

Gopal Sharma and anr. Vs. Central Bureau of Narcotics

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Court : Madhya Pradesh

Decided On : Aug-02-2007

Reported in : 2008(2)MPHT299

Judge : S.L. Kochar, J.

Appellant : Gopal Sharma and anr.

Respondent : Central Bureau of Narcotics

Judgement :

S.L. Kochar, J.

1. By this appeal, the appellants named above have challenged their conviction under Section 8/21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act'), and sentence of RI for ten years with fine of Rs. 1,00,000/- each and in default of payment of fine to suffer additional SI for six months passed in Special Case No. 4/2001 passed by the learned Special Judge, West Nirnar, Mandleshwar, on 13-11 -2002.

2. Briefly stated, the prosecution case as unfolded before the Trial Court is that on 27-9-2001 in the evening at 4.00 P.M. J.C. Shrivastava (P.W. 6), Superintendent, Central Narcotics Bureau (for short, hereinafter referred to 'Bureau'), Inspector R.K. Rajak (P.W. 7) and Sub-Inspector Girvarpuri (P.W. 5) jointly received a secret information from informant that the appellants named Gopal Sharma and Smt.

Shyamubai wife of Karansingh were taking two kilograms of heroin illegally to Pune in a bus and they could be apprehended by checking the buses near Khaltaka. The information was recorded vide Exh. P-13, Superintendent Shri Shrivastava issued direction to Inspector Kumari Swati Tamrakar (P.W. 4) and also constituted a trapping party consisting of himself, Inspector Ku. Swati Tamrakar (P.W. 4), Sub Inspector Girvarpuri (P.W. 5), Inspector R.K. Rajak (P.W. 7), Constable Suresh (not examined) and Constable Yeshwantsingh (P.W. 3). They proceeded from Indore at 4.30 PM and reached at Khaltaka Police Out Post in District Khargone West Nimar and started checking the bus going from Indore to Pune. In the night at 10.30 PM 'Pushpak' bus bearing registration No. MP-07-F-2844 of M.P. State Road Transport Corporation was stopped. The said bus was being driven by driver Ambalal (P.W. 1) and Abdul Rashid (P.W. 2) was its conductor. The driver was apprised of the secret information and also was told about search of the bus. Upon search, they had suspicion on the passengers sitting on seat Nos. 27 and 28 (the appellants). Inspector Ku. Smita Tamrakar (P.W. 4) obtained the consent from appellants while apprising them to be searched before the Magistrate by the Raiding Party in which Gazetted Officer J.C. Shrivastava (P.W. 6) was also present. The appellants gave consent to be searched in presence of the Raiding Party. The proceeding of search and seizure was performed in presence of Driver Ambalal (P.W. 1) and Conductor Abdul Rashid (P.W. 2). In a black bag of appellant Gopal, in its bottom, there was a hollow or cavity wherein two polythene packets were found. In those packets, gray colour powder was available. Weight of the said powder in one packet was one kilogram and that of another packet was 1.200 kilograms. The appellants disclosed that the polythene bags were containing heroin. The Raiding Party tested the same by their testing kit and found it to be heroin, a product of opium.

3. Ku. Smita Tamrakar (P.W. 4), the Investigating Officer took out 5 grams heroin from each bag for chemical examination. She seized and sealed the same. Remaining heroin contained in the bag of the appellants was also seized and sealed. In the search of the bag of appellant Shyamubai no contraband article was seized. She was having two travelling ticket of seat Nos. 27 and 28. The consent letter Exh. P-1 was prepared regarding search and seizure and Exhs. P-2 and P-3 were prepared with regard to the consent of the appellants. Through seizure

memo, Exh. P-9, two tickets Exhs. P-6 and P-7 from appellant No. 2 Shyamubai were seized. The appellants were arrested and their respective memos were Exhs. P-8 and P-9. Spot map Exh. P-5 and facsimile of seal Exh. P-4 were prepared and after returning to Indore Office, the appellants were put in lock-up. A detailed memorandum Exh. P-14 (FIR) was handed over to the Superintendent. The seized articles were deposited in the MALKHANA and thereafter sent the sample to the Laboratory for examination Superintendent Shrivastava registered case No. 5/01 and appointed Inspector Shri R.K. Rajak (P.W. 7) as Investigating Officer for further action. The seized samples were sent to the Laboratory for examination and after examination report Exh. P-16 whereof was given by Vimal Mohan Goyal (P.W. 8), Assistant Chemical Examiner. After completion of investigation, Shri Rajak filed the complaint against the appellants for commission of offence punishable under Section 8/21 of the NDPS Act.

