

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on: 09/11/2017

Judgment delivered on: 16/01/2018

CRA No. 843 of 2011

- Yogendra Kumar Sharma S/o Santosh Kumar Sharma, aged about 25 years, R/o Damoh Naka, Shanti Nagar, Jabalpur, P.S. Gohalpur, Distt.-Jabalpur, M.P.

---- Appellant

Versus

- State Of Chhattisgarh Through: P.S. City Kotwali, Mahasamund, Distt.-Mahasamund, C.G.

---- Respondent

For Appellant	:	Shri Anil Khare, Sr. Advocate with Shri Alok Nigam, Shri DK Sharma & Shri Jasmit Hora, Advocates.
For Respondent/State	:	Shri Prafull Bharat, Addl. A.G.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Arvind Singh Chandel

CAV Judgment

Per Pritinker Diwaker, J

This appeal arises out of the judgment of conviction and order of sentence dated 29.9.2011 passed by the Special Judge (NDPS Act), Mahasamund in Special Criminal Case No. 05/2011, convicting the accused/appellant under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act & Section 25(1)(a) of the Arms Act and sentencing him to undergo RI for 12 years, to pay a fine of Rs.1,20,000/- and RI for 4 years, to pay a fine of Rs.10,000/- with

default stipulations respectively.

02. Facts of the case in brief are that on 22.12.2010 at about 9 am vehicle of the appellant Qualis bearing registration No. MP 20 HA 5675 was intercepted by PW-1 Eklavya Bais, Police Constable. In the said vehicle, which was coming from Saraipali, three persons including the appellant were found travelling. As soon as the vehicle was stopped, two persons sitting in the vehicle fled from the spot, however, the appellant was detained. Upon search being made, three bags containing contraband – ganja were found in the vehicle. PW-1 gave information to ASI Kapishwar Pushpkar (PW-14) over phone, the same was accordingly entered in Rojnamchana (Ex.P/6) on 22.12.2010 at 9.40 am and the SDOP was also intimated about the same. After preparing panchanama of the notice the police party proceeded for the place of incident. Notices for search of the vehicle were given to the appellant vide Exs .P/17 & P/18 at 10.45 am and 10.50 am respectively, to which the appellant consented for search of the vehicle by PW-14. Thereafter vide Ex.P/19 the police officers gave their personal search at 11.20 am. Vide Ex.P/20 upon search of the vehicle being made at 11.45 am, total 46 packets containing ganja like substance kept in three plastic bags as also one country made pistol were seized. This apart, one purse containing Rs.750/-, documents of the vehicle and cell phones were also seized. At 12.05 pm the contraband was examined by smelling and burning the same and was found to be ganja vide Ex.P/21. Thereafter, homogenization of the contraband contained in three different bags was done vide Ex.P/22 at 12.30 pm. Physical verification of the electronic weighing machine was

done vide Ex.P/2 at 12.25 pm and thereafter, at 13.05 hours on weighment of the contraband being done, it was found to be 46.850 kg vide Ex.P/3. Out of the said contraband, three samples, each of 50 gm, were drawn at 14:30 hours and sealed vide Ex.P/4. As per Ex.P/23 at 15:30 hours, the contraband including three samples of 50 gm each, country made pistol, documents of the vehicle, purse and two cell phones of the appellant were seized. Dehati Nalishi was recorded at 16:30 hours vide Ex.P/28, spot map was prepared vide Ex.P/26 and after reaching police station vide Ex.P/11 & P/12 all the seized articles except the vehicle were deposited in Malkhana. The appellant was arrested at 19:30 hours vide Ex.P/24. FIR was registered against the appellant under Section 20(b) of NDPS Act and 25 of the Arms Act vide Ex.P/29 at 18:00 hours. Information regarding arrest of the appellant was given to his parents through SHO, Gohalpur, Jabalpur vide Ex.P/30. Vide Ex.P/7 information of the entire proceedings was passed on to SDOP and three samples drawn were sent to FSL vide Ex.P/31 on 23.12.2010 along with copy of FIR, seizure memo, sample panchanama and specimen seal which were received by FSL on 24.12.2010 vide Ex.P/13. The country made pistol was sent to armourer and report of the armourer is Ex.P/14 that the country made pistol was found in working condition. Vide Ex.P/5 a report was received from FSL on 17.3.2011 confirming the contraband to be ganja. After obtaining consent vide Ex.P/15 from the District Magistrate, Mahasamund in relation to Arms Act, charge sheet was filed against the appellant under Section 20(b) of NDPS Act and Section 25 of the Arms Act.

