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READING MATERIAL

for

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

Important Judgments on NDPS post 2011

Date : 20th August, 2017 (Sunday)
Venue : Judicial Academy Jharkhand

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JUDICIAL ACADEMY JHARKHAND

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HUSSAIN AND ANR VERSUS UNION OF INDIA

Bench: Hon'ble Mr. Justice Adarsh Kumar Goel, Hon'ble Mr. Justice Uday Umesh Lalit

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.509 OF 2017

(Arising out of Special Leave Petition (Crl.)No. 4437 of 2016)

Hussain and Anr. Appellants
Versus
Union of India Respondent

WITH

CRIMINAL APPEAL NO.511 OF 2017

(Arising out of Special Leave Petition (Crl.)No. 348 of 2017)

Aasu Appellant
Versus
State of Rajasthan Respondent

JUDGMENT

ADARSH KUMAR GOEL, J.

1. Leave granted. Grievance in these appeals is against denial of bail pending trial/appeal where appellants have been in custody for a long period.

2. In the first case, the appellants have been in the custody since 4th August, 2013 on the allegation of having committed offence under Section 21(c) of the Narcotics Drugs and Psychotropic Substances Act, 1985 (the NDPS Act). Their bail application, pending trial, has been dismissed. In the second case, the appellant is in custody since 11th January, 2009. He has been convicted by the trial court under Section 302 IPC and sentenced to undergo life imprisonment. His bail application has been dismissed by the High Court pending appeal. The appellants contend that, having regard to the long period of custody, they are entitled to bail as speedy trial is their fundamental right under Article 21 of the Constitution.

3. To consider the question as to the circumstances in which bail can be granted on the ground of delayed proceedings when a person is in custody, notice was also issued to learned Attorney General and Mr. Siddharth Luthra, Senior Advocate was appointed Amicus Curiae.

4. We have heard learned counsel for the parties, the learned amicus and the learned Additional Solicitor General.

5. During the hearing reference has been made to the decisions of this Court dealing with the issue and reference has also been made to Section 436A Cr.P.C. which provides

for grant of bail when a person has undergone detention upto one half of maximum prescribed imprisonment. It was submitted that the said provision applies only during trial and the first case is not covered by the said provision as the appellant therein has not undergone the requisite detention period to claim bail under the said provision.

6. With regard to grant of bail, pending appeal, reference has been made to decisions of this Court in Akhtari Bi (Smt.) v. State of M.P.[1] and Surinder Singh alias Shingara Singh v. State of Punjab[2] which provides that if the appeal is not heard for 5 years, excluding the delay for which the accused himself is responsible, bail should normally be granted. The second case is not covered by the said judgment as the pending appeal in the High Court is of the year 2013.

7. In Abdul Rehman Antulay and ors. v. R.S. Nayak and anr.[3] while holding that speedy trial at all stages is part of right under Article 21, it was held that if there is violation of right of speedy trial, instead of quashing the proceedings, a higher court can direct conclusion of proceedings in a fixed time. In the light of these principles, the present appeals can be disposed of by directing that the pending trial in the first case and the appeal in the second case may be disposed of within six months. We order accordingly and dispose of the matters to the extent of grievance in the two cases.

8. However, since the issue is arising frequently, inspite of earlier directions of this Court, further consideration has become necessary in the interest of administration of justice and for enforcement of fundamental right under Article 21.

9. As already noticed, speedy trial is a part of reasonable, fair and just procedure guaranteed under Article 21. This constitutional right cannot be denied even on the plea of non-availability of financial resources. The court is entitled to issue directions to augment and strengthen investigating machinery, setting-up of new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures as are necessary for speedy trial[4].

10. Directions given by this Court in Hussainara Khatoon (supra) to this effect were left to be implemented by the High Courts[5] are as follows: 2. Since this Court has already laid down the guidelines by orders passed from time to time in this writ petition and in subsequent orders passed in different cases since then, we do not consider it necessary to restate the guidelines periodically because the enforcement of the guidelines by the subordinate courts functioning in different States should now be the responsibility of the different High Courts to which they are subordinate. General orders for release of undertrials without reference to specific fact-situations in different cases may prove to be hazardous. While there can be no doubt that undertrial prisoners should not languish in jails on account of refusal to enlarge them on bail for want of their capacity to furnish bail with monetary obligations, these are matters which have to be dealt with on case-to-case basis keeping in mind the guidelines laid down by this Court in the orders passed in this writ petition and in subsequent cases from time to time. Sympathy for the undertrials who are in jail for long terms on account of the pendency of cases has to be balanced having regard to the impact of crime, more particularly, serious crime, on society and these considerations have to be weighed having regard

to the fact- situations in pending cases. While there can be no doubt that trials of those accused of crimes should be disposed of as early as possible, general orders in regard to judge strength of subordinate judiciary in each State must be attended to, and its functioning overseen, by the High Court of the State concerned. We share the sympathetic concern of the learned counsel for the petitioners that undertrials should not languish in jails for long spells merely on account of their inability to meet monetary obligations. We are, however, of the view that such monitoring can be done more effectively by the High Courts since it would be easy for that Court to collect and collate the statistical information in that behalf, apply the broad guidelines already issued and deal with the situation as it emerges from the status reports presented to it. The role of the High Court is to ensure that the guidelines issued by this Court are implemented in letter and spirit. We think it would suffice if we request the Chief Justices of the High Courts to undertake a review of such cases in their States and give appropriate directions where needed to ensure proper and effective implementation of the guidelines. Instead of repeating the general directions already issued, it would be sufficient to remind the High Courts to ensure expeditious disposal of cases.

(emphasis added)

11. Deprivation of personal liberty without ensuring speedy trial is not consistent with Article 21. While deprivation of personal liberty for some period may not be avoidable, period of deprivation pending trial/appeal cannot be unduly long. This Court has held that while a person in custody for a grave offence may not be released if trial is delayed, trial has to be expedited or bail has to be granted in such cases[6].

12. Timely delivery of justice is a part of human rights. Denial of speedy justice is a threat to public confidence in the administration of justice. Directions of this Court in Noor Mohammed v. Jethanand and anr.[7] are as follows:

34. Therefore, we request the learned Chief Justice of the High Court of Rajasthan as well as the other learned Chief Justices to conceive and adopt a mechanism, regard being had to the priority of cases, to avoid such inordinate delays in matters which can really be dealt with in an expeditious manner. Putting a step forward is a step towards the destination. A sensible individual inspiration and a committed collective endeavour would indubitably help in this regard. Neither less, nor more.

13. In Thana Singh v. Central Bureau of Narcotics[8] this Court directed that liberal adjournments must be avoided and witnesses once produced must be examined on consecutive dates. Directions were also issued for setting up of sufficient laboratories, for disposal of seized narcotics drugs and for providing charge-sheets and other documents in electronic form in addition to hard copies of same to avoid delay.

14. In Akhtari Bi (supra) this Court observed as under: 5. it is incumbent upon the High Courts to find ways and means by taking steps to ensure the disposal of criminal appeals, particularly such appeals where the accused are in jails, that the matters are disposed of within the specified period not exceeding 5 years in any case. Regular Benches to deal with the criminal cases can be set up where such appeals be listed for final disposal. We feel that if an appeal is not disposed of within the aforesaid period

of 5 years, for no fault of the convicts, such convicts may be released on bail on such conditions as may be deemed fit and proper by the court. In computing the period of 5 years, the delay for any period, which is requisite in preparation of the record and the delay attributable to the convict or his counsel can be deducted. There may be cases where even after the lapse of 5 years the convicts may, under the special circumstances of the case, be held not entitled to bail pending the disposal of the appeals filed by them. We request the Chief Justices of the High Courts, where the criminal cases are pending for more than 5 years to take immediate effective steps for their disposal by constituting regular and special Benches for that purpose.

15. Again in Imtiyaz Ahmad v. State of Uttar Pradesh and Ors.[9] it was observed that long delay has the effect of blatant violation of rule of law and adverse impact on access to justice which is a fundamental right. Denial of this right undermines public confidence in justice delivery. These observations have been reiterated in recent Constitution Bench judgment in Anita Kushwaha etc. etc. v. Pushap Sudan etc. etc.[10]. In the said judgment it was noticed that providing effective adjudicatory mechanism, reasonably accessible and speedy, was part of access to justice.

16. In Bhim Singh V. Union of India[11], it was observed that central government must take steps in consultation with the state governments in fast tracking all types of criminal cases so that criminal justice is delivered timely and expeditiously. In the same case, in a further order[12] it was noted that more than 50% of the prisoners in various jails are undertrial prisoners. In spite of incorporation of Section 436A in Cr.PC. undertrial prisoners continue to remain in prisons in violation of the mandate of the said section. Accordingly, this court directed jurisdictional Magistrate/Chief Judicial Magistrate/ Session judge to hold one sitting in a week in each jail/prison for 2 months for effective implementation of Section 436A. Again in Re: Inhuman Conditions in 1382 Prisons[13] reference was made to the advisory issued by Ministry of Home Affairs to all States for implementation of Section 436A, Cr.PC. stipulating constitution of a review committee in every district under the chairmanship of the District Judge. It was noted that 67% of the prisoners in the jails were undertrials prisoners.

