Binding Fictions. Contradicting Facts and Judicial Constraints in a Narcotics Case in Himachal Pradesh

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[Published in Daniela Berti & Devika Bordia (eds), *Regimes of Legality. Ethnography of Criminal Cases in South Asia*, pp. 91-128. New Delhi: Oxford University Press, 2015.]

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Anoop Chitkara is considered by the High Court judges in Himachal Pradesh to be one of the top lawyers specializing in narcotic cases. I first met Chitkara in the corridor of the High Court building after the judges of the court I was attending had decided to take a break. I was told by a judge that this lawyer had been invited to take part in a twoday conference on the Narcotic Drugs and Psychotropic Substances Act, or NDPS Act, which was about to take place in Shimla in March 2010 on the initiative of the Judicial Academy. Apparently, this was the first time that a lawyer had been invited to give a paper at a meeting of this kind, where speakers were usually chosen from high-ranking judges or advocate generals along with various experts on the topic in question. As I was still unsure whether the Chief Justice, the head of the Academy, would allow

* This article is part of the ANR programme, 'Justice and Governance in India and South Asia' (http://just-india.net). This chapter is part of a research project that was funded by the French National Research Agency (ANR-08GOUV-064). I would like to thank Veronique Bouillier, Gilles Tarabout, and Anthony Good for their comments on the first draft of this text.

me to attend the event, I was curious to **/p.92/** glean something about the paper that Chitkara was going to present at the conference.

Smiling at my question, the lawyer told me that he was still working on his paper, although he was rather sceptical about achieving a positive outcome from the conference, which, as the Chief Justice had announced, was intended 'to improve the quality of investigations of NDPS cases'.[1] He pointed out that in India, despite the extremely stringent nature of narcotic legislation, those accused were usually acquitted. These acquittals, he said, were mainly due to procedural mistakes made by the police during investigations as well as to contradictions that emerged during the trial between the way the police replied to the questions about how investigations had been conducted and what had previously been written in the police report. The paper he planned to present at the conference would thus throw light on the essential steps that the police had to follow so that prosecutors would be able to prove their cases. 'As a lawyer,' he told me, 'I defend all these people who become involved in a narcotics case. Who better than me to tell the judges about the way to improve the quality of investigations in such cases?'

However strange the idea of a defence lawyer helping the police to improve their investigation might appear, Chitkara did not seem worried about this. 'I am going to place all my cards on the table, and then we'll see if they get me, but they won't', he said confidently. Indeed, he was fully convinced that regardless of the clues passed on to the other side, he would continue to win cases. The reason for his self-assurance went hand in hand with his complete mistrust of the police, whom he considered to be incompetent, sometimes corrupt, and constantly coming up with 'fabricated stories'. 'They present these stories as the truth, but they never tell the truth', he concluded.

Although Chitkara accused the police of not telling the truth, he did not mean that people in the area, including his clients, were not involved in narcotic trafficking and that the police always incriminated innocent people. Though this is the official version that lawyers always present before a judge, his discourse implies something else. It refers to the notion of the police's concern about providing the court with an 'ideal' report that does not exactly correspond to how investigations are carried out in the field. According to this discourse, which is commonly upheld in court

circles, an element of fiction is introduced by the police **/p.93/** in their report which is due to police efforts to show that they have duly followed the relevant procedures, even in cases where they have not done so. This element of fiction would inevitably lead police officers to lie or to contradict one another when cross-examined during the trial, and would consequently undermine their credibility before the court. The tendency of police officers to provide an idealized and thus untrue report of the investigations was also often put forward by judges, which is probably the reason why they decided to invite a defence lawyer— hence someone used to finding contradictions in police reports—to take part in the NDPS workshop.

The problem of truth is ever present in criminal cases not only in relation to the version of events written by the police at the time of the investigations, but also in reference to the testimony provided by witnesses during the trial. Judges and prosecutors alike always complain that most witnesses called to the bar by the prosecutor to support the accusation will eventually lie for the benefit of the accused, denying what they said in their previous statements.

In this chapter, I will base my findings on a case study I followed at a Session Court in a district of Himachal Pradesh to examine the notions of truth and untruth that were put forward by its protagonists. The analyses of court dialogues in both oral and written forms show how the lawyer's defence strategy consists in demolishing the police's credibility and in presenting another fictional version of the story, which is suggested during the trial itself through cross-examination techniques. Unlike the way in which the police compile the investigative report, the lawyer's story does not have to follow procedural rules or legal provisions. Instead, it relies on a more intuitive scenario that was commonly used in the court cases I observed in Himachal Pradesh, according to which the accused is falsely implicated in a case by a family member or by someone from his or her village. In the case presented here, the plausibility of this counter-story was not immediately evident to the court but came across at the end of a long process during which the defence lawyer challenged the veracity of every detail of the police account. I will show how the version strategically proposed by the defence lawyer became legally plausible when the police version of the case had gradually lost its credibility in the eyes of the judge. The defence's story, though constantly reduced to strategic fiction

by both the prosecutor and the judge in the initial stages of the trial, eventually prevailed at the **/p.94/** end of the trial and was used in part by the judge to back his decision to acquit the accused.

The analyses of the interactions that took place during the hearings will be discussed here with reference to the notion of 'binding', which in court studies denotes a legal procedure according to which a statement 'must confront past statements, generating inconsistency and contradiction' (Scheffer 2007: 5). The notion of binding regularly emerges in Indian trials when a witness's statement is considered to have more or less evidentiary value according to specific procedural rules. Furthermore, the case discussed here shows how the issue of binding is related to a constant shift between writing and orality in an Indian judicial setting and, more specifically, to the extent to which an oral testimony and its written equivalents are likely to be considered admissible evidence by the court. In this chapter, I examine how the court manages to deal with contradictory oral and written versions of a story and how greater evidentiary value is attributed to one of these versions. I also address the fictional aspects of the trial proceedings by considering the ways in which the judge, the police, and the prosecutor discuss the case out of court.

However, before introducing the case study, and in order to contextualize the court dialogues, I provide a more general view of the ways in which narcotic issues are discussed and perceived in government and judiciary milieus as well as by society at large.

Formal Meetings and Local Discourse

After my conversation with Anoop Chitkara, it turned out that the Chief Justice had no objections to my attending the conference at the Judiciary Academy; he even came to welcome me personally during the coffee break. The style of the conference was rather formal; though the speakers were all from the Higher Judiciary, the audience was made up of district judges and prosecutors, young trainee judges, high-ranking police officers, and forestry officials, as well as a few journalists seated in the middle of the room.[2]

During the workshop, narcotic cases were assessed from an international perspective. Judges reminded attendees that the actual source of narcotic trafficking in Himachal Pradesh comes from outside the country

itself, evoking 'narco-tourism' from Israel and European countries or **/p.95/** 'narco-terrorists'. Drug-trafficking experts had been invited to heighten junior judges' awareness of the dangers of drug use and of the means by which drugs produced in India circulate on the international market. Discussions were mostly geared towards improving the performance of the police and prosecution services by providing advice on technical issues or suggesting strategies to avoid errors that commonly prevent judges from taking the decision to convict the accused.

One of the first speakers at the workshop was Justice Deepak Gupta who at that time was appointed to Himachal Pradesh High Court after having spent part of his career as a High Court lawyer. Deepak Gupta is a very modern, efficient judge and well aware of the need to speed up court proceedings and to computerize the court system. He regularly updated the court website himself and posted his own judgments online. His favourite expressions were 'constitution', 'human rights', and 'the rule of law'. At the workshop, he began his speech by analyzing what he considered to be the commonest reason why prosecutors lose narcotic cases in India, stating his viewpoint that 'if you follow the system, the prosecution cannot fail'. One of his major criticisms was addressed to the 'investigative agency', that is to the police; as Chitkara had done, he remarked that police officers were mistaken in believing that they were required to proceed according to the Act, which resulted in their falsifying their reports. By way of an example, he cited an occasion when the police had claimed that a case was registered on the spot at night in the glow of a scooter's headlamp, yet the defence lawyer had shown that the documents were so neatly written that they had obviously been drafted at the police station. 'Why can't you say that there was not enough space there, that it was dark and so we moved to an office?' he bust out with, addressing the few senior police officers sitting in the room.

