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Abdul Malik Vs. State

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Court : Delhi

Decided On : Feb-28-2014

Judge : V. K. Jain

Appellant : Abdul Malik

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment reserved on:17.02.2014 Date of Decision:

28. 02.2014 CRL.A. 891/2010 ABDUL MALIK Through: ..... Appellant Mr. M.A. Hasan, Adv. versus STATE Through: + ... Respondent Mr. Feroz Khan Ghazi, APP for State with SI Pankaj Kumar, Special Cell, INR, Rohini, Delhi CRL.A. 943/2010 & Crl. M(B) 1151/2012 & Crl. MA44062013 MOHD ASLAM ..... Appellant Through: Mr. Hemendra Jailiya, Adv. versus STATE Through: + ... Respondent Mr. Feroz Khan Ghazi, APP for State with SI Pankaj Kumar, Special Cell, INR, Rohini, Delhi CRL.A. 946/2010 & Crl.M(B) 1120/2010 MOHD SAHID @ ANTONY BABA ..... Appellant Through: Mr. M.A. Hasan, Adv. Versus STATE Through: ..... Respondent Mr. Feroz Khan Ghazi, APP for State with SI Pankaj Kumar, Special Cell, INR, Rohini, Delhi CORAM: HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT
V.K.JAIN, J.

On 26.02.2004, the Special Cell of Delhi Police received an information that one Mohd. Sahid @ Antony Baba would receive some parcels containing ganja from the Post Office, Sri Niwas Puri or nearby post office between 11 am to 11.30 am. The information was recorded vide DD no.6 and the concerned ACP was informed, though not in writing. A raiding party was then organized under the leadership of Inspector Kulbhushan Sharma. The raiding party besides Inspector Kulbhushan Sharma, included SI Dinesh Kumar, ASI Ram Babu, ASI Ishwar Singh, Constable Deepak and constable Ravish. When the raiding party reached near Cambridge School, the informer pointed out three persons standing at footpath. One of them, who was an old man and was identified as Mohd. Sahid @ Antony Baba was carrying a parcel in his hand whereas his two associates Mohd. Aslam and Abdul Malik were found sitting on two parcels each, which had been kept on footpath. All the three persons were apprehended and were told that if they wished they could get their parcels searched by any Gazetted Officer or a Magistrate. They were also told that it was their right and they were also briefed about the duties and powers of a Gazetted Officer/ Magistrate. The notice under Section 50 of the NDPS Act was served on all of them. They, however, refused to get the parcels searched by any Gazetted Officer/ Magistrate. They also refused to take the personal search of SI Pankaj, who thereafter opened the parcels. The parcel recovered from the appellant - Mohd. Sahid was found addressed to him and on weighing it is weight was found to be 5 kg and 800 gm. The parcels recovered from Mohd. Aslam were also addressed to Mohd. Sahid @ Antony Baba and were found to contain ganja wrapped in polythene. The first parcel weighed 9.4 kg. The second parcel recovered from the appellant - Mohh. Aslam was also addressed to Mohd. Sahid and its weight was found to be 10 kg and 500 gm. The ganja was found wrapped in a polythene in this parcel as well. The first parcel recovered from Abdul Malik was also found addressed to Mohd. Sahid and contained ganja wrapped in polythene. The weight of the said parcel was found to be 12 kg. The second parcel recovered from Abdul Malik weighed 10 kg and 500 gm and contained ganja wrapped in polythene. This parcel also was addressed to Mohd. Sahid.

2. The case of the prosecution is that SI Pankaj took 500 gm each from all the parcels as samples and thereafter the samples as well as the residuary substance

were duly seized after they had been sealed with the seal of MS, which after use was handed over to Constable Ravish. This is also the case of the prosecution that the staff of Post Office Sri Niwas Puri was contacted and asked to keep a watch on such parcels. On 8.3.2004, an information was received from the Post Office that four more parcels addressed to Mohd. Sahid @ Antony Baba had been received. The said parcels were seized from the post office. The first parcel weighed 16 kg, the second parcel weighed 15 kg, the third parcel weighed 14.8 kg and the fourth parcel weighed 14.2 kg. After drawing 500 gm each as samples from the substance found in the aforesaid four parcels, the samples as well as the residual substance were duly seized after they were sealed with the seal of KS, which after use was handed over to Constable Adesh Kumar.

3. During the course of investigation, the IO also seized of the original delivery slips purported to be signed by Mohd. Sahid @ Antony Baba while receiving the parcels. Some earlier delivery slips of January and February, 2004, signed by Mohd. Sahid @ Antony Baba were also seized from the post office.

4. On 17.3.2004, the post office informed the Special Cell that three parcels addressed to Vijay son of Billal had been received in the post office. Those parcels were also seized from the post office and on opening, they were found to contain ganja. Each parcel weighed 12.5 kg. This time also 500 gm each was taken out as sample from all the three parcels and the samples as well as residuary substance were seized after they had been sealed with the seal of KS.

5. All the three appellants were charged under Section 20 of NDPS Act. They having pleaded not guilty, as many as 21 witnesses were examined. One witness was also examined in defence.