4. The appellants abjured their guilt. According to them, they were falsely implicated by Bureau-team. They have not examined any witness in defence, whereas the prosecution examined as many as eight witnesses and adduced 36 documents to prove its case against the appellants. Learned Trial Court finding the appellants guilty of the aforementioned offence, convicted and sentenced them as mentioned hereinabove.

5. Learned Counsel for the appellant has vehemently argued that there is no compliance of mandatory provision of Sections 42 and 50 of the NDPS Act, therefore, the whole trial would be vitiated and the statement of the prosecution witnesses are contradictory on material particulars like possession of bags by the appellants, their trapping and seizure proceedings.

6. Per contra, learned Counsel for the respondent (Bureau) has supported the impugned judgment and finding of the Trial Court and submitted that in the facts and circumstances of the case at hand, the provisions of Sections 42 and 50 of the NDPS Act would not attract, because search of the bags of the appellants was taken on a public place and their personal search (search of 'person') was not taken. Learned Counsel has placed reliance on the judgment rendered by three Judges Bench of Supreme Court in the case of State of Himachal Pradesh v.

Pawankumar : 2005 CriLJ2208 and in the cases of Madanlal v. State of Himachal Pradesh 2003 Cr.LR (SC) 751, State of Rajasthan v. Baburam 2007(3) Crimes 24 (SC), State of Haryana v. Suresh 2007(3) Crimes 52 (SC), State of Haryana v. Jarnail Singh : 2004 CriLJ2541 , Sajan Abraham v. State of Kerala : 2001 CriLJ4002 , Union of India v. Majorsingh (2006) 9 SCC 170 and G. Shrinivas v. State of Andhra Pradesh : 2005 CriLJ4367 .

7. Having heard learned Counsel for the parties and after perusing the entire record, this Court is of the view that in the instant case provisions of Sections 42 and 50 of the NDPS Act would not be attracted, because the search of the persons of the appellants was not taken by the Bureau Team or the officer of the Bureau. The bags of the appellants were with them. They were searched and in the bag of appellant No. 1 Gopal Sharma, heroin weighing 2 kgs. 200 grams was seized and search and seizure was effected on a public place at Khaltaka Police Out Post where the Raiding Party of the Bureau was present for checking. The bus going from Indore to Pune in which the appellants were travelling was stopped and on the basis of the secret information, the appellants were identified and alighted from the bus. Thereafter, on search of the bag of appellant No. 1 Gopal heroin was found in his black bag whereas in the gray bag of appellant No. 2 Shyamubai wd/o Karansingh no contraband article was found. The proceedings of search and seizure took place in the night near or at Khaltaka Police Out Post Barrier/NAKA by the Bureau Team with the help of Out Post Police.

8. The three Judges Bench of the Supreme Court in the case of Pawan Kumar (supra), has held specifically that in search of a bag/brief case or any such article or container etc. which is being carried by accused, is not a search of the person, hence, Section 50 would not apply in such a case. In the instant case, the bag was not concealed in the body, therefore, search of the bags would not come within the ambit of search of 'person' as enshrined under Section 50 of the NDPS Act. Hon'ble Shri Justice G.P. Mathur, speaking for the Bench in Para 20 considered the observations made in the judgment rendered by the Constitution Bench in the case of State of Punjab v. Baldev Singh : (1999)6SCC172 as under:

As pointed out in *State of Punjab v. Baldev Singh*, drug abuse is a social malady. While drug addition casts into the vitals of the society, drug trafficking not only casts into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to some United Nations Conventions. Against illicit trafficking in Narcotic Drugs, which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in these kind of nefarious activities should not go scot-free on technical pleas which come bandy to their advantage in a fraction of a second by slight movement of the baggage, being placed to any part of their body, which baggage may contain the incriminating article.

