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

+ CRL.A. 660/2017

SIKODH MAHTO Appellant

Through: Mr. S.B.Dandapani, Adv.

versus

STATE Respondent

Through: Ms. Meenakshi Chauhan, APP
for State with ASI Yashin
Khan, PS Crime Branch

+ CRL.A. 698/2017

PRABHU MAHTO Appellant

Through: Mr. Jivesh Kr. Tiwari, Adv.

versus

STATE Respondent

Through: Ms. Meenakshi Chauhan, APP
for State with ASI Yashin
Khan, PS Crime Branch

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

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J U D G M E N T

6th June, 2019

1. *Vide* judgment dated 26th April, 2017, the learned Additional Sessions Judge (hereinafter referred to as “the learned ASJ”) has convicted the appellants under Section 20(b)(ii)(C) of the Narcotic, Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to

as “the NDPS Act”). As a consequence, *vide* separate order dated 29th April, 2017, the learned ASJ has sentenced each appellant to 10 years’ rigorous imprisonment (RI) and fine of ₹ 1 lakh in each case, with default sentence of 1 year’s RI.

2. These appeals are directed thereagainst.

The Facts

The Case of the Prosecution

3. At 6:15 p.m. on 5th March, 2013, a secret informer visited the office of the Narcotics Cell, Shakarpur, and informed that two persons, namely Sikodh Mahto and Prabhu Mahto (the appellants herein), who were involved in smuggling of *charas* (cannabis) from Nepal, would arrive at the bus stand, near the Delhi Police Apartments, Noida Road, with a huge quantity of *charas*, between 7:30 and 8:00 p.m.. The information was passed by Insp. Sanjay Kumar Gade (PW-8) to ACP N&CP Zile Singh, who issued directions for conducting the raid and taking of action on the basis thereof. The information was recorded by SI Rajnikant Sharma (PW-9) at about 6:45 p.m., and produced, under Section 42 of the NDPS Act, before the Inspector, Narcotics Cell, for appropriate action. SI Rajnikant (PW-9), thereafter, organized a raid party comprising Head Constable (HC) Kanwal Singh (PW-3), HC Narender (PW-2), HC Mahesh Kumar and himself, which proceeded to the spot in question, in a vehicle driven by Const. Satpal (PW-5). Passers-by were invited to

join the raid team, but they refused. The appellants were seen walking towards the spot at about 7:55 p.m., with Sikodh Mahto (hereinafter referred to as “Sikodh”) carrying a red and blue coloured bag and Prabhu Mahto (hereinafter referred to as “Prabhu”) carrying a cream coloured bag. The informer identified them, and left. At about 8 p.m., the appellants were intercepted and overpowered. SI Rajnikant (PW-9) introduced himself to them. On being queried, they disclosed their names to be Sikodh Mahto and Prabhu Mahto. The appellants were apprised of the fact that information, regarding their carrying *charas*, had been received, and that their persons and bags would have to be searched. They were asked whether they desired to be searched in the presence of a Gazetted Officer or a Magistrate, and were also provided copies of notices under Section 50 of the NDPS Act. The appellants refused the offer for having the search conducted in the presence of a Gazetted Officer/Magistrate. Sikodh conveyed his refusal in writing, whereas Prabhu, who was illiterate, instructed that his refusal be recorded, in writing, by SI Rajnikant (PW-9), on the original notice which was, thereafter, read over to Prabhu. Prabhu, thereafter, affixed his left hand thumb impression under the said note. SI Rajnikant (PW-9) requested five or six public persons, who had gathered at the spot, to join the investigation, but they refused.

4. SI Rajnikant (PW-9), thereafter, conducted the search of Sikodh. The red and blue coloured bag, being carried by him, was found to contain a black, slab-type substance, in a transparent polythene. On being tested, using the Field Drug Testing Kit carried by SI Rajnikant, the substance was found to be *charas*, 2 kg in weight.

From the said substance, two samples, of 50 grams each, were recovered, and kept in two separate polythene bags, which were tied with rubber bands and converted into two cloth *pullandas*, marked 'A' and 'B'. The remaining quantity of *charas*, weighing 1.9 kg, was kept in the same transparent polythene, in the red and blue coloured bag, of which a third *pullanda* was prepared, marked 'C'. The Forensic Science Laboratory (FSL) form was filled. The seal 'RKS' was affixed on all the three *pullandas*, as well as on the FSL form. After use thereof, the seal was handed over to HC Kanwal Singh (PW-3). All three *pullandas*, as well as the FSL form, were seized vide Seizure Memo.

5. Thereafter, the cream-coloured bag of Prabhu was searched. It was also found to contain a black coloured substance, in a transparent polythene which, on being tested using the Field Drug Testing Kit, was found to be *charas*, weighing 2 kg. From the said quantity, two samples, of 50 grams each, were retrieved and kept in separate polythenes, which were tied with rubber bands and converted into *pullandas*, marked 'A-1' and 'B-1'. The remaining 1.9 kg *charas* was restored to the polythene, which was, in turn, placed in the cream-coloured bag, of which a third *pullanda* was prepared, marked 'C-1'. The FSL form was filled up. The three *pullandas* were sealed with the seal 'RKS'. An impression of the said seal was also affixed on the FSL form. After use, the seal was handed over to HC Kanwal Singh (PW-3). Separate Seizure Memos were prepared, in respect of the three *pullandas*.

6. SI Rajnikant (PW-9), thereafter, prepared the *rukka*, which was sent to the Police Station through Constable Narender Kumar (PW-2), along with the six sealed *pullandas*, the two FSL forms and carbon copies of the two Seizure Memos. HC Narender Kumar (PW-2) proceeded to the PS Crime Branch, and handed over the *Rukka* to the duty officer, for registration of FIR under Sections 20 and 29 of the NDPS Act. The remaining articles were handed over to the SHO, PS Crime Branch. Consequent to registration of FIR, the investigation was entrusted to ASI Devender Singh (PW-10).

7. ASI Devender Singh (PW-10) arrived at the spot, along with the driver Const. Satpal (PW-5), in the Government vehicle. He was handed over custody of the appellants, as well as the documents. ASI Devender Singh (PW-10) prepared the Site Plan, on SI Rajnikant (PW-9) indicating the spot. The appellants were, thereafter, arrested, and their personal search was conducted. Reports, regarding the seizure and arrest of the appellants, were prepared, under Section 57 of the NDPS Act, by SI Rajnikant (PW-9) and ASI Devender Singh (PW-10), before Insp. Sanjay Kumar Gade (PW-8).

8. On 11th March, 2013, the exhibits were sent to the FSL. The report of the FSL confirmed that the exhibits were of *charas*.