6. PW1 - Mr. S.N. Mastana was the Post Master of Sri Niwas Puri Post Office at the relevant time. He deposed with respect to handing over seven parcels to SI Mahender Singh, out of which four were seized vide memo Ex.PW1/C and three were seized vide memo Ex.PW1/D, after sample was drawn in his presence. PW2 - ACP Umesh Kumar stated that on 13.3.2004, he had received the report Ex.PW2/B under Section 57 of NDPS Act and on 20.3.2004, he had received another report under Section 57 of the Act, which is Ex.PW2/A. Both the reports

were diarized vide entry Ex.PW2/C and PW2/D and were forwarded by the witness to the concerned Deputy Commissioner of Police. PW3 - ACP Parmod Singh Kushwah stated that on 26.2.2004, Inspector Kulbhushan informed him that he had received a secret information regarding Mohd. Sahid being involved in sale of ganja, which he was receiving through postal parcels. He further stated that at about 11.30 am, on the aforesaid date, he was informed that Mohd. Sahid and his associates were going to take parcels containing ganja from some post office in or around Sri Niwas Puri. He also deposed with respect receipt of a report under Section 57 of NDPS Act from SI Mahender Singh on 27.7.2004 and dispatching the same to the concerned DCP on the same date vide dispatch register entry Ex.PW3/A. PW6 Constable Deepak deposed with respect to taking the case property to Inspector Satbir Singh of the Special Cell and the said Inspector putting his official seal SVS on the parcel as well as the FSL form. He also deposed with respect to deposit of case property with MHC(M). PW7 - Inspector Satyavir Singh stated that on 26.02.2004 SI Mahender came to him along with the appellants parcels and depositing ten parcels sealed with the seal of MS as well as FSL form sealed with the same seal. According to the witness, he called MHC(M) with Register no.19 in his office and handing over all the parcels with the FSL form and copy of seizure memo. PW10 - SI Umesh deposed with respect to seizure of parcels containing ganga from the post office on 12.3.2004, drawing of samples from the said parcels and then seizure of the samples as well as the residuary substance after parcels had been sealed with the seal of KS. PW11 Paramjit Sijgh stated that on 26.2.2004, Inspector Satyabir Singh deposited five samples as well as the five parcels sealed with the seal of MS and SVS with him along with one FSL Form sealed with the aforesaid seals. He also deposed with respect to deposit of the samples as well as the parcels with him on 12.3.2004 and 18.3.2004. He further stated that on 2.4.2004, five samples sealed with the seal of MS and SVS and seven samples sealed with the seal of KS and SVS were sent to FSL form through SI Maninder Singh along with CFSL form. He also proved copies of the entries made in Register no.19 in this regard. PW15 Sukhbir Singh was the postman in Post Office Sri Niwas Puri at the relevant time. He stated that the appellant Mohd. Sahid used to reside in I.G Camp, Tamoor Nagar at the relevant time. He stated that the appellant Mohd. Sahid used to reside in IG Camp,

Tampur Pur where he had seen him several times and he used to come to post office to receive the parcels etc. PW17 SI Mahender Singh, inter alia, deposed with respect to seizure of four parcels from the post office on 12.3.2004 after drawing samples from them and sealing the samples as well as the parcel containing residual substance with the seal of KS. PW18 SI R. Srinivasan stated that the report, copy of which is Ex.PW18/A was received in ACP Office on 27.02.2004. He also deposed with respect to receipt of the report Ex.PW2/A and Ex.PW2/B and entry of the said reports in the Register.

7. PW4 Head Constable Ravish stated that on 26th February, 2004 when he was posted in the Special Cell, an informer came there and informed Inspector Kulbhushan Sharma that a person named Mohd. Sahid @ Antony Baba would come to Sri Niwas Puri along with his two colleagues for taking parcels containing ganja, which would be coming through post office. A raiding party was then organized and they went to Sri Niwas Puri in a Government vehicle where they found three persons standing on the footpath in front of Cambridge School. The secret informer while sitting in the Government vehicle had told them that the old man having beard was Mohd. Sahid @ Antony Baba and the other two persons were his colleagues. He further stated that SI Pankaj also requested 4-5 public persons to join the raiding party but none agreed. According to the witness, the appellant Mohd. Sahid @ Antony Baba was having one white colour packet in his hand and his two other colleagues were sitting on two packets each of white colour Mohd. Sahid @ Antony Baba was trying to stop an auto rickshaw but no auto rickshaw had stopped there. Thereupon, all of them were apprehended and were informed by SI Pankaj that they had information with regard to possession of ganja by them and that they (the appellants) had a right to be searched in presence of Gazetted Officer or a Magistrate. A notice under Section 50 of NDPS Act was also given to them in this regard. But all of them refused to be searched in presence of the Gazetted Officer or a Magistrate. They also refused to take the search the members of the raiding party. The parcel which the appellant Mohd. Sahid @ Antony Baba was carrying with him, was opened and out of the said parcel, one polythene of orange colour containing ganja wrapped in a newspaper was found. The parcels recovered from the appellant Mohd. Aslam and Abdul Malik were also opened and were found to contain ganja wrapped in Newspaper

and kept in polythene. After drawing 500 gram each sample from all the parcels, sample as well as the residual substance was sealed with the seal of MS. FSL form was also filled up at the spot. According to the witness, ganja recovered from the possession of Mohd. Sahid @ Antony Baba was found to be 5 kgs. & 800 gm., ganja in one packet found in possession of Mohd. Aslam was found to be 9 kg. & 400 gm whereas other packet was found to be of 10 kg. & 500 gm. One of the packets recovered from the possession of the accused Abdul Malik was found to be of 10 kg. & 500 gm. whereas the other packet was found to contain 12 kg. of ganja. During examination, he stated that contraband acquired from the appellants was weighed on a manual scale and after arranging the same on the scale and seal after use was given to him, which he returned to I.O. after two days.

8. PW-5 Constable Adesh was also a member of the raiding party, which went to Ring Road, Sri Niwas Puri on 26 th February, 2004. He corroborated the deposition of PW-4 Head Constable Ravish with respect to their reaching in front of Cambridge School, finding the appellants on the footpath and recovered the ganja from the packets found in their possession. He also stated that the ganja found with the appellants was weighed with the help of a manual weighing machine. However, when he was cross-examined, he, inter alia, denied the suggestion of the appellants that contraband was weighed on a manual scale.