03. So as to hold the accused/appellant guilty, the prosecution examined 14 witnesses in all. Statement of the accused was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as mentioned in para-1 of this judgment.

05. Learned counsel for the appellant submits as under:

- (i) that there is non-compliance of Sections 42 and 50 of the NDPS Act,
- (ii) that conscious possession of the contraband has not been proved by the prosecution;
- (iii) as the samples were with the police constable in police station for one day, possibility of tampering with the same cannot be ruled out;
- (iv) that weighment of the contraband has not been done properly;
- (v) that in his statement under Section 313 of CrPC no question was put to the appellant that he had any knowledge of exclusive possession of the contraband;
- (vi) that representative samples have not been drawn from the seized contraband in three bags.
- (vii) that seizure witnesses have not supported the prosecution case

and have been declared hostile.

Reliance has been placed on the judgment in the matter of ***Om Prakash Vs. State of Rajasthan, (2009) 10 SCC 632.***

06. Opposing the submission of counsel for the appellant, it has been vehemently argued by learned counsel for the State as under:

- that there is full compliance of Section 42 of NDPS Act. The appellant was apprehended at 9 am on 22.12.2010 and immediately thereafter on phone information was passed on to the ASI in police station which was recorded in Rojnamchasanha vide Ex.P/32 (C-1) on 22.12.2010 at 9.05 am. and in turn, ASI forwarded the same to SDOP vide Ex.P/6 which was received by SDOP at 9.40 am on 22.12.2010. Information of the entire proceedings was sent to SDOP on 23.12.2010 which was received in his office at 3 pm (Ex.P/7). As such there is full compliance of Section 42(2) of the Act.
- that proviso to Section 42(1) is not applicable in the present case as the entire exercise was being done between sunrise and sunset, and the proviso is only applicable in case of proceedings taking place after sunset and before sunrise.

He placed reliance on the judgment in the matter of ***Karnail Singh Vs. State of Haryana, (2009) 8 SCC 539*** and ***Sukhdev Singh Vs. State of Haryana, (2013) 2 SCC 212.***

- that applicability of Section 50 in the present case does not arise because present is a case where the contraband has been found

in the vehicle belonging to the appellant and therefore, the question of personal search does not arise. No notice for personal search was given to the appellant and notice Ex.P/17 & 18 are only in respect of search of the vehicle. Conscious possession of the contraband by the appellant has been duly proved by the prosecution in this case.

Reliance has been placed on the judgment in the matter of ***Makhan Singh Vs. State of Haryana, (2015) 12 SCC 247*** and ***Mohan Lal Vs. State of Rajasthan, (2015) 6 SCC 222***.

- admittedly, the vehicle in question belongs to the appellant, of which he is the registered owner, he was driving the same along with complete documents of the vehicle. When the vehicle was apprehended, it is the appellant who was found in the vehicle and contraband was found kept in three bags inside the vehicle. The appellant has also not dispute the factum of he being the owner of the vehicle. The judgment cited by the appellant i.e. *Om Prakash Vs. State of Rajasthan* (supra) is not applicable to the facts of the present case because it was a case relating to ownership of the house and not of a vehicle.
- In respect of not asking relevant questions under Section 313 of CrPC regarding conscious possession, it has been argued by the State counsel that questions No.22, 23 & 30 are the relevant questions which were put to the appellant and answered by him. The appellant has admitted his presence, seizure of his cell phone, PAN card, vehicle registration documents while

answering question No.37.