Justice Gupta put forward another common mistake where police officers who make 'a search' in a private house systemically include the name of a senior officer who allegedly took part in a raid merely in order to respect the requirement defined in the Narcotic Act. He noted that he had encountered this problem a number of times in the past two weeks, explaining,

> When the constable gets the information, the senior says, 'Go and take my name!' [as if he had been with him]. Now what happens is that when the

> senior becomes linked to the operation, the search is already over, and when he is cross-examined in court, he cannot give even the slightest **/p.96/** description of the building where the search took place or of the people involved in the search, clearly showing that he had never been there.

Turning to the prosecutors, the judge blamed them for withdrawing all too quickly a case when they see witnesses turn hostile or for not taking the time to cross-examine them. He also held the magistrates and session judges responsible for frequently omitting in their transcription of the evidence many important facts that emerge during hearings and which need to be recorded in the court report as they may be relevant to revision of the case by the appeal judge.

Gupta's paper, like the others scheduled for that day, reflected the superior position from which High Court judges address both members of the lower judiciary and the police. By contrast, in his concluding words the judge congratulated Anoop Chitkara, the aforementioned High Court lawyer, for the paper he was about to present, which Gupta had already had the opportunity to read. He described the paper as a wonderful checklist for police officers and worthy of being printed and distributed to every policeman to ensure that they are in a position to prove a case. Chitkara was visibly flattered by the judge's comments about his paper, the preparation of which had occupied his junior assistants for several days. The lawyer then embarked on a point-by-point discussion on the many technical procedures the police were required to follow in order to provide prosecutors with the chance to prove their cases. He associated the 'technicality' of the Narcotic Act with 'the need to protect innocent citizens from being falsely implicated in a narcotic case' (Chitkara 2010). He also referred to the possibility that a false case could be made against a villager not only by one of his or her enemies, but also by police officers themselves in order to enter into negotiations with the accused.

The discourse of a 'possible misuse of the Narcotic Act' is quite commonly made in the court milieu, not only by lawyers but also by judges. This is demonstrated in a speech delivered by Justice A. R. Lakshmanan at another workshop of the Narcotic Act organized by the Judiciary Academy in 2008. In his paper, Lakshmanan highlighted the contrast between the severity of the Narcotic Act and the fact that during some festivals, such as Holi, a cannabis-based preparation (*bhang*) is used freely before the eyes of police officers, because it is considered to be a

traditional local beverage. According to the judge, however, 'nothing could prevent the police from making arrests and throwing everyone at a Holi party into jail' (Lakshmanan 2008:55). Indeed, this appeared **/p.97/** to him to be a good way for politicians and others to get rid of their enemies. The judge concluded by noting how many innocent people 'languish in jail indefinitely […] after ganja [cannabis] has been deliberately planted in their household or belongings [by connivers in the police force].' (Lakshmanan 2008: 55.)

Lakshmanan's reference to the cultural aspects of cannabis in the area is something of an exception, as these Academy workshops usually focus on legal procedures and penal sections. By contrast, villagers involved in the cultivation of cannabis strongly emphasize the cultural value attributed to cannabis, the cultivation of which, they say, is a traditional practice that has been maintained exclusively for domestic and religious purposes (Berti 2011). Local newspapers give a great deal of visibility to this discourse, often reporting that villagers consider cannabis cultivation to have been approved by their village deities. For example, an article appeared in *The Tribune* in 2004, entitled 'Where devta tells them [villagers] to grow cannabis' includes statements from a number of villagers, who claimed that 'unless Jamlu god tells us to grow other crops, we will grow only cannabis'. Furthermore, the vice-president of Malana village, a place in the region famous for growing cannabis, is quoted as saying, 'Cannabis has been grown here since time immemorial'.[3]

Other newspapers report on villagers' discourses that criticize the criminalization of cannabis activities. The article *Hardships Multiply for Cannabis Growers* is representative of the kind of discourse reported in the press. The same journalist, Kuldeep Chauhan, refers to the way villagers consider the anti-cannabis Act as 'city-centric anti-villager law'. He writes about young girls who were asked by their parents 'to give up their studies as the anti-cannabis team has destroyed their only source of income.' He refers to Mand Das, a ward member of the panchayat complaining that 'we can't grow cannabis, the traditional source of handicrafts and staple food [though] our ancestors have survived on these two sources of livelihood down the centuries' (*The Tribune*, 6 October 2005).[4] The problem villagers have with the Narcotic Act is often presented as being linked to the policy regarding forest protection. The article reports, for example, how villagers belonging to the Great

Himalayan National Parks area complain that their traditional practice of collecting herbs from the forest is now banned. The journalist explicitly takes the defence of the 'poor villagers' against the implementation **/p.98/** of the law, reproaching forestry and police officials for not providing 'convincing answers.' (*The Tribune*, 6 October 2005)

Nevertheless, this local discourse has to be regarded as only part of the picture. As Molly (2001) underlines, for the last forty years cannabis cultivation has been under the control of national and international dealers whose only concern is to sell the product on foreign drug markets. The discourse on the 'traditional' use of cannabis also appears to contradict the fact that, in some cases, fields previously reserved for ordinary crops have recently been turned into cannabis fields—and in most cases, this has been requested by outsiders. The domestic and religious use of cannabis may well persist, but a villager cultivating cannabis today does it, first and foremost, to reply to a market demand (Berti 2011). The economic interest behind cannabis cultivation has even led villagers to develop some strategies in order to escape police control, such as sowing cannabis on woodland instead of private land so that nobody can be punished (*The Tribune*, 12 December 2005).

Though supported by the press and sometimes referred to by lawyers in informal conversations, the ongoing discourse about the cultural and religious importance of cannabis, is never used as a 'defence argument' inside the courtroom where narcotic cases are considered to be extremely serious and are punishable by very harsh sentences. However, these social and cultural dynamics inevitably impact the proceedings of a trial, often leading all village-based witnesses to side with the accused. This is especially true in cases where cannabis has been discovered on the property of the accused, whether cultivated in a field or hidden in his or her house. The judicial process may also ultimately be hampered by recurrent procedural errors made by the police during the investigation, which often results in the total collapse of the prosecutor's case. In order to analyze the interactions that took place during the trial I observed, I first examine various police documents included in the case file, which will help to introduce the case and to give some insight into the way investigations are reported before the court.

Writing up the story

Though never invoked before the judge, the discourse on the cultural and religious value of cannabis may be part of a preliminary version given by the accused before the case is taken up by the defence lawyer.
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This was what happened in the case presented here, which was registered against Kishan Ram and his son Hari Chand[5] under Section 20b of the Narcotic Act, which asserts that 'whoever produces, manufactures, possesses, sells, purchases, transports, or uses cannabis shall be punishable by rigourous imprisonment for a term which may extend to ten years, and with a fi ne which may extend to one lakh [one hundred thousand] rupees'.

In the FIR (First Information Report) for the case, the inspector noted the following:

> On [date], along with [seven police officers' names], I went in the day squad, and at six o'clock I received secret information that the accused, Kishan Ram, and his son, of Rajput caste and of [village], were involved in cannabis trading at their residential house and the report was reliable. At this time, the village president Devi Varma was informed [about the raid that the police wanted to make] on her mobile. On her arrival, the report about the search warrant was prepared and the copy of this authorization was sent to Constable Puran Chand of the criminal branch. Then, along with other officials, I went to the village of the accused and Kishan Ram was found at his house (Police diary).

The opening passage of a FIR such as this provides information which is of legal relevance. During the trial, each police officer who appears before the judge as a prosecutor witness is asked to repeat, orally, all the details written in the document, which may include the number and names of the officers who took part in the operation, place names, procedures followed, their exact timetable, and so on. Based on these details, the defence lawyer looks for contradictions in the police officers' replies. In fact, police records not only 'look backward at the events they describe, but they are also drawn up in anticipation of their prospective use by criminal law professionals' (Komter 2006:202).

In the case analysed here, the investigation reports were intended to fulfill the provisions indicated in the NDPS Act. Section 42 of the Act allows a police officer, superior in rank to a peon or constable, to possess the power 'of entry, search, seizure, and arrest without warrant or authorization [from a magistrate]'. An officer is also given the right to keep the identity of his informant secret, even though he is obligated to write the so-called grounds of belief—a document explaining why he should be allowed to proceed with the search without applying to the court for a warrant—and send it to his superior officer within **/p.100/** seventy-two hours of the search. To be more precise, an officer must justify why he believes that waiting for a warrant would provide 'the opportunity for the concealment of evidence or facility for the escape of an offender' (Section 42, NDPS Act). Despite the importance of this procedure in proving a case before the court, there are a number of instances in which police officers do not send the document in time or else draft it incorrectly, and defence lawyers regularly cite such mistakes as evidence that a false case has been invented against a client.