9. Consequent to completion of investigation, charge-sheet was filed under Section 20(b)(ii)(C) of the NDPS Act.

10. Cognizance of the offence was taken by the learned ASJ. Copies of the documents were supplied to the appellants, and charges, under Section 20(b)(ii)(C) of the NDPS Act was framed against them. The appellants pleaded not guilty, and were set to trial.

Evidence

11. The prosecution examined 11 witnesses, whereas the appellants, in their defence, examined 1 witness.

Oral testimonies of PWs

12. HC Adal Singh, deposing as PW-1, testified that, at about 12:30 a.m. on 6th March, 2013, he received a *rukka* from SI Rajnikant (PW-9), through HC Narender Kumar (PW-2), on the basis of which he had registered FIR. He also testified to having endorsed the *rukka* (Ex. PW-1/B). Thereafter, he deposed a copy of the FIR and the original *rukka* was handed over to ASI Devender Singh (PW-10), through HC Narender (PW-2), for further investigation. Nothing substantial emerged from his cross examination.

13. ASI Narender Kumar deposed as PW-2. He testified that, on 5th March, 2013, at about 6:55 p.m., SI Rajnikant (PW-9) constituted a raiding team, consisting of himself, along with ASI Narender Kumar, HC Mahesh Kumar (who was not co-opted as a witness), HC Kanwal Singh (PW-3) and Const. Satpal (PW-5). He also testified to have

been the recipient of the secret information, regarding the appellants arriving at Delhi with *charas*, from Nepal, between 7:30 p.m. and 8 p.m.. He confirmed that the raid team had proceeded to the spot, as informed by the informer, in the Government vehicle driven by Const. Satpal (PW-5), and that the I/O had recorded DD Entry No. 29, at 7 p.m., regarding the information and the departure, of the raid team, from the Narcotics Cell, Shakar Pur. He deposed, further, that the raid team reached the spot of interception at 7:30 p.m., and that, though members of the public, were present at the spot, were invited to participate in the raid, they refused to do so. He also confirmed the arrival of the appellants, at the spot, at 7:55 p.m., their identification by the informer (who left the spot thereafter), and their interception, by the raiding team. He also testified that the appellants were informed, by the I/O, of the information received, with respect to them, and that they were also offered to have their search conducted before a Gazetted Officer or a Magistrate, but that they refused. He confirmed the appellants having disclosed their identity as Sikodh and Prabhu, respectively. He further stated that he had prepared two notices, under Section 50 of the NDPS Act, carbon copies of which were served on the appellants. The original notices, in the names of Sikodh and Prabhu were exhibited as Ex. PW-2/A and Ex. PW-2/B, which bore the signatures of Sikodh, and the left thumb impression of Prabhu, respectively, as well as his own signatures.

14. PW-2 ASI Narender Kumar further deposed that, 1st, the I/O (PW-9 SI Rajnikant) conducted search of Sikodh, and that, from the bag being carried by him, he recovered black slab-like objects which,

on being tested with the Field Drug Testing Kit, were found to be *charas*, 2 kg in weight. PW-2 further confirmed that SI Rajnikant (PW-9) had taken out two samples, of 50 grams each, taking pieces from all the slabs, which were kept in two transparent polythene packets, which were converted into *pullandas* and marked 'A' and 'B'. He also confirmed that the remaining *charas*, weighing 1.9 kg, was retained in the same polythene and bag, which were converted into a third *pullanda*, was marked 'C'. All the three *pullandas*, he further confirmed, were sealed with the seal 'RKS', which was also affixed on the FSL form, after filling the same. He also confirmed that the I/O SI Rajnikant (PW-9) seized the three *pullandas* and the FSL form, vide Seizure Memo Ex. PW-2/E, which bore his, as well as Sikodh's, signature. He also confirmed the fact that, after use, the seal was handed over to HC Kanwal Singh (PW-3).

15. ASI Narender Kumar (PW-2) further deposed that the I/O SI Rajnikant (PW-9), thereafter, searched Prabhu, from the bag in whose possession, too, black slab-like objects were found, in a transparent polythene packet which, on being tested using the Field Drug Testing Kit, were found to be *charas*, 2 kg in weight. He confirmed that, from the said slabs, two samples, each weighing 50 grams, were recovered, after taking pieces from all slabs, and that the said two samples were kept in two transparent polythene packets, which were converted into cloth *pullandas*, marked 'A-1' and 'B1'. He also confirmed that the remaining 1.9 kg *charas* was retained in the same polythene and bag and, after being converted into a third *pullanda*, was marked 'C-1'.

16. PW-2 ASI Narender Kumar further deposed that the I/O SI Rajnikant (PW-9), after filling in the FSL form and sealing all three *pullandas*, as well as the FSL form with the 'RKS' seal (which he took from HC Kanwal Singh, returned the seal to HC Kanwal Singh (PW-3). All three *pullandas*, along with the FSL form where, he deposed, seized, by the I/O SI Rajnikant (PW-9), vide Seizure Memo Ex. PW-2/F, which bore his signature as well as the left thumb impression of Prabhu. He confirmed that, thereafter, the I/O SI Rajnikant (PW-9) prepared the *Rukka*, which was handed over, by the I/O, to him (i.e. ASI Narinder Kumar), along with the six sealed *pullandas*, marked 'A', 'B', 'C', 'A-1', 'B-1' and 'C-1', as well as the FSL form and two carbon copies of the seizure memos, for being handed over to the Duty Officer at the PS. He deposed that he proceeded to the PS Crime Branch and handed over the *Rukka*, along with the six sealed *pullandas*, two FSL forms and carbon copies of the two Seizure Memos is, to the SHO Crime Branch Insp. P.S. Rana (PW-6), who wrote the FIR number on all the three *pullandas*, the FSL form and on the carbon copies of the Seizure Memos, and affixed the seal 'PSR' on the *pullandas* and the FSL forms. Thereafter, as per the deposition of PW-2 ASI Narender, Insp. P.S. Rana (PW-6) handed over the sealed *pullandas*, FSL form and copy of the Seizure Memo to the MHCM, who entered the particulars of the case property in the Register and deposited the property in the Malkhana. PW-2 further deposed that, after collecting the copy of the FIR and the original *Rukka* from the PS, he proceeded to the Narcotics Cell ShakarPur, where he handed over the FIR and original *Rukka* to ASI Devender (PW-10) for further investigation.

17. PW-2 also recognised the appellants, who were present in Court. He also identified the *pullandas* marked 'A' and 'B', which were exhibited, consequently, as Exhibits P-1 and P-3 respectively. The *pullanda* marked 'C', duly sealed with the seals 'RKS' and 'PSR' was also opened, and the red and blue coloured back retrieved therefrom. From the bag, one transparent polythene, containing a black slab-like object was taken out and shown to PW-2, who identified it as the *charas* recovered from Sikodh, who was present in Court. The polythene containing *charas*, the red and blue coloured bag and the cloth piece were, accordingly, exhibited as Exhibits P-4, P-5 and P-6 respectively. Similarly, PW-2 identified the *pullandas* marked 'A-1' and 'A-2', as the packets containing *charas*, recovered from Prabhu. They were, accordingly, exhibited as Exhibits P-7 and P-9. The *pullanda* containing the remaining *charas* from the cream coloured bag of Prabhu, sealed with the seals 'RKS' and 'PSR' was also identified by PW-2, following which the polythene containing *charas*, the cream coloured bag the cloth piece were exhibited as Exhibits P-10, P-11 and P-12 respectively.