{Also see : *State of Rajasthan v. Baburam* 2007(3) Crimes 24 (SC) and *State of Haryana v. Suresh* 2007(3) Crimes 52}

9. In the case of *Majorsingh* (supra), the Supreme Court has held that the provision of Section 42 shall not apply when search and seizure have taken place on a public place. In the case at hand, alongwith the raiding party, Gazetted Officer, Superintendent of Bureau, J.C. Shrivastava (P.W. 6) was present together with Inspector Ku. Smita Tamrakar and other officials of the Bureau. Therefore, the provision of Section 42 (2) of the NDPS Act would not apply. In the case of *Shriniwas Goud* (supra), the Supreme Court has held that the officers of Gazetted rank are not required to comply with the requirements of Section 42 (2) of the NDPS Act. The said requirement is confined to the cases where action is taken by the officers below the rank of Gazetted Officer without authorization. In the instant case, the authorization was also given by the Superintendent of the Bureau Shri J.C. Shrivastava (P.W. 6) to the Inspector Ku. Smita Tamrakar, which is available in the document Exh. P-13 at place B to B, wherein secret information from the informant was recorded. This also shows clear compliance of Section 42 (12) of the NDPS Act for search, seizure and arrest on public place. Section 43 of the Act would apply and in this section, there is no such provision as prescribed under Sections 42 and 42 (2) of the Act as held in the case of *State of Haryana v.*

Jamailsingh (supra).

10. In the instant case, Girvar Puri received secret information from the informant. He apprised about the details of information to the Bureau Superintendent, J.C. Shrivastava (P.W. 6) and in their presence, recorded this information vide Exh. P-13. In this information, names and addresses of the appellants are mentioned specifically regarding illicit trafficking of heroin. This Panchnama (Exh. P-13) is carrying the signatures of the Superintendent of Bureau, J.C. Shrivastava (P.W. 6), Sub Inspector, Girvar Puri (P.W. 5), trapping and Seizure Officer, Ku. Smita Tamrakar (P.W. 4), Inspector R.K. Rajak (P.W. 7) and they have also proved the same in Court. The Supreme Court in the case of G. Shriniwas (supra), has held that the officers of gazetted rank are not required to comply with the requirements of Section 42 (2) of the NDPS Act. The said requirement is confined to the cases where the action is taken by the officers below the rank of Gazetted Officer without authorization.

11. After receiving the secret information and its recording the Superintendent Shrivastava (P.W. 6) authorised Inspector Kumari Smita (P.W. 4) for immediate action which is available at portion marked B to B on Exh. P-13. In this view of the matter, also the infringement of Section 42 regarding sending of the information is not attracted. Superintendent J.C. Shrivastava was also the member of Raiding Party as stated by him as well as Kumari Tamrakar (P.W. 4), Girvarpuri (P.W. 5) and Inspector R.K. Rajak (P.W. 7). Though the prosecution has led evidence regarding compliance of Section 50 of the NDPS Act, to apprise the appellants about their right to be searched in presence of Magistrate or Gazetted Officer in writing vide memo Exh. P-2, as well as Exh. P-3 of appellant No. 1 Gopal Sharma and appellant No. 2 Smt. Shyamubai respectively, on both these documents the appellants have given their consent of search of their person and luggage in presence of Superintendent Shri J.C. Shrivastava. This document is having signatures of Inspector Ku. Tamrakar, Panch-witnesses, driver of the bus Ambalal (P.W. 1) and Conductor Abdul Rashid (P.W. 2). These were the independent witnesses, but since the provision under Section 50 of the NDPS Act regarding search of bags of the appellants is not applicable, therefore, this Court is not dealing with this aspect herein detail.

12. Now this Court shall deal with the contradictions; pointed out by the learned Counsel for the appellants regarding identification of the appellants in the bus, situation of bags and procedure regarding search and seizure.