After official registration of the case, the facts are recorded by the police in the so-called police diary, which covers the period of the investigations.[6] The police diary for the case I witnessed included results from the questioning of the accused, which was carried out to obtain further information about the other people involved in the case. The inspector wrote that the two accused '[were] not saying anything related to the case'; they were 'clever' (*chalaka*) and 'of a criminal nature' (*apradhikism ke*). The report also described how, after twenty-four hours in police custody, the men were brought before the magistrate for the police to apply for permission to detain the accused in jail for three more days:

> The accused have been brought before the judge, and the judge has heard both parties' points of view and given his consent for three days in police custody. This time, the inspector and his colleagues have reached the jail with the accused. Food has been given to them and the guard is doing his duty. I, the inspector, am talking on the telephone to DSP Brijesh Sood of the crime branch.

A summary was provided at the end of the diary which concluded by assuring the reader that 'investigations into the case are underway, the file is being kept safe, and the report is being sent to the officers'.

Total transparency is guaranteed through the existence of a written record. Although no reference was made in the diary to the way the questioning was conducted, the accused reportedly said that the cannabis found in their house 'had been rubbed from the plants by their own hands, and [that] it had been kept in their house in order to be distributed as *prasad* (offerings) to *baba* and *sadhu* (ascetics) who were to come during the Shiva *puja* (worship)'. The version of events reported in the diary echoes the aforementioned cultural discourse about cannabis; the accused explained the presence of cannabis in their house using a religious/cultural argument, which implicitly led them to admit that cannabis was actually found in their house. This cultural argument **/p.101/** also appears in the first documents presented before the court that were produced while the two men were being held in police custody and which describe how the inspector of police presented them both to a judicial magistrate to prolong the custody order on the grounds that the men refused to speak.[7]

Despite featuring in the version of events given to the police by the accused, this was the last time that this cultural/religious discourse appeared in the official documents. No reference was made to it during the session trial, either in oral interactions or in written records. It did not therefore prejudice or contradict the defence's successive juridical strategies; neither was it binding for the accused, nor did it infl uence arguments during the trial. As we will see, not only did the defence lawyer attempt to show that no cannabis had been found in the house but also that no police officers had ever been there.

The Trial: The Orality Stage

The ethnographic observations regarding the case presented here began at the time of the trial itself, which was held at the Session Court in 2010, almost one and a half years after the case had been registered. During this period, after spending three weeks in police custody, the father and son had been released on bail and had returned to their village.

The first time I saw the two men was at the entrance to the court-room while they waited for their case to be called. When their turn came, they were asked to enter and stand at the back of the courtroom. They looked very nervous, heads bent, staring at the floor. For their defence, they had hired a lawyer specialized in narcotic cases, a somewhat self-assured man

who was always keen to tell stories about how he had succeeded in unsettling police officers during cross-examinations.

The prosecutor for the case was the district attorney, the highest authority at the Prosecutor Bureau, a rather elegant, sophisticated man in his sixties, whose main passion in life was not so much talking about law or criminal cases but about spirituality, meditation, and philosophy; whenever I called on him to ask about a case, it seemed that he would have happily talked for hours about these topics.

The session judge was a very jovial man, fond of English literature and always keen to receive me in his *chambra* to discuss the cases of the day. He liked to recount humorous anecdotes about previous **/p.102/** cases, which he used to illustrate the dysfunctionality of the Indian judicial system. Although he sometimes described sitting in court all day as 'boring', he was a conscientious, hard-working judge. During the trial, he took an active part in the proceedings, calling upon his former experience as a lawyer to question witnesses directly, especially those who turned hostile. The trial began with the presentation of evidence, during which the prosecutor's witnesses were called to the bar to affirm before the judge what they had stated during the investigation.[8]

Analysis of the subsequent court interactions shows the fluctuating value attributed to oral and written testimonies. While witnesses' written statements, as reported by the police in the file, need to be confirmed orally before the judge, the verbal interactions that take place in Hindi during the trial are simultaneously translated into English by the judge and written in the form of a first-person narrative from the point of view of the witnesses. In his re-transcription of the oral interactions, the defence lawyer's primary concern is that contradictions emerge in the police's version of events and that an alternative version be provided;[9] it is essential for the lawyer to ensure that this document is on record in order to undermine the story established by the police in their investigation accounts. As we shall see, the defence lawyer achieves his ends by asking police witnesses for very detailed, trivial information which he puts on record in the hope that this may contradict the police's previous written statements or provide accounts that are inconsistent with those of other police witnesses during cross-examination.

At the time of the trial therefore, the evidentiary value of the 'oral' statement eventually becomes less important than its written

re-transcription. The most significant *oral* part of the trial—witnesses' testimonies before the judge—paradoxically focuses on recording, i.e., writing the evidence. This shift in value between orality and writing will emerge in the analysis of courtroom interactions presented hereafter.

The Beginning of the Defence's Subtext

The first witness to be called to the bar was the *patwari*, a local land officer. *Patwaris* are commonly summoned to testify in narcotic cases, as they need to certify the identity of the person on whose property, **/p.103/** *i.e.*, land or house cannabis has been found. By questioning the witness, the lawyer put on record that the house of one of the accused was joined to his brother's house and that, because his brother was now dead, he and his sister-in-law had both inherited his brother's property. The lawyer also put on record that this house was joined to the house of the widow's brother and that the two houses had not been partitioned. Although this information may appear insignificant, it was in fact crucial evidence to support the lawyer's version of the facts, which was that the case had been completely invented by the police at the instigation of the widow's brother.

The next witness to appear before the court was a man who owned a shop in the village where the accused lived. At the time of the search, one of the police officers involved in the raid had asked the shopkeeper to lend him weights and a set of scales to weigh the cannabis found in the house of the accused. When the shopkeeper reached the bar, the prosecutor told him, 'You tell the truth and do not worry. No mountain will fall upon you. Why are you hiding something, and why are you carrying this burden on your back?'

These words were particularly revealing; the prosecutor had evidently realized that this witness was now on the side of the accused. The judge looked at the prosecutor quizzically, which prompted the prosecutor to explain his words—'This man is hiding and he is not telling the truth'—which clearly referred to the brief interaction that the prosecutor had had with him before entering the court.[10] The following is an extract from the oral interactions that took place in the courtroom in Hindi and in which the witness was expected to say that the police had taken the scales and weights to weigh the cannabis:

Judge: When did it happen [that the police came]? Can you tell us?
Man: I don't know.
Judge: Rack your brains and try to picture when it happened.
Man: Some men came at eight o'clock and took some weights and scales.
Judge: How many men were they?
Man: There were two.
Judge: Did they give them back to you?
Man: Yes, they returned them after a while.

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Prosecutor: Do you know why they took them?
Man: I don't know.
Prosecutor: (*angrily*) Why did you come here then? If you do not want to say anything, then why come to court?

The prosecutor had presumed that the shopkeeper would say that the police officer had told him that the weights and scales he had asked to borrow were needed to measure the cannabis found in the house. However, the man did not give this information when questioned, and the prosecutor did not ask to cross-examine him. The tension between the witness and the prosecutor was palpable during this part of the hearing, but this did not come across in the record.

The next witness was a taxi driver who had been hired by the police on the day of the search to take them to the village where the accused lived, which was situated in the mountains a fair distance from the main road. When the prosecutor asked this man to recount what had happened that day, the latter stated spontaneously that a CID (Criminal Investigation Department) officer, whom he referred to as Shiva Lal, had hired him to drive them to the village of the accused. However, this name—Shiva Lal—had not been given by the driver at the time of the investigation one and a half years earlier. In the police report, the driver had simply affirmed that the CID had hired his taxi, without mentioning a name.

At that stage in the trial, the name Shiva Lal did not rouse any particular interest in the prosecutor or the judge. No mention of it had ever been made in their presence, nor was there any record of it in the case file. Moreover, since the name had been given spontaneously by the prosecutor's witness, it appeared to be a completely 'neutral' piece of information. The judge therefore proceeded to translate into English what the witness had said, dictating to the stenographer,'[On the day of the search], a certain Shiva Lal of the CID had taken my taxi to a village

named Haripur.' The defence lawyer asked the driver if Shiva Lal was the 'widow's brother' (the brother of the sister-in-law of one of the accused), which the driver confirmed.