9. PW-9 Inspector Kulbhushan Sharma was heading the raiding party who went to Ring Road, Sri Niwas Puri in front of Cambridge School on 26th February, 2004. He deposed with respect to the appellants having been found present on the footpath, the appellant Mohd. Sahid @ Antony Baba carrying a postal parcel in his hands where the remaining appellants being found sitting on two parcels each. He also corroborated the deposition of PW-4 and PW-6 with respect to recovery of ganja from the packets found in possession of the appellants as well as with respect to drawing the samples from each packet, sealing them with the seal of MS. He also deposed with respect to service of notice under Section 50 of NDPS Act given by SI Pankaj. He also claimed that the secret information received by him was recorded in a DD and was also brought to the notice of the concerned ACP who directed him to form a raiding party. He, however, admitted that copy of the DD was not sent to the ACP. He, however, claimed that the weighing machine

with the I.O. was not a manual weighing machine and it had one platform upon which the substance was kept and thereupon weight was indicated by the machine. He also stated that was no need for weights for weighing on the said machine.

10. PW-12 SI Ram Babu is yet another member of the raiding party who went to Ring Road, Sri Niwas Puri, on 26.02.2004. He also corroborated the deposition of other police officials with respect to all the three appellants being present with the appellant Mohd. Sahid @ Antony Baba carrying a parcel with him and the other two appellants being found sitting carrying two parcels each. He also deposed with respect to recovery of ganja in the parcels found with the appellant and seizure of the contraband as well as residual substance with the seal of substance. He also stated that the case property was handed over to the SHO who affixed seal of MS as well as the FSL form besides being FIR number on the document of the case property and thereafter the case property was deposited in Malkhana. In the cross-examination, he claimed that the ganja was weighed with a manual weighing scale and weights were used for this purpose.

11. PW14 SI Pankaj Kumar is yet another member of the raiding party headed by Kulbhushan Sharma, which recovered the contraband from the appellants on 26th February, 2014. He also stated that when they reached spot, all the three appellants were found present there. According to him, the appellant Mohd. Sahid @ Antony Baba was standing on a footpath with a parcel in his hand which the remaining appellants found sitting on two parcels each and after that they had been informed that they had right to be searched in the presence of a Gazetted Officer or a Magistrate and they refused to be searched in presence of the Gazetted Officer or a Magistrate. The parcels were opened and were found to contain ganja in a polythene wrapped in a newspaper. He also deposed with respect to seizure of ganja after drawing samples and sealing the samples as well as the residual substance with the seal of MS. He also claimed that all the parcels were weighed with the help of a manual weighing scale and the seal of MS after its use was handed over to Constable Ravish.

12. PW-20 Dr. Madhulika Sharma, Assistant Director, FSL Rohini, Delhi, stated that on 2nd April, 2004, twelve sealed parcels, out of which three parcels Q1 to Q3 were sealed with the seal of KS and SVS, five parcels were sealed with the seal of MS and SVS and four parcels were sealed with the seal of KS and MS along with the FSL forms and specimen seal impression. All the parcels were handed over to this witness for chemical examination. Weight of parcels marked S1 to S5 was 415 grams, 418 grams, 463 grams, 407 grams, 459 grams and 483 grams respectively. On chemical examination, all the parcels were found to contain tetrahydrocannabinol, which is the main constitute of Cannabis plan.

13. PW21 Dr. Rajender Kumar, Assistant Director, Biology, FSL Rohini, Delhi, received twelve parcels sealed with the seal of MS FSL in the biology division of FSL and on analysis found the substance inside the parcels to be ganja.

14. Vide impugned judgement dated 6.7.2010, the appellants Mohd. Sahid @ Antony Baba and Mohd. Aslam were convicted under Section 20(b)(ii)(B) of NDPS Act whereas the appellant Abdul Malik was convicted under Section20(b)(ii)(C) of NDPS Act. Vide order on sentence, the appellants Mohd. Sahid @ Antony Baba and Abdul Malik were sentenced to undergo RI for ten (10) years each and to pay fine of Rs.1.00 lakh each or in default to undergo SI for one (1) year. The appellant Mohd. Aslam was sentenced to undergo RI for eight (8) years and to pay fine of Rs.75,000/- or in default to undergo SI for six (6) months. Being aggrieved from their conviction and sentence awarded to them, the appellants are before this Court by way of these appeals.

15. In their statements under Section 313 of Cr.P.C., the appellants denied the alleged recovery from them. The appellant Mohd. Sahid @ Antony Baba claimed that he was picked up from his residence and nothing was found in his possession. He also claimed that his signatures were obtained on various blank papers in the Police Station. The appellant Mohd. Aslam and Abdul Malik claimed to be innocent and denied the alleged recovery of the contraband from them.

16. DW-1 Mohd. Ilyas stated that on 26th February, 2004, he saw the Police officials taking the appellants from their residence to the Police Station for interrogation and on the next day, he came to know that they had been implicated

in some case of ganja. DW-2 Shahid also claimed that on 26th February, 2014, at about 8 am, 8-10 police officials came and took the accused persons to the Police Station for the purpose of interrogation and later implicated them in a false case.