- In respect of drawing representative samples and sending the same and also in respect of FSL report (Ex.P/5), it has been argued by the State counsel that apart from leaves and seeds, flowering were also sent for chemical examination which were found positive as per FSL report. He submits that flowering or fruiting tops of cannabis plant are duly covered within the definition of ganja as provided under Section 2(iii)(b) of the Act.
- With regard to improper weighment of the contraband, it has been argued that weighment was done by PW-2 Manoj Mandal who in his examination-in-chief on 13.5.2011 has categorically stated that weighment was done by him and he signed the said weighment panchanama Ex.P/3. He submits that unfortunately cross-examination of this witness was done on 26.8.2011 i.e. after about 3 months of his examination-in-chief, and it appears that during this period this witness was won over by the defence. He submits that his entire statement is required to be read together and once he admits his signature on the document, it cannot be said that he was not present at the time of weighment and that he did not do the same.
- While referring to Ex.P/11, learned counsel for the State has argued that out of 46.850 kg of ganja, three samples, each of 50 gms, were drawn and it is not the case of the prosecution that the weighment was 46.850 kg + 150 gm. No relevant question was put to the investigating officer or Malkhana Muharrir in this

regard. In para-10 of cross-examination of PW-14 Kapishwar Pushpkar, investigating officer, he has categorically stated that after drawing three samples of 50 gms each, the total remaining ganja was 46.700 kg, however, it has not been mentioned separately. Considering the overall evidence on record, such minor lacuna cannot be said to be fatal to the prosecution case. He submits that statement of PW-6 Dhanesh Tandekar in para-2 is though contrary to Ex.P/11 but the same would not prevail over Ex.P/11 which has been duly proved by the investigating officer and also finds corroboration from other attending circumstances.

- In respect of tampering with the sample, it has been argued while referring to the statement of PW-7 Murlidhar Patel that he received the samples on 23.12.2010 in the evening and deposited the same in the Malkhana and lifted it on 24.12.2010 and on the same day deposited the same in the FSL. This witness has stated that the samples were in sealed condition. No suggestion was put to this witness regarding tampering with the sample during this period. State counsel further submits that though the contraband was not required to be produced in the Court, the same was duly produced in the Court and it is apparent from the last paragraph of deposition of PW-14 as also the order sheet dated 16.9.2011 of the trial Court.

07. Heard counsel for the respective parties and perused the material on record.

08 PW-1 Eklavya Bais, Police Constable (Traffic), has stated that

on the date of incident i.e. 22.12.2010 in discharge of his duties he intercepted a vehicle Qualis, checked its documents and found ganja kept in it. Thereafter, he informed about the same over cell phone to Police Station – Kotwali, Mahasamund from where police personnel reached the spot and conducted enquiry. In cross-examination he states that there were three persons travelling in the said vehicle, however, two of them managed to run away whereas the appellant was caught by him and that he found contraband kept in the vehicle in some bags and then informed about the same to the police station.

09. PW-2 Manoj Mandal did weighment of the contraband. He admits his signature over documents Ex.P/2. However, he expressed his inability to tell the weight of the contraband so weighed for the reason that it was done many days ago. He also admits his signature over weighment panchanama Ex.P/3. However, this witness in cross-examination has denied the fact that he did weighment of the contraband. PW-3 Ugrasen Patel, Head Constable, who at the relevant time was working as Reader in the office of Sub Divisional Officer (Police), Mahasamund has stated that he had received the document of Ex.P/6 in two copies, the original one was retained by him for placing the same before SDOP and the carbon copy of the document (Ex.P/6) was returned to the concerned person who had brought that document by putting his signature over it with a tip.

10. PW-4 Rajkumar Sahu, Patwari, prepared the spot map Ex.P/8. PW-5 Pawan Chandrakar, Home Guard, a witness to information panchamana (Ex.P/10) has proved the same. PW-6 Dhanesh Tandekar, Police Constable, has stated proved deposit of all the seized