13. Ambalal (P.W. 1) driver of the bus has stated that on 27-9-2001, he proceeded in the evening at 7.00 PM as a driver of the bus of M.P. State Road Transport Corporation from Indore for Pune with conductor Abdul Rashid (P.W. 2). When they reached near the Barrier of Khalghat District Khargone in the night at about 9.00 PM, on getting signal by the police, he stopped the bus and ten to twelve persons entered inside the bus for checking the passengers and their baggages. They brought one man and a woman outside the bus who were sitting as passengers. He further testified that police started the proceeding of search and seizure and asked them to sign the Panchnamas prepared there and they put their signatures on the same. From the bag of appellant Gopal Sharma in two plastic packets, there was some kind of powder having yellow colour weighing about one kilogram each. It was called by them as 'sukar sukar' and stated that it was very costly thing. He had no experience of the said article. The said packets were seized by the police and seizure memos were written. These proceedings took about 20 minutes to complete. Thereafter they were taken from Khalghat Barrier to the office (Out Post). The appellants were detained and he was permitted to take the bus. He admitted and proved his signatures on seizure memo Exh. P-1 at place A to A as well as on Panchnama of compliance of Section 50 Exh. P-2 of appellant Gopal and Exh. P-3 of appellant Smt. Shyamubai. This witness has admitted his signatures on the memorandum of facsimile of seal Exh. P-4, spot map Exh. P-5, travelling tickets of Gopal Exh. P-6 and of Shyamubai Exh. P-7. He also proved his signature on the document Exh. P-3 regarding whole search and seizure proceedings as well as arrest of the appellants prepared in his presence. Their arrest memos are Exhs. P-8 and P-9. This witness has also accepted about interrogation later on and recording of his statement by the police. This witness has also stated that because they were getting late, therefore, his signatures were taken on some blank papers, but nowhere he has stated that out of the documents Exhs. P-1 to P-9, which were the documents on which his signature on blank papers were taken. This statement he has given voluntarily. It appears that he wanted to speak truth and also wanted to favour the appellants. On all nine

documents from Exhs. P-1 to P-9 he admitted his signatures and preparation thereof in his presence. Learned Counsel put much emphasis on the statement of this witness regarding taking of his signatures on blank papers, but on careful perusal of his entire statement as well as the statement of Abdul Rashid (P.W. 2), conductor of the same bus, the companion of P.W. 1, this Court is of the considered view that the proceedings of search and seizure from the bag of the appellant No. 1 Gopal Sharma which was containing 2.200 kgs. of heroin, had taken place in their presence. It is the well recognized legal principle regarding reading of the statements of the witnesses and their appreciation that their veracity has to be considered as a whole and not by picking up one sentence in isolation.

14. In cross-examination Ambalal (P.W. 1) driver has stated that the police party entered inside the bus on Khalghat barrier where the vehicles were being checked. Police brought out from inside the bus two passengers with bags. He was seeing sitting on the steering by turning the neck behind. Police also called him and the conductor and started preparing the documents at the barrier office. He also admitted that on the third day, when he was returning he was interrogated at Khalghat barrier. In his cross-examination nothing has come out which may render his testimony useless for the prosecution. On over all reading of the statement of this witness Ambalal, this Court is fully satisfied that he was present at the time of search and seizure from the appellants and he signed on the documents Exhs. P-1 to P-9 and in his presence from appellant No. 1 Gopal heroin was seized from his bag.

15. Abdul Rashid (P.W. 3), conductor of the bus has identified the appellants who were travelling in the bus. He also identified Exhs. P-6 and P-7 travelling tickets bearing seat Nos. 27 and 28. The further say of this witness is that in the night at about 9.30 to 9.45 PM on Khalghat Toll Tax barrier, the bus was stopped by the officials of Narcotic Department. They expressed their desire to check the bus and after taking about 15 to 20 minutes alighted from the bus alongwith the passengers sitting on seat Nos. 27 and 28 viz. the appellants. Each of these passengers were having one bag which were opened in their presence and two polythene packets having heroin were found in the bag and police party prepared the Panchnamas regarding search and seizure of brown sugar and took his and

driver Ambalal's signatures on the documents. He gone through Exh. P-1 to Exh. P-9 and identified his signatures at portion B to B. After seizure proceedings, the police party allowed them to go and both the appellants were detained. In cross-examination, he stated that in their bus, so many passengers were travelling and he could not identify all the passengers unless some special event takes place. He also admitted that near Khalghat barrier, there was a Police Out Post/Chowki. This witness has also supported the prosecution case and he is supposed to be an independent witness being conductor of the bus. He has corroborated the testimony of Ambalal driver of the bus on material particulars and stated about seizure of the brown sugar found in the bag. In cross-examination, he has stated that the police had taken their signatures on several documents and on some documents, the signatures were taken when the bus was stopped after crossing Khalghat barrier at the site of bifurcation of roads for taking meals by the drivers and conductors etc. The same statement has been given by Ambalal (P.W. 1) in his cross-examination Para 18. Learned Counsel for the appellants could not point out any substantial contradiction which may attach vulnerability to the testimony of both the independent Panch-witnesses.