17. The impugned judgement has been assailed by the learned counsel for the appellants on the following grounds: a. The case of the prosecution is that 500 grams each was drawn as sample from all the parcels alleged to have been recovered from the appellant whereas the weight of the samples when examined in the laboratory was found to be less which indicates the possibility of the sample having been tampered with. b. According to PW4 the seal was returned to the IO after two (2) days and according to PW11 Paramjeet Singh the samples were deposited by PW17 S.I. Maninder Singh in the laboratory on 2.4.2004 and, therefore, there was possibility of the samples having been tampered with by PW17 using the seal of MS which had been put on them at the time of seizure. c. There is contradiction in the deposition of the witnesses as to whether the scale used for weighing the contraband and samples was manual or electronic scale. d. There was non-compliance of the provisions of Section 42 of the NDPS Act. e. There was delay in sending the samples to FSL since the seizure was effected on 26.2.2004, whereas the samples were sent on 2.4.2004. f. No public witness was joined in the raiding party though there was ample time and opportunity for the purpose.

18. I find that according to PW6 Constable Deepak the case property was taken by him and S.I. Maninder Singh to Inspector Satyavir Singh, who put his official seal SVS on the parcel as well as FSL forms and then deposited the same with MHC(M). Inspector Satyavir Singh came in the witness box as PW7 and stated that on 26.2.2004, S.I. Mahender had come to him and ten (10) parcels sealed with the seal of MS as well as FSL forms sealed with the same seal were also produced before him. He put his seal SVS on all the parcels as well as FSL forms and thereafter called the MHC(M) and deposited the said parcels as well as FSL forms with him. His deposition has been corroborated by PW11 Paramjeet Singh who stated that five (5) samples as well as parcels sealed with the seal of MS and SVS were deposited by Inspector Satyavir Singh on 26.2.2004, and the same were sent, through S.I. Maninder Singh, to the FSL on 2.4.2004. Since the parcels

containing samples were sealed not only with the seal of MS, which according to PW4 Constable Harish, had been returned to S.I. Maninder Singh after two days of the seizure but also with the seal of SVS, it would not be possible for PW17 SI Maninder Singh to tamper with the samples since he did not have the sale of SVS in his custody. It would be appropriate to note that when the parcels were received in the FSL, they were found duly sealed with the seals of MS as well as SVS. Therefore, there was no possibility of the samples having been tampered with by S.I. Maninder Singh.

19. As regards the weight of the samples when examined in the FSL being less than 500 grams each, the court needs to keep in mind that ganja is primarily a plant which is bound to contain moisture. With the passage of time, the moisture in the ganja is likely to evaporate thereby resulting in reduction of its weight on account of loss of moisture. A reference in this regard may be made to the decision of the Kerala High Court in Dharman Vs. State of Kerala 2003 Crl.LJ1586 where the Court, finding reduction in the weight of the sample when they were examined in the laboratory, was of the view that the reduction was a result of loss of moisture from the sampled ganja during the period between the seizure and the analysis. In the present case the seizure took place on 26.2.2004 whereas the samples were examined in the laboratory on 14.7.2004, i.e., after about five (5) months of the seizure. Therefore, the loss in the weight of the samples can be safely attributed to loss of moisture with the passage of time. A similar view was taken by Patna High Court in Criminal Appeal (S.J.) No.321/1997 titled Surendra Singh and Suraj Mal Yadav, Both Sons of Rupan Singh Yadav Vs. The State of Bihar decided on 20.7.2011, where the Court inter alia observed it is well known that ganja has the potency of losing weight in the course of time on account of loss of moisture.

20. In Dehal Singh Vs. State of Himachal Pradesh (2010) 9 SCC85 the case of the prosecution was that two samples of 50 grams each were taken out of the contraband recovered from the accused. However, the net weight when received in the laboratory was found to be 65.56 grams, i.e., more than 30 per cent in excess of the quantity alleged to have been drawn as sample. It was contended on behalf of the accused that the discrepancy in the weight of the sample casts

serious doubt to the credibility of the case and was enough to reject it. Reliance by the learned counsel for the accused was placed on the decision of the Apex Court in Noor Aga Vs. State of Punjab (2008) 16 SCC417as well as Rajesh Jagdamba Avasthi Vs. State of Goa (2005) 9 SCC773 Both the cases relied upon by the accused were cases of recovery of charas. Noticing that the weighing scale and the weights came from a nearby grocery shop, the Apex Court observed that samples were taken by a common weighing scale and the weights found in a grocery shop, whereas the weight in the laboratory is recorded with precision scale and, therefore, the small difference in the weight loses its significance when no infirmity in the other part of the prosecution story is found. It was noted that in the case of Noor Aga (supra), the sample was taken by custom official at the Airport from a precision scale and discrepancy in the weight alone was not the reason to reject the case of the prosecution in the said case. The Court, in this regard, also referred to the observations in Noor Aga (supra) to the effect that discrepancy in weight individually may not be fatal. It was also noted that in Rajesh Jagdamba Avasthi (supra), the recovery proceedings were found to be suspicious and there was every possibility of the seized substance being tampered with and it were those infirmities which had led the Court to doubt the truthfulness of the prosecution case.

21. The learned counsel for the appellants has relied upon Pappu Vs. State of Rajasthan 2007 (2) JCC (Narcotics) 67, where the weight of the sample was per the report of FSL was found to be 43 grams whereas the case of the prosecution was that they had drawn two samples of 50 grams each. The contraband in the aforesaid case was opium. The High Court inter alia observed that this created doubt in the prosecution case. However, in the present case the contraband seized from the appellants was ganja which contains moisture and the moisture evaporates with the passage of time. Therefore, no adverse inference can be drawn on account of weight of the samples when analyzed in FSL being found to be less than 500 grams each.

22. As regards discrepancy in the deposition of the witnesses with respect to the kind of the scale used for weighing the samples, the said discrepancy, in my view, can be safely attributed to loss of memory with the passage of time and is not

material. Most of the witnesses have expressly stated that it was manual scale which was used for weighing samples. Nothing really turns on whether the scale used for weighing the samples was a manual scale or a digital scale.