17. In Imtiyaz Ahmad (supra) this Court noted that serious cases involving murder, rape, kidnapping and dacoiting were pending for long period. In some cases proceedings are delayed on account of stay orders. Out of the said cases, in 9 per cent cases stay was operating for more than 20 years, in 21 per cent stay was operating for more than 10 years. Having regard to the situation noticed in the judgment, this Court directed the High Courts to dispose of cases in which proceedings were stayed preferably within six months from the date of stay orders. The Law Commission was directed to make recommendation for measures to be adopted by way of creation of additional courts and the like matters. The Law Commission made its recommendations in its 245th Report which was examined by the National Court Management Systems Committee (NCMSC) to determine additional number of courts required. The said report was thereafter considered by this Court in judgment dated 2nd January, 2017 in Imtiyaz Ahmad v. State of U.P. & Ors. [Criminal Appeal No. 254-262 of 2012]. After noticing the stand of the Ministry of Law and Justice on the subject of creation of additional posts,

this Court also noted the recommendations of the 14th Finance Commission whereby additional fiscal allocation was provided. In that context, the Prime Ministers letter to the Chief Ministers calling upon them to allocate funds in the State Budgets was also referred to. Further follow up letter of the Law Minister and Resolution of Chief Justices Conference held in April, 2016 were also referred to. Thereafter, this Court issued directions for computing the required judge strength of the district judiciary and also directed the State Governments to take steps for enhancing the judge strength accordingly. The directions are as follows:

22. Having regard to the above background, we now proceed to formulate our directions in the following terms :

i) Until NCMSC formulates a scientific method for determining the basis for computing the required judge strength of the district judiciary, the judge strength shall be computed for each state, in accordance with the interim approach indicated in the note submitted by the Chairperson, NCMSC;

ii) NCMSC is requested to endeavour the submission of its final report by 31 December 2017;

iii) A copy of the interim report submitted by the Chairperson, NCMSC shall be forwarded by the Union Ministry of Law and Justice to the Chief Justices of all the High Courts and Chief Secretaries of all states within one month so as to enable them to take follow-up action to determine the required judge strength of the district judiciary based on the NCMSC interim report, subject to what has been stated in this judgment;

iv) The state governments shall take up with the High Courts concerned the task of implementing the interim report of the Chairperson, NCMSC (subject to what has been observed above) and take necessary decisions within a period of three months from today for enhancing the required judge strength of each state judiciary accordingly;

v) The state governments shall cooperate in all respects with the High Courts in terms of the resolutions passed in the joint conference of Chief Justices and Chief Ministers in April 2016 with a view to ensuring expeditious disbursal of funds to the state judiciaries in terms of the devolution made under the auspices of the Fourteenth Finance Commission;

vi) The High Courts shall take up the issue of creating additional infrastructure required for meeting the existing sanctioned strength of their state judiciaries and the enhanced strength in terms of the interim recommendation of NCMSC;

vii) The final report submitted by NCMSC may be placed for consideration before the Conference of Chief Justices. The directions in (i) above shall then be subject to the ultimate decision that is taken on receipt of the final report; and

viii) A copy of this order shall be made available to the Registrars General of each High Court and to all Chief Secretaries of the States for appropriate action. The said matter now stands adjourned to July, 2017.

18. During Joint Conference of Chief Ministers of States and Chief Justices of High Courts held in April, 2015, a decision was taken that all High Courts will establish Arrears Committees and prepare a plan to clear backlog of cases pending for more than 5 years. Such Committees have reportedly been established. In Chief Justices Conference held in April, 2016 under Item No. 8 inter alia the following resolution was passed:

[8] DELAY AND ARREARS COMMITTEE:

xxx xxx xxx Resolved that

(i) all High Courts shall assign top most priority for disposal of cases which are pending for more than five years;

(ii) High Courts where arrears of cases pending for more than five years are concentrated shall facilitate their disposal in mission mode;

(iii) High Courts shall progressively thereafter set a target of disposing of cases pending for more than four years;

(iv) while prioritizing the disposal of cases pending in the district courts for more than five years, additional incentives for the Judges of the district judiciary be considered where feasible; and

(v) efforts be made for strengthening case-flow management rules.

19. The position of five year old cases continues to be alarming in many States. Total number of more than five year old cases in subordinate courts at the end of the year 2015 is said to be 43,19,693 as noted in para 9 of the judgment of this Court dated 2nd January, 2017 in Imtiyaz Ahmad v. State of U.P. & Ors. [Criminal Appeal No. 254-262 of 2012]. Number of undertrials detained for more than five years at the end of the year 2015 is said to be 3599.[14] Number of appeals pending in High Courts where detention period is beyond five years may be still higher.

20. It appears that annual action plans have been prepared by some High Courts with reference to the subject of discussion in the Chief Justices Conference. Reference to action plan of the Punjab and Haryana High Court for the year 2011-2012[15] shows that undertrials who were in custody for more than two years as on 1st April, 2011 in Session Trial cases and those in custody for more than six months in Magisterial Trial cases were targeted for disposal, apart from five year old cases and other priority cases. Similar targets were fixed for subsequent years and result reflected in the pendency figures shows improvement in disposal of five year old cases and cases of undertrials in custody beyond two years in Session Trial cases and six months in Magisterial Trial cases in subordinate courts in the jurisdiction of Punjab & Haryana High Court.[16] Reportedly, success is on account of monitoring inter alia by holding quarterly meetings of District Judges with Senior High Court Judges as well as constant monitoring by concerned Administrative Judges[17].

Presumably, there is similar improvement as a result of planned efforts elsewhere. In view of successful implementation of plan to dispose of cases of undertrials in custody in two years in Session Trial cases and six months in Magisterial trials, we

do not see any reason why this target should not be set uniformly. The same need to be regularly monitored and reflected in performance appraisals of concerned judicial officers. Handicaps pointed out can be tackled at appropriate level. Accordingly, we are of the view that plan of each High Court should include achieving the said target and not the target of five years for undertrials in custody. Of course, if such cases can be disposed of earlier, it may be still better. Plans can be revised as per local conditions. We also feel delay in disposal of bail applications and cases where trials are stayed are priority areas for monitoring. Timeline for disposal of bail applications ought to be fixed by the High Court. As far as possible, bail applications in subordinate courts should ordinarily be decided within one week and in High Courts within two-three weeks. Posting of suitable officers in key leadership positions of Session Judges and Chief Judicial Magistrates may perhaps go a long way in dealing with the situation. Non performers/dead word must be weeded out as per rules, as public interest is above individual interest.

21. Another suggestion which cropped up during the hearing of the present case relates to remedying the situation of delay in trials on account of absconding of one or the other accused during the trial. In this regard our attention has been drawn to an amendment in the Code of Criminal Procedure, 1898 of Bangladesh by way of adding Section 339B to the following effect: Trial in absentia [339B. (1) Where after the compliance with the requirements of section 87 and section 88, the Court has reason to believe that an accused person has absconded or concealing himself so that he cannot be arrested and produced for trial and there is no immediate prospect of arresting him, the Court taking cognizance of the offence complained of shall, by order published in at least two national daily Bengali Newspapers having wide circulation], direct such person to appear before it within such period as may be specified in the order, and if such person fails to comply with such direction, he shall be tried in his absence.

(2) Where in a case after the production or appearance of an accused before the Court or his release on bail, the accused person absconds or fails to appear, the procedure as laid down in sub-section (1) shall not apply and the Court competent to try such person for the offence complained of shall, recording its decision so to do, try such person in his absence. (emphasis added)

22. It is for the concerned authority to take cognizance of the above amendment which may considerably reduce delay in cases where one or the other accused absconds during the trial.

23. Learned Amicus Curiae as well as learned Additional Solicitor General have suggested that monitoring by all High Courts is necessary to ensure minimizing adjournments at all levels, taking steps to remove obstacles in speedy trials including setting up of adequate number of laboratories, use of Video Conferencing to examine scientific experts or otherwise, appointment of public prosecutors, compliance of Section 207/208 Cr.P.C. by scanning/digitizing police reports, introduce system for electronic service of summons (wherever necessary), issuing timelines for disposal of bail matters at all levels. It has also been suggested that suitable amendments ought to be made in the

Code of Criminal Procedure for permitting tendering evidence of medical witnesses on the pattern of Section 293 Cr.P.C. While we have discussed some of the issues germane to the subject of speedy trials, in view of directions already issued by this Court, issuance of further directions and monitoring of directions already issued is left to the concerned High Courts.

24. In view of the above, we do consider it necessary to direct that steps be taken forthwith by all concerned to effectuate the mandate of the fundamental right under Article 21 especially with regard to persons in custody in view of the directions already issued by this Court. It is desirable that each High Court frames its annual action plan fixing a tentative time limit for subordinate courts for deciding criminal trials of persons in custody and other long pending cases and monitors implementation of such timelines periodically. This may perhaps obviate the need for seeking directions in individual cases from this Court. We also feel that it is desirable for Chief Justices of all the High Courts to take other steps consistent with the directions already issued by this Court for expeditious disposal of criminal appeals pending in High Courts where persons are in custody by fixing priority having regard to the time period of detention. We also reiterate the directions for setting up of adequate number of forensic laboratories at all levels. Specification of some of these issues is in addition to implementation of other steps including timely investigation, timely serving of summons on witnesses and accused, timely filing of charge-sheets and furnishing of copies of charge-sheets to the accused. These aspects need constant monitoring by High Courts.