18. In cross-examination, PW-2 deposed that the secret informer had not met him directly, as also the secret informer had not intimated about the secret information, in his presence, to SI Rajnikant (PW-9). He confirmed, however, that SI Rajnikant had called him at about 6:55 p.m., to be involved in the raiding team. He claimed that it was only thereafter that he had received all the relevant information. He deposed that the apprehension of the appellant had taken place at 8

p.m.. He also deposed that the site plan had been prepared after he had left the spot of interception of the appellants, with the *Rukka*, for registration of FIR. He denied the suggestion that no notice had been given to Prabhu, all that his signatures had been obtained on a blank papers. He also denied the suggestion that no recovery had been effected from Prabhu, or that all documents were prepared while sitting at the PS. He further confirmed the grant of option, to the appellants, under Section 50 of the NDPS Act, to have the search effected in the presence of a Gazetted Officer or a Magistrate, as also the fact of service, on the accused, of the said notice. He also confirmed, in cross-examination, the refusal, by the appellants, to avail the opportunity available to them under Section 50. The endorsement, by Sikodh, on the notice, under Section 50 of the NDPS Act, he deposed, was in his presence and was, accordingly, exhibited as Ex. PW-2/C. He confirmed the preparation of six *pullandas*, and of their being sealed, at the spot with the 'RKS' seal which was, thereafter, handed over to HC Kanwal Singh (PW-3). He also affirmed the affixation of the 'RKS' seal on the FSL form. He explained that the I/O SI Rajnikant (PW-9) at, after the 1st recovery, handed over the sealed to HC Kanwal Singh (PW-3), and had again taken it back for sealing the 2nd recovery. He affirmed that he had handed over all *pullandas* to the SHO Insp. P.S. Rana (PW-6) in intact condition, with the seals intact. He deposed that he had left the spot of interception at 11:50 p.m. on 5th March, 2013, and had reached the PS Crime Branch at about 12:30 AM on 6th March, 2013. All suggestions, questioning the correctness and veracity of his statements, were emphatically denied by him.

19. PW-3 HC Kanwal Singh deposed that, at about 6:55 p.m. on 5th March, 2013, SI Rajnikant (PW-9) prepared a raid team, consisting of ASI Narender (PW-2), HC Mahesh Kumar, Const. Satpal (PW-5) and himself, which proceeded to the spot where, according to the secret information, Sikodh and Prabhu were to arrive, and that they reached at the said spot at about 7:30 p.m.. He, too, confirmed that public persons were invited to associate themselves in the raid team, but refused. He further deposed that, at about 7:55 p.m., the informer indicated two persons, identified them as Sikodh and Prabhu, of which the former was carrying a red and blue coloured bag and the latter was carrying a cream coloured bag, he confirmed that they apprehended the said persons at about 8 p.m., and offered them the option of having the search conducted in the presence of a Gazetted Officer or a Magistrate, for which purpose notices (Ex. PW-2/A and Ex. PW-2/B) were served on them under Section 50 of the NDPS Act. He proved the original notices, as served on Sikodh and Prabhu, the signature of Sikodh and the left thumb impression of Prabhu thereon, as well as his own signature. He further confirmed that Sikodh and Prabhu refused the option given to them under Section 50 of the NDPS Act, with Sikodh recording his endorsement on the body of the notice under Section 50 in his own handwriting (Ex. PW-2/C), and the refusal of Prabhu being recorded by the I/O SI Rajnikant (PW-9) in his handwriting (Ex. PW-2/D). Both refusals, he confirmed, were countersigned by him.

20. Thereafter, deposed PW-3, the I/O SI Rajnikant (PW-9) searched Sikodh, as well as the bag being carried by him, whereupon, from the bag, a transparent polythene, containing black slab-like objects, was retrieved. On testing the said objects, deposed PW-3, they were found to be *charas* which, on weighment, was found to be 2 kg. From this quantity, it was testified by PW-3, two samples of 50 grams each were retrieved by the I/O, which were consigned to two transparent polythene packets, later converted into *pullandas* and marked 'A' and 'B', whereas the remaining 1.9 kg *charas* was retained in the same polythene and converted into a *pullanda* marked 'C'. The I/O, he deposed, sealed all the *pullandas* with the seal 'RKS', filled up the FSL form, affixed the 'RKS' seal on the said form as well, and seized all the three sealed *pullandas* and the FSL form vide Seizure Memo Ex. PW-2/E, which also bore his signature and the signature of the appellants. He confirmed that, after sealing, the seal was handed over to him.

21. PW-3 confirmed that a similar procedure has been followed in the case of Prabhu. He deposed that the I/O SI Rajnikant (PW-9) recovered, from the bag being carried by Prabhu, a black object which, on testing, was found to be *charas*, weighing 2 kg. He confirmed that, from the said quantity, the I/O SI Rajnikant (PW-9) retrieved two samples of 50 grams each, after taking pieces from all the *charas* slabs, which were kept in two transparent polythene packets, converted into *pullandas* and marked 'A-1' and 'B-1'. The remaining 1.9 kg *charas*, he further deposed, was retained in the same polythene and bag, and were converted into a *pullanda* which was marked 'C-1'.

He also confirmed the filling up of the FSL form, sealing of the three *pullandas* and the FSL form with the 'RKS' seal (which was taken from PW-3 and, after usage, returned to him) and seizure, of the three *pullandas* and the FSL form vide Seizure Memo Ex. PW-2/F, by the I/O SI Rajnikant (PW-9).

22. PW-3 further deposed that he had written the *Rukka* at the instructions of the I/O SI Rajnikant (PW-9) and that, after writing the *Rukka*, that he had handed it over to HC Narender (PW-2), along with the six sealed *pullandas*, two FSL forms and two carbon copies of the Seizure Memos, with directions to him to hand them over to the Duty Officer at the SHO Crime Branch, whereafter they left the spot at 11:50 p.m..