23. As regards non-compliance of the provisions of Section 42 of the NDPS Act is concerned, a bare perusal of the said Section would show that it applies only to a case where narcotic drugs, psychotropic substance or controlled substance is kept or concealed in any building, conveyance or enclosed place. The recovery in the present case was not effected from any building, conveyance or enclosed place. Moreover the information received by him was recorded by Inspector Kulbhushan Sharma by way of DD No.6 which was also immediately thereafter brought by him to the notice of the concerned ACP. Sub-section (2) of Section 42 requires an officer recording the information to send its copy to its immediate official superior within 72 hours. It has come in the deposition of PW3 Shri Pramod Singh, ACP that on 26.2.2004, Inspector Kulbhushan had informed him that he had received a secret information regarding Mohd. Shahid being involved in sale of ganja which he was receiving through postal parcels. It has also come in his deposition that Inspector Kulbhushan had further informed him on 26.2.2004 that Mohd.Shahid and his associates were going to take parcels containing ganja from Post Office in or around Srinivaspuri. On receipt of a report under Section 57 of the NDPS Act from S.I. Mahender Singh on 27.2.2004, this witness dispatched the same to the concerned DCP on the same date vide entry Ex.PW3/A made in the dispatch register. The report Ex.PW18/A, received by the ACP on 27.2.2004, also contained the information, which Inspector Kulbhushan had received on 26.2.2004. Thus, there was due compliance not only with the provisions of Section 42 but also with the provisions of Section 57 of the Act which requires every seizure to be reported to the immediate superior officer within 48 hours of the seizure.

24. In Ravindran @ John Vs. The Superintendent of Customs (2007) 6 SCC410 the appellant was found at a bus stand, carrying a polythene bag which on being searched was found to contain Diazepam. Before taking search, the accused was asked whether he would like the search to be conducted before a Magistrate or a Gazetted Officer. He, however, did not insist on his search before them. Later, the

conviction was challenged, inter alia, on the ground that there was non-compliance with the provisions of Section 50 of the Act since the accused was not informed of his legal right to be searched in the presence of a Gazetted Officer or a Magistrate and the mere information given to him was not sufficient. It was held by the Apex Court that the High Court was right in coming to the conclusion that Section 42 of the Act was not attracted since the appellant had not been searched and arrested in exercise of the powers of arrest, search and seizure under the said Act, which applies to a case where information is received or an officer has reasons to believe that any offence has been committed in relation to any drug, etc. which is kept or concealed in any building, conveyance or enclosed place. The Apex Court was of the view that there was no requirement that the concerned officer must send a copy of the information to his immediate official superior within 72 hours. In support of his contention with respect to the alleged noncompliance of the provisions of Section 42 of the Act, the learned counsel for the appellants relied upon Dalip & Anr. Vs. State of MP (2007) 1 SCC450 In the aforesaid case, the contraband was found in the search of the scooter on which the appellants before the Apex Court were travelling. The conviction of the appellants was challenged on a number of grounds. The provisions of Section 42 of the Act do apply to the search of a conveyance but not to the search of a parcel, in a public place. Nowhere the Apex Court has held in this case that the provisions of Section 42 of the NDPS Act need to be complied with even in the case where the search of a parcel is effected from a public place. In Ravindra Vs. Superintendent of Customs 2007 (2) JCC Narcotics 89, the appellant was arrested from a bus stand pursuant to an information received in this regard. The Apex Court inter alia held that since the appellant was not searched and arrested in exercise of the powers of arrest, search and seizure under Section 42 of the Act, the seizure having taken place at a bus stand and not at a building, conveyance or enclosed place the information was not required to be taken down in writing and there was no requirement of sending a copy of the information to the immediate official superior within 72 hours. A similar view was taken in Azim Hussain Vs. State of Delhi 2010 (1) JCC (Narcotics).

25. Coming to the question of delay in sending the samples to FSL, the purpose of sending the samples to the laboratory at the earliest is to rule out the possibility of

its being tampered before it reaches the laboratory. I find that in the case before this Court, the prosecution has proved, by producing the recovery link evidence, verbal as well as documentary that there was no tampering with the samples till the time they were received in the FSL. The police official who took the samples duly sealed with the seal of MS to the office of Special Cell and handed over to Inspector Satyavir Singh, with seals intact on them has been produced. Inspector Satyavir Singh received these samples duly sealed with the seal of MS and then put his own seal SVS on them and deposited the samples duly sealed with the seals of MS and SVS in the Malkhana on the same date. The MHC(M) Pritam Singh has come in the witness box as PW11 and has clearly stated that the samples duly sealed with the seals of MS and SVS along with the FSL forms bearing the said seals were deposited in the Malkhana on 26.2.2004 and the said samples were sent to the FSL through S.I. Maninder Singh on 2.4.2004. The entry made in register No.19 on 2.4.2004 (Ex.PW1/J) corroborates the oral deposition of PW11 with respect to sending the samples duly sealed with the seals of MS and SVS to the FSL through S.I. Maninder Singh on 2.4.2004. The entry made in the register at the time the samples sealed with the seals of MS and SVS were deposited in the Malkhana on 26.2.2004 is Ex.PW11/A. In these circumstances, I find no reasonable possibility of the samples having been tampered with during the period they remained in the Malkhana. The learned counsel for the appellants on the issue of delay in sending the samples to FSL relied upon Jarnail Singh Vs. State of Punjab and connected matter 2008 (4) JCC (Narcotics) 204 and Dharambir Vs. The State of Haryana 2008 (4) JCC (Narcotics) 197. In Jarnail Singh (supra), the Court relied upon the instructions issued by NCB emphasizing that the samples should be dispatched to the laboratory within 72 hours of seizure to avoid any legal objection. However, the aforesaid delay was not the sole ground on acquittal in that case. A perusal of the judgement would show that the record produced in the Court was quite barren to show that FSL form was filled at the spot or deposited in Malkhana. There were also amongst the discrepancies found in the case of the prosecution. However, in the case before this Court, the NCB instructions are not applicable and evidence has been led to prove that FSL form was filled on the spot, was sealed with the seal of MS on the spot. Seal of SVS was then put on it in the office of the Special Cell and thereafter the form duly filled