25. One other aspect pointed out is the obstruction of Court proceedings by uncalled for strikes/abstaining of work by lawyers or frequent suspension of court work after condolence references. In view of judgment of this Court in Ex. Captain Harish Uppal versus Union of India[18], such suspension of work or strikes are clearly illegal and it is high time that the legal fraternity realizes its duty to the society which is the foremost. Condolence references can be once in while periodically say once in two/ three months and not frequently. Hardship faced by witnesses if their evidence is not recorded on the day they are summoned or impact of delay on undertrials in custody on account of such avoidable interruptions of court proceedings is a matter of concern for any responsible body of professionals and they must take appropriate steps. In any case, this needs attention of all concerned authorities the Central Government/ State Governments/Bar Councils/Bar Associations as well as the High Courts and ways and means ought to be found out to tackle this menace. Consistent with the above judgment, the High Courts must monitor this aspect strictly and take stringent measures as may be required in the interests of administration of justice.

26. Judicial service as well as legal service are not like any other services. They are missions for serving the society. The mission is not achieved if the litigant who is waiting in the queue does not get his turn for a long time. Chief Justices and Chief Ministers have resolved that all cases must be disposed of within five years which by any standard is quite a long time for a case to be decided in the first court. Decision of cases of undertrials in custody is one of the priority areas. There are obstructions at every level in enforcement of right of speedy trial vested interests or unscrupulous elements try to

delay the proceedings. Lack of infrastructure is another handicap. Inspite of all odds, determined efforts are required at every level for success of the mission. Ways and means have to be found out by constant thinking and monitoring. Presiding Officer of a court cannot rest in the state of helplessness. This is the constitutional responsibility of the State to provide necessary infrastructure and of the High Courts to monitor the functioning of subordinate courts to ensure timely disposal of cases. The first step in this direction is preparation of an appropriate action plan at the level of the High Court and thereafter at the level of each and every individual judicial officer. Implementation of the action plan will require serious efforts and constant monitoring.

27. To sum up:

(i) The High Courts may issue directions to subordinate courts that

(a) Bail applications be disposed of normally within one week;

(b) Magisterial trials, where accused are in custody, be normally concluded within six months and sessions trials where accused are in custody be normally concluded within two years;

(c) Efforts be made to dispose of all cases which are five years old by the end of the year;

(d) As a supplement to Section 436A, but consistent with the spirit thereof, if an undertrial has completed period of custody in excess of the sentence likely to be awarded if conviction is recorded such undertrial must be released on personal bond. Such an assessment must be made by the concerned trial courts from time to time;

(e) The above timelines may be the touchstone for assessment of judicial performance in annual confidential reports.

(emphasis added)

(ii) The High Courts are requested to ensure that bail applications filed before them are decided as far as possible within one month and criminal appeals where accused are in custody for more than five years are concluded at the earliest;

(iii) The High Courts may prepare, issue and monitor appropriate action plans for the subordinate courts;

(iv) The High Courts may monitor steps for speedy investigation and trials on administrative and judicial side from time to time;

(v) The High Courts may take such stringent measures as may be found necessary in the light of judgment of this Court in Ex. Captain Harish Uppal (supra) .

28. Accordingly, we request the Chief Justices of all High Courts to forthwith take appropriate steps consistent with the directions of this Court in Hussain Ara Khatoon (1995) 5 SCC 326) (supra), Akhtari Bi (Smt.) (supra), Noor Mohammed (supra), Thana Singh (supra), S.C. Legal Aid Committee (supra), Imtiaz Ahmad (supra), Ex. Captain Harish Uppal (supra) and Resolution of Chief Justices Conference and

observations hereinabove and to have appropriate monitoring mechanism in place on the administrative side as well as on the judicial side for speeding up disposal of cases of undertrials pending in subordinate courts and appeals pending in the High Courts.

We place on record our appreciation for the valuable assistance rendered by Mr. Atmaram N.S. Nadkarni, learned Additional Solicitor General and Mr. Siddharth Luthra, learned Senior Advocate.

A copy of this order be sent to all the courts.

Hon'ble Mr. Justice Adarsh Kumar Goel

Hon'ble Mr. Justice Uday Umesh Lalit

NEW DELHI;

MARCH 9, 2017.

❑❑❑

(2016) 1 Supreme Court Cases 315

(BEFORE DIPAK MISRA AND PRAFULLA C. PANT, JJ.)

STATE THROUGH INTELLIGENCE OFFICER,
NARCOTICS CONTROL BUREAU .. Appellant;

Versus

MUSHTAQ AHMAD AND OTHERS .. Respondents.

Criminal Appeals Nos. 1294-95 of 2015†, decided on October 6, 2015

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 20(b)(ii)(B) or S. 20(b)(ii)(C) and Ss. 8, 2(vii-a), 2(xxiii-a) & 2(iii) and Noti. dt. 19-10-2001 issued under Ss. 2(vii-a) & (xxiii-a) — Punishment for possession of commercial quantity of charas (derivative of cannabis) under S. 20(b)(ii)(C) — Converted by High Court to that under S. 20(b)(ii)(B), treating quantity to be intermediate quantity — High Court guided by percentage by weight presence of "tetrahydrocannabinol" (THC) content in the sample, and on that foundation, held seized item from both respondent-accused to be beyond small quantity but lesser than commercial quantity — Validity of — Percentage of THC in seized contraband article — Relevance**

— Held, in instant case, contraband article seized was "charas" and dictionary clause S. 2(iii), NDPS Act clearly states that it can be crude or purified obtained from cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish — Definition also indicates any mixture with or without any neutral material of cannabis or any drink prepared therefrom — It finds mention at Entry 23 of aforementioned Notification — Notification clearly shows, that more than 1 kg of charas is commercial quantity — Charas found in possession of both respondents weighed 6.2 kg and 4 kg, respectively, which, accordingly, is commercial quantity — Again, commercial quantity for contraband article, tetrahydrocannabinol, as stated in Entry 150, is 50 gm — Tetrahydrocannabinol content in seized item from both respondents was 5.1% and 4.9%, respectively, which by weight comes to 316 gm and 196 gm, which again goes beyond "intermediate" quantity and falls under "commercial" quantity — Judged from any score, view expressed by High Court is not correct — Seized item did fall under commercial quantity and trial court rightly treated the same as such — Hence, conviction recorded by trial court under S. 20(b)(ii)(C) is absolutely impeccable — Therefore, judgment of High Court set aside and conviction of respondents under S. 20(b)(ii)(C) restored (Paras 6, 7, 12 to 29, 33 and 34)

Harjit Singh v. *State of Punjab*, (2011) 4 SCC 441 : (2011) 2 SCC (Cri) 286, *relied on*

Mushtaq Ahmad v. *State*, Criminal Appeal No. 35 of 2009, decided on 3-6-2011 (J&K), *reversed*

Amarsingh Ramajibhai Barot v. *State of Gujarat*, (2005) 7 SCC 550 : 2005 SCC (Cri) 1704; *Sami Ullaha* v. *Narcotic Control Bureau*, (2008) 16 SCC 471 : (2010) 3 SCC (Cri) 793; *E. Micheal Raj* v. *Narcotic Control Bureau*, (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558; *Ouseph* v. *State of Kerala*, (2004) 4 SCC 446 : 2004 SCC (Cri) 1303, *referred to*

† Arising out of SLPs (Crl.) Nos. 8567-68 of 2012

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Amendment Act 9 of 2001 — Objects and reasons for, stated — In instant case, admittedly occurrence took place in 2004 and, therefore, 1985 Act as amended in 2001 applies (Paras 9 to 12)**

Basheer v. *State of Kerala*, (2004) 3 SCC 609 : 2004 SCC (Cri) 1107, *relied on*

C. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 20(b)(ii)(C) — Punishment under — Minimum punishment of 10 yrs' RI prescribed under S. 2(b)(ii)(C) — Held, no court can impose lesser punishment — Respondent-accused contended that they had already spent more than 7 yrs in custody and, therefore, they should not be incarcerated again, hence, rejected — Their sentence modified to 10 yrs' RI and fine of Rs 1 lakh, with default stipulation of 1 year's RI — Criminal Trial — Sentence — Minimum sentence/Minimum statutory sentence (Paras 30 to 33)**

Narendra Champaklal Trivedi v. *State of Gujarat*, (2012) 7 SCC 80 : (2013) 1 SCC (Cri) 963 : (2012) 2 SCC (L&S) 343; *State of M.P.* v. *Ayub Khan*, (2012) 8 SCC 676 : (2012) 3 SCC (Cri) 1021, *relied on*

Appeals allowed Y-D/55517/CR

Advocates who appeared in this case :

Ms Sushma Manchanda, M. Khairati and B. Krishna Prasad (Advocate-on-Record) and Yoshak Adhyaru, Advocates, for the Appellants;

Ms Nidhi, Advocate, for the Respondents.