articles excluding the vehicle in the Malkhana by him. However, in para-2 of his cross-examination he states that he received three sealed packets containing total 46.850 kg of ganja and likewise also received three samples of 50 gms each. He also admits that the articles were in sealed condition. PW-7 Murlidhar Patel, Constable, states that he went to Forensic Science Laboratory with three packets for their examination, which were in sealed condition. On 24.12.2010 he deposited the same in the FSL. No question was put to this witness by the defence which could suggest that the samples were tampered with. PW-8 Shyam Madhukar, Police Inspector, has stated that after getting the country made pistol, which was seized from the appellant, examined from the armourer Pooran Singh, he gave report Ex.P/14 under his seal and signature to the Station House Officer, Police Station–Mahasamund that the said country made pistol was in working condition and fire can be made from it. However, in cross-examination he admits that said Pooran Singh is not arms experts but does cleaning, repairing etc. of arms and that he has nowhere mentioned in Ex.P/14 the features of the said country made pistol. PW-9 Pooran Singh Lahre, Head Constable, who was working at the relevant time on the post of armourer in Police Station – Mahasamund, has stated that he maintains the firearms, does cleaning and repairing of the same. He has stated that after examining the seized country made pistol (Article A-1) he found that it was in working condition and fire could be made from it. He admits that the packet containing country made pistol was in sealed condition. He also admits that he is not arms experts, has got training of maintenance and repairing of the arms only but the working condition of the arms can be ascertained by pulling the trigger and that

is how he examined the pistol. PW-10 Parasram Sidar, Assistant Grade-II in the office of Collector, Mahasamund, has stated about grant of sanction for criminal prosecution of the appellant under the Arms Act vide Ex.P/15 by the Collector. PW-11 Tikam Chandrakar has turned hostile, however, has admitted his signatures on the documents Ex.P/1 to 4 & Ex.P/16 to P/26. PW-12 Vikas Mishra, Constable, is a witness to the notice to the witnesses Ex.P/9 and prepared information panchanama Ex.P/10. He has proved these documents. PW-13 Khemraj Jangde, labourer, has though turned hostile, however, admitted his signature over documents Ex.P/1 to 4 and P/16 to P/27. PW-14 Kapishwar Pushpkar, investigating officer, has duly supported the prosecution case.

11. The first limb of argument of learned counsel for the appellant is that there is non-compliance of Sections 42 & 50 of the NDPAS Act. Sections 42 & 50 of the Act read thus:

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

(1) 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 or of the Border Security Force 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 personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence 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 Chapter IV relating to such drug or substance; 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 Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorization 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 sun set and sun rise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (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.

50. Conditions under which search of persons shall be conducted.

(1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or sections 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but

otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 to 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof of his immediate official superior.”

12. Admittedly, on 22.12.2010 at about 9 am vehicle of the appellant Qualis bearing registration No. MP 20 HA 5675 was intercepted by PW-1 Eklavya Bais, Police Constable wherein three persons including the appellant were found travelling and as soon as the vehicle was stopped, two persons sitting in the vehicle fled from the spot, however, the appellant was detained. Upon search being made, three bags containing contraband – ganja were found in the vehicle and then PW-1 gave information to ASI Kapishwar Pushpkar (PW-14) over phone, which was accordingly entered in Rojnamchana (Ex.P/6) on 22.12.2010 at 9.40 am and the SDOP was also intimated about the same. After preparing panchanama of the notice the police party proceeded for the place of incident.

13. In the matter of ***Sukhdev Singh Vs. State of Haryana***, reported in ***(2013) 2 SCC 212***, the Supreme Court while dealing with the applicability of Section 42 of the Act, held as under:

“15. Section 42 can be divided into two different parts. First is the power of entry, search seizure and arrest without warrant or authorisation as contemplated under sub-section (1) of the said section. Second is reporting of the information reduced to writing to a higher officer in consonance with sub-section (2) of that section. Sub-section (2) of Section 42 had been a matter of judicial interpretation as well as of legislative concern in the past. Sub-section (2) was amended by the Parliament vide Act 9 of 2001 with effect from 2nd October, 2001. After amendment of this sub-section, the words ‘forthwith’ stood amended by the words ‘within 72 hours’. In other words, whatever ambiguity or leverage was provided for under the unamended provision, was clarified and resultantly, absolute certainty was brought in by binding the officer concerned to send the intimation to the superior officers within 72 hours from the time of receipt of information. The amendment is suggestive of the legislative intent that information must reach the superior officer not only expeditiously or forthwith but definitely within the time contemplated under the amended sub-section (2) of Section 42. This, in our opinion, provides a greater certainty to the time in which the action should be taken as well as renders the safeguards provided to an accused more meaningful. In the present case, the information was received by the empowered officer on 4th February, 1994 when the unamended provision was in force. The law as it existed at the time of commission of the offence would be the law which will govern the rights and obligations of the parties under the NDPS Act.”