with the aforesaid seals was deposited in the Malkhana on the same date and later sent to FSL on 2.4.2004. In Dharambir Vs. The State of Haryana (supra), the High Court found that there was delay of nine (9) days in sending the sample to FSL. The Court, however, also took note of the fact that the other evidence produced by the prosecution to prove the link evidence was not only deficient but also unreliable. However, in the case before this Court, there is no deficiency in the link evidence produced by the prosecution nor can the same be said to be unreliable. Therefore, sending the samples to FSL after 35 days would by itself not entitled the appellants to acquittal.

26. After conclusion of arguments, the learned counsel for the appellant Mohd. Aslam has submitted certain judgements, viz., Ramu Vs. State of Punjab 2008 (4) C.C. Cases (HC) 98; Bhagwan Dass Vs. State of Himachal Pradesh 2003 Crl.L.J.

536 and State of Punjab Vs. Gurnam Kaur & Ors. 2009 (2) JCC (Narcotics) 73. In Ramu Vs. State of Punjab (supra), the accused was found sitting on bags on the roadside of the bridge of canal minor towards a village. It was found by the Court that possession or conscious possession of the bags in question had not been put to him in his statement. It was, therefore, held that the presumption under Section 34 or 54 of the Act could not be drawn against him. However, in the present case, the appellants were not only found sitting on the two parcels which contained ganja and the said parcels were addressed to the appellant Mohd. Shahid @ Antony Baba who was also present along with them. In their statements under Section 313 of Cr.P.C., the appellants did not offer any explanation for their sitting on the aforesaid parcels to the appellants Antony Baba. They did not claim that they did not know to whom the parcels belonged and what they contained and having found the parcels kept on the footpath they had just sat on them when they were apprehended. Section 106 of the Evidence Act, provides that when a fact is in the special knowledge of a person, the onus of proving that fact lies on him. In the present case, it was known only to the appellants, Abdul Malik & Mohd. Aslam, as to in what circumstances and for what reasons they were sitting on the parcels addressed to the appellant Mohd. Shahid @ Antony Baba. Therefore, it was for them to disclose such circumstances to the court. No such attempt, however, was made by them. Their case before the trial court was of total denial and they

claimed that they were picked up from their house and implicated in a false case. Thus, they did not even admit their presence on the footpath where they were found sitting on the said parcels. It was expressly put to the appellants in their statements under Section 313 of Cr.P.C. that they were sitting on the two bags of white colour while their co-accused Mohd. Shahid was trying to stop an autorickshaw and ganja was found in the aforesaid parcels when they were opened in their presence. It was also put to them that the samples drawn from the parcels on which they were sitting when analyzed in the FSL was found to be ganja. Therefore, the judgement relied upon by the learned counsel for the appellant does not really help him. In Bhagwan Dass Vs. State of Himachal Pradesh (supra), the two accused were found sitting on the roadside and a bag was found lying in between them. It was in these circumstances that the Court felt that it cannot be presumed that they were in possession of the said bag. It was further observed that assuming that the bag was in possession of one of them, the question would be in whose possession it was. It was also noticed by the High Court that the recovery of the bag from the possession of the accused was not put to them in their statement under Section 313 of Cr.P.C. However, in the present case, the facts are quite different and the entire incriminating evidence was duly put to the appellants in their respective statements under Section 313 of Cr.P.C. In State of Punjab Vs. Gurnam Kaur & Ors. (supra), the respondents Gurnam Kaur and her two daughters-in-law were found sitting on the same bed beneath which the contraband had allegedly been kept. It was held, that by itself did not establish that all of them were in conscious possession of the narcotics. It was also noticed that the ladies in the natural course were in their house. The facts in the present case being altogether different, this judgement is of no use to the appellants.

27. In State of Rajasthan Vs. Tara Singh (2011) 11 SCC559 the respondent before the Apex Court was found carrying opium in a bag which he was carrying on his head. An `offer of search, in terms of Section 50 was made to him, which he declined to avail. The High Court acquitted the accused inter alia on the ground that the provisions of Section 50 had not been complied. The Apex Court was of the view that the provisions of Section 50 would not be applicable to such a search. The Apex Court in this regard placed reliance upon its earlier decision in State of Himachal Pradesh Vs. Pawan Kumar (2005) 4 SCC350 In Ravindran @

John (supra), the appellant before the Apex Court had been informed as to whether he would like the search to be conducted before a Judicial Magistrate or a Gazetted Officer. Since he did not insist on search before a Judicial Magistrate or a Gazetted Officer, he was searched in the presence of witnesses. It was argued on behalf of the appellant that the mandatory provisions of Section 50 of the Act had not been complied with. It was held by the Honble Supreme Court that since the appellant was carrying a bag in which the drug had been kept Section 50 of the Act was not attracted. It was contended before the Honble Supreme Court that the appellant had not been informed of his legal right to get his person searched in the presence of a Gazetted Officer or a Magistrate and merely informing him that he had an option to have his personal search done in the presence of a Gazetted Officer or a Magistrate was not sufficient. Rejecting the contention, the Apex Court held that this issue had been settled by a larger Bench of the Apex Court in State of Himachal Pradesh Vs. Pawan Kumar (supra). The Apex Court thereafter expressly held that if any drug was recovered from the personal search of the appellant as explained in State of Himachal Pradesh Vs. Pawan Kumar (supra) the appellant could advance this argument to challenge his personal search but since that was not the case, the submission must be rejected. In State of Himachal Pradesh Vs. Pawan Kumar (supra), the three Judges Bench of the Honble Supreme Court had inter alia held as under:

10. 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.