Chronological list of cases cited ***on page(s)***

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2. (2012) 7 SCC 80 : (2013) 1 SCC (Cri) 963 : (2012) 2 SCC (L&S) 343, *Narendra Champaklal Trivedi* v. *State of Gujarat* 330*c*
3. (2011) 4 SCC 441 : (2011) 2 SCC (Cri) 286, *Harjit Singh* v. *State of Punjab* 328*c-d*, 328*e-f*, 329*b-c*, 329*d*
4. Criminal Appeal No. 35 of 2009, decided on 3-6-2011 (J&K), *Mushtaq Ahmad* v. *State* **(reversed)** 316*g-h*, 331*a-b*, 331*c*
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8. (2004) 4 SCC 446 : 2004 SCC (Cri) 1303, *Ouseph* v. *State of Kerala* 318*c*, 323*f*, 323*f-g*
9. (2004) 3 SCC 609 : 2004 SCC (Cri) 1107, *Basheer* v. *State of Kerala* 321*a-b*

The Judgment of the Court was delivered by

DIPAK MISRA, J.— In this appeal, by special leave, the State of Jammu and Kashmir has called in question the legal propriety of the judgment and order passed in *Mushtaq Ahmad* v. *State*[1] whereby the High Court has converted the conviction recorded by the learned trial Judge holding the respondent-accused guilty of the offence punishable under Section 20(*b*)(*ii*)(*C*) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity

1 Criminal Appeal No. 35 of 2009, decided on 3-6-2011 (J&K)

"the NDPS Act") and sentencing each of them to suffer rigorous imprisonment for a period of 12 years and further to pay a fine of Rs 2 lakhs each and in case of default of payment of fine to undergo rigorous imprisonment for a period of one year to one under Section 8 read with Section 20(*b*)(*ii*)(*B*) of the NDPS Act and restricted the period of custody to the period already undergone, that is, slightly more than seven years and to pay a fine of Rs 25,000 each with a modified default clause.

2. The facts which are necessary to be stated are that the respondent-accused were charge-sheeted under Section 8 read with Section 20 of the NDPS Act and accordingly, they were sent up for trial. The accused persons denied the accusations and claimed trial. The prosecution to substantiate its stand examined number of witnesses and brought in series of documents in evidence. The learned trial Judge taking note of the fact that Mushtaq Ahmad, the first respondent and Gulzar Ahmad, the second respondent were in possession of 6 kg 200 gm and 4 kg of charas, respectively and the prosecution had been able to establish the same, treated the contraband article as commercial quantity and accordingly found them guilty for the offence punishable under Section 20(*b*)(*ii*)(*C*) of the NDPS Act and eventually considering the gravity of the offence and the proliferating and devastating menace the drugs have been able to create in the society and keeping in view the need for eradication, sentenced each of them as has been mentioned hereinabove.

3. The aforesaid judgment of conviction and order of sentence constrained the respondent-accused to prefer Criminal Appeals Nos. 35 and 36 of 2009 and the Division Bench of the High Court of Jammu and Kashmir at Jammu heard both the appeals together. The Division Bench addressed to various aspects and taking into consideration the law laid down in *Amarsingh Ramajibhai Barot* v. *State of Gujarat*[2] and *Sami Ullaha* v. *Narcotic Control Bureau*[3] and *E. Micheal Raj* v. *Narcotic Control Bureau*[4] came to hold that the narcotic drug proved to have been recovered from the possession of the accused persons was of "intermediate quantity" in terms of Section 2(*vii-a*) of the NDPS Act read with SO No. 1055(E) dated 19-1-2001 and the addition of "Note 3" after "Note 4" did not change the complexion of the matter for the reason that the alleged recovery had been made way back on 5-4-2004, that is, more than five years prior to the amendment had come in force and further there was no allegation that there were more than one narcotic drugs or isomers, esters, ethers and salts of the narcotic drug detected in the recovered substance. Being of this view, the High Court opined that the accused could only be convicted for the offence punishable under Section 8 read with Section 20(*b*)(*ii*)(*B*) of the NDPS Act. The High Court, accordingly, held thus:

> "*38*. The appellants against the above backdrop were to be convicted of the offence punishable under Section 8 read with Section 20(*b*)(*ii*)(*B*) of the Act and sentenced to the punishment prescribed under

2 (2005) 7 SCC 550 : 2005 SCC (Cri) 1704
3 (2008) 16 SCC 471 : (2010) 3 SCC (Cri) 793 : AIR 2009 SC 1357
4 (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558

Section 20(*b*)(*ii*)(*B*) of the Act and not to the punishment prescribed for the offence involving possession of 'commercial quantity' of narcotic drug under Section 20(*b*)(*ii*)(*C*) of the Act. However, the appellants were arrested on 5-4-2004 and are in custody for last more than seven years.

39. We therefore, alter the conviction of the appellants to Section 20(*b*)(*ii*)(*B*) of the NDPS Act and sentence the appellants to the imprisonment already undergone and a fine of Rs 25,000 each. In default of payment of fine the appellants shall suffer rigorous imprisonment for a further period of six months. Criminal Appeal No. 35 of 2009 titled *Mushtaq Ahmad* v. *State* and Criminal Appeal No. 36 of 2009 titled *Gulzar Ahmad* v. *State* are disposed of accordingly."

4. It is submitted by Ms Sushma Manchanda, learned counsel appearing for the State that the High Court has fallen into error by converting the conviction from Section 20(*b*)(*ii*)(*C*) to Section 20(*b*)(*ii*)(*B*) of the NDPS Act relying on the decisions in *Amarsingh Ramajibhai Barot*[2], *Ouseph* v. *State of Kerala*[5] and *E. Micheal Raj*[4] without taking into consideration the definition of "charas" under the dictionary clause of the NDPS Act and fallaciously dwelt upon the other substance which has no applicability. She has seriously criticised the finding recorded by the Division Bench of the High Court on the ground that neither the definition nor the stipulations in the relevant notification lend support to such a finding and, therefore, the conclusion arrived at by the High Court is vulnerable in law.

5. Ms Nidhi, learned counsel for the respondent, per contra, submitted that the High Court has rightly converted the offence from Section 20(*b*)(*ii*)(*C*) to Section 8 read with Section 20(*b*)(*ii*)(*B*) of the NDPS Act regard being had to the percentage in the seized contraband article and the sentence imposed being in the upper limit of the sentence prescribed in the provision, the same does not warrant any interference by this Court. It is her further submission that the reliance on the authorities placed by the High Court cannot be found fault with. Additionally, it is contended by her that the discretion exercised by the High Court cannot be regarded as injudicious warranting interference by this Court.

6. We shall deal with the first aspect first, for our finding on that score shall foreclose other submissions as there would be no warrant for the same. There is no dispute over the fact that the contraband articles were seized on 5-4-2004. Section 8 of the NDPS Act at that time read as follows:

"**8.** ***Prohibition of certain operations***.—No person shall—

(*a*) cultivate any coca plant or gather any portion of coca plant; or

(*b*) cultivate the opium poppy or any cannabis plant; or

(*c*) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance,

2 *Amarsingh Ramajibhai Barot* v. *State of Gujarat*, (2005) 7 SCC 550 : 2005 SCC (Cri) 1704

5 (2004) 4 SCC 446 : 2004 SCC (Cri) 1303

4 *E. Micheal Raj* v. *Narcotic Control Bureau*, (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558

except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes."

7. Section 20 of the NDPS Act at the relevant time after certain amendments reads thus:

"**20.** ***Punishment for contravention in relation to cannabis plant and cannabis***.—Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder—

(*a*) cultivates any cannabis plant; or

(*b*) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis,

shall be punishable—

(*i*) where such contravention relates to clause (*a*) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees; and

(*ii*) where such contravention relates to clause (*b*)—

(*A*) and involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine, which may extend to ten thousand rupees, or with both;

(*B*) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(*C*) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

8. Prior to the amendment, Section 20 of the NDPS Act read as follows:

"**20.** ***Punishment for contravention in relation to cannabis plant and cannabis***.—Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder—

(*a*) cultivates any cannabis plant; or

(*b*) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis,

shall be punishable—

(*i*) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees;

(*ii*) where such contravention relates to cannabis other than ganja, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

9. The legislature amended certain provisions of the NDPS Act which came into effect on 2-10-2001 vide amending Act 9 of 2001. Be it stated the said Act rationalised the structure of punishment under the NDPS Act by providing graded sentences linked to the quantity of narcotic product or psychotropic substance in relation to which the offence was committed. The Statement of Objects and Reasons to the Bill declares the intention thus:

"*Amendment Act 9 of 2001.*—The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years' rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences."

10. Section 41(1) of amending Act 9 of 2001 determined the application or exclusion of the amending provisions. The said provision read as follows:

"**41.** ***Application of this Act to pending cases.***—(1) Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending before the courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence:

Provided that nothing in this section shall apply to cases pending in appeal."

11. The question arose with regard to the constitutional validity of the said provision inasmuch as there was a classification between the accused facing trial and the convicts who had already been convicted and their appeals were pending after 2-10-2001. This Court in *Basheer* v. *State of Kerala*[6], after referring to certain authorities pertaining to classification came to hold as follows: (SCC p. 618, para 28)

> "*28.* In the result, we are of the view that the proviso to Section 41(1) of amending Act 9 of 2001 is constitutional and is not hit by Article 14. Consequently, in all cases, in which the trials had concluded and appeals were pending on 2-10-2001, when amending Act 9 of 2001 came into force, the amendments introduced by amending Act 9 of 2001 would not be applicable and they would have to be disposed of in accordance with the NDPS Act, 1985, as it stood before 2-10-2001."