The role that Shiva Lal played in the defence's version of the events would be clearly revealed by the lawyer later in the trial, when the police officers were called to the bar. Yet even at this early stage, the defence **/p.105/** lawyer—as he hinted to me later—was trying to discreetly construct the 'subtext' of his defence by having a prosecutor witness introduce a 'seemingly' irrelevant piece of information (the name Shiva Lal) for the record, information that would ultimately be a crucial part of his defence. Such a strategy is sometimes developed beforehand by a lawyer who may encourage the accused, as the lawyer seemed to infer in this case, to persuade a prosecutor's witness to say something during the trial that can later be used to lend weight to the lawyer's story.[11]

Witnesses Turning Hostile: The Woman *Pradhan*

Up until that point in the trial, no witness had been explicitly declared hostile. The first real moments of tension occurred during the testimony given by the *pradhan* (president) of the village where the cannabis had been found. Before carrying out any search, police officers are obliged—according to a provision in the NDPS Act—to contact the village pradhan and to involve him or her in the search. Aside from serving as a guarantee for the accused, this provision reflects the responsibility that a pradhan has assumed within the village in which he or she has been elected.[12] Despite the major role that pradhans are called upon to play during investigations, they are often considered to be unreliable witnesses since they come from the same village as the accused. It is often thought that, as an elected member from the locality of the accused, the pradhan is likely to take sides with the accused and therefore to become a 'hostile witness' (cf. Berti 2010, 2011).

The pradhan in the case I attended, a peasant woman in her forties, was asked to repeat an oath after the judge: 'Whatever I say, I will speak the truth in all honesty and in accordance with *dharma*.' She was then told to recount the events that took place on the day of the search, one and a half years earlier. In her statement recorded by the police, the pradhan had said that she took part in the search and saw that cannabis had been found

in the house of the accused. Although the statement had been written on her behalf by a police officer, she had signed some parts of the paper (memo) as required by law. However, the following passages, taken from the court dialogues, demonstrate how the pradhan denied each and every point in the statement. They also illustrate how the judge assumed an active role during the hearing, almost completely taking over from the prosecutor.

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> Judge: What happened on that day?
> Pradhan: The police came to our place.
> Judge: Did the police ask you anything [when they asked you to go with them]?
> Pradhan: They did not ask me anything.
> Judge: Where did [the police offi cers] go then?
> Pradhan: They went to Kishan Ram's house [of the accused].
> Judge: Were you outside?
> Pradhan: Yes, I was outside.
> Prosecutor: Did they tell you anything [about] why they had to go inside?
> Pradhan: They didn't tell me anything.
> Judge: So why didn't you stop them? A pradhan can stop the police from doing certain things if they don't inform you of the illegal acts going on there. That is the law.
> Pradhan: They [the police] did not tell me anything, though I asked them. They just told me that they had to go there [to the house of the accused] because they had some work to do.

The pradhan thus denied before the judge what had been written in the police statement, namely, that she had been told the reason they wanted to search the house of the accused. Her replies were given in a rather pitiful tone of voice as if to convey the popular idea that police officers acted rudely and abused their positions of power vis-à-vis villagers. Although she was questioned many times, she insisted that she had not been told anything. The judge then dictated directly in English: 'At this stage, the learned public prosecutor has put forth a request that he be allowed to cross-examine the witness, as the witness has resiled from her previous statement. Allowed.' He then began to cross-examine the pradhan, since she was now clearly on the side of the accused.[13]

Judge: The police showed you some papers that you had to read and understand before signing.[14]
Pradhan: I did not read them because I was in a hurry, as I had to go to a wedding.

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The judge stared at her incredulously while the prosecutor shook his head, baffled. With this reply, the woman completely lost any credibility she had had before the court.

Prosecutor: You are a pradhan, and you sign without reading what you are signing? How can you do that? Why did you write your signature without reading the papers?
Pradhan: (*after some hesitation*) We trust the police, and we believe that whatever they write is correct. So I signed [the *memo*].

By trying to provide a plausible answer, the pradhan in fact contradicted what she had alluded to only a few minutes before, that is, to the idea that police officers abused their power.

Prosecutor: How much time did you spend there with the police?
Pradhan: I don't know.
Judge: Try to give some idea.
Pradhan: I am not sure; almost an hour.
Judge: You are a pradhan—you are sharp-witted, so you must know.

The judge proceeded to test the pradhan with a series of questions that had no relation to the case, with the aim of unsettling her.

Judge: Whose marriage was it?
Pradhan: My aunt's son's.
Judge: What's his name?
Pradhan: I've forgotten.
Judge: Was it the girl's or the boy's marriage?
Pradhan: It's my paternal aunt's son.
Judge: What is your aunt's name?

The woman was quiet for some time; then she quietly uttered a name, leading the prosecutor to think that she was lying.

> Prosecutor: It took a long time to reply, and after a lot of thought… I would be able to give my auntie's name without any hesitation!

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The prosecutor's comment provoked some laughter in the audience. Convinced that the pradhan was lying, the judge continued to ask her for details of the wedding. He then started questioning her about the cannabis that had been found in the house and about the fact that she was supposed to have followed all the police operations. The pradhan denied witnessing any such discovery and replied to each question that she did not know anything.

By denying that the police had found cannabis in the house, the woman effectively admitted that an unjust arrest had occurred and she had done nothing about it.

> Prosecutor: Did you file a written complaint that people from your area had been taken away by the police for no reason?
> Pradhan: No, I didn't.
> Prosecutor: Is it not your duty to protect the people of your area?
> Pradhan: Yes—I told them [the police] not to arrest them, but they didn't listen to me.

Although the judge and the prosecutor were visibly convinced that the witness was lying, they questioned her as if they believed she were telling the truth. This sort of dialogue is very common during cross--examinations; the person asking the questions follows the logic of the respondent in order to expose gaps in his/her arguments, even though the questioner thinks that the witness is lying.

Referring to the police report, the judge and the prosecutor proceeded by asking the pradhan to confirm her version of events as recorded in the statement she gave to the police when the cannabis was discovered in the house of the accused.

> Judge: When the search took place inside the house, a packet was found on the first floor, hidden in a cupboard on the veranda.
> Pradhan: No, nothing was found there.
> Judge: While checking that packet, cannabis was found there in the form of long sticks.
> Pradhan: I did not see it.

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The judge dictated 'It is incorrect that on searching the house of the accused, the police found a packet kept concealed in a cupboard on the fi rst floor, and on taking the said packet, cannabis in the shape of sticks was found; nor did I state this to the police' (Court record, 2010). Then, still in English, he dictated various passages from the pradhan's statement that had previously been recorded by the police in order to highlight contradictions with her present assertions. These passages were added as an aside after each reply from the pradhan before the court under the heading '(Confronted with statement [police reference] in which it is recorded)'.[15]

This way of recording the evidence produces a narrative in which, paradoxically, the person speaking repeatedly denies what she says. In fact, the main aim of the questions is not to elicit a reply from the witness, but rather to orally 'reconstruct' and rewrite in English what has been recorded in the police report. Thus, when the judge decided that the pradhan needed to be cross-examined, he in a sense implicitly re-established the police report's authority.[16]

Compared to the aforementioned police diary, the police report is seemingly more binding. Its contents can be used during the trial as a starting point when questioning a witness, and can also serve as a mirror to make the witness contradict themselves. In principle, the 'oral' version of events provided by the witness and subsequently written in the court record is considered to be more valuable in terms of legal evidence than what is written in the police report. However, as we have seen, in the case where the reply given by the witness to the court contradicts what they supposedly said to the police during the investigation, this contradictory statement will be added in brackets to the recording of the oral reply preceded by the formula 'Confronted with…'

At the end of the cross-examination, the judge finally said to the pradhan, 'Look, you are protecting them because they are your supporters and you are doing this to win their votes.' The pradhan then replied: 'No, they are not my supporters. They are from the other party.'

The judge dictated for the record in English: 'It is correct that the accused are of my *panchayat*. It is incorrect that they are my supporters. Self-stated that they are supporters of the other party. It is incorrect that I

have received consideration from the accused and that for that reason I am telling a lie.' (Court record, 2010).