16. Yeshwantsingh (P.W. 3), Constable of the Bureau took sealed envelope of samples together with forwarding letter vide Exh. P-10 and facsimile seal (Exh. P-11) to submit the same to Opium and Alkalite Laboratory. He submitted the same and obtained receipt Exh. P-12, which has been proved by him. He submitted this receipt in the office of the Bureau Superintendent, Indore. Vimal Mohan Goyal (P.W. 9) was the Chemical Analyser supported the version of Yeshwantsingh (P.W. 3), Constable in regard to submission of sealed packets articles A-I and B-I with forwarding letter Exh. P-10. He also confirmed that the seal and facsimile seal were intact and correct. He made entry regarding receipt of the samples in the Laboratory register at Sr. Nos. 255 and 256/2001. This witness has also proved the Chemical Examination Report Exh. P-16 signed by him at place A to A and facsimile seal at place B to B. According to him, he found 19.09 per cent and 11.74 per cent heroin in the samples mentioned at Sr. Nos. 255 and 256 respectively in the laboratory register. He is qualified in Miscellaneous Organic Chemistry and has experience of 23 years regarding examination of narcotic drugs and up till now in Court he has tested about 10,000 sample. He has been cross-

examined by the defence Counsel regarding keeping of samples in the almirah, its position and kind of tests. This witness has admitted non-mention of, in the report Exh. P-16, name and number of test performed by him in the laboratory while testing the samples. In the opinion of this Court, it is not necessary to mention all these details in the report and there is no such provision available in the Act and Rules made thereunder. From the statement of this witness, the prosecution has established that both the samples were containing narcotic contraband article.

17. Inspector Ku. Smita Tamrakar (P.W. 4), Sub Inspector Girvarpuri (P.W. 5), Superintendent C.B.N. Jagdishchandra Shrivastava (P.W. 6) and Inspector of CBN Indore, R.K. Rajak (P.W. 7), are the members of the raiding party. Girvarpuri (P.W. 5), Sub Inspector received secret information about trafficking of narcotic drug by two persons, out of whom one was a man and another a woman from Indore to Pune. He apprised this information to Superintendent Shrivastava (P.W. 6) in the office and prepared a memorandum Exh. P-13 to this effect. He proved his signature at portion D to D and signature of Shri Shrivastava on portion E to E. At that time, Inspector Rajak was also with them in the office. He also signed on Exh. P-13 at portion F to F. The further say of this witness is that the Superintendent Shri Shrivastava directed Inspector Ku. Smita Tamrakar (P.W. 4) for taking action on the secret information. He made an order in writing on Exh. P-13 at portion marked B to B and put his signature at portion C to C.

18. Ku. Smita Tamrakar (P.W. 4) also recorded the statement of Sub Inspector Girvanpuri (P.W. 5) and Inspector R.K. Rajak (P.W. 7). She proved her signature on the secret information, memorandum Exh. P-13 at portion A to A and also the signature of Superintendent Shrivastava at portion B to B and constituted a raiding party including herself, with Superintendent, J.C. Shrivastava (P.W. 6), Inspector K.K. Rajak, Sub Inspector Girvarpuri and Constables. She was stated that they all reached near Khaltaka Out Post and formed their checking barrier. In the night at about 10.30 PM 'Pushpak' bus of M.P. State Road Transport Corporation going from Indore to Pune reached there. They stopped the said bus and apprised the driver and conductor about secret information as well as search of the bus. They also asked them to be the witnesses to the proceedings and both agreed to it. On the basis of secret information, personality (HULIYA) description of the appellants

mentioned in secret information, they asked their names. The male passenger disclosed his name as Gopal Sharma and the female passenger disclosed her name as Shyamubai. This witness identified the appellant Gopal in Court. Shyamubai was absent on that day. On confirmation of the secret information, they asked both the appellants to come down from the bus. Each of them were having bag, one was black in colour and the another was of gray colour. This witness has given detailed description of compliance of Sections 50 and 42 of the NDPS Act. Since both these sections are not applicable in the instant case, therefore, this Court is not required to deal with the evidence in this regard.