12. In the case at hand, admittedly the occurrence had taken place in 2004 and, therefore, the 2001 Act applies. The "Notes" that came to be inserted by way of amendment at a later date need not be debated upon in this case, for the Simon-pure reason that the said Notes would not be attracted regard being had to the factual score in the present case. Presently, we shall refer to certain pertinent provisions of the NDPS Act.

13. Section 2(*vii-a*) of the NDPS Act defines "commercial quantity". It is as follows:

> "**2. (*vii-a*) 'commercial quantity**', in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette;"

14. Section 2(*xxiii-a*) of the NDPS Act defines "small quantity". It reads as follows:

> "**2. (*xxiii-a*) 'small quantity**', in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette;"

15. At this juncture, it is appropriate to refer to the definition of "cannabis" (hemp) as contained in Section 2(*iii*) of the NDPS Act:

> "**2. (*iii*)(*a*)** *charas*, that is, the separated resin, in whatever form, *whether crude or purified*, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;
>
> **(*b*)** ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and
>
> **(*c*)** *any mixture*, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;"
>
> (emphasis supplied)

16. It is pertinent to reproduce the relevant extract from the Notification dated 19-10-2001 issued under clauses (*vii-a*) and (*xxiii-a*) of Section 2 of the NDPS Act. The requisite part of the Table is reproduced below:

6 (2004) 3 SCC 609 : 2004 SCC (Cri) 1107

"Sl. No.	*Name of narcotic drug and psychotropic substance [International non-proprietary name (INN)]*	*Other non-proprietary name*	*Chemical name*	*Small quantity (in gm)*	*Commercial quantity (in gm/kg)*
(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*
23.	*Cannabis* and cannabis resin	*CHARAS*, HASHISH	EXTRACTS AND TINCTURES OF CANNABIS	100	*1 kg*
150.		*Tetrahydro-cannabinol*	The following isomers and their stereochemical variants: 7, 8, 9, 10-tetrahydro-6, 6, 9-trimethyl-3-pentyl-6H-dibenzo [b, d] pyran-1-o1 (9R, 10aR)-8, 9, 10, 10a-tetrahydro-6, 6, 9-trimethyl-3-pentyl-6H-dibenzo [b, d] pyran-l-ol (6aR, 9R, 10aR)-6a, 9, 10, 10a-tetrahydro-6, 6, 9-trimethyl-3-pentyl-6H-dibenzo [b, d] pyran-1-o1 (6aR, 10aR)-6a, 7, 10, 10a-tetrahydro-6, 6, 9-trimethyl-3-pentyl-6H-dibenzo [b, d] pyran-1-ol 6a, 7, 8, 9-tetrahydro-6, 6, 9-trimethyl-3-pentyl-6H-dibenzo [b, d] pyran-l-ol (6aR, 10aR)-6a, 7, 8, 9, 10, 10a-hexahydro-6, 6-dimthyl-I-9-methylene 3-pentyl-6H-dibenzo [b, d] pyran-1-o"	*2*	*50 gm*

(emphasis supplied)

17. The learned trial Judge had treated the seized contraband article falling within the definition of "commercial quantity" and accordingly found the accused persons guilty and imposed the sentence. He has taken note of the fact that the Notification issued on 19-10-2001 clearly shows that more than one kilogram is commercial quantity. The High Court while reversing the finding pertaining to commercial quantity has stated thus:

> "It needs to be pointed out that the chemical examiner as per the prosecution case did not only analyse the samples to find out whether it comprised of or contained any narcotic drug but went a step further to find out 'percentage by weight' of the narcotic drug in the sample. The chemical examiner as per his reports dated 25-4-2004 certified that the sample taken from one of the seven brownish stick shaped substance tested positive for charas and the tetrahydrocannabinol (THC) content in the sample was 5.1%. In case of sample lifted from one of the five sticks recovered from the appellant Mushtaq Ahmad tetrahydrocannabinol (THC) content in the sample was 5.1%. In case of sample lifted from one of the five sticks recovered from the appellant Mushtaq Ahmad tetrahydrocannabinol (THC) content in the sample was found to be 4.9%. In the circumstances, if the samples lifted from the substance recovered from the appellants would be 45 gm and 39 gm respectively taking each stick to have average weight of 890 (6.2 kg-7) and 800 (4.0 kg-5) gm respectively. However, if, working on the assumption made by the learned trial court that in view of confessional statements of the appellants, the whole substance was to be taken as Charas irrespective of restricted sampling, the narcotic drug content in the entire substance recovered from the appellants still would work out to be 316 gm and 196 gm respectively."

18. We have reproduced the aforesaid paragraph to appreciate that the High Court has been guided by presence of "tetrahydrocannabinol" (THC) content and on that foundation has proceeded to hold that the seized item from both the accused persons is beyond the small quantity but lesser than the commercial quantity. To arrive at the said conclusion, reliance has been placed essentially on *Ouseph*[5] and *E. Micheal Raj*[4].

19. We think it appropriate to analyse the ratio of the said decisions. In *Ouseph*[5], the accused was found in possession of 110 ampoules of buprenorphine trade name of which is Tidigesic. The Court addressed to the issue whether psychotropic substance was in small quantity and if so, whether it was for personal consumption. In that regard, the Court proceeded to state thus: (SCC p. 447, para 8)

> "*8.* The question to be considered by us is whether the psychotropic substance was in a small quantity and if so, whether it was intended for personal consumption. The words 'small quantity' have been specified by

5 *Ouseph* v. *State of Kerala*, (2004) 4 SCC 446 : 2004 SCC (Cri) 1303

4 *E. Micheal Raj* v. *Narcotic Control Bureau*, (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558

the Central Government by the Notification dated 23-7-1996. The learned counsel for the State has brought to our notice that as per the said notification small quantity has been specified as 1 gram. If so, the quantity recovered from the appellant is far below the limit of small quantity specified in the notification issued by the Central Government. It is admitted that each ampoule contained only 2 ml and each ml contains only 0.3 mg. This means the total quantity found in the possession of the appellant was only 66 mg. This is less than 1/10th of the limit of small quantity specified under the notification."

20. In *E. Micheal Raj*[4], a two-Judge Bench while dealing with the determination of a small or commercial quantity in relation to narcotic drug or psychotropic substance in a mixture with one or more neutral substance opined that the quantity of neutral substance is not to be taken into consideration and it is the only actual content by weight of the offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity should be considered. The question arose in *E. Micheal Raj*[4] under which entry of the notification the substance found in possession of the appellants would fall, that is, whether Entry 56 or Entry 239. After referring to the entries, the Court held as under: (SCC pp. 168-69, paras 14-15)

"*14*. As a consequence of the amending Act, the sentence structure underwent a drastic change. The amending Act for the first time introduced the concept of 'commercial quantity' in relation to narcotic drugs or psychotropic substances by adding clause (*vii-a*) in Section 2, which defines this term as any quantity greater than a quantity specified by the Central Government by notification in the Official Gazette. Further, the term 'small quantity' is defined in Section 2(*xxiii-a*), as any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette. Under the rationalised sentence structure, the punishment would vary depending upon whether the quantity of offending material is 'small quantity', 'commercial quantity' or something in-between.

15. It appears from the Statement of Objects and Reasons of the amending Act of 2001 that the intention of the legislature was to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalised sentence structure, the punishment would vary depending upon the quantity of offending material. Thus, we find it difficult to accept the argument advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gm and contains 0.2% of heroin or more would be punishable under Section 21(*c*) of the NDPS Act, because the intention

4 *E. Micheal Raj* v. *Narcotic Control Bureau*, (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558

of the legislature as it appears to us is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such. This may be tested on the following rationale. Supposing 4 gm of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gm is mixed with 50 kg of powdered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appears to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking in significant quantities, with more severe punishment."

21. In the said case, the Court accepted the submission that purity of heroin was 1.4% and 1.6% respectively and, therefore, the quantity of heroin in possession was only 60 gm and on that ground treated it as a small quantity.

22. In *Amarsingh Ramajibhai Barot*[2] the appellant was found carrying a black packet which contained black-coloured liquid substance that smelled like opium. The police officer weighed the said substance recovered from him and found the weight to be 920 gm 4.250 kg of a grey-coloured substance suspected to be a drug, was recovered from the other accused who had already died. Out of the 920 gm opium recovered from the appellant, samples were sent to the Forensic Science Laboratory which opined that substance which had been sent was opium containing 2.8% anhydride morphine and also pieces of poppy flowers (posedoda). Both the accused persons faced trial and the trial court found both of them guilty for the offences punishable under Sections 17 and 18 read with Section 29 of the NDPS Act and sentenced each of them to undergo rigorous imprisonment of 10 years with a fine of Rs 1 lakh each with the default clause. The appeal preferred by the other accused abated as he expired during the pendency of the appeal and the appeal of Amarsingh Ramjibhai Barot was dismissed.