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Referring to the electoral link between the accused and the witness is a typical way of concluding a hearing with a village pradhan. It is a standard formula added at the end of the court interaction to intimate that the witness is telling a lie and to provide a motive for this. In the case discussed here, both the judge and the prosecutor were convinced that in addition to winning the vote of the accused, the pradhan had received money from them. Yet, the electoral reference was a conventional form of recording the fact that the pradhan had turned hostile. Moreover, although there was no direct reference during the hearing to any money that the pradhan may have received, the term 'consideration' used by the judge in recording the evidence tacitly suggested such a deal.

While the judge and the prosecutor used the cross-examination to 'rewrite' the police report entirely (using the formula Confronted with…), the defence lawyer based his argument on it. He again, referred to Shiva Lal, the CID (Criminal Investigation Department) officer whom the taxi driver had identified as the man who had hired him on the day of the search. He asked the pradhan to confirm the taxi driver's assertion that this Shiva Lal was the brother of the sister-in-law of one of the accused, which the pradhan confirmed. She was also asked to confirm that this woman, now a widow, continued to live in her husband's house, which she shared with the family of the accused. After the pradhan had verified these statements, the cross-examination was transcribed in the court record as follows: 'It is correct that Shiva Lal, a CID official, is the brother of the widow of Hira Singh. It is correct that the relations of the family of the accused and the family of Hira Singh are strained. Self-stated that they are living separately but in the same house. Inside the house, there is no partition' (Court record).

According to the subtext to which the lawyer was alluding before the court, Shiva Lal had instigated his sister, who shared a house with the accused, to lodge a false case against them. The lawyer prompted the pradhan to state that all the signatures on the police report were false. He also showed the judge one of her signatures that had apparently been added between two lines by the police, with no serial number. All these

replies were translated into English and put on record as the judge dictated them.

At the end of the pradhan's hearing, the judge stared at the woman and addressed her in Hindi in a grave tone of voice: 'Look, it is your fi rst time as village president. If you have told the truth before the court, you **/p.111/** will get good results [*tera udhar ho jayega*]. Otherwise, if you have told a lie, you have ruined your *karma*.[…] The police have done their work, and if you have made a false statement, then you have done yourself wrong.'

The judge's reference to a moral or religious order brought the hearing to a close. This kind of assertion does not have the same judicial value as the standard forms of accusation delivered in English at the end of a cross-examination so that they might be put on record. Although the latter are not usually intended for the witnesses themselves (most of whom cannot understand English), but rather for those reading the fi le at a later stage (e.g., appeal judges), the moral judgements are addressed exclusively to the witnesses and are not put on record.

On the Lookout for Police Contradictions

The issue of truth that emerged in the pradhan's testimony cropped up again at the beginning of the police hearings. At this stage, the defence lawyer used the cross-examination to undermine the police officers' credibility and to show that they had entirely invented the case. He asked for extremely detailed information that was aimed not so much at explaining the reasons why the case had been fabricated than at increasing his chances of finding contradictions.[17] Here, the 'proof of truth' lay in a systematic search for minor elements of divergence between what had previously been written in the report and how the officers replied to the lawyer and the judge, as well as between the replies each of these officers gave before the court.

The lawyer's attack on the credibility of the police began during the cross-examination of the first police witness who had taken part in the raid. During the cross-examination, he fired a long list of detailed questions at the witness in order to fit each event into an exact timetable: What time did you leave there? Were you all together from the very beginning, or did you pick up people on the way? At what time did you reach the place? How many villages did you stop in and at what time?

Where did you stop to take tea? At what time did the inspector write the grounds of belief, and where did he write it? Who brought the grounds of belief to CID headquarters? Did they come back afterwards? At what time did you get back to headquarters, how, and with whom?
/p.112/

To be most effective, the lawyer asked these questions very quickly, using a tone of voice to suggest that the officer had invented the whole story. This strategy has a cumulative effect: the more the lawyer succeeded in undermining the policeman's credibility, the easier it was for him to discredit the other officers. During the long question-and-reply sequences, each of which is routinely translated and dictated by the judge to the stenographer, the lawyer managed to slip an important detail into the dictation or to frame a sentence to his liking, since his expertise lies in memorizing any minor detail that is likely to contradict the police officer's replies.[18]

Doubt was cast on the truthfulness of the police version when the first officer called to the bar was asked to recall the time at which the inspector had received the information that the witness had cannabis in his house. Significantly, the officer's answer did not match the timing written in the report. After asking which of the two times was correct, the lawyer, in an accusatory tone of voice, promptly dictated on his behalf in English: 'My today's testimony is correct, whereas the time of receipt of secret information written in seizure *memo* is incorrect.' Many other replies contradicted the report and therefore, on many occasions, the lawyer was able to put on record that the report made at the time of the investigation was incorrect.[19]

At the end of the cross-examination, the lawyer dictated to the stenographer some concluding sentences in English without having asked the witness any questions:

> It is incorrect that all the papers were prepared later on in the police station just to comply with the provisions of the Narcotic Drugs and Psychotropic Substance Act. It is wrong to suggest that the case has been planted upon the accused by the police in connivance with Shiva Lal. It is wrong to suggest that the taxi was hired by Shiva Lal. It is incorrect that I am deposing falsely. (Court record, 2010)

This kind of declaration serves to summarize the lawyer's version of events through the witness's denial of what the lawyer appeared to be stating. This is common practice in court; it allows the lawyer to put forward his account without giving the accused any opportunity to respond.

Once the police's credibility had been questioned, the judge himself seemed to be in a dubitative frame of mind. When the second police officer came to the bar to be cross-examined, the judge asked him a **/p.113/** series of questions: Where were you patrolling that day? Who was with you? When did you arrive at the house? What did you and the other officers find, and where did you find it? Who took the cannabis, and what did they do with it? How many seals did they put on the samples?

The atmosphere in the court had started to change: it was clear that the judge now mistrusted the police officers, and was disappointed in their work. Meanwhile, the accused, though unable to follow the English part of the dialogue, appeared to be a little more relaxed, and had moved slightly nearer to the bar to follow the interactions more closely. They now dared to show their faces to the judge, although nobody addressed them directly. The situation definitely shifted in their favour with the introduction of the next police witness, after whose testimony the whole case collapsed. The young man (another CID officer) looked terrified. By the time he entered the courtroom, the judge was already visibly annoyed by the turn of events, which served to unsettle him even more. The judge began by asking the officer to give precise information, such as the names of the other officers involved and the registration plate of the taxi hired by the police, to which the young man, panicking, responded by trying discreetly to read some notes he had written on the palm of his hand. As people around him began to laugh, making him more nervous, the judge changed his attitude and addressed the man calmly: 'You have written on your hand, so read it and look at the words properly.' The witness told the judge that the officers had stopped at some places on the way to the house of the accused, but when the judge asked for the names of the places, he looked confused and kept quiet. 'This is useless! He never went there', commented the defence lawyer.

Sensing that he was getting embarrassed, the judge addressed the young man in a sympathetic tone of voice

Judge: Do you feel sick?
Man: Yes, I do.
Judge: What's the problem?
Man: I've got high blood pressure.
Judge: Since when? Don't be scared and don't get embarrassed. Make yourself at home. Be happy. Why are you scared? It is a good thing that you seized the cannabis. Just tell us what happened there.

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The judge was now convinced that the case was hopeless, but he did not want to stress the young man any further. The officer continued to give contradictory replies. 'All my witnesses are now working for the lawyer!' the prosecutor exclaimed scornfully.

When the defence lawyer's turn came to cross-examine the witness, he began by stating for the record that the man had written something on his hand: 'It is correct that the name of the officers, the vehicle number, and the timing have been written by me on my hand for remembrance.' He then attempted to elicit from the officer every single detail about the way the investigations had been conducted and completed the cross-examination by dictating a few sentences in English, still from the point of view of the witness but this time without even asking him any relevant questions.

