding of *charas* based on the report of the Chemical Analyser (Exts. 5 and 6) which is not based on any detail examination, as such, the same cannot be relied.

33. Further submission which has also vigorously been advanced by learned counsel for the appellants is about non-production of seized articles or remaining of the sample returned by the Chemical Examiner. It has also been argued that there is live link between the seized articles from the possession of the appellants and the finding of *charas* and the non-production of the same vitiated the whole trial and in that connection, learned counsel for the appellants has relied upon the decision of *Jitendra Kumar & Anr versus State of M.P.* reported in *(2004) 10 SCC 562* as well as case of *Ashok @ Dangra Jaiswal versus State of M.P.* reported in *(2011) 5 SCC 123*. It has also been submitted that not only the material exhibit not produced in the Court but there is also nothing available on record to show that as to where the material exhibit or samples were kept after its seizure, as no Malkhana register has been brought on record nor Malkhana Incharge has been examined



to show the seized articles or remaining of same were kept in safe custody, so as to rule out tampering. On the basis of above material irregularities, learned counsel for the appellants found the judgment of conviction unsustainable in the eye of law.

34. On the other hand, learned senior counsel for the E.O.U. has submitted that when there is consistent evidence available on record showing the recovery from the possession of the appellants and samples were prepared from them and on examination by the F.S.L., Patna and C.R.C.L., Kolkata (Exts. 5 and 6) they are found to be *charas*, as such, there is presumption against the appellants under Sections 35 & 54 of the N.D.P.S. Act. In such a situation, the whole trial cannot be vitiated only because of the non-production of seized articles or non- production of Malkhana register. Learned Senior counsel for E.O.U. has also referred to Section 465 of Cr.P.C. in this context.

35. On close scrutiny of the record, it appears that neither the seized articles nor the remaining of the samples has been produced before the Trial Court. However, as discussed above, there are consistent evidence available on record about recovery from the possession of the appellants from which samples were prepared and the same, on examination, found to be *charas*. Further, Sections 35 & 54 of the N.D.P.S. Act provides for presumption against the accused persons and he has to explain how he came to be in possession of the same. The



Hon'ble Apex Court in a case of *Gian Chandra and Ors versus State of Haryana reported in AIR 2013 SC 3395* has discussed this aspect of the matter in paragraph nos. 13 to 16, which is reproduced hereinbelow:

“13Once 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..... It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.”

14. From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise.

Thus, in view of the above, it is settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same.

15. Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872 (hereinafter referred to as ‘the Act 1872’).

16. In State of West Bengal v. Mir Mohammad Omar & Ors. Etc. Etc., AIR 2000 SC 2988 : (2000 AIR SCW 3230), this Court held that if the fact is specifically in the knowledge of any person, then the burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to



relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.”

36. What will be the effect in a case where there is presumption and procedure as prescribed in various sections has not been followed, has been considered by a Constitutional Bench of the Hon'ble Apex Court in a case of *State of Punjab versus Baldev Singh* reported in *AIR 1999 SC 3318* and considering the other judgments on this point, the Constitutional Bench held as under in paragraphs 51 to 57:-

“51. The Constitution Bench in Sanjay Dutt's case, thus clearly held that once the prosecution has proved unauthorised conscious possession of any of the specified arms and ammunition etc. in a notified area by the accused, the offence is complete and the conviction must follow on the strength of the statutory presumption, unless the accused proves the non-existence of a fact essential to constitute any of the ingredient of that offence. Indeed, the presumption, even though statutory in nature, was held to be rebuttable.

52. Thus, even if, it be assumed for the sake of argument that all the material seized during an illegal search, may be admissible as relevant evidence in other proceedings, the illicit drug or psychotropic substance seized in an illegal search cannot by itself be used as proof of unlawful conscious possession of the contraband



by the accused. An illegal search cannot also entitle the prosecution to raise a presumption under [Section 54](#) of the Act because presumption, is an inference of fact drawn from the facts which are known as proved. A presumption under [Section 54](#) of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of [Section 50](#).

53, We, therefore, hold that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in [Section 50](#) of the Act, cannot by itself be used as admissible evidence of proof of unlawful possession of the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in other/independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case.