23. A contention was canvassed before this Court in *Amarsingh Ramjibhai case*[2] that the High Court had fallen into error by taking a total quantity of the offending substance recovered from the two accused jointly and holding that the said quantity was more than the commercial quantity, warranting punishment under Section 21(*c*) of the NDPS Act. This Court addressed in detail to the factum of possession of 920 gm of black liquid and the FSL Report that indicated the substance recovered from it was opium

2 *Amarsingh Ramajibhai Barot* v. *State of Gujarat*, (2005) 7 SCC 550 : 2005 SCC (Cri) 1704

containing 2.8% anhydride morphine, apart from pieces of poppy (posedoda) flowers found in the sample. The Court referred to definition of "opium" in Sections 2(*xv*) and 2(*xvi*) and proceeded to state thus: (*Amarsingh Ramjibhai case*[2], SCC pp. 554-55, paras 14-15)

"*14*. There does not appear to be any acceptable evidence that the black substance found with the appellant was 'coagulated juice of the opium poppy' and 'any mixture, with or without any neutral material, of the coagulated juice of the opium poppy'. FSL has given its opinion that it is 'opium as described in the NDPS Act'. That is not binding on the court.

15. The evidence also does not indicate that the substance recovered from the appellant would fall within the meaning of sub-clauses (*a*), (*b*), (*c*) or (*d*) of Section 2(*xvi*). The residuary clause (*e*) would take into its sweep all preparations containing more than 0.2 per cent of morphine. The FSL Report proves that the substance recovered from the appellant had 2.8 per cent anhydride morphine. Consequently, it would amount to 'opium derivative' within the meaning of Section 2(*xvi*)(*e*). Clause (*a*) of Section 2(*xi*) defines the expression 'manufactured drug' as:

'**2. (*xi*) "manufactured drug**" means—

(*a*) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(*b*) * * *'

All 'opium derivatives' fall within the expression 'manufactured drug' as defined in Section 2(*xi*) of the NDPS Act. Thus, we arrive at the conclusion that what was recovered from the appellant was 'manufactured drug' within the meaning of Section 2(*xi*) of the NDPS Act. The material on record, therefore, indicates that the offence proved against the appellant fell clearly within Section 21 of the NDPS Act for illicit possession of 'manufactured drug'."

24. Being of this view, this Court concurred with the decision taken by the High Court that it was a commercial quantity. The said decision has been distinguished in *E. Micheal Raj*[4] by opining thus: (SCC pp. 170-71, paras 18-19)

"*18*. Being aggrieved, Amarsingh approached this Court. This Court has held in para 14 of the judgment as under: (*Amarsingh Ramjibhai case*[2], SCC p. 554)

'*14*. There does not appear to be any acceptable evidence that the black substance found with the appellant was "coagulated juice of the opium poppy" and "any mixture, with or without any neutral material, of the coagulated juice of the opium poppy". FSL has given its opinion that it is "opium as described in the NDPS Act". That is not binding on the court.'

2 *Amarsingh Ramajibhai Barot* v. *State of Gujarat*, (2005) 7 SCC 550 : 2005 SCC (Cri) 1704

4 *E. Micheal Raj* v. *Narcotic Control Bureau*, (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558

The Court further held that the evidence also does not indicate that the substance recovered from the appellant would fall within the meaning of sub-clauses (*a*), (*b*), (*c*) or (*d*) of Section 2(*xvi*), but residuary clause (*e*) would apply and consequently it would amount to opium derivative as all opium derivatives fall within the expression 'manufactured drugs'. Thus, the Court arrived at the conclusion that what was recovered from the appellant was manufactured drug and the offence proved against the appellant fell clearly within Section 21 of the NDPS Act for illicit possession of manufactured drug. The Court concluded and held in para 17 as under: (*Amarsingh Ramjibhai case*[2], SCC p. 555)

> '*17*. In respect of opium derivatives (at Sl. No. 93) in the said notification, 5 gm is specified as "small quantity" and 250 gm as "commercial quantity". The High Court was, therefore, right in finding that the appellant was guilty of unlawful possession of "commercial quantity" of a manufactured drug. Consequently, his case would be covered by clause (*c*) and not clause (*a*) or (*b*) of Section 21 of the NDPS Act.'

This Court has, therefore, upheld the imposition of minimum punishment under Section 21(*c*) of 10 years' rigorous imprisonment with fine of Rs 1 lakh.

19. On going through *Amarsingh case*[2] we do not find that the Court was considering the question of mixture of a narcotic drug or psychotropic substance with one or more neutral substance(s). In fact that was not the issue before the Court. The black-coloured liquid substance was taken as an opium derivative and the FSL Report to the effect that it contained 2.8% anhydride morphine was considered only for the purposes of bringing the substance within the sweep of Section 2(*xvi*)(*e*) as 'opium derivative' which requires a minimum 0.2% morphine. The content found of 2.8% anhydride morphine was not at all considered for the purposes of deciding whether the substance recovered was a small or commercial quantity and the Court took into consideration the entire substance as an opium derivative which was not mixed with one or more neutral substance(s). Thus, *Amarsingh case*[2] cannot be taken to be an authority for advancing the proposition made by the learned counsel for the respondent that the entire substance recovered and seized irrespective of the content of the narcotic drug or psychotropic substance in it would be considered for application of Section 21 of the NDPS Act for the purpose of imposition of punishment. We are of the view that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance(s), for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration."

2 *Amarsingh Ramajibhai Barot* v. *State of Gujarat*, (2005) 7 SCC 550 : 2005 SCC (Cri) 1704

25. We have referred to the said decision as the learned counsel for the State submitted that the said decision applies to the present case. In our considered opinion, the factual matrix in the said case was totally different and, in fact, it was dealing with the manufacturing and the percentage content and hence, we need not delve into the same.

26. In the present case, the contraband article that has been seized is "charas" and the dictionary clause clearly states that it can be crude or purified obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish. The definition also indicates that any mixture with or without any neutral material of any of the cannabis or any drink prepared therefrom. The reference in Section 2(*iii*)(*c*) refers to any mixture which has a further reference to charas, which states crude or purified. The chemical name for charas and hashish is "extracts and tinctures of cannabis". It finds mention at Entry 23 of the Notification. Serial No. 150 of the Notification deals with "tetrahydrocannabinol" having a long list.

27. Regard being had to the aforesaid factual score, reference to a two-Judge Bench decision in *Harjit Singh* v. *State of Punjab*[7], would be apt. In the said case 7.10 kg of opium was ceased from the accused. A contention was raised before this Court that the opium recovered from the appellant weighing 7.10 kg contained 0.8% morphine, that is, 56.96 gm and hence, the quantity was below the commercial quantity. The two-Judge Bench referred to the pronouncement in *E. Micheal Raj*[4] and referred to various entries in the Notification, namely, Entry 77 that deals with morphine, Entry 92 that deals with opium and Entry 93 that deals with opium derivatives. The Court posed the question whether the case would fall under Entry 92 or Entry 93 or any other entry. The Court referred to the definition of "opium" under the NDPS Act, the chemical analysis made by the Forensic Science Laboratory, took note of the percentage of morphine, the amendment brought in 2001 and came to hold thus: (*Harjit Singh case*[7], SCC pp. 445-46, paras 21-22)

> "*21.* In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus the appellant being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 18(*b*) of the NDPS Act. The instant case squarely falls under clause (*a*) of Section 2(*xv*) of the NDPS Act and clause (*b*) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of

7 (2011) 4 SCC 441 : (2011) 2 SCC (Cri) 286

4 *E. Micheal Raj* v. *Narcotic Control Bureau*, (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558

imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry 92 becomes totally redundant.

a *22*. Thus, as the case falls under clause (*a*) of Section 2(*xv*), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry 93, so in case of pure opium falling under clause (*a*) of Section 2(*xv*), determination of the quantity of morphine is not required. Entry 92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of *b* small quantity or commercial quantity."

28. In the said case, the judgment referred in *E. Micheal Raj*[4] was distinguished by stating thus: (*Harjit Singh case*[7], SCC p. 446, para 23)

"*23*. The judgment in *E. Micheal Raj*[4] has dealt with heroin i.e. diacetylmorphine which is an 'opium derivative' within the meaning of the term as defined in Section 2(*xvi*) of the NDPS Act and therefore, a *c* 'manufactured drug' within the meaning of Section 2(*xi*)(*a*) of the NDPS Act. As such the ratio of the said judgment is not relevant to the adjudication of the present case."

Eventually, in para 25 the Court held thus: (*Harjit Singh case*[7], SCC p. 446)

"*25*. The notification applicable herein specifies small and *d* commercial quantities of various narcotic drugs and psychotropic substances for each contraband material. Entry 56 deals with heroin, Entry 77 deals with morphine, Entry 92 deals with opium, Entry 93 deals with opium derivatives and so on and so forth. Therefore, the notification also makes a distinction not only between opium and morphine but also between opium and opium derivatives. Undoubtedly, morphine is one of *e* the derivatives of the opium. Thus, the requirement under the law is first to identify and classify the recovered substance and then to find out under what entry it is required to be dealt with. If it is opium as defined in clause (*a*) of Section 2(*xv*) then the percentage of morphine contents would be totally irrelevant. It is only if the offending substance is found in the form of a mixture as specified in clause (*b*) of Section 2(*xv*) of the *f* NDPS Act, that the quantity of morphine contents becomes relevant."