However, these sentences are preceded by 'It is correct that' or 'It is incorrect that', depending on whether the person asking the question thinks that the witness would deny or confirm his statement.[20] Thus, the dictation for the young officer's cross-examination reads as follows: 'It is incorrect that no contraband was recovered from the house of the accused. It is also incorrect that I was not with the police party on that day. It is incorrect that Shiva Lal, the CID official, was with us on that day. It is incorrect that I am deposing falsely, being an official. It is incorrect that a false case has been set up against the accused' (Court record, 2012). By putting these set phrases on record, the lawyer's aim was to suggest that the exact opposite was true: no contraband was recovered from the house of the accused, and the police officer who was testifying was not with the team of policemen on that day (and was thus lying). He also wanted to put on record that Shiva Lal, the CID officer, was with these policemen on the day of the search, which would have supported his theory that orders for the raid had been given by him.[21] The police officer who was testifying

was most probably unaware of the lawyer's strategy to build the 'widow's brother complot' theory. This explains why he denied what the lawyer asked him—that Shiv Lal was with the team of policemen on the day of the search. Instead of weakening the lawyer's theory, his denial seemed to reinforce the general perception that the police were lying because the officer was contradicting what the taxi driver had previously stated.

After this last cross-examination, and even though there were more witnesses waiting to testify, the judge proceeded with the resolution of **/p.115/** the case. He suggested that the prosecutor close the evidence and fix the date for the arguments; clearly, he had already reached a decision and was intent on not wasting any more time. 'Now it's time for arguments, not for witnesses', he said bitterly.

The analysis of the interactions, therefore, shows how contrary to the pradhan's testimony discussed previously, the police's loss of credibility did not lead to these officers being declared hostile. This reveals a major difference in the way the officers' statements, on the one hand, and the pradhan's, on the other, were perceived as untrue by the court. The police officers did not present a completely new version of events, as the *pradhan* had done by saying, for example, that nothing had been recovered from the house of the accused. The difference between the officers' oral testimonies and the previous report, which they had produced themselves, concerned the details of the investigative procedure. Yet without actually being declared hostile, the police officers contradicted their own report and therefore invalidated the accusation even more than the pradhan had done by turning hostile.

The preceding discussion reveals how the position of power that police officers enjoy during the investigations may be completely overturned at the time of the trial, when their words—both written and oral—may be challenged and even ridiculed. In addition, this case study exemplifies how the courtroom may become a hostile environment for police officers in instances where the judge begins to side with the defence lawyer rather than the prosecutor. While some police officers appear to be somewhat used to the kind of pressure one experiences when interacting with legal specialists, others, like the young man described above, feel very uneasy in court and can end up completely destroying the police's credibility.

Out-of-Court Discussion About the Case

The lawyer for the accused did not provide any defence witnesses. Instead, he strengthened his counter-story for the case using the questions he had put to prosecution witnesses and the techniques he had used during cross-examination. In his version of the events, Shiva Lal appeared to be a crucial figure. On the one hand, he was presented as an accomplice in a plot organized by Kishan Ram's widowed sister-in-law, who wanted to stop sharing her husband's property. On the other hand, **/p.116/** he was presented as a CID officer, which could explain why he had been able to convince the CID inspector to order a raid on the property of the accused.

As a matter of fact, since the defence lawyers' version of the story had not been taken seriously by anyone, no one had taken the trouble to check whether Shiva Lal was really a CID officer or even whether he really existed. While the case was pending, I had a particularly interesting conversation with the judge in his *chambra*. 'Shiva Lal?' he exclaimed. 'That's just the defence's story! This name does not appear anywhere in the statements. The taxi driver made up the name of this man during the hearing because he had sided with the accused.' The judge explained to me that the lawyer had to provide a story in order to 'problematize his case', and that the tale about Shiva Lal most probably filled this role. He did not seem particularly bothered about this. 'We are concerned with the main witnesses,' he explained, 'which in this case are police officers, and the police officers have contradicted themselves a lot. Two of them have said that one of the officers was not present; others have said that he was. This contradiction has cast doubt on the presence of some police officers at the scene.' What he, as a judge, was required to consider, he told me, was whether the accused was fully aware that there was cannabis at his property. 'You must have noticed that the defence has laid out the case based on the fact that the house is joined to another house and that the widow of the brother of one of the accused also resides there', he remarked. 'The prosecution was bound to prove that the house was not the joint property of the other family members. If this is not proved, the possibility that some other persons residing in the house could have kept the cannabis there cannot be ruled out'.

The prosecutor, who was very disappointed in the police officers, did not seem to lend much importance to Shiva Lal either. When I went to see

him in his office, he was waiting for a visit from the state inspector who had investigated the case and whom he had invited for a meeting. The inspector, who had recently retired, was required to appear in court as a witness the following day, and the prosecutor wanted to bring him up to date regarding the situation. Upon the inspector's arrival, the prosecutor handed him the investigative report and started listing the many errors that the inspector had committed. The inspector looked puzzled and muttered some vague excuses, but he put forward no real argument.
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The prosecutor's first reproach concerned the 'search warrant' that the officer had sent to the deputy police superintendent via a constable in order to proceed with the search without waiting for the warrant issued by the magistrate. Instead of using Section 42 of the NDPS Act (about searching property), the inspector had used Section 50, which deals with questions and answers. Moreover, although he had written the 'grounds of belief ' and had sent it to his superior officer, the inspector had forgotten to add the disclaimer that there was 'no time to wait for court authorization, as there is the risk that the cannabis might be hidden or thrown away' (section 42d NDPS Act). 'I don't know whether it's out of ignorance or what,' remarked the prosecutor rather disappointedly, addressing the inspector, 'but this is mandatory procedure. Otherwise, this document [the grounds of belief] is just wastepaper. For three days, I have been ridiculed in court because of you.'

Trying to reassure the inspector, the prosecutor added, 'Okay, what's done is done. Now it's too late, but I tell you that I am incapable of proving the offence.' However, the prosecutor continued to admonish the inspector, listing other failings; for instance, the name of the pradhan had been added to the list of witnesses with no serial number. 'You put her name there without a number', he began 'That looks as if you added her name later, and in the court she denied that this signature is hers. There is no sign under the carbon and no number anywhere. Now, you see, we can neither explain these things nor can we withdraw it all because this is the original document.'

The prosecutor's third criticism of the investigation concerned the alleged timing of events. In the police report, the time at which the police had received the tipoff was listed as 7:30 a.m., but the time at which they had sent the 'grounds of belief' was 6:35 a.m.—nearly an hour earlier!

'What's the meaning of all this?' the prosecutor cried. 'Why do you put the time then? It is not necessary to put it.' Finally, he mentioned the raiding party: 'Let me say that bringing ten men for a raid is not an intelligent thing to do. They will make a lot of contradictions before the court. Two or three men are enough.' The prosecutor again mitigated his censure by adding, 'Okay, it's too late now'. He reminded the inspector that the following day he would have to explain all of these issues to the judge and, even more distressingly, to the defence lawyer. He told the inspector to take the fi le with him and to read it at home at his leisure.
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The inspector left the office with the file under his arm, and after a time another officer entered. He was the deputy police superintendent, the inspector's superior officer, a more self-confident, well-educated man. The following day, he too would have to appear before the judge to be questioned about why he had not stopped the investigations once he realized that the document the inspector sent him was not accurate. Speaking in Hindi mixed in with a number of English expressions, he apologized many times to the prosecutor, saying that he had given full instructions to his 'men'—the inspector and others—and had told them to draft the documents in a certain way, yet despite his instructions they had done it all wrongly. 'I was so shocked on seeing that report', he said. 'I thought about going to beat them up! Actually, I really reprimanded him [the inspector], but what was to be done? In fact, I never punished him.' 'I know', said the prosecutor. 'I'm also like that.'

'I was really very upset, really very upset', continued the deputy superintendent. 'I didn't know what action I could take without completely destroying the inspector's career. I didn't do anything because he was about to retire. Actually, sir, you know this. We don't have a good investigating officer. Those who investigate are not there all the time, so you can't always give full instructions.'

