of the same statement. Therefore, *Nishikant Jha's* case supra, relied upon by the learned counsel, having a reference to the facts which arose in that case, will not be of any assistance. In *Bhagirath* v. *State of Madhya Pradesh,* (2), their Lordships were considering a case where the Court reconstructed a story different from the one propounded by the prosecution and convicted the accused on that basis. It was held that the prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence, nor can the Court of its own make out a new case for the prosecution and convict the accused on that basis. When the stratum of the evidence given by the eye witnesses examined by the prosecution was found to be false, the only prudent course, in the circumstances, left to the Court was to throw out the prosecution case in its entirety against all the accused. Following the ratio of this decision, we consider that the entire prosecution case had to be thrown out. Since Jagjit Singh appellant made an attack to save his own wife on whom Harpal Singh attempted to rape, he could not be held guilty for the offence for causing the death of Harpal Singh. He got a right of private defence to save the person of his wife Smt. Amarjit Kaur and as such, he was completely exonerated. He could not be convicted under section 302 of the Indian Penal Code. The appeal is allowed and the conviction and sentence are accordingly set aside. The appellant is in custody and he shall be released forthwith unless required in connection with any other offence.

K.T.S.

APPELLATE CRIMINAL

Before B. S. Dhillon and R. N. Mittal, JJ.

STATE OF HARYANA,—*Appellant.*

versus

RAM NIWAS,—*Respondent.*

Criminal Appeal No. 874 of 1974.

February 15, 1978.

Code of Criminal Procedure (2 *of* 1974)—*Sections* 100 *and* 165—*Raid by a police party* — *Police officer—When to offer himself for*

(2) 1975 S.C.C. (Col.) 742.

search by the accused—Rule of caution—Stated—Opium Act (1 of 1878)—Sections 3(ii), & (iii) and 9(1)—Different percentage of morphine found in different samples taken from the same packet—Each sample containing more than 0.2 per cent morphine—Adverge inference against the prosecution—Whether to be drawn.

Held, that there is no provision in the Code of Criminal Procedure, 1973 which requires that a police officer before recovering any incriminating article from the accused should offer himself for search to him. The principle of offering for search by the police officer at such juncture is a rule of caution. The basic principle in doing so is to avoid the possibility of planting incriminating material by the police officer on the person of the accused when search is made. In case the article which is alleged to have been recovered is of such a nature that it can be concealed by the police officer on his person, it is necessary that he should offer himself for search to the accused. But if the volume of the article which is to be recovered is such that it cannot be concealed by him on his person, then it is not necessary for him to offer himself for search to the accused.

(Para 5)

Held, that from clauses (ii) and (iii) of Section 3 of the Opium Act 1878 it is evident that the mixture of spontaneously coagulated juice of capsules of the poppy with or without natural material, if it contains more than 0.2 per cent of morphine, is opium. It may be possible that if coagulated juice of poppy is found in large quantity without mixture of any neutral material, it may have uniform quantity of morphine. If, however, a neutral material is mixed with manual process it is possible that the admixture may not contain a uniform quantity of morphine in it. The inevitable result would be that if samples are taken at different times from the admixture, the percentage of morphine detected in them after analysis may not be the same. It cannot, therefore, be said that the samples was not taken from the same material. If evidence in case of recovery in large quantity is otherwise credible, the accused should not be given any benefit and no adverse inference should be drawn against prosecution on the ground that different percentage of morphine exceeding 0.2 per cent was found in different samples taken at different times.

Satnam Singh v. The State, 1967 P.L.R. 645 overruled.

(Para 9)

Appeal from the order of Shri V. P. Aggarwal, Judicial Magistrate; Ist Class; Sirsa; dated the 5th February; 1974; *acquitting the respondent.*

Charge under Section 9(1) of the Opinm Act, 1878.
ORDER : Acquittal.

H. S. Gill, D.A. (Haryana), *for the appellant.*

S. S. Surjemale, Advocate, *for the respondent.*

JUDGMENT

R. N. Mittal, J.

(1) This appeal of the State of Haryana is directed against the judgment of acquittal rendered by the judicial Magistrate Ist Class, Sirsa dated February 5, 1974.