In the case in hand also, the appellant was apprehended at 9 am on 22.12.2010 and immediately thereafter on phone information was passed on to ASI in police station which was recorded in Rojnamchasanha vide Ex.P/32 (C-1) on 22.12.2010 at 9.05 am. and in turn, ASI forwarded the same to SDOP vide Ex.P/6 which was received by SDOP at 9.40 am on 22.12.2010. Information of entire proceedings

was sent to SDOP on 23.12.2010 which was received in his office at 3 pm (Ex.P/7). As such there is full compliance of Sections 42(2) of the Act. Since the entire proceedings were done between sunrise and sunset, proviso to Section 42(1) is not applicable in the present case.

14. So far as compliance of 50 of the Act is concerned, a bare reading of the said section makes it clear that provisions of this section do not apply to any search or seizure where the article was not being carried on the person of the accused. It can be invoked only in cases where the drug/narcotic substance is recovered as a consequence of the body search of the accused. In case, the recovery of the narcotic is made from a container being carried by the individual, the provisions of Section 50 would not be attracted.

15. In the matter of ***Makhan Singh Vs. State of Haryana*** reported in **(2015) 12 SCC 247**, the Supreme Court considering the scope of Section 50 of the Act, held as under:

“14. A Constitution Bench of this Court in [State of Punjab v. Baldev Singh](#), (1999) 6 SCC 172, while dealing with the scope of [Section 50](#) of the NDPS Act, had emphasized upon the aspect of availability of right of an accused to have 'personal search' conducted before a Gazetted Officer or a Magistrate and held as under:

"32...The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a Gazetted Officer or a Magistrate, if he so requires, is sacrosanct and indefeasible- it cannot be disregarded by the prosecution except at its own peril.

33. The question whether or not the safeguards provided in [Section 50](#) were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the 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 in that section were complied with, it would not be advisable to cut short a criminal trial."

15. Compliance with [Section 50](#) of the NDPS Act will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which the accused may be carrying ought to be searched. [In State of H.P. v. Pawan Kumar](#), (2005) 4 SCC 350, this Court in Para (11) has held as under:

"11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in [Section 50](#) of the Act."

The same view was reiterated in [Ajmer Singh v. State of Haryana](#), (2010) 3 SCC 746.

16. In the present case, since the vehicle was searched and the contraband was seized from the vehicle, compliance with [Section 50](#) of the NDPS Act was not required. In the absence of independent evidence connecting the appellant with the *fitter-rehra*, mere compliance with [Section 50](#) of the NDPS Act by itself would not be sufficient to establish the guilt of the appellant. It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence. When the independent witnesses PW1 and DW2 have not supported the prosecution case and the recovery of the contraband has not

been satisfactorily proved, the conviction of the appellant under [Section 15](#) of the NDPS Act cannot be sustained.”

16. Here in this case also, indisputably the contraband was not found from the physical possession of the accused/appellant but from the vehicle admittedly belonging to the appellant and as such, the question of personal search does not arise. The notices Ex.P/17 & 18 are only in respect to search of the vehicle. From a plain reading of Section 50 of the Act as also the aforesaid judicial pronouncements it is abundantly clear that Section 50 is applicable only where search of a person is involved and said section is not applicable nor attracted where no search of a person is involved. Thus, search and recovery from a bag, brief case, container, etc. does not come within the ambit of Section 50 of the Act.

17. As regards the argument as to conscious possession of the contraband by the appellant, in the case of ***Mohan Lal Vs. State of Rajasthan*** reported in **(2015) 6 SCC 222**, the Supreme Court has held as under:

“12. The term "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. One of the definitions of possession given in Black's Law dictionary is as follows:

"Possession. - Having control over a thing with the intent to have and to exercise such control. *Oswald v. Weigel* [219 Kan 616 : 549 P 2d 568 at p. 569 (1976)]. The detention and control or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner

or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.