19. The members of raiding party first gave their own search and in the said search no incriminating article was found. On search of black bag, they found some clothes including two polythene packets each containing some gray colour powder kept inside the pocket of the bag in the bottom. The total weight of the packets was 2.200 kilograms. On asking, the appellants disclosed that it was heroin. They tested that powder by their testing kit and found it to be heroin, a product of opium. Two samples of 5 grams each were taken from the white polythene packets and the same were sealed. Remaining powder was separately sealed. The second bag of gray colour was also searched. In the said bag, clothes of Shyamubai appellant No. 2 were found. The descriptions of the same were mentioned in the seizure-memorandum. No other incrimination article was found in that bag. From the possession of Shyamubai two travelling tickets were recovered description whereof was also mentioned in the seizure memo. This witness Inspector Smita Tamrakar (P.W. 4), proved the seizure memo Exh. P-1 as well as the seizure of tickets Exh. P-9, tickets Exhs. P-6 and P-7 and signature and thumb impression of the appellants on these documents. She has also proved the signatures of the witnesses alongwith the signature of Superintendent. Both the appellants were arrested and their arrest memos were prepared.

The further say of this witness is that the seized property was sealed and facsimile seal was also prepared Exh. P-4, which bears her signature and signatures of the Superintendent, witnesses and signature of Gopal as well as thumb impression of Shyamubai. Thereafter they all returned to Indore Office and lodged the appellants in lock up. She prepared a detailed statement on the next day morning and

submitted it to the Superintendent vide Exh. P-14. After this exercise, the Superintendent ordered for further investigation by R.K. Rajak Inspector. She handed over all the documents prepared by that time to Shri Rajak and seized property was deposited in the MALKHANA of the office and receipt whereof was taken on document (Exh. P-14) at place D to D. All the seized articles were produced before the Court and identified by this witness as mentioned in Paragraphs 24 and 25 of her deposition.

20. It is pertinent to mention here that the Article A was the black bag in which one T-Shirt, one pant, one underwear and one Baniyan were found. In this bag in the bottom there was a pocket (chamber). On opening the second bag of gray colour, it was found to contain one saree/LUGDA (in local parlance). It was marked as article B. The sealed packets of heroin were also opened. All these packets were bearing signatures of the witnesses, Investigating Officer, appellant Gopal and thumb impressions of appellant Shyamubai. These were marked as article C to article I.

21. According to the seizure memo Exh. P-1, the appellant Gopal was carrying black canvass bag whereas the appellant Shyamubai was carrying gray colour bag. On search of black bag, heroin was found. No contraband article was found in the gray colour bag. In the said bag, one printed saree/Lugda was found and bus tickets were seized from the possession of appellant Shyamubai. In Para 41 last line of cross-examination, this witness Ku. Tamrakar (P.W. 4) has deposed that both the appellants were keeping their bags on their laps. She denied the defence suggestion that the appellants were not having any bag and signatures of the witnesses and accused were taken on blank papers. In Para 34, she stated that the Gazetted Officer (Superintendent) of Bureau was with them and they gave option to the appellants for their search in the presance of Gazetted Officer or the Magistrate available nearby. In cross-examination Para 40, she has admitted that in seizure memo Exh. P-1 there is no mention of seizure of bus tickets from the appellant Shyamubai. She voluntarily stated that this fact is mentioned in personal search memorandum. She has denied the defence suggestion regading no relation between the appellant Gopal Sharma and Shyamubai and both were travelling on their individual tickets.

22. Girvarpuri (P.W. 5) Sub Inspector has also stated about receiving the secret information and thereafter going on the spot, trapping the appellants, search and seizure, preparation of all the aforementioned documents and putting his signatures thereon. This witness, in Para 4 has stated that the appellant Gopal Sharma was keeping a black rexine bag on his lap vide article A containing a pant. T-Shirt, underwear and a Baniyan and in the said bag in its bottom there was a secret pocket wherein two polythene packets containing gray colour powder were found. On asking, the appellant Gopal disclosed it to be heroin. From the statement of this witness and the statement of J.C. Shrivastava (P.W. 6) and R.K. Rajak (P.W. 7), Inspector, it is crystal clear that the black rexine bag was in possession of appellant Gopal Sharma in which heroin was found and gray colour bag was in possession of appellant Shyamubai wherein no contraband article was found, except her saree.