The interactions I have just described need to be contextualized within the institutional relationship between prosecutors and police officers. Since 1973, Indian police have operated separately from the prosecutor agency and have had complete control over investigations. Although some high-ranking police officers have offices inside the district court complex and even, in some district courts, just next door to the prosecutor's office, the prosecution is not supposed to intervene in investigations until the

challan (charge sheet) has been prepared. In most cases, investigations are carried out in the field by lower-ranking officers (so-called non-gazetted officers) who are monitored by their superiors (gazetted officers). In the case study presented here, we have seen how operations were led in the field by the inspector; he had sent the grounds of belief to his superior officer, and, as was stated in court, the operation was already over when this superior officer reached the house of the accused. He also left the scene of the crime before the raid party had completed its task. As he explained to the prosecutor, by the time he realized that there were mistakes in the document it was too late: 'I could neither change the document nor explain the mistakes'.[22]

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Police officers do not usually have solid excuses for their mistakes when they are face to face with a prosecutor. I had the opportunity to converse with some CID officers at their headquarters and it was obvious that they had far more to say in their defence there and then than in court. They particularly criticized a defence lawyer's habit of systematically declaring that all cases are fictitious. As one officer explained in Hindi, 'They always say that we arrested the accused for no reason, that we didn't draw the map straightaway, and that all the documents were in fact prepared at the police station. This is a total waste of time.' The officers also complained about the delay between the investigations and the trial and about the conditions under which they had to testify before the court:

> When I'm called to give my testimony, I arrive at the court one hour before and I have only one hour to read the file. I am asked before the court—but I can't remember the small details of the case—what time I was present and what I was doing there and things like that. I can't remember all that. The defence lawyer will asks how far it is from that place, and how many houses there are in that village, and how far it is from another place, and he'll proceed with a cross-examination. I'll tell him everything because I drew the map, so I'll tell him everything, and after that he'll want more information on very minor questions that I cannot give, especially when the case is two or three years old or even more.

The Defence Version Prevails

After all the evidence had been presented, both the inspector and the superintendent of police were cross-examined at length by the defence lawyer, but this had no further impact on the prosecutor's case. By this point everyone was convinced that the prosecutor had lost the case and that the accused were going to be acquitted. Subsequently, the accused were examined under Section 313 of the Code of the Criminal Procedure. This is the only moment in a trial, when the accused has the opportunity to express themselves before the bench. However, in most cases this part of the trial does not lead to any great surprises. The questions for the witnesses are prepared beforehand, and begin with 'It has come in the prosecution evidence led against you that […the charges are listed]. What have you to say about […]?' The replies are usually very standard, with the accused systematically stating, 'It is incorrect', **/p.120/** 'It is wrong', or 'I don't know'. It is only at the end of the series of questions that the replies may include some supplementary information to sum up the defence's general theory. In weak cases, where the prosecutor has failed to prove the case, the statement of the accused is a mere formality. In the case discussed here, for example, the statement was even taken in the stenographer's office with only the lawyer, the prosecutor, and the accused present.

Apart from denying all the points raised in the questions, the accused stated that no cannabis had been found in their house and that they had been framed by the police at the request of Shiva Lal, who was working in the Criminal Investigation Department' (Court record 2010). We have seen how this version of the events was overlooked during the trial; even when the defence lawyer, by questioning the pradhan, explicitly disclosed how Shiva Lal was crucial to his counter-narrative of events, the role of this man and even his very existence had not been challenged by the prosecutor. The attorney's team even considered my efforts to look into the matter to be a total 'waste of time'.

Yet the 'Shiva Lal story' was to be unexpectedly put forward as a fully legitimate account by the judge who ruled to acquit the accused. In his twenty-five-page judgment, after recalling in detail the main logic behind the defence's 'complot theory', the judge wrote,

> By whom the taxi was hired remained a mystery. One police witness said under oath that the taxi had been hired by the inspector, but this version has been contradicted by the taxi driver, who said that his taxi was hired by a man called Shiva Lal, of the C.I.D.

The judge then continued as follows:

> The said contradiction apparently does not appear of much signifi cance, but if read in conjunction with the defence set up on behalf of the accused [the 'complot's theory'], it has become most significant. (Court record, 2010)

At the beginning of his judgment, the judge had merely referred to the 'Shiva Lal story' as a possible reason why the accused 'may have been falsely implicated in the case.' Nevertheless, this story ultimately proved to be crucial for him in providing the case with a narrative logic.

It should be noted that the 'complot theory' is constantly used by the defence lawyer in criminal cases. The potential impact of such a theory **/p.121/** on a judicial decision increases if the case is referred to an appeal court. After all, it is in the interest of the defence lawyer at the trial to make reference to an 'enemy', whether real or invented. In fact, should a case go to appeal, this type of issue may raise doubts in the judge's mind, but only if it had been put on record during the trial.[23]

During the trial discussed above, not only had the defence lawyer but also the judge cross-examined the police witnesses at length in order to discern contradictions between their testimonies. In his ruling, the judge underlined every detail of the incongruities in the accounts provided by the police officers when they were questioned at the bar. 'The said contradictions,' he wrote many times in his text, 'have rendered doubtful the presence, manner, and mode of the [police] proceedings from the headquarters [to the house of the accused] in the manner set up by the prosecution'. He also emphasized the problem of the joint ownership of the house where the cannabis had been found, which prevented the prosecutor from proving 'that the charas [cannabis] in question had been found in the possession of the accused and no one else […] as a result of which the prosecution has miserably failed to prove that the accused were found in exclusive and conscious possession of the contraband in question' (Court report, 2010).

Technical arguments over, for example, procedural errors or contradictions in police stories emerge systematically in narcotic cases which lead to many similarities between different investigations. Similarly, the 'social' argument—that there was a conspiracy against the accused—is part of a repertoire that is regularly proposed by the defence lawyer. Both are forged through cross-examination, although the relevance they may acquire varies considerably according to which judge conducts the trial.

A judge's personality and the style he adopts in court are important variables in determining the direction a trial may take, and both have a sizeable influence on the way the evidence is assessed.[24] During the case in question, the judge and the defence lawyer ultimately appeared to be of one mind in doubting the police's version of the story, but other judges may have turned the evidence around to suit the prosecution.[25] The impact of a judge's attitude on a trial's outcome is a topic frequently raised by defence lawyers, some of whom try to adjust their styles of cross-examination to curry favour with the judge. In situations where the odds are 50-50, the judge does not generally have a clear idea of the **/p.122/** verdict when the trial draws to a close, while in the case presented here, no one seemed to doubt that the police officers had lost all credibility and that the accused would be acquitted.

Although the police officers had clearly made many mistakes, the final verdict was in all likelihood elicited by aspects of the trial that were difficult to convey in writing; it relied on a certain court dynamic, on the performance of the various protagonists in the trial, and on the power relations enacted both inside and outside the courtroom. These aspects, which were highly perceptible in the trial setting, are barely traceable in the way trial interactions have been put on record.

* * *

My concern in this chapter has not been so much to understand how true the defence or the police story is but rather, by relying on a case study, how the notions of 'truth' and 'untruth' are used and managed in a court of law. Kolsky (2010) has shown how the issue of truth was a constant concern for the British in India, especially when it came to administering justice. Colonial administrators often characterized Indians as people who could not 'distinguish fact from fiction' or who had a 'notorious disregard for truth' (Kolsky 2010:108–9; see also Lal 1999). The

case presented here shows how the culturalist discourse on truth is reproduced by many Indian judges and prosecutors who cannot help stating that Indian people, especially villagers, tell lies before the court.

The notions of 'truth' and 'fiction' were constantly evoked in the court both by the prosecutor (or the judge) in cross-examining witnesses from the village of the accused and by the defence lawyer in cross-examining police officers. In order to understand what these notions mean in this context we must draw upon what emerged from the details of trial interactions as well as from how people involved in the trial understand the case outside the court.

By suggesting that the pradhan was lying, the judge was implicitly endorsing the police's version of events. However, this presumption proved to be incorrect; in the follow-up to the hearings, the judge began to doubt the credibility of the police story. In fact, due to the police officers' contradictory replies, the very 'fact' of their presence in the house of the accused was increasingly challenged by the judge, even though **/p.123/** this in turn contradicted the part of the pradhan's statement that was thought to be true by the judge, that is, that the police had actually gone to search the house of the accused.

As it transpires from the court interactions, the relationship between telling the truth and lying was not as Lynch and Bogen note in reference to a different case, 'a simple binary opposition between making true and false statements' (Lynch and Bogel, 1996). The judge was convinced in this case that both the pradhan and the police were lying but not about the same point: the pradhan was considered to be lying when she said that cannabis had not been discovered, and the police officers were considered to be lying when they said that they had all taken part in the raid. We may note that there is a discrepancy here between what was written in the court record and what emerged from the informal discussions. The judge dictated in the record that the pradhan was lying for political reasons, though he was of the opinion that the woman had received money from the accused. On the other hand, the judge did not record the fact that the police officers were also telling lies despite his conviction that contrary to what they had claimed, some police officers had not taken part in the raid. During our informal conversations, the judge told me that the police's lies were due to their desire to make the case appear stronger for the prosecution, whereas in his written judgment he supported the defence's

version of the story, that the police officers had invented the case on Shiva Lal's request.