The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint."

In the said *Dictionary*, the term "possess" in the context of narcotic drug law means:-

"Term "possess." Under narcotic drug laws, means actual control, care and management of the drug. *Collini v. State*[487 SW 2d 132 at p. 135 (Tex Cr App 1972)]. Defendant 'possesses' controlled substance when defendant knows of substance's presence, substance is immediately accessible, and defendant exercises "dominion or control" over substance. *State v. Hornaday*[105 Wash 2d 120 : 713 P 2d 71 at p. 74 (Wash 1986)]."

And again

"*Criminal law*. - Possession as necessary for conviction of offense of possession of controlled substances with intent to distribute may be constructive as well as actual, *U.S. v. Craig*[522 F 2d 29 at p. 31 (6th Cir 1975)]; as well as joint or exclusive, *Garvey v. State*[176 Ga App 268 : 335 SE 2d 640 at p. 647 (1985)]. The defendants must have had dominion and

control over the contraband with knowledge of its presence and character. U.S. v. Morando- Alvarez[520 F 2d 882 at p. 884 (9th Cir 1975)].

Possession, as an element of offense of stolen goods, is not limited to actual manual control upon or about the person, but extends to things under one's power and dominion. McConnell v. State [48 Ala App 523 : 266 So 2d 328 at p. 333 (1972)].

Possession as used in indictment charging possession of stolen mail may mean actual possession or constructive possession. U.S. v. Ellison[469 F 2d 413 at p. 415 (9th Cir 1972)].

To constitute "possession" of a concealable weapon under statute proscribing possession of a concealable weapon by a felon, it is sufficient that defendant have constructive possession and immediate access to the weapon. State v. Kelley[12 Or App 496 : 507 P 2d 837 at p. 837 (1973)]."

16. Coming to the context of [Section 18](#) of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language employed in [Section 35](#) of the NDPS Act. The said provision reads 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."

17. On a perusal of the aforesaid provision, it is plain as day that it includes knowledge of a fact. That apart, [Section 35](#) raises a presumption as to knowledge and culpable mental state from the possession of illicit articles. The expression "possess or

possessed" is often used in connection with statutory offences of being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting [Section 35](#) of the NDPS Act."

18. Here in this case, when the vehicle in question was searched contraband was found in it. Apart from other articles, the registration certificate of the said vehicle and driving licence were seized from the appellant at the spot itself. The appellant has also admitted the same while replying to Question No.25 in his statement under Section 313 of CrPC. Though the witnesses to memorandum and seizure have turned hostile but they have admitted their signature on the seizure memo. PW-1 Eklavya Bais, who had intercepted the vehicle and found ganja in it, as well as PW-14 Kapishwar Pushpkar have duly supported the prosecution case. From the above, it is clear that the appellant was owner of the vehicle in question from which the contraband was seized. In these circumstances, it does not appeal to reason that the appellant was not aware that such a huge quantity of contraband i.e. 46.850 kg was kept in his vehicle. The judgment relied upon by learned counsel for the appellant in the matter of *Om Prakash* (supra) is of no help to him because in that case recovery of contraband was made from a house inhabited by number of persons and its ownership itself was uncertain whereas in the present case, as discussed above, the vehicle in question was owned by the appellant and from it as many as three bags containing 46.850 kg of ganja was seized.

The judgment relied upon by learned counsel for the appellant in the matter of ***Avtar Singh and others Vs. State of Punjab*** reported

(2002) 7 SCC 419, is of no help to the appellant because in that case no relevant question was put to the accused in his statement under Section 313 of CrPC whereas in the present case, in his statement under Section 313 of CrPC the appellant has merely denied possession of the contraband and no explanation has been offered by him as to how such a huge quantity of contraband was found from his vehicle. Thus, from the facts and circumstances of the case and the principles of law relating to possession as detailed above, it is evident that the appellant was in conscious possession of the contraband kept in his vehicle.