23. Learned Trial Court held the appellant Shyamubai guilty on the basis of seizure of bus travelling tickets recovered from her possession and both Shyamubai and appellant Gopal were sitting adjacent to each other on seat Nos. 27 and 28. This Court has perused the entire statements of the witnesses and given anxious consideration to the issue that whether the prosecution has proved beyond all reasonable doubt about conscious possession of brown sugar found in the black bag of appellant Gopal and is of the considered opinion that merely because both the appellants were travelling in one public bus sitting adjacent to each other and the tickets were seized from appellant Shyamubai, it would be very difficult to presume that she was knowing that the appellant Gopal Sharma was possessing heroin and kept the same with the consent and connivance of appellant Shyamubai. It is worthwhile to mention that the appellant Gopal Sharma was a resident of Village Dogda P.S. Dug Tehsil Gangdhar District Jhalawad (Rajasthan) whereas Shyamubai widow of Karansingh was resident of Village Karawan P.S. Pagaria District Jhalawad (Rajasthan) as described in the complaint filed by the Bureau. Both the appellants belong to separate caste and possibility of her travelling as an innocent passenger with the appellant Gopal Sharrna cannot be ruled out, because from the bag which was possessing by her no incriminating article was seized. Their association from Indore Bus Stand could be just as a chance meeting on Bus Stand and at the time of taking tickets at many a time on

Booking Windows male passengers request the lady co-passenger also to take their tickets because the ladies are being given priority. All these possibilities and probabilities cannot be ruled out regarding possession of tickets by Shyamubai and travelling in the bus. Even it cannot be said that she was associated with the appellant Gopal. The witnesses of Narcotic Bureau have stated that the statements of both the appellants were recorded and they disclosed their association as well as keeping of heroin in the bag, but the statements of both the appellants were not proved and exhibited in Court. Therefore, the same cannot be used against them and on the basis of oral statement of witnesses of the Bureau, this Court is not satisfied and convinced to hold that Shyamubai was in conscious possession of the seized heroin from the black bag possessed by the appellant Gopal Sharma. The circumstances against Shyamubai are not pointing unerringly at her guilt excluding all reasonable hypothesis of her innocence. Therefore, in the considered view of this Court, she is entitled for getting benefit of reasonable doubt.

24. This Court did not find any material any substantial contradictions in the statements of the prosecution witnesses which may cause any serious dent to the prosecution case making appellant Sharma liable for acquittal. Learned Counsel has pointed out that in the seizure memo Exh. P-1 in column No. 2 date and time of incident/seizure of heroin was mentioned afterwards and not at the time of preparation of this document. Learned Counsel has pointed out at the document Exh. D-1 wherein the dale and time is not mentioned. This argument has no weight because the author of document Exh. P-1, i.e., Ku. Smita Tamrakar (P.W. 4) has not been shown the document Exh. D-1 and given opportunity to explain the same. No question was put to this witness on this aspect. The document was put to Inspector R.K. Rajak (P.W. 7) and he expressed his ignorance about this fact, because he was not the author of this document. Exh. D-1 is the photo-slat copy and it cannot be said that it is the exact photo-stat copy of Exh. P-1. Who filed this document is not clear from the statements of the prosecution witnesses. The defence has also not explained as to how and from where they found this document and used the same while cross-examining the witness R.K. Rajak (P.W. 7). R.K. Rajak (P.W. 7) has stated that this was filed while taking departmental remand, but he has nowhere stated that he got done the photo-stat copy of Exh.

P-I and he filed the same for taking remand. It is well known that while taking the photo-stat copy of any document by tricks something can be omitted and something can be added or excluded. If the defence was certain on this point, it could have called the author of the document Exh. P-1, Inspector, Ku. Smita Tarnrakar (P.W. 4). But, no such step was ever taken during the course of trial. All the witnesses have in unequivocal terms stated that at the time of trapping the appellants at the Barrier the proceeding of search and seizure were drawn and they signed on the documents.

25. Ex-consequenti, in view of the foregoing legal and factual discussion, this appeal deserves to be allowed in part.

26. The conviction and sentence of the appellant Gopal Sharma as awarded by the Trial Court are hereby affirmed while the conviction and sentences of the appellant Shyamubai are set-aside. It appears from the record that the appellant No. 2 Shyamubai though was granted order of suspension of sentence on 22-7-03, but she has not furnished any bail and surety bonds. Therefore, the Trial Court is directed to verify this fact and if she is inside the jail she be released forthwith if not required in any other criminal case. Office is directed to send a copy of this order to the Trial Court alongwith its record for immediate compliance.