As we have seen, the perception of truth and lies in such contexts relies partly on the performative skills of the legal professionals in challenging the other party's version of events, as well as on the witnesses' guile when replying while giving evidence—which particularly appeared to work against the police in this case.

Finally, the definition of truth appears to be related to the question of whether a previous statement is considered to be legally binding. For example, the accused initially admitted that the cannabis in their house was for use during religious ceremonies, although this statement was not binding—even if reported in the police diary—as far as the outcome of the case was concerned. Despite showing implicitly that the police had gone to their house and had discovered cannabis, neither the prosecutor nor the judge referred to this version of events during the trial. The fact that this information was overlooked during the trial may be due in part to the somewhat unconventional nature **/p.124/** of the so-called 'police diary' which is often a neglected aspect of the police investigation report. Court hearings focus on the report of the witnesses' statements collected by the police during the investigation. Although these statements are said to be non-binding for the witnesses, as they have to be confirmed orally, they are used as a gauge to evaluate the truthfulness of their replies in court. Indeed, the case presented here has revealed the ambiguous value of the 'principle of orality' in Indian criminal procedure. Though a witness's statement must be confirmed orally during the trial, what is taken into account by the judge when making his decision—and by higher-level courts in the event of an appeal—is only what has been put on record in writing during the trial.

Finally, the case analysed here raises the issue of the importance of fiction in the judicial process. By comparing court documents with informal discussions, at least three kinds of fictions can be identified. The first, commonly attributed to police officers, is interpreted as a way of ensuring conformity between investigative practices and the so-called technicality of legal provisions. A second fiction is created by villagers who, having negotiated with the family of the accused, deny whatever the police have written on their behalf in the report. The final fiction is that of the defence lawyer, who tries to challenge the police's version of the story

not only by undermining the officers' credibility vis-à-vis the court, but also by proposing a conventional social scenario—that of a family conspiracy—which has ultimately been accepted by judges as the possible truth.

Notes

[1] Tribune News Service 'Chief Justice for steps to check drug menace', *The Tribune* (Himachal Pradesh edition), Shimla, March 27, 2010. http://www.tribuneindia.com/2010/20100328/himachal.htm#6, 26/06/2014.

[2] This kind of official meeting is an occasion for people dealing with criminal cases in their everyday work to discuss issues in a more analytical way. The Narcotic Drugs Act is a topic frequently chosen by the Academy, which shows that judges are aware of the problems involved in the Act's implementation.

[3] Chauhan, Kuldeep 'Where devta tells them to grow cannabis.' The Tribune (Himachal Pradesh edition), 27 July 2004.

[4] Chauhan, Kuldeep,'Hardships multiply for cannabis growers', The Tribune (Himachal Pradesh edition), Shimla, 6 October 2005. http://www.tribuneindia.com/2005/20051006/himachal.htm#1 (accessed 29 May 2014)

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[5] Most of the names used here have been changed.

[6] The diary also contains a step-by-step account of the actions undertaken by the accused while they were in custody: when they ate, dates of medical examinations, whether a guard was present, and so on. The person who made the report, who identifies himself by his role ('I, the inspector, am talking'), recorded the names of all the people within the police force who were involved in the investigation. Additionally, he provided information on how the fi le concerning the accused was circulated within the police department.

[7] 7 . At this stage, the magistrate was authorized to set bail even though he himself would not be trying the case; it was to be tried by a higher court because it was punishable by more than ten years' imprisonment.

[8] The prosecutor must select witnesses amongst those put forward by the police.

[9] Most of the time, this alternative story is constructed entirely by the lawyer on the basis of his own questions, which are translated and reformulated in English in the first person from the point of view of the witness by simply adding the

words 'It is correct that…' at the beginning if the witness confirms what the lawyer asks, or 'It is incorrect that…' in the case where he or she denies it.

[10] The prosecutor meets the witnesses before they enter the courtroom to refresh their memories about the information they provided in previous statements.

[11] Negotiations with the prosecutor's witnesses are carried out not by the lawyer but by the accused or his/her family members, who come to the lawyer's office to receive instructions.

[12] According to Section 47 of the NDPS Act, it is the 'duty of certain officers to provide information to any police officer when it may come to his knowledge that any land has been illegally cultivated with opium poppies, cannabis plants, or coca plants, and every such officer of the government who neglects to give such information shall be liable to punishment'. Evidence shows that during the colonial period, a similar procedure existed in which a headman from the area where the accused lived was brought in to witness the investigation during the investigation process (cf. Singha 1998:16).

[13] Although a request to cross-examine a witness is always recorded by the judge as coming from the prosecutor, most of the time it is the judge himself who decides when to make this request and who actually begins the cross--examination.

[14] Here the judge is referring to a part of the police record called memo, which is made whenever the police take something from the scene of the crime during the investigation. Contrary to the oral statement that witnesses give to the police, the memo must be signed by an independent witness.

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[15] During the cross-examination, the witness was systematically confronted with his/her previous statement, which was referred to after every question as a way of casting doubt on his/her reply.

[16] This technique recalls what Conley and O' Barr observed (2005:26) in reference to an American context, where they noted that 'Because each of the tag questions is preceded by a statement that is damaging to the witness the answers are almost irrelevant. Even if the witness answers in the negative the denial may be lost in the flow of the lawyer's polemic. By controlling question form, the lawyer is thus able to transform the cross-examination from dialogue into self-serving monologue.'

[17] For the use of this cross-examination technique in a UK context, see Good (2004).

[18] As a judge explained to me, a good lawyer has to 'master the file'. However, a prosecutor rarely does so because, unlike the defence lawyer, he does not have a team of junior lawyers working for him.

[19] One wonders how the officers could actually remember all these details, including the exact timing of each operation some eighteen months after the report had been written. According to the procedure established by the Indian Evidence Act, witnesses (including police officers) are asked to reply without the report in front of them, but they may 'refresh their memories' by reading the file again just before entering the courtroom. What is required of them, therefore, is not to accomplish the impossible task of remembering every detail, but to succeed in replying to the questions put to them during the trial without contradicting what they wrote in their previous report. It is more a performance based on the witness's capacity to reproduce orally what has been written in the file than an actual recollection of facts.

[20] Any legal professional in India who reads these sentences, including the appeal judge, recognizes that this is the method a lawyer uses to suggest the exact opposite of what a witness appears to confirm or deny in the report.

[21] It should be noted that the use of a double negative such as 'It is incorrect that I was not…' is sometimes confusing even for judges, and some lawyers seem to play on this double negative to frame the statement to their advantage.

[22] Although the prosecutor now showed his disappointment in the police, it seems that he himself had not noticed all the technical mistakes before approving the *challan* that needed to be filled in at the session court. As reported in Chapter 4 of the prosecutor manual, one of the prosecutor's tasks is to 'scrutinize the final investigation report': 'In the case where there is non-compliance or where the investigation is still incomplete regarding a crucial aspect, the prosecutor will bring the matter to the notice of the police superintendent who may order action to bridge the gap in investigations' (Prosecution Manual 2008).

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[23] A High Court judgment can only be based on information from the trial, which means that a recording of the evidence is crucial for reaching an eventual resolution of the case. When attending High Court hearings, I noted that the judge always asked the lawyer if any enmity between the victim and the accused had been mentioned (and recorded) in the trial evidence.

[24] Compare with Conley and O'Barr (1990:108-12).

[25] An extreme example of this comes courtesy of a case conducted by another session judge, which was held in the same court as the case presented here. This

judge had very strict rules for recording evidence during the trial: when witnesses came to the bar, instead of letting the prosecutor question them, the judge immediately began to dictate to the stenographer what the police officers had recorded for the witness statement at the time of the investigation. This was done in order to reduce the likelihood of a witness turning hostile. His way of conducting the trial provoked discontent among the lawyers, who complained that they were no longer allowed to cross-examine the witnesses in the manner to which they were accustomed. With this new judge, there was barely room for a lawyer to propose a conspiracy theory like the 'Shiva Lal version'. When one looks at the decisions taken by this judge on narcotic cases similar to the one described here, one finds sentences such as 'There was not even a suggestion of previous hostility of the witnesses of the prosecution with the accused person. As such, the possibility of false implication was ruled out' (State of HP vs [xx], 2009).

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