19. So far as the argument regarding tampering with the contraband is concerned, as per PW-7 Murlidhar Patel, Constable, he went to Forensic Science Laboratory with three packets for their examination, which were in sealed condition and on 24.12.2010 he deposited the same in the FSL. There is no suggestion to this witness by the defence that the samples were tampered with during the period when it was in possession of the police. This apart, PW-6 Dhanesh Tandekar, Head Constable, has also stated that on 22.12.2010 he had received three bags containing ganja, three samples, one country made pistol, cash of Rs.750/-, two numbers of mobile phones, one Qualis vehicle, its RC book and licence and all of those articles excluding the vehicle were duly deposited by him in Malkhana on the same day and a receipt thereof (Ex.P/11) was given by him which bore his signature. In cross-examination, he has admitted the fact that all the articles were duly sealed, though he could not mention the same in the document Ex.P/12C. As such, there is nothing on record which could suggest

that the samples were tampered with by the police.

20. As regards improper weighment of the contraband, we find substance in the arguments advanced by learned counsel for the State in this regard. The weighment is said to have been done by PW-2 Manoj Mandal. He was examined in the Court on 13.5.2011 when he categorically stated about weighment being done by him and proved said weighment panchanama Ex.P/3. However, his cross-examination could take place only on 26.8.2011 i.e. after about 3 months of his examination-in-chief, and as such, the possibility cannot be ruled out that during this period this witness might have been won over by the defence. Furthermore, as per Ex.P/11, out of 46.850 kg of ganja, three samples, each of 50 gms, were drawn and it is not the case of the prosecution that the weighment was 46.850 kg + 150 gm. No such question with regard to difference in the quantity of the contraband was put to the investigating officer or Malkhana Muharrir. PW-14 Kapishwar Pushpkar, investigating officer, in para-10, has categorically stated that after drawing three samples of 50 gms each, the total remaining ganja was 46.700 kg, however, it has not been mentioned separately.

21. It cannot be stated as a rule of law that a police officer can or cannot be a reliable in a criminal case which will always depend upon facts of a given case. If testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, then statement of such witness cannot be discarded only on ground that he is a police officer and may have some interest in success of the case. Only when his interest in success of case is motivated by overzealousness to an extent of his involving

innocent people, then, no credibility can be attached to his statement. Presumption that a person acts honestly applies as much in favour of a police officer as in respect of other persons and it is not proper to distrust and suspect him without there being good grounds therefor.

22. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to be reliable and trust worthy, the Court can definitely act upon the same. If, in the course of scrutinizing the evidence, the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle that quality of the evidence weighs over the quantity of evidence. [AIR 2013 Supreme Court 3344 between [Pramod Kumar v. State \(GNCT\) of Delhi](#)].

23. In the present case, though the independent witnesses have not fully supported the prosecution case but the other witnesses, though police personnel, have unequivocally stated about search and seizure of the contraband, the defence has utterly failed to elicit anything from them which could suggest that they had any interest or enmity with the accused/appellant for his false implication; their evidence appear to be trustworthy and supported by the documentary evidence on record and in these circumstances, there is no reason to suspect the credibility of these witnesses merely on the ground of they being the police personnel.

As regards conviction under Section 25 of the Arms Act, from the

unrebutted evidence on record it is clear that a country made pistol was recovered from the vehicle which was kept under the driver seat, for which no valid licence could be produced by the appellant, neither at the time of recovery of the pistol nor even thereafter and the said pistol was functional. As such, conviction under the Arms Act of the appellant is also based on proper appreciation of the evidence on record.

24. Thus, keeping in mind the principles of law laid down by the Supreme Court referred to in the foregoing paragraphs, if we scrutinize the overall evidence on record, oral and documentary, complicity of the accused/appellant in crime in question stands proved beyond all reasonable doubt. Being so, the findings recorded by the trial Court holding the appellant guilty under Sections 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act & Section 25(1)(a) of the Arms Act, cannot be faulted with and the same are hereby affirmed.

25. Resultantly, the appeal being without any substance is liable to be dismissed and is, accordingly, dismissed. The appellant is reported to be in jail, therefore, no further order regarding his arrest/surrender etc. is required to be passed.

Sd/

(Pritinker Diwaker)

Judge

Sd/

(Arvind Singh Chandel)

Judge