(2) Briefly the prosecution story is that on the night intervening June 9/10, 1972, S.I. Braham Dutt (P.W. 2) alongwith constables Pyare Lal and Rattan Singh was present in vilage Bara Gudha in the course of patrol duty. He received information that Ram Niwas accused and Jugal Kishore were present with opium at the tubewell of Mohan Lal Arora in the area of village Buddhabhana. A raiding party was formed by him with two constables who were already with him and by joining Dayal Singh (P.W. 1) and Gurbachan Singh (P.W. 3) Thereafter, the party reached the tubewell of Mohan Lal Arora where they found Ram Niwas accused and Jugal Kishore sitting on two *charpais* near the tubewell. Both of them, it is alleged, on seeing the police party, started running with one bundle each in their hands. They were, however, secured by the police and opium weighing about 2 kilograms was found in the bundle carried by Ram Niwas. A sample weighing 10 gms. was taken from the opium and the remaining opium was put in a tin. The sample and the tin were made into two parcels and sealed.

(3) S.I. Braham Dutt sent a *ruqa* to the police station, Bara Gudha on the basis of which a formal first information report (Exhibit P.B./1) was recorded. Ram Niwas, accused was challaned under section 9(1) of the Opium Act, 1878. The accused denied all the facts and pleaded that he had been implicated falsely. The case was tried by the Judicial Magistrate, 1st Class, who acquitted him. The State has come up in appeal against the judgment of the Judicial Magistrate Ist Class to this Court.

(4) The first contention of the learned counsel for the State is that the respondent was carrying a bundle of Opium weighing about 2 kilograms and the learned Magistrate gave him the benefit on the ground that before conducting a search, the S.I. did not offer himself for search to him. He has argued that in case the volume of the article which is to be recovered is such that it cannot be concealed and there is no such voluminous article with the police officer, then it is not necessary for him to offer himself for search to

the person to be searched. He has further argued that in the present case, the respondent was carrying opium weighing about two kilograms in a bundle and a bundle of that size could not be concealed by the Police officer. Consequently, it was not necessary for S.I. Braham Dutt to offer himself for search to the respondent.

(5) We have heard the learned counsel and find force in the contention of the counsel for the State. The counsel for the parties have not been able to bring to our notice any provision in the Code of Criminal Procedure which requires that a police officer before recovering any incriminating article from the accused, should offer himself for search to the accused. The principle of offering for search by the police officer at such juncture is a rule of caution. The basic principle in doing so is to avoid the possibility of planting incriminating material by the police officer on the person of the accused when search is made. In case the article which is alleged to have been recovered is of such a nature that it can be concealed by the police officer on his person, it is necessary that he should offer himself for search to the accused. But if the volume of the article which is to be recovered is such that it cannot be concealed by him on his person, then in our opinion, it is not necessary for him to offer himself for search to the accused. To illustrate, if some money in the form of currency notes is alleged to have been recovered from the accused, it may be necessary for the police officer to offer himself for search to the accused before searching him but it may not be necessary in case a pitcher of incriminating article weighing about 20 kilograms is recovered from him.

(6) In the present case, the prosecution version is that the accused was carrying the opium in a bundle having two kilograms of it and that it could not be concealed by the police officer on his person. In the circumstances, no adverse inference can be drawn against the prosecution if the S.I. Barham Dutt did not offer himself. for search, before recovering the incriminating material from the accused. The learned trial Court while holding to the contrary placed reliance on *Tikkam Dass K. Dossani* v. *State* (1). That case was under Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act and the prosecution story was that the accused had accepted a currency note of Rs. 100 as illegal gratification which was recovered from him. That case is distinguishable from the present case and the ratio in that case will not be applicable to it.

(1) 1973 Ch. Law Reporter, 299.

(7) The second contention of the learned counsel for the State is that a sample of opium was sent to the Chemical Examiner, Karnal for analysis and a report was received from him that it contained 1.2 per cent morphine. Another sample at the instance of the accused was sent to the Assistant Chemical Examiner, Chandigarh and he gave an opinion that it contained 3.14 per cent morphine. Mr. Gill submits that the learned Magistrate wrongly gave benefit of the conflicting reports of the Chemical Examiners to the accused. According to the learned counsel both the samples fall within the definition of opium as given in the Act. The opium, he urges, is a costly commodity and is adulterated by smugglers. He further urges that adulteration is not made by a machanical process and it is possible that in a large adulterated quantity of opium, the percentage of morphine may not be uniform. In the circumstances, Mr. Gill argues, if different percentage of morphine is found in different samples taken at different times, from the same packet, an adverse inference cannot be drawn against the prosecution.