29. Another aspect needs to be noted. The High Court in para 28 has found that the seized article contained more than 50 gm tetrahydrocannabinol in respect of both the accused persons. The commercial quantity for the contraband article, namely, tetrahydrocannabinol (THC) as stated in Entry *g* 150 is 50 gm. Even assuming the said percentage is found in the seized item then also the contraband article would go beyond the "intermediate" quantity and fall under the "commercial" quantity. Judged from any score, we do not find that the view expressed by the High Court is correct. Therefore, we conclude and hold that the seized item fell under the commercial quantity

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4 *E. Micheal Raj* v. *Narcotic Control Bureau*, (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558

7 *Harjit Singh* v. *State of Punjab*, (2011) 4 SCC 441 : (2011) 2 SCC (Cri) 286

and hence the conviction recorded by the trial court under Section 20(*b*)(*ii*)(*C*) is absolutely impeccable.

30. We will be failing in our duty if we do not deal with another submission put forth by the learned counsel for the respondent-accused. It is her submission that the accused persons have already spent more than seven years in custody and, therefore, they should not be incarcerated again. Section 20(*b*)(*ii*)(*C*) stipulates that the minimum sentence will be ten years which may extend to twenty years and the minimum fine imposable is one lakh rupees which may extend to two lakh rupees. The provision also provides about the default clause which stipulates imposition of fine exceeding two lakh rupees, for the reasons to be recorded by the Court. When a minimum punishment is prescribed, no court can impose lesser punishment.

31. In *Narendra Champaklal Trivedi* v. *State of Gujarat*[8], while a submission was advanced that in exercise of power under Article 142 of the Constitution, this Court can impose a lesser punishment than the prescribed one, this Court ruled that: (SCC pp. 90-91, para 30)

> "*30.* … where the minimum sentence is provided, we think it would not be at all appropriate to exercise jurisdiction under Article 142 of the Constitution of India to reduce the sentence on the ground of the so-called mitigating factors as that would tantamount to supplanting statutory mandate and further it would amount to ignoring the substantive statutory provision that prescribes minimum sentence for a criminal act…."

32. Yet again, in *State of M.P.* v. *Ayub Khan*[9], wherein the High Court had awarded the lesser punishment this Court while analysing the position in law has opined thus: (SCC p. 679, para 8)

> "*8.* The legislature, in its wisdom, has fixed a mandatory minimum sentence for certain offences—keeping, possessing arms and ammunition is a serious offence for which sentence shall not be less than three years. The legislature, in its wisdom, felt that there should be a mandatory minimum sentence for such offences having felt the increased need to provide for more stringent punishment to curb unauthorised access to arms and ammunition, especially in a situation where we are facing with menace of terrorism and other anti-national activities. A person who is found to be in possession of country-made barrelled gun with two round bullets and 50 gm explosive without licence, must in the absence of proof to the contrary be presumed to be carrying it with the intention of using it when an opportunity arises which would be detrimental to the people at large. Possibly, taking into consideration all those aspects, including the national interest and safety of the fellow citizens, the legislature in its wisdom has prescribed a *minimum mandatory sentence*. Once the

8 (2012) 7 SCC 80 : (2013) 1 SCC (Cri) 963 : (2012) 2 SCC (L&S) 343

9 (2012) 8 SCC 676 : (2012) 3 SCC (Cri) 1021

accused was found guilty for the offence committed under Section 25(1)(*a*) of the Arms Act, he has necessarily to undergo the minimum mandatory sentence, prescribed under the statute."

(emphasis in original)

33. In view of the aforesaid analysis, we are unable to sustain the judgment and order[1] of the High Court and, accordingly, unsettle the same and find that the respondent-accused, Mushtaq Ahmad and Gulzar Ahmad, are guilty of the offence punishable under Section 20(*b*)(*ii*)(*C*) of the NDPS Act and each of them is sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs 1 lakh and, in default of payment of such fine, to suffer rigorous imprisonment for a further period of one year.

34. Resultantly, the appeals are allowed and the judgment and order passed by the High Court in *Mushtaq Ahmad* v. *State*[1], is set aside and that of the learned trial Judge, as far as the sentence is concerned, stands modified.

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1 *Mushtaq Ahmad* v. *State*, Criminal Appeal No. 35 of 2009, decided on 3-6-2011 (J&K)

(2016) 11 Supreme Court Cases 368

(BEFORE ABHAY MANOHAR SAPRE AND ASHOK BHUSHAN, JJ.)

SEKHAR SUMAN VERMA .. Appellant;

Versus

SUPERINTENDENT OF NARCOTICS CONTROL BUREAU AND ANOTHER .. Respondents.

Criminal Appeal No. 317 of 2006†, decided on June 29, 2016

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 42 — Compliance with — When not necessary — Where search and seizure is conducted by a gazetted officer himself acting under S. 41 of NDPS Act, held, compliance with S. 42 of NDPS Act not necessary in such a case (Paras 12 and 13)**

State of Haryana v. *Jarnail Singh*, (2004) 5 SCC 188 : 2004 SCC (Cri) 1571; *M. Prabhulal* v. *Directorate of Revenue Intelligence*, (2003) 8 SCC 449 : 2003 SCC (Cri) 2024, *followed*

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 50 — Compliance with — Written offer meeting the requirements**

— Accused-appellant given a written offer to be searched before a gazetted officer or a Magistrate — Said offer also containing an option to be searched in presence of the gazetted officer accompanying the raiding party — Accused agreeing to be searched in presence of the accompanying gazetted officer — Search conducted pursuant to said consent given by accused, held, in compliance with S. 50 of NDPS Act (Paras 12 to 14)

Krishna Kanwar v. *State of Rajasthan*, (2004) 2 SCC 608 : 2004 SCC (Cri) 607; *Prabha Shankar Dubey* v. *State of M.P.*, (2004) 2 SCC 56 : 2004 SCC (Cri) 420, *cited*

C. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 21 — Conviction and sentencing — Appellant sentenced to 10 yrs' RI along with fine of Rs 1,00,000 with default stipulation, affirmed — Recovery of 250 gm of heroin from possession of appellant**

— Even leaving out the statement made by appellant whereby he disclosed that he was forced to write his confessional statement on threat and torture and that his signatures on more or less 18 blank papers were taken by prosecution, the other evidence on record was quite sufficient to prove charge against him — Prosecution established its case against appellant beyond any shadow of doubt — Hence, the aforesaid conviction and sentence passed against appellant by trial court and affirmed by High Court, held, not liable to be interfered with (Paras 12, 13 and 16)

Sekhar Suman Verma v. *Supt. of NCB*, Cri MP No. 9545 of 2007 in Criminal Appeal No. 317 of 2006, order dated 17-9-2007 (SC); *Sekhar Suman Verma* v. *Supt. of NCB*, Criminal Appeal No. 317 of 2006, order dated 15-12-2015 (SC); *Sekhar Suman Verma* v. *Supt. of NCB*, Criminal Appeal No. 317 of 2016, order dated 19-5-2016 (SC), *cited*

Appeal dismissed W-D/57154/SR

† From the Judgment and Order dated 31-8-2004 in CRA No. 269 of 2003 passed by the High Court of Calcutta

Advocates who appeared in this case :

Aniruddha P. Mayee (Amicus Curiae), Advocate, for the Appellant;

Anukul Chandra Pradhan, Senior Advocate (P.K. Dey, Ms Rekha Pandey, R.S. Pandey, Ajay Kr. Singh, Ms Anil Katiyar, Manish Vashishtha and Ms Sushma Suri, Advocates) for the Respondents.

Chronological list of cases cited ***on page(s)***

1. Criminal Appeal No. 317 of 2016, order dated 19-5-2016 (SC), *Sekhar Suman Verma* v. *Supt. of NCB* 371*a*
2. Criminal Appeal No. 317 of 2006, order dated 15-12-2015 (SC), *Sekhar Suman Verma* v. *Supt. of NCB* 370*e*
3. Cri MP No. 9545 of 2007 in Criminal Appeal No. 317 of 2006, order dated 17-9-2007 (SC), *Sekhar Suman Verma* v. *Supt. of NCB* 370*c-d*, 370*d-e*, 373*g*
4. (2004) 5 SCC 188 : 2004 SCC (Cri) 1571, *State of Haryana* v. *Jarnail Singh* 371*e-f*, 373*c-d*
5. (2004) 2 SCC 608 : 2004 SCC (Cri) 607, *Krishna Kanwar* v. *State of Rajasthan* 372*g*
6. (2004) 2 SCC 56 : 2004 SCC (Cri) 420, *Prabha Shankar Dubey* v. *State of M.P.* 372*g*, 373*d*
7. (2003) 8 SCC 449 : 2003 SCC (Cri) 2024, *M. Prabhulal* v. *Directorate of Revenue Intelligence* 372*a*

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J.— This appeal is filed against the final judgment and order dated 31-8-2004 passed by the High Court of Calcutta in CRA No. 269 of 2003 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and affirmed the orders dated 11-4-2002 and 12-4-2002 of the Special Judge, NDPS Act and the VIth Bench, City Sessions Court at Calcutta in NDPS Case No. 11 of 1998 convicting the appellant herein under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") and sentencing him to suffer rigorous imprisonment for ten years and to pay a fine of Rs 1,00,000, in default, to suffer further rigorous imprisonment for one year.

2. The case of the prosecution is as under: acting on an information received on 21-5-1998, a batch of officers of NCB, EZU, Calcutta led by a gazetted officer proceeded for New Sarat Lodge at 77/1A, Acharya Prafulla Chandra Road, Calcutta. After reaching there, the NCB officers searched the room of the appellant herein who was staying in Room No. 1 of New Sarat Lodge. The officers asked the appellant in writing as to whether he wanted to be searched in the presence of a gazetted officer or a Magistrate and informed the appellant that one gazetted officer was already with them and if he so desired, he might be searched by the said gazetted officer as well.