23. At 3:20 a.m., according to the further deposition of PW-3, SI Devender Singh (PW-10), along with HC Charan Singh, arrived at the spot, whereafter the I/O SI Rajnikant (PW-9) handed over custody of the appellants, as well as the documents, to ASI Devender (PW-10), who prepared site plan at the instance of SI Rajnikant (PW-9). Thereafter, at 5:15 a.m., according to the deposition of PW-3, ASI Devender (PW-10) arrested Sikodh at 5:15 a.m. *vide* Arrest Memo Ex. PW-3/A (which bore his signature as well as the signature of Sikodh) and conducted his personal search. Following this, Prabhu was arrested, by ASI Devender (PW-10) at around 6 a.m., *vide* Arrest Memo Ex. PW-3/C which, too, bore his signature, along with the left thumb impression of Prabhu, whose personal search followed. He further deposed that, thereafter, SI Devender (PW-10) recorded the

disclosure statements of the appellants, which were exhibited as Ex. PW-3/E and 3/F, and bore his (i.e. PW-3's) signatures, as well as the signature of Sikodh and the left thumb impression of Prabhu. PW-3 further testified that they left the spot at 6:30 a.m. and proceeded to the Crime Branch office, where the I/O deposited the personal search articles of the appellants with the MHCM. They returned to the Narcotics Cell at 8:10 a.m., where SI Devender (PW-10) produced the appellants before Insp. Sanjay Gade (PW-8).

24. PW-3 correctly identified the appellants, who were present in Court, as well as the cash recovered from the personal search of Prabhu.

25. PW-3 was cross-examined on 24th May, 2014. He denied the suggestion that the appellants had been falsely implicated, or that no recovery had been effected from them. He also confirmed that he did not recollect who exactly had apprehended Sikodh. He deposed, in cross-examination, that the raid team reached the spot of interception at 7:30 p.m., and left the said spot at about 6:30 a.m., and that the *rukka* was handed over to HC Narinder (PW-2) at about 11:50 p.m.. He confessed not being able to recollect the exact time when the seal was handed over to him after used by the I/O SI Rajnikant (PW-9), but confirmed that he had returned the seal to the I/O one week thereafter. He also accepted that he was not present at the time of deposition of the articles at the *Malkhana*, but deposed that the samples, when sent by the I/O to the Police Station, were not tampered. He also confirmed that the FIR had been brought, from the police station to the spot of

occurrence at about 3:20 a.m. by the second I/O, accompanied by HC Charan Singh. He also confirmed that the I/O had interrogated the appellants in his presence.

26. Deposing as PW-4, ASI Om Prakash testified that, on 6th March, 2013, two reports, under Section 57, NDPS Act, were received in the office of the ACP, N&CP (where he was working as a reader), and were endorsed by the ACP. The said reports were exhibited as Ex. PW-4/B and 4/C. In cross-examination, he denied the suggestion that he was deposing falsely.

27. Deposing as PW-5, Const. Satpal testified that he had been called by the SHO Crime Branch, Insp. P.S. Rana (PW-6), and that he had, as per his directions, taken the samples marked 'A' and 'A-1', bearing seals 'RKS' and 'PSR', along with the FSL forms, which were also sealed, and certain other papers, to the FSL, vide RC No. 74/21, which was exhibited as Ex. PW-5/A. He further confirmed that he had deposited the *pullandas* and documents in the FSL and had handed over the acknowledgement, given by the FSL (Ex. PW-5/B), to HC Jagnarayan (PW-7), after returning to the PS Crime Branch. He testified that the case property was not tampered with, in any manner, while in his custody. In cross-examination, PW-5 testified that he had deposited the sample, at the FSL, at 11:45 a.m.

28. Insp. P.S. Rana, deposing as PW-6, testified that, on 6th March, 2013, at 12:35 a.m., HC Narender (PW-2) handed over, to him, six *pullandas*, marked A, B, C, A-1, B-1 and C-1, along with two carbon

copies of Seizure Memos and two FSL forms, which bore the seal 'RKS', on which he affixed the seal 'PSR'. He confirmed having handed over the *pullandas* and documents to the MHCM HC Jagnarayan (PW-7), who made entries in the official register, which were countersigned by him and were marked 'PW-6/A'. He confirmed having lodged DD No. 3 (Ex. PW-6/A) in the *roznamcha*, at 1:15 a.m., regarding the possession of the case property. He further testified that, on 11th March, 2013, the exhibits were sent to the FSL through Const. Satpal (PW-5). Nothing substantial emerged from his cross-examination.

29. The MHCM HC Jagnarayan testified as PW-7. He deposed that, on 6th March, 2013, at 12:55 a.m., he was called by the SHO, PS Crime Branch, Insp. P.S. Rana (PW-6), to his office and was handed the six *pullandas* marked A, B, C, 'A-1', 'B-1' and 'C-1', in sealed condition, bearing the seal of 'RKS' and 'PSR', along with two FSL forms bearing the same seals and two carbon copies of Seizure Memos, for depositing in the *Malkhana*. He confirmed depositing the said material and documents in the *Malkhana*, vide S. No. 1630 of Register No. 19, the original of which was marked and was produced in the Court and exhibited as Ex. PW-7/A. He confirmed that the SHO also lodged a DD in the daily diary, regarding the deposition of the case property in the *Malkhana*. He further confirmed that, on the same day, the personal search articles of the appellants Sikodh and Prabhu were brought, by ASI Devender Singh (PW-10) to the PS Crime Branch at about 7:15 a.m., and that he had deposited the said articles in the *Malkhana* vide S. No. 1630 of Register No.19, which was

exhibited as Ex. PW-7/B. He further testified that, on 11th March, 2013, the *pullandas* marked 'A' and 'A-1', bearing the seals 'RKS' and 'PSR' were sent to the FSL, along with two FSL forms, with the same seal impressions, through Const. Satpal (PW-5), vide RC Note No. 74/21, on the directions of the SHO, i.e. Insp. P.S. Rana (PW- 6). He also deposed that, after depositing the said *pullandas* in the FSL, Const. Satpal (PW-5) returned to the PS Crime Branch and handed over, to him, the acknowledgement receipt of the FSL (Ex. PW-5/B). He confirmed that, while they were in his possession, the exhibits were not tampered with, and their seals had remained intact. Nothing substantial turned on his cross-examination.

30. Insp. Sanjay Gade, deposing as PW-8, confirmed the fact that the raiding team had been constituted at his directions by SI Rajnikant (PW-9) and left, for conducting the raid, about 7 p.m. on 5th March, 2013, with HC Kanwal Singh (PW-3), HC Mahesh, HC Narender (PW-2) and Const. Satpal (PW-5). He also confirmed that, on 6th March, 2013, ASI Devender (PW-10) had produced the appellants before him, and that he had made enquiries from them. He further deposed that, on 6th March, 2013 itself, SI Rajnikant (PW-9) and ASI Devender (PW-10) had produced, before him, the Special Reports under Section 57 of the NDPS Act (Ex. PW-4/B and PW-4/C), regarding the seizure of 4 kg *charas*, which he forwarded to the ACP. In cross-examination, PW-8 confirmed that the appellant had not been produced before any ACP, DCP, Magistrate or Gazetted Officer. He denied all suggestions that the raiding team had not been constituted by him or that the raid had not been conducted or contraband

recovered. He correctly identified the appellants, who were present in court.