11. An incriminating article can be kept concealed in the body or clothings or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the word "search of person". One of the tests, which can be applied is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person.

The Bench in this regard also referred to the decision of the Constitution Bench decision in State of Punjab Vs. Baldev Singh 1999 Crl.LJ3672 While allowing connected Crl. A. No.375/2003 titled State of Rajasthan Vs. Bhanwar Lal, the Bench noted that in that case the accused was found standing with a attach in his hand. A written notice was given to him that his attach case would be searched as information had been received that the same contained opium. He was also asked as to whether he would like the search to be conducted before a Magistrate or a Gazetted Officer. This fact was also mentioned in the notice. The accused said that he did not want to be searched before any Magistrate or Gazetted Officer. The High Court, however, held that the provisions of Section 50 of the Act were not complied with. Allowing the appeal filed by the State, the Apex Court held that the view taken by the High Court could not be sustained. Thus, despite a notice under Section 50 of the Act having been given to the accused and a contention having been raised that the notice was not in conformity with the provisions of Section 50 of the Act, the three Judges Bench, allowed the appeal filed by the State and set aside the acquittal of the accused, on the ground that no such notice was required in law. In Ajmer Singh Vs. State of Haryana (2010) 3 SCC746 the appellant before the Apex Court was carrying on his shoulders, a bag which was later found to contain 500 grams of charas. He was served a notice under Section 50 of the Act giving an option to be searched either by the Gazetted Officer or the Magistrate. He was then taken to a DSP where his search was carried out on the directions of the DSP though not by the DSP himself. It was contended before the Apex Court that the provisions of Section 50 of the Act had not been complied with. Rejecting the contention, the Apex Court held that the question of compliance or non-compliance of Section 50 of the Act is relevant only where the search of person is involved and the said Section does not apply where no search of a person is involved. The Court was of the view that the said provision is not attracted in case

of recovery from a bag, brief case, container, etc., which do not come within its ambit. In K. Chithhayan Vs. State of Tamil Nadu (2008) 11 SCC363 the appellant was found standing near a bus stop with a bag on his right hand. It was conveyed to him that he was entitled for the conduct of the search before a Gazetted Officer or a Judicial Magistrate. The accused, however, gave consent to be search by the police officer himself. It was contended on behalf of the appellant that there was non-compliance of the mandatory provisions of Sections 42(2) & 50 of the Act. Rejecting the contention, it was held that Section 42 of the Act did not apply since the search was made in a public place. It was further held that Section 50 of the Act also did not apply since the search was of the bag carried by the appellant and there was no personal search. Reliance in this regard was placed upon State of Himachal Pradesh Vs. Pawan Kumar (supra). In Ghasita Sahu Vs. State of Madhya Pradesh (2008) 3 SCC52 the search was effected from a gunny bag kept in a room in the house of the appellant. The appellant was told that if he wanted the search to be conducted in the presence of some Gazetted Officer or Magistrate or he had no objection if the police officer conducted the search himself. It was contended on his behalf that he was not informed of his legal right. Rejecting the contention, the Apex Court held that there was no question of any such right of the accused since the right is restricted to a case where the search is to be taken of the person of the accused whereas in the case before the Apex Court the search was of a house. In State of Haryana Vs. Ranbir @ Rana (2006) 5 SCC167 the contraband was recovered from the plastic bag which the respondent before the Apex Court was carrying. He was told that the search was to be effected in the presence of a Gazetted Officer or a Magistrate if he so desired. The High Court having acquitted him, the State took the matter to the Apex Court by way of appeal. Relying upon State of Himachal Pradesh Vs. Pawan Kumar (supra) and State of Punjab Vs. Baldev Singh (supra), it was held that Section 50 of the Act was applicable only in a case of personal search of the accused. The Apex Court rejected the contention that the three Judges Bench in State of Himachal Pradesh Vs. Pawan Kumar (supra) had wrongly distinguished the earlier decision of another three Judges Bench in Namdi Francis Nwazor Vs. Union of India (1998) 8 SCC534 In State of Rajasthan Vs. Daulat Ram (2005) 7 SCC36 the respondent before the Apex Court was asked as to whether he wanted to be searched before

a Magistrate or a Gazetted Officer. The High Court while acquitting the respondent held that the provisions of Section 50 of the Act would be applicable and since the option given to the respondent was only a partial option there was no strict compliance of Section 50 of the Act. Setting aside the decision of the High Court, the Apex Court held that the provisions of Section 50 of the Act were not attracted. In Dehal Singh (supra), the accused persons were given option in writing as to whether they wanted the search of the vehicle before a Magistrate or a Gazetted Officer. It was contended on their behalf that they were not apprised of their legal right to be searched in the presence of a Gazetted Officer or a Magistrate and, therefore, the requirement of Section 50 of the Act had not been fulfilled. Rejecting the contention, it was noted that the recovery had been effected from a vehicle and, therefore, the requirement of Section 50 of the Act was not to be complied with.

28. The attention of this Court has been drawn to the fact that in the above-referred cases despite notice having been given to the accused, the Apex Court, rejected the challenge to the validity of the notice, with reference to the requirement of Section 50 of the Act taking the view that the search having not been effected from the person of the accused, no such notice was required. Taking a different view would be contrary to the aforesaid decisions.