54. Thus, considered we are of the opinion that the judgment in Ali Mustaffas case correctly interprets and distinguishes the judgment in Pooran Mal's case (AIR 1974 SC 348) and the broad observations made in Pirthi Chand's case (1996 AIR SCW 42 : AIR 1996 SC 977 : 1996 Cri LJ 1354) and Jasbir Singh's case [(1996) 1 SCC 288] are not in tune with the correct exposition of law, as laid down in Pooran Mal's case.

55. On the basis of the reasoning and discussion above, the following conclusions arise :

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of [Section 50](#) of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer,



on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of [Section 50](#) of the Act;

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by [Section 50](#) at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in [Section 50](#) have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of [Section 50](#), and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- short a criminal trial;



*(6) That in the context in which the protection has been incorporated in **Section 50** for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of **Section 50** are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of **Section 50**, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;*

*(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in **Section 50** of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;*

*(8) A presumption under **Section 54** of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of **Section 50**. An illegal search cannot entitle the prosecution to raise a presumption under **Section 54** of the Act.*

*(9) That the judgment in Pooran Mal's case (AIR 1974 SC 348) cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of **Section 50** of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;*

(10) That the judgment in Ali Mustaffa's case (1994 AIR SCW 4393 : AIR 1995 SC 244) correctly interprets and distinguishes the judgment in Pooran Mal's case (AIR 1974 SC 348) and the broad observations made in Pirthi Chand's case (1996 AIR SCW 42 : AIR 1996 SC 977 : 1996 Cri LJ 1354) and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case.

56. The above conclusions are not a summary of our judgment and have to be read and considered in the light of the entire discussion contained in the earlier part.



57. We, accordingly, answer the reference in the manner aforesaid.”

37. Apart from above, the Hon’ble Apex Court in a case of *Noor Aga versus State of Punjab* reported in (2008) 16 SCC 417 considered the effect of the presumption as well as the non-production of the articles in the Court and in paragraphs 58 to 60, held as under:

“58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to 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, would the legal burden 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.

60. Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of the doctrine of proportionality. The difficulties faced by the prosecution



in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair.....”

With regard to non-production of physical evidence, the Apex Court has also observed as under in paragraph 85:

“85. The prosecution alleged that 1.4 kg heroin was concealed in a cardboard container for carrying grapes and was recovered from the appellant at Raja Sansi Airport. Essential key items necessary to prove the same were:

“(i) The cardboard carton allegedly used for carrying the heroin, to test the veracity.

(ii) The bulk, which establishes the quantity recovered.

(iii) The three homogeneous samples of five grams each taken from the bulk amount of heroin, which would be essential in ascertaining whether the substance that the accused was allegedly in possession of was, in fact, heroin.”

The Hon’ble Apex Court has also considered the non-production of recovered articles in paragraphs 95 and 96 of the judgment which is as under;

“95. The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution. Even for the said purpose the retracted confession on the part of the accused could not have been taken recourse to.

96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed,



the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroine as envisaged under Section 52-A of the Act.”

And, in paragraph 98, the Hon’ble Apex Court, the Hon’ble Apex Court held as under:

“98. We are not oblivious of the fact that a slight difference in the weight of the sample may not be held to be so crucial as to disregard the entire prosecution case as ordinarily an officer in a public place would not be carrying a good scale with him.....”

Considering the entire aspect of the matter, the Hon’ble Apex Court held as under in paragraph 100:

“100. Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect to the prosecution’s endeavour to prove the fact of possession of contraband by the appellant. This aspect of the matter has been considered by this Court in Jitendra vs. State of M.P. [2004 10 SCC 562] in the following terms (SCC p. 565, para 6):

“6.... In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS



Act.”

It appears that the Hon’ble Apex Court has also found discrepancies in the statement of official witnesses as well as some other material irregularities and come to a conclusion in para 119 as under:

“119. Our aforementioned findings may be summarised as follows:

1. The provisions of Sections 35 and 54 are not ultra vires the Constitution of India.

2. However, procedural requirements laid down therein are required to be strictly complied with.

3. There are a large number of discrepancies in the treatment and disposal of the physical evidence. There are contradictions in the statements of official witnesses. Non-examination of independent witnesses and the nature of confession and the circumstances of the recording of such confession do not lead to the conclusion of the appellant’s guilt.

4. Finding on the discrepancies, although if individually examined, may not be fatal to the case of the prosecution but if cumulative view of the scenario is taken, the prosecution’s case must be held to be lacking in credibility.