31. The I/O SI Rajnikant deposed as PW-9. He testified that (i) on 5th March, 2013, at about 6:15 p.m., the secret informer had visited his office and informed him that the appellants would be arriving at the bus stand, Delhi Police Department, Noida Road, carrying *charas*, between 7:30 and 8:30 p.m., (ii) after satisfying himself, he produced the secret informer before Insp. Sanjay Gade (PW-8) at about 6:30 p.m. in his office, (iii) Insp. Sanjay Gade directed constitution of the raiding team, which included himself, HC Narinder (PW-2), HC Kanwal Singh (PW-3) and HC Mahesh, (iv) the raiding team proceeded to the spot indicated by the secret informer, where they reached at about 7:30 p.m., (v) despite his request, no public person joined the investigation (vi) at about 7:55 p.m., the appellants reached the spot, carrying one bag each, (vii) the appellants were apprehended at about 8 p.m., and, on enquiry, revealed their names as Sikodh Mahto and Prabhu Mahto, (viii) he informed them of their right to have their search conducted in the presence of a Gazetted Officer or a Magistrate, and served, on them, carbon copies of notices under Section 50 of the NDPS Act, but both the appellants refused to avail the said option, (ix) Sikodh recorded his refusal in writing (Ex. PW-2/C), on the notice under Section 50 of the NDPS Act (Ex. PW-2/A), (x) he recorded the refusal, of Prabhu Mahto, on the body of the notice under Section 50 of the NDPS Act, in his own handwriting, as Prabhu Mahto claimed to be illiterate, (xi) from the red and blue coloured bag carried by Sikodh (whom he correctly identified in court), a

transparent polythene, containing a dark brown/black slab-like substance was retrieved which, on testing, using the Field Drug Testing Kit being carried by him, was found to be *charas*, weighing 2 kg, (xii) two samples, of 50 grams each, were taken therefrom and kept in two smaller transparent polythenes, of which separate cloth *pullandas*, marked 'A' and 'B' were prepared by him, (xiii) the remaining 1.9 kg *charas*, along with the transparent polythene in which it had been found, was returned to the bag, and a separate *pullanda* was prepared in respect thereof, marked 'C', (xiv) all the three *pullandas* were sealed with the seal 'RKS', which was also affixed on the FSL form, which was filled in by him, (xv) after usage, the seal was returned to HC Kanwal Singh (PW-3), (xvi) the three sealed *pullandas*, along with the FSL form was seized, by him, vide Seizure Memo Ex. PW-2/C, (xvii) thereafter, from the cloth bag being carried by Prabhu Mahto (whom, too, he correctly identified"), a transparent polythene, containing a dark brown/black coloured slab-like substance was found, which, on testing, was found to be *charas*, weighing 2 kg, (xviii) from the said *charas*, too, two samples, of 50 grams each, were retrieved and kept in two smaller transparent polythenes, of which cloth *pullandas* were prepared, marked 'A-1' and 'B-1', with the remaining *charas* being returned to the polythene, and a separate *pullanda*, marked 'C-1' prepared in respect thereof, (xix) after usage, the seal was returned to HC Kanwal Singh (PW-3), (xx) all the three *pullandas* were sealed with the seal 'RKS', which was also affixed by him on the FSL form, (xxi) the said three sealed *pullandas*, along with the FSL form, were seized by him vide Seizure Memo Ex. PW-2/F, (xxii) he, thereafter, prepared the *Rukka* (Ex. PW-

9/B), which he handed over to HC Narender Kumar (PW-2), along with the six sealed *pullandas*, two FSL forms and two carbon copies of the seizure memos, with the direction that the *Rukka* be handed over to the Duty Officer at the PS, and the six sealed *pullandas*, two FSL forms and two carbon copies of seizure memos to the SHO PS Crime Branch, (xxiii) on 6th March, 2013, at about 3:20 a.m., ASI Devender Singh (PW-10) reached the spot, and interrogated the appellants, (xxiv) the appellants were arrested vide Arrest Memos Ex. PW-3/A and PW-3/B, (xxv) the disclosure statements of the appellants (Ex. PW-3/E and PW-3/F) were recorded by ASI Devender (PW-10), (xxvi) the appellants were, thereafter, produced before Insp. Sanjay Gade (PW-8), (xxvii) on 6th March, 2013, he prepared the Special Report under Section 57 of the NDPS Act (Ex. PW-4/B), regarding seizure of 4 kg *charas* from the appellants, and handed over the Special Report to Insp. Sanjay Gade for onward transmission to the ACP, (xxviii) on the same day, ASI Devender (PW-10) also prepared Special Report, under Section 57 of the NDPS Act (Ex. PW-4/C) which, too, was handed over to Insp. Sanjay Gade, (xxix) the samples were sent to the FSL through Constable Satpal (PW-5), and (xxx) the FSL Report (Ex. PW-9/I) was collected by ASI Devender. He correctly identified the case property, which was shown to him in court.

32. The above testimony was reiterated by PW-9 SI Rajnikant, during cross examination. He further clarified that the seal, returned to HC Kanwal Singh (PW-3) remained with him for a week after it was returned. He acknowledged that the source of supply of the *charas*

could not be traced, and that the appellants did not disclose, specifically, the person to whom they were to supply the *charas*. He denied the suggestion that the appellants had been falsely implicated.

33. ASI Devender, deposing as PW-10, testified that, at about 3 a.m. on the night between 5th and 6th March, 2013, HC Narinder (PW-2) had come to the Narcotics Cell Office, Shakarpur, and handed over, to him, the copy of the FIR registered in the present case, along with the original *Rukka*, and that further investigation of the case and been handed over to him. He confirmed having reached the spot near the bus stop at Delhi Police Apartments, along with HC Charan Singh and Const. Satpal (PW-5), where they met SI Rajnikant (PW-9) as well as the appellants, who were correctly identified by him in court. He also confirmed that custody of the appellant had given, to him, by SI Rajnikant (PW-9), and that the appellant Sikodh was arrested *vide* Arrest Memo Ex. PW-3/A, whereas Prabhu was arrested *vide* Arrest Memo Ex. PW-3/C. He also confirmed recording the disclosure statements of Sikodh and Prabhu, which were exhibited as Ex. PW-3/F and Ex. PW-3/B respectively. Thereafter, according to his testimony, he, along with SI Rajnikant (PW-9), other officers and the appellants, proceeded to the PS Crime Branch, where the seized articles were deposited in the *Malkhana* through the MHCM. They then proceeded to the Narcotics Cell, Shakarpur, where the appellants were produced before Insp. Sanjay Gade (PW-8), who interrogated them. He testified that, thereafter, he prepared the Special Report under Section 57 of the NDPS Act (Ex. PW-4/C), and submitted the said report to Insp. Sanjay Gade. The appellants were medically examined and produced before

the learned Metropolitan Magistrate, who remanded them to judicial custody.