(8) We have given a thoughtful consideration to the argument and also find force in it. The word 'opium' has been defined in Section 3 of the Act which reads as under: —

"Opium"

(i) the capsules of the poppy (*Papaver somniferum* L.) Whether in their original form or cut, crushed or powdered and whether or not juice has been extracted therefrom.

(ii) the spontaneously coagulated juice of such capsules which has not been submitted to any manipulations other than those necessary for packing and transport; and

(iii) any mixture, with or without neutral materials, of any of the above forms of opium,

but does not include any preparation containing not more than 0.2 per cent of morphine, or a manufactured drug as defined in Section 2 of the Dangerous Drugs Act, 1930 (2 of 1930)."

(9) From clauses (ii) and (iii) of the definition it is evident that the mixture of spontaneously coagulated juice of capsules of the poppy with or without neutral material, if it contains more than 0.2 per cent of morphine, is opium. It may be possible that if coagulated juice of poppy is found in large quantity without mixture of any neutral material, it may have uniform quantity of morphine.

If, however, a neutral material is mixed with it with manual process, it is possible that the admixture may not contain a uniform quantity of morphine in it. The inevitable result would be that if samples are taken at different times from the admixture, the percentage of morphine detected in them after analysis, may not be the same. In the circumstances, it cannot be held that the sample was not taken from the same material. If evidence, in case of recovery in large quantity, is otherwise credible, the accused should not be given any benefit on the ground that different percentage of morphine exceeding 0.2 per cent was found in different samples taken at different times. A contrary view has been taken by a learned Single Judge of this Court in *Satnam Singh* v. *The State,* (2), wherein it was held that where the reports of the Chemical Examiners are conficting, the benefit of divergence must go to the accused as the case is not free from doubt. With great respect to the learned Judge, we are unable to affirm the above view.

(10) The third contention of Mr. Gill is that the evidence of the prosecution was reliable and trustworthy but the learned Magistrate erroneously rejected it on frivolous grounds. He further submits that the offence against the respondent was fully established but inspite of that he had been given the benefit of doubt and acquitted. Findings of the Magistrate, according to the counsel, are perverse and deserve to be set aside. We are unable to accept this contention of the learned counsel. Dyal Singh (P.W. 1) admitted that he appeared in 5-7 cases as police witness and joined the police party as and when the police summoned him. He had been called by the police during the night from his house, which was in the heart of the village. He was neither a member of the Panchayat nor Lambardar. It is also admitted by the prosecution that Gurbachan Singh the other witness was called by Dyal Singh P.W. 1. These facts show that Dyal Singh was a convenient witness for the police. He also assisted it in providing another witness. Moreover the statement of this witness differs from that of the S.I. on material points. He stated in his cross-examination that both the accused ran in the opposite direction to each other. The S.I. on the other hand desposed that both of them ran in the same direction and not in the opposite direction. If the respondent had been arrested in the way as described by the prosecution there should not have been any contradiction on this point. In appeal against acquittal, the High Court is slow in disturbing the finding of fact arrived at

(2) 1967 P.L.R. 645.

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by the trial Magistrate. In this regard reference may be made to the observations of the Supreme Court in *Sita Ram Durga Prasad* v. *State of Madhya Pradesh* (3) wherein it was held, that in appeals against acquittal, the High Court should give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he had been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. We have gone through the statements of the witnesses and are of the view that they are not trust worthy. In our opinion, the trial Magistrate properly appreciated the evidence and rejected the prosecution version.

(11) In view of the aforesaid circumstances, it will not be proper to upset the findings of the trial Magistrate. The appeal, therefore, fails and the same is dismissed.

Bhopinder Singh Dhillon, J.—I agree.

N.K.S.

APPELLATE CRIMINAL

Before Bhopinder Singh Dhillon and K. S. Tiwana JJ.

STATE OF PUNJAB—*Appellant.*

versus

NAIB SINGH,—*Respondent.*

Criminal Appeal No. 1185 of 1974

February 21, 1978.

Indian Penal Code (XLV of 1860)—Section's 320(7), and 326—Probation of Offenders Act (XX of 1958)—Sections 4(1) and (2)—'Fracture'—Meaning of—Partial cut of the skull vault—Whether a grievous injury—Such offence—Whether falls under section 326—

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(3) A.I.R. 1975 S.C. 1977.