5. The fact of recovery has not been proved beyond all reasonable doubt which is required to be established before the doctrine of reverse burden is applied. Recoveries have not been made as per the procedure established by law.

6. The investigation of the case was not fair.

We, therefore, are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly.”

38. In the background of the above, it appears that it has been settled by the Hon’ble Apex Court that once the recovery is after following the procedure prescribed under the N.D.P.S. Act, that shall be considered as the legal evidence of recovery under the Act and thereafter



there shall be presumption against the accused persons. Similarly, it appears that the Hon'ble Apex Court has also found the production of seized articles in the Court necessary for conviction. Though it appears from the judgment in case of *Noor Ara (supra)*, *Jitendra Kumar (supra)* and *Ashok @ Dangra Jaiswal (supra)* that in all the cases, there were some other material irregularities and discrepancies also.

39. In background of settled principle, if the materials available in this case is concerned, it will appear that the contraband articles were seized from the possession of the appellants after following the procedure prescribed under Section 50 of the N.D.P.S. Act as they have been noticed to be examined by the Magistrate or Gazetted Officer and on their consent, they have been searched and recovery of contraband articles was made. Further, the samples (A/1, A/2, B/1, B/2, C/1 and C/2) have been prepared at the spot and sealed and on that the signature of the witnesses as well as accuseds has been taken which is compliance of Standing Order No. 1/89. Further, the seized articles were produced before the Special Court along with the accuseds on very next day and after obtaining permission of the Special Court, the articles were sent to the F.S.L., Patna and further report of the F.S.L., Patna and C.R.C.L., Kolkata clearly shows that articles found in samples is *charas* which is a contraband under the N.D.P.S. Act. All the aforesaid facts, if taken into consideration, clearly establish that the seizure of *charas* from the



appellants are after following the prescribed procedure under the N.D.P.S. Act and, as such, there is legal evidence of the recovery from the appellants. Hence, there shall be a presumption under Sections 35 and 54 of the N.D.P.S. Act.

40. Now the question that emerges is when there is legal evidence available on record of the recovery of contraband from the possession of the appellants which, on chemical examination, found to be *charas* and there shall be a presumption of culpable mental state of the appellants and also with regard to possession which has not been rebutted by the appellants by a cogent or reliable evidence except stating that they had been falsely been implicated in this case, whether the conviction, based on the legal evidence of recovery and when there is presumption also, can be held to be unsustainable in law on the ground that residuary of recovered articles have not been produced in the Court and even samples has not been produced.

41. To our opinion, once there is legal and reliable evidence of the recovery of the contraband article from the possession of the appellants, there shall be a presumption under Sections 35 and 54 of the N.D.P.S. Act raised against the appellants. Only on account of the fact that there is non-production of physical evidence in the Court shall not vitiate the conviction, particularly, when the aforesaid articles were produced before the Court without loss of time and as per the order of



the Court, they were dispatched for chemical examination and on chemical analysis, the same was found 'charas' (narcotic) So far judgments in case of *Noor Aga (supra)*, *Jitendra Kumar (supra)* and *Ashok @ Dangra Jaiswal (supra)* are concerned, the Court noticed several other material discrepancies and irregularities apart from non-production of seized articles and samples. In *Noor Aga case (supra)*, there are contradictions in statement of official witnesses, nature of confessions, discrepancies in treatment and disposal of the physical evidence and circumstances of recording which individually may not be found to be fatal but if a cumulative view of the scenario is taken, the prosecution case was held to be lacking in credibility and it was also found that recovery has not been made from the procedure established by law and it was found that the fact of recovery was not made adopting the procedure established by law. As such, doctrine of reverse burden shall not apply. Similarly, in case of *Jitendra Kumar (supra)* and *Ashok @ Dangra Jaiswal (supra)*, I.O. has not been examined and the submission of the charge-sheet has not mentioned in the final form though it has been submitted earlier to submission of charge-sheet and, hence, the conviction has been set aside on that ground.

42. Considering the above, the facts of the present case appear to be manifestly different. Here, there is consistent legal evidence of recovery of *charas* against the appellants leading to presumption against



them and burden to dispel them has not been discharged. Hence the conviction of the appellants by the learned Trial Court, on the basis of recovery of contraband found to be *charas*, appear to be just and proper.

43. The appeals are dismissed.

(Vinod Kumar Sinha, J)

Kishore Kumar Mandal,J I agree.

(Kishore Kumar Mandal, J)

Pankaj/-

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