34. PW-10 ASI Devender further deposed that, on 11th March, 2013, he directed Const. Satpal (PW-5) to deposit the case exhibits at the FSL, and that Const. Satpal did so. After the result of the examination was obtained from the FSL and placed on record (Ex. PW-9/I), charge-sheet was prepared and filed in the court.

35. In cross-examination, PW-10 ASI Devender confirmed that, before he reached the spot, where the appellants had been apprehended, they had already been served notices under Section 50 of the NDPS Act, by SI Rajnikant (PW-9), the samples of contraband, recovered from the bags being carried by them had been sealed and *pullandas*, in respect thereof, prepared. All these, he confirmed, had been done by the first I/O, i.e. SI Rajnikant (PW-9). He denied all adverse suggestions put to him.

36. The last witness who deposed was PW-11 Dr. Kanak Lata Verma, Assistant Director Chemistry in the FSL. She confirmed that, on 11th March, 2013, two sealed cloth parcels had been received in the FSL for examination, and that they had been marked to her. These parcels were marked 'A-1' and 'A' and contained Ex. A-1 and Ex. A, respectively. She further confirmed that, on physical, microscopic, chemical and TLC examination, the said exhibits were found to be *charas*. She affirmed her detailed report, which was exhibited as Ex. PW-9/I. In cross-examination, however, she confirmed that she had

not carried out any examination for testing the purity of the samples received and volunteered that qualitative examination, thereof, had been carried out and reported.

37. The Examination Report of the FSL (Ex. PW-9/I) recorded that two sealed cloth parcels, marked 'A-1' and 'A' had been received, the seals of which were found intact, and tallied with the specimen seals forwarded by the authorities. Each parcel was found to be sealed with one seal bearing the initials 'RKS' and the other bearing the initials 'PSR'. The parcel marked 'A-1' was found to contain Ex. A-1, while the parcel marked 'A' was found to contain Ex. A. Each exhibit was seen to be "dark greenish brown semi-solid resinous material" The report, of the FSL, was to the effect that "on physical, microscopic, chemical and TLC examination, Exhibits 'A-1' and 'A' were found to be *charas* (cannabis)".

38. Following the conclusion of the recording of the statements of the prosecution witnesses, the statements of the appellants Sikodh and Prabhu were recorded, under Section 313 of the Cr.P.C. Both the appellants baldly denied all the allegations, against them, as "incorrect", asserted that the case against them was "false", that the witnesses, who had deposed against them were "false and interested" and that they were innocent. They submitted that they desired to lead defence evidence.

39. The appellants chose to lead the evidence of only one defence witness, i.e. Ram Pravesh Prasad, who deposed that, on 5th March,

2013, after dinner, he heard a noise and, on coming out of his house, saw that the Police was taking Prabhu, who used to live in the adjacent room and that, on his enquiry, from the Police officials, the reason for their doing so, they rebuked him. He acknowledged, in cross-examination, that he did not made any complaint, regarding the incident, to any higher Police official. He denied the suggestion that he had deposed falsely, in favour of Prabhu.

The impugned judgment

40. The learned ASJ based his judgment, resulting in the conviction of the appellants under Section 20(b)(ii)(C) of the NDPS Act, on the following findings:

- (i) The evidence on record clearly proved the recovery of *charas*, from the bags carried by the appellants, in accordance with the provisions and the procedure described in the NDPS Act in that regard. The oral and documentary evidence corroborated each other. Notice, under Section 50 of the NDPS Act, had been served on the appellants, who had been apprised of their right to have their search conducted before a Gazetted Officer or a Magistrate. The appellant had themselves refused the said option. This amounted to compliance with Section 50 of the NDPS Act. On the factum of recovery of *charas* from the bags of the appellants, therefore, there could be no dispute.

(ii) It had been sought to be contended that, as the seal on the samples, produced in the Court, was found to be broken, there had been tampering, with the sample, in the Malkhana. SI Rajnikant (PW-9) deposed that he had prepared the *pullandas* marked 'A', 'B' and 'C', of the *charas* recovered from Sikodh, and marked 'A-1', 'B-1' and 'C-1', of the *charas* recovered from Prabhu, and that had handed over the said sealed *pullandas* to PW-2 HC Narender Kumar. PW-2 deposed that he had taken all the six sealed *pullandas*, the two FSL forms, and the two carbon copies of the seizure memos, to the Police Station and had handed them over to the SHO at the PS Crime Branch Inspector P.S. Rana (PW- 6). No suggestion, to the effect that, at the time of handing over the *pullandas* to the SHO, they did not bear the seal 'RKS', or that they had been tampered by him, was put to him in cross-examination. PW-6 Inspector PS Rana confirmed that he had received six *pullandas* from PW-2, marked A, B, C, A-1, B-1 and C-1, along with two carbon copies of the seizure memos sent to FSL having the 'RKS' seal. He was not cross-examined, at all, on the aspect of the seal on the samples or on the FSL form. He further deposed that he had put his seal 'PSR' on all the *pullandas* and on the FSL forms, and had handed over the *pullandas* and documents to the MHCM HC Jagnarayan (PW-7), who made the requisite entry in Register No. 19. Though he was cross-examined, PW-6 was not questioned regarding the seal of 'PSR' by him on the *pullandas* or the FSL form. These testimonies were corroborated by PW-7 HC Jagnarayan, the MHCM, who

confirmed that the six *pullandas*, bearing the seals 'RKS', and 'PSR', along with the two FSL forms with the same seals, and copy of seizure memos, were handed over to him by PW-6, which were deposited by him in the *Malkhana*, the relevant entry of which (Ex. PW-7/A) was also proved by him. PW-5 Const. Satpal deposed that, on 11th March, 2013, he carried the said samples marked 'A' and 'A-1', bearing the seals 'RKS' and 'PSR', to the FSL, vide RC Note No. 74/21, and that he had deposited the *pullandas* and documents in the FSL, obtained acknowledgement thereof and handed over the said acknowledgement to PW-7. RC Note No. 74/21 (Ex. PW-5/A) was also proved by PW-7 HC Jagnarayan, without any challenge thereto. The acknowledgement receipt from the FSL (Ex. PW-5/B) was also proved. The Examination Report of the FSL (Ex. PW-11/A), too, confirmed that the samples Ex. A-1 and Ex. A bore the 'RKS' and 'PSR' seals, which were found intact and tallying with the specimen seal sent by the prosecution. This clearly linked the entire chain, from the spot of recovery of the *charas* in the arrival of the samples in the FSL. No evidence was forthcoming, in cross-examination, to indicate tampering with the samples. This argument of the appellants was, therefore, liable to be rejected.