29. The learned counsel for the appellant Mohd. Aslam relied upon Dalip & Anr. (supra), Narcotics Central Bureau Vs. Sukh Dev Raj Sodhi 2011 (2) Crimes 311 (SC) and Mahinder Singh Vs. State and connected matter 2011 (2) JCC (Narcotics) 123. However, none of these judgements are of any help to the appellants since the recovery having not been effect from their person no notice under Section 50 of the Act was required to be served upon them. In any case, it has come in the deposition of the witnesses that the accused persons were told that they had a right to be search in the presence of a Gazetted Officer of a Magistrate. If this is so, there would be compliance with the requirement of Section 50 of the Act even if such a requirement is assumed in the present case and there would be no defect in the notice given to the appellants.

30. In the case before this Court two appellants were found sitting on parcels containing ganja. Somewhat similarly in Birakishore Kar Vs. State of Orissa AIR 2000 SC3626 the accused was found lying on a plastic bag in a train compartment. It was held that it was not a case of the search of the person of the accused.

31. The question whether the failure to join public witnesses before effecting the recovery of the contraband would be fatal to the prosecution or not came to be considered by this Court in Crl. A. No.392/2010 Jai Yodhad Vs. State decided on 30.1.2014, and the following view was taken:

11. As regards public witnesses not being joined, it has come in the deposition of prosecution witnesses that a number of persons present on the bus stops on the way to the place where the appellant was apprehended as well as several members of the public present on the spot were requested to join the police team but no one agreed to be associated with them. It cannot be disputed that the public does not want to get dragged in police and criminal case and wants to avoid them, because of long drawn trials and unnecessarily harassment. Similar view was taken in Manish Vs. State, 2000 VIII AD (SC) 29 and in A. Bhai Vs. State of Gujrat, AIR 1980 SC696 We cant be oblivious to the reluctance of common men to join such raiding parties organized by the police, lest they are compelled to attend Police Station and Courts umpteen times at the cost of considerable inconvenience to them, without any commensurate benefit. Hence, no adverse inference on account of failure to join public witnesses in such raids despite genuine efforts should be drawn. In Ajmer Singh Vs. State of Haryana (2010) 3 SCC746 it was contended that the evidence of the official witness cannot be relied upon as their testimony had not been corroborated by any independent witness. The Honble Supreme Court, rejecting the contention, held as under:

16. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no

independent witness has been produced. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence.

Rejecting a similar contention in Kashmiri Lal Vs. State of Haryana (2013) 6 SCC595 the Honble Supreme Court inter alia observed as under:

9. .it is evincible from the evidence on record that the police officials had requested the people present in the 'dhaba; to be witnesses, but they declined to cooperate and, in fact, did not make themselves available. That apart, there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to reliable and trustworthy, the court can definitely act upon the same. If in the course of scrutinising 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 of quality of the evidence weighs over the quantity of evidence. These aspects have been highlighted in State of U.P. v. Anil Singh 1988 Supp SCC686 State, Govt. of NCT of Delhi v. Sunil and another (2001) 1 SCC652and Ramjee Rai and others v. State of Bihar (2006) 13 SCC229 Dealing with a similar contention in Ram Swaroop Vs. State (Govt. NCT) of Delhi 2013 (7) SCALE407 where the alleged seizure took place at a crowded place yet no independent witness could be associated with the seizure, the Apex Court inter alia observed as under:

7. .We may note here with profit there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in State of U.P. v. Anil Singh 1988 Supp SCC686 wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for nonexamining the independent witnesses.

9. In Ramjee Rai and others v. State of Bihar (2006) 13 SCC229 it has been opined as follows:

26. It is now well settled that what is necessary for proving the prosecution case is not the quantity but quality of the evidence. The court cannot overlook the changes in the value system in the society. When an offence is committed in a village owing to land dispute, the independent witnesses may not come forward.

10. Keeping in view the aforesaid authorities, it can safely be stated that in the case at hand there is no reason to hold that nonexamination of the independent witnesses affect the prosecution case and, hence, we unhesitatingly repel the submission advanced by the learned counsel for the appellant.

Therefore, no adverse inference can be drawn against the prosecution on account of the inability of the raiding party to join public witnesses. It is not as if no effort was made by them in this regard. They did make efforts at several places but no member of the public agreed to be associated with them.

32. For the reasons stated hereinabove, I find no good reason to interfere with the conviction of the appellants which is accordingly affirmed.

33. As regards sentence, the appellant Abdul Malik having been given the minimum sentence prescribed in the Act, there is no scope for interfering with the substantive sentence awarded to him or the fine imposed on him. It is, however, directed that in default of payment of fine, the appellant, Abdul Malik, shall undergo SI for thirty (30) days as against one (1) year awarded by the trial court. As far as the appellant, Mohd. Aslam, is concerned, he has been found in

possession of intermediate quantity. In the facts & circumstances of the case, he is sentenced to undergo RI for five (5) years and to pay fine of Rs.10,000/- or to undergo SI for fifteen (15) days in default. As far as appellant Mohd. Sahid @ Antony Baba is concerned, though he appears to be the kingpin since the parcels found in possession of the other appellants were also addressed to him and it has also come in evidence that ganja was also found in a number of other parcels which were addressed to him and were later seized from the post office, he has been charged only for the possession of intermediate quantity of ganja. In the facts & circumstances the case, the appellant Mohd. Sahid @ Antony Baba is sentenced to undergo RI for seven (7) years and to pay fine of Rs.20,000/- or to undergo SI for one (1) month in default. The appeals are accordingly disposed of. LCR be sent back along with a copy of this order. A copy of this order be sent to the concerned Jail Superintendent for information and necessary action. FEBRUARY28 2014 rd/bnesh V.K. JAIN, J.

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