(iii) It was true that, at the time of production of the samples in court, the seal on one of the samples was found to be broken and stapled with pins. However the said sample was marked 'A', regarding which the FSL had already, after examining the

sample, reported that it contained *charas*. The mere fact that, by the time the sample reached the court, its seal was found broken, was not, therefore, of any consequence.

(iv) It was also sought to be submitted, before the learned ASJ, that the seal had been retained by the I/O for six days after use. However, this was found to be contrary to the evidence, and was, therefore, rejected.

(v) The absence of public witnesses did not affect the case of the prosecution. Reliance was placed, for this proposition, on *Ajmer Singh v. State of Haryana*, (2010) 3 SCC 746, *Ramesh v. State of U.P.*, (2009) 15 SCC 513, *Sumit Tomar v. State of Punjab*, (2013) 1 SCC 395, *Rohtash v. State of Haryana*, (2013) 14 SCC 434 and *Gian Chand v. State of Haryana*, (2013) 14 SCC 420.

(vi) The FSL report confirmed that the samples sent to it for testing contained *charas*.

Rival Submissions

41. Arguing on behalf of the appellant, Mr. Dandapani advanced the following submissions:

(i) The entire conviction and sentence was invalidated on account of non-compliance with Section 50 of the NDPS Act, read in conjunction with the law laid down by the Supreme

Court in *Arif Khan v. State of Uttarakhand*, 2018 SCC Online SC 459.

(ii) In the case of Prabhu, the alleged refusal, on his part, of the option available under Section 50 of the NDPS Act, was by way of noting in the handwriting of the I/O read with the impression of the appellant. This was insufficient to constitute refusal.

(iii) Though the sample seal, after usage, were stated to have been handed over to PW-3 HC Jagnarayan, there was no record of such handing over of the seal, or of the returning of the seal by HC Jagnarayan, to the I/O SI Rajnikant. PW-7 HC Jagnarayan had stated, in cross-examination, that he had returned the seal after one week, but did not remember the date when it was returned. This was significant, inasmuch as the raid had taken place on 5th March, 2013, and the samples were sent to the FSL on 11th March, 2013.

(iv) The acknowledgement form, dated 11th March, 2013 (Ex. PW-5/B), whereby the FSL acknowledged acceptance of the samples, only recorded receipt of “two sealed cloth parcels”, and made no reference of receipt of any FSL form.

(v) PW-5 Const. Satpal, who was supposed to have signed the Road Certificate (Ex. PW-5/A) did not testify to having affixed his signature thereon. Rather, PW-7 HC Jagnarayan

deposed that the Road Certificate bore the signature of PW-5 Const. Satpal.

(vi) These defects vitiated the case of the prosecution. Reliance was placed, for these propositions, on the judgments of a learned Single Judge of this Court in *Safiullah v. State, 1992 SCC Online Del 516* and *Prem Singh v. State, 1996 SCC Online Del 936*, and the judgment of a learned Single Judge of the High Court of Punjab and Haryana in *Bhola Singh v. State of Punjab, 2005 SCC Online P&H 112*.

(vii) There was no evidence of the samples having been taken from the *Malkhana*.

42. As against this, Ms. Meenakshi Chauhan , appearing for the State, pointed out that, in his deposition, PW-3 HC Kanwal Singh had stated that the I/O had, after sealing the *pullandas* and the FSL form with the 'RKS' seal, returned the same to him. The presence of the seal of the samples was also mentioned on the Road Certificate as well as on the FSL Form. Apropos the judgment of the Supreme Court in *Arif Khan (supra)*, Ms. Meenakshi Chauhan submitted that the raiding team had acted in accordance with the procedure, as it existed in view of the law enunciated prior to *Arif Khan (supra)* and could not, therefore, be faulted.

Analysis

43. Having heard learned counsel appearing for the rival parties, I have applied myself to the material on record, in the light of the law enunciated in that regard.

44. There can be little doubt about the fact of interception of the appellants, by the raiding team. Though, before the learned ASJ, a faint objection, on the ground of the failure to co-opt public witnesses, had been raised, the said objection has not been pursued, before me, by Mr. Dandapani, arguing for the appellants. In any event, I am in entire agreement with the learned ASJ, to the effect that non-co-opting of public witnesses does not vitiate the case of the prosecution. The judgments, on which the learned ASJ has relied, for the said purpose, are apt. It is a well known fact that members of the public do not prefer to involve themselves in criminal investigations. To the extent of receipt of secret information, constitution of the raiding team, apprehending of the appellants by the raiding team and recording of their statements, therefore, I completely concur with the findings of the learned ASJ.

45. Adverting, now, to the aspect of seizure and recovery, Mr. Dandapani has placed reliance on the judgment of the Supreme Court in *Arif Khan (supra)*, to submit that Section 50 of the NDPS Act stood infracted in the present case and that, consequently, the seizure and recovery of *charas*, from the appellant, could also not be said to

be definitively established. In any event, he submits, where Section 50 of the NDPS Act stood violated, the entire prosecution was vitiated thereby, and the accused entitled, consequently, to acquittal.

46. Section 50 of the NDPS Act reads thus:

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

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 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 of 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 to his immediate official superior.”

47. The Special Report (Ex. PW4/B), under Section 57 of the NDPS Act, as drawn up by the I/O SI Rajnikant (PW-9), and is proved by him in the course of his deposition during trial, clearly states thus:

“After their refusal, their formal search was conducted by me. During search of Sikodh Mahto, one Red-Blue-color raxene/cloth bag was recovered from his right hand. On checking of this bag one transparent polythene containing 2 kg charas was found in it. ... During search of Prabhu Mahto, one cream coloured cloth bag was recovered from his right hand. On checking of this bag one transparent polythene containing 2 kg charas was found in it.”

It stands established, therefore, that the recovery of the alleged *charas*, from the bags of the appellants, took place during the search of the appellants. In *Dilip v. State of M.P.*, (2007) 1 SCC 450 and *State of Rajasthan v. Parmanand*, (2014) 5 SCC 345, the Supreme Court has held that, if the recovery takes place from the bag carried by the

accused – or, for that matter, even from the vehicle in which the accused was travelling – and the search of the said bag/vehicle takes place along with the search of the accused, compliance with Section 50 of the NDPS Act is mandatory. The applicability of Section 50 of the NDPS Act, to the facts of the present case cannot, therefore, be gainsaid.

48. The next question which arises, for consideration, is whether there had, or had not, been compliance with Section 50 of the NDPS Act. Mr. Dandapani would seek to contend that the answer to this query has necessarily to be in the negative, in view of the law laid down by the Supreme Court in *Arif Khan (supra)*.

49. *Arif Khan (supra)* marks a radical change, in the jurisprudence relating to Section 50 of the NDPS Act. The facts of the said case strikingly mirror those of the present, and may, therefore, be briefly adverted to. Pursuant to receipt of secret information, a raiding party was constituted, which spotted the appellant Arif Khan approaching, and intercepted him. On being questioned, he admitted being in possession of *charas*. He was informed of his right to have his search conducted by a Gazetted Officer or a Magistrate, *to which he responded that he had faith on the raiding police party and consented to be searched by them. After having obtained the said consent, in writing*, the raiding police party searched the accused, resulting in seizure of *charas*, weighing 2.5 kg, from his body. Arif Khan was, accordingly, prosecuted for commission of the offence punishable

under Section 20 of the NDPS Act. The prosecution resulted in conviction, by order dated 9th November, 2004, of the learned ASJ. An appeal, preferred thereagainst, was dismissed by the High Court of Uttarakhand. Arif Khan appeal further, to the Supreme Court.

50. The principal contention advanced, by learned counsel appearing for Arif Khan before the Supreme Court, was that there had been violation of Section 50 of the NDPS Act, inasmuch as the search of Arif Khan had not been conducted in accordance with the said provision. Reliance was placed, for the said purpose, on the judgment of the Supreme Court in *Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609*. It was contended that the search/recovery of the alleged contraband from Arif Khan ought to have been made only in the presence of either a Magistrate or a Gazetted Officer. The response of the prosecution has been recorded, in para 26 of the judgment, in the following words:

“It is the case of the prosecution and which found acceptance by the two Courts below that *since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully fully complied with* and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act.”

(Italics and underlining supplied)

51. The Supreme Court proceeds, in paragraphs 27 to 30 of the judgment, to hold thus:

“27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband “Charas” does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of **Vijaysinh Chandubha Jadeja** (*supra*). This we say for the following reasons.

28. First, *it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer*; Second, it is also an admitted fact that *due to the aforementioned first reason, the search and recovery of the contraband “Charas” was not made from the appellant in the presence of any Magistrate or Gazetted Officer*; Third, it is also an admitted fact that *none of the police officials of the raiding party, who recovered the contraband “Charas” from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband “Charas” as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer*; Fourth, *in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer.*

29. Though, the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party but *none of them deposed that the search/recovery*

was made in presence of any Magistrate or a Gazetted Officer.

30. *For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove the compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal.*

31. *In the light of the foregoing discussion, the appeal succeeds and is allowed. Impugned judgment is set aside. As a consequence thereof, the appellants conviction is set aside and he is acquitted of the charges in question.”*

(Emphasis supplied)

52. Insofar as the facts, essential for determination of the controversy in issue are concerned, the present case cannot be distinguished, in any manner, from *Arif Khan (supra)*. The only difference, on facts – which makes no difference to the legal position – is that, in *Arif Khan (supra)*, the appellant Arif Khan, on being queried, confessed to carrying *charas*, whereas the appellants, in the present case, did not do so. In the present case, too, the alleged contraband *charas* was recovered from the bags of the appellants. In the present case, too, the search of the bags, and the seizure of *charas* therefrom, was effected by the raiding team, in the absence of any Magistrate or a Gazetted Officer. The witnesses, in the present case, have deposed that the I/O was not a Gazetted Officer, and that no

Magistrate or Gazetted Officer was contacted. The *ratio decidendi* of *Arif Khan (supra)*, as contained in para 28 of the said decision applies, therefore, to the present case on all fours. While it is true that *Vijaysinh Chandubha Jadeja (supra)* would seem to suggest that, once the accused was offered the option of having his search conducted in the presence of a Magistrate or a Gazetted Officer, and he declined the offer, Section 50 stood complied with, *Arif Khan (supra)*, after noticing *Vijaysinh Chandubha Jadeja (supra)*, as well as the law laid down therein, holds, nevertheless, that, even where the accused – as in that case, and as in the present case – declined the offer under Section 50 of the NDPS Act, the raiding team was, nevertheless, required to have the search of the appellant conducted in the presence of a Gazetted Officer or Magistrate. The said enunciation of the law binds me, by virtue of Article 141 of the Constitution of India.

53. Respectfully following the judgment of the Supreme Court in *Arif Khan (supra)*, therefore, I hold the objection, of Mr. Dandapani, regarding non-compliance, with the provisions of Section 50 of the NDPS Act, in the present case, as the appellants, and the bags carried by them, were searched by the raiding team, and not in the presence of any Gazetted Officer or Magistrate, to merit acceptance.

54. In view of this position, it would neither be necessary, nor even appropriate, for this Court to venture into the allegations, or the findings, regarding the nature and identity of the substance found in

the bags carried by the appellants, as the failure, on the part of the raiding team, to proceed in accordance with Section 50 of the NDPS Act, vitiates the very search and seizure of the said material. All subsequent efforts at identifying the nature of the material, allegedly seized from the bags of the appellants, whether by using the Field Drug Testing Kit carried by the raiding team, or by way of the report of the FSL, would pale into insignificance.

55. In *Parmanand (supra)*, the Supreme Court held that communication of the right, available under Section 50 of the NDPS Act, to the person about to be searched, was not an empty formality, and had a purpose, as offences under the NDPS Act carries stringent punishments and, therefore, the prescribed procedure was required to be meticulously followed. This procedure, it was further clarified, provided the “minimum safeguards available to an accused against the possibility of false involvement”. Further, in *Ali Mustaffa Abdul Rehman Moosa v. State of Kerala, AIR 1995 SC 244*, the Supreme Court held thus:

“The judgment cannot be interpreted to lay down that a contraband seized as a result of illegal search or seizure, can be used to fasten that liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in a legal manner. “Unlawful possession” of the contraband is the sine qua non for conviction under the NDPS Act and that factor has to be established by the prosecution beyond a reasonable doubt. Indeed the seized contraband is evidence but in absence of proof of possession of the same, and accused cannot be held guilty under the NDPS Act.”

There can be no manner of doubt, therefore, that failure to comply with Section 50 of the NDPS Act is fatal to the case of the prosecution, which stands vitiated, in its entirety, thereby.

56. Notably, in *Arif Khan (supra)* too, once the Supreme Court found the seizure of the alleged *charas* to have been effected in violation of Section 50 of the NDPS Act, it did not proceed to discuss any other aspect of the matter, and acquitted the appellant/accused, in that case, on that sole ground.

57. An identical outcome must, of necessity, visit the present proceedings.

Conclusion

58. As the result of the above discussion, the appeals succeed. The appellants are acquitted of the charges against them. The impugned judgment dated 26th April, 2017, and order on sentence, dated 29th April, 2017, of the learned ASJ, are quashed and set aside. The appellants shall be released forthwith, unless their incarceration is required in any other case.

59. Copy of the judgment be also sent to the appellants through the Jail Superintendent.

C. HARI SHANKAR, J

JUNE 06, 2019/HJ