3. After search being done by the raiding party, a polythene packet containing brown-coloured powder weighing 250 gm of heroin was recovered from the left side pocket of his wearing trousers. Thereafter, the appellant was arrested on the same day at 2230 hrs. As a follow-up action of the said recovery, one Anjan De was arrested from Bidhan Nagar Railway Station at Calcutta by

the said NCB officers possessing 245 gm of heroin on 22-5-1998. During the trial, the prosecution examined eight witnesses and the defence examined nine witnesses.

4. The learned Judge, VIth Bench, City Sessions Court acting as the Judge, Special Court under the NDPS Act by his judgment and orders dated 11-4-2002 and 12-4-2002 found the appellant guilty of the offence punishable under Section 21 of the NDPS Act, convicted him thereunder and sentenced him to suffer rigorous imprisonment for ten years and to pay a fine of Rs 1,00,000, in default to suffer further rigorous imprisonment for one year. However, the appellant was acquitted of the offence charged under Section 29 of the NDPS Act. So far as another accused Anjan De was concerned, he was not found guilty of both the offences under Sections 29 and 21 of the NDPS Act and was accordingly acquitted thereof.

5. Challenging the said order of conviction and sentence, the appellant preferred an appeal being CRA No. 269 of 2003 before the High Court. The High Court, by the impugned judgment and order dated 31-8-2004, dismissed the appeal filed by the appellant. Aggrieved by the said judgment and order, the appellant has filed this appeal by way of special leave before this Court. By order dated 17-9-2007[1], this Court released the appellant on bail.

6. In this appeal, we find from the record that the appellant was originally represented by an Amicus Curiae Mr Mulkh Raj, who later stopped appearing for the appellant after leave was granted by this Court. Thereafter Mr Abhijit Sengupta, learned counsel appeared for the appellant and bail was granted by this Court on 17-9-2007[1]. On 10-12-2015, Mr Abhijit Sengupta, learned counsel also filed application for discharge as advocate of the appellant. By order dated 15-12-2015[2], this Court allowed the application filed by Mr Abhijit Sengupta and discharged him from acting as AOR on behalf of the appellant. The Registry served notice on the appellant by speed post but no one represented the appellant.

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1 *Sekhar Suman Verma* v. *Supt. of NCB*, Cri MP No. 9545 of 2007 in Criminal Appeal No. 317 of 2006, order dated 17-9-2007 (SC), wherein it was directed:

"Considering the fact that the petitioner is in custody for more than nine years, prayer for bail is accepted. Let the petitioner be released on bail on furnishing bail bonds to the sum of Rs 25,000 with two sureties of the like amount to the satisfaction of the Judge, Special Court under the NDPS (Seventh Bench), City Sessions Court, Calcutta."

2 *Sekhar Suman Verma* v. *Supt. of NCB*, Criminal Appeal No. 317 of 2006, order dated 15-12-2015 (SC), wherein it was directed:

"Mr Abhijit Sengupta, learned Advocate-on-Record representing the appellant has filed an application for discharge. We allow the application filed by Mr Abhijit Sengupta and discharge him from acting as AOR. We direct the Registry to take necessary steps and to issue notice returnable within four weeks after winter vacation."

7. When the appeal came up for hearing on 19-5-2016[3], in the interest of justice and fair play, we requested Mr Aniruddha P. Mayee, learned counsel, who was present in Court, to appear as Amicus Curiae on behalf of the appellant. On our request Mr Aniruddha P. Mayee, learned counsel appeared and argued the case for the appellant. We place on record our appreciation for Mr Aniruddha P. Mayee for his valuable services in arguing the case of the appellant.

8. In these circumstances, we are of the opinion that the appellant is sufficiently and duly represented throughout in these proceedings and it is not necessary to issue any fresh notice to the appellant and give him another opportunity to engage a counsel of his choice.

9. The submission of the learned counsel appearing for the appellant (accused) was only one and that was in regard to non-compliance with requirements of Section 42 read with Section 50 of the NDPS Act. According to him, the compliance of these sections being mandatory at the time of search and the same in this case was not done in the manner required by the officials concerned of the Department, the appellant's conviction is rendered legally unsustainable and hence, deserves to be set aside.

10. The learned counsel for the respondents, however, supported the impugned order and urged for dismissal of the appeal. It was his submission that compliance with the requirements of Sections 42 and 50 of the NDPS Act has been done in letter and spirit and both the courts rightly held the same to have been done and hence there arises no case to interfere in the impugned order.

11. Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in this appeal.

12. The point urged by the learned counsel for the appellant was dealt with by the High Court as under:

> "Now, we come to the main area which has detained Shri Jash at length. His argument is that there was no compliance with Section 42 of the said Act. This ground has to be discarded at the very outset in view of the latest decision of the Supreme Court in *State of Haryana* v. *Jarnail Singh*[4] wherein their Lordships had held: (SCC p. 192, para 10)
>
> '*10.* ... Moreover, it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by

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3 *Sekhar Suman Verma* v. *Supt. of NCB*, Criminal Appeal No. 317 of 2016, order dated 19-5-2016 (SC), wherein it was directed:

"It is brought to our notice that one Mr Abhijit Sengupta, Advocate was appearing as a counsel (AOR) for the appellant. He later on applied for his discharge from the case which was permitted by this Court by order dated 15-12-2015. In the interest of justice, we consider it just and proper to appoint another Amicus Curiae to assist the Court. Mr Aniruddha Mayee, Advocate who is present in the Court is requested to assist the Court as Amicus who has graciously agreed to do so. Let necessary papers be given to him today by the learned counsel for the respondents. List the matter for final hearing tomorrow i.e. 20-5-2016."

4 (2004) 5 SCC 188 : 2004 SCC (Cri) 1571 : 2004 SAR (Cri) 535

this Court in *M. Prabhulal* v. *Directorate of Revenue Intelligence*[5] that where a search is conducted by a gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the requirement of Section 42. For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to Section 42 of the NDPS Act.'

Such being the position, the argument of Shri Jash so far as infraction of Section 42 of the said Act is concerned has no merit at all since PW 7 was a gazetted officer himself and he conducted the raid and also effected the search and seizure from the appellant.

Now, this brings us to the last ground of Shri Jash that Section 50 of the said Act was not strictly complied with. We have carefully gone through the evidence of PWs 4, 6 and 7 in this regard and we feel that the provisions of Section 50 of the said Act have been complied with.

PW 4, who conducted the raid, stated:

"We gave him off in writing whether he likely (*sic* would like) to be searched in presence of a Magistrate or a gazetted officer or a gazetted officer accompanying the raiding party. He agreed to be searched before the accompanying gazetted officer. Prior to search, we gave offer to him that if he likes he can search the gazetted officer, NCB officers, etc. But he declined."

PW 6, conducting the raid on the relevant date and time of seizure, supported the said version and stated:

"We gave written offer that we want to search and disclosed to him whether he would like to be searched by a gazetted officer or a Magistrate or the accompanying gazetted officer, who was with us. He stated to us that he could be searched before our accompanying gazetted officer. We asked him to search us before we started conducting search to him. He expressed his unwillingness."

PW 7, the gazetted officer similarly stated:

"One of our officers offered the accused to be searched in presence of a gazetted officer or a Magistrate. We also told him that one gazetted officer accompanied the raiding party. The accused agreed to be searched in presence of the accompanying gazetted officer."

The decision of *Krishna Kanwar*[6], relied upon by the Revenue has full application in the fact situation of the instant case (see also *Prabha Shankar Dubey* v. *State of M.P.*[7]

From a broad analysis of the entire evidence and other materials on record we find from the seizure list (Ext. 9) which discloses seizure of contraband articles from the place of occurrence (New Sarat Lodge at

5 (2003) 8 SCC 449 : 2003 SCC (Cri) 2024

6 *Krishna Kanwar* v. *State of Rajasthan*, (2004) 2 SCC 608 : 2004 SCC (Cri) 607

7 (2004) 2 SCC 56 : 2004 SCC (Cri) 420

77/1A, APC Road, Calcutta 700 009) on 21-5-1998 at about 1600 hrs in presence of the witnesses and being signed by the appellant himself. The said contraband articles in question, which were seized from the possession of the appellant were found to be HEROIN on the basis of the report (Ext. 2) submitted by chemical analyst (PW 2) and even if we leave out the statement (Ext. 6) made by him as he had disclosed on the second day of his production (8-6-1998) that "he was forced to write his confessional statement on threat and torture, it is also his allegation that his signature on more or less 18 blank papers were taken by the prosecution", we find that the other evidence on record is quite sufficient to prove the charge against the appellant.

We find that the prosecution has been able to prove its case beyond any shadow of doubt against the appellant and the points canvassed by Shri Jash have no manner of application in view of the discussion held hereinabove."

13. We are in complete agreement with the aforementioned finding of the High Court as, in our opinion, it is just, legal and proper calling no interference in this appeal. Firstly, the High Court has recorded the finding keeping in view the law laid down by this Court in *State of Haryana* v. *Jarnail Singh*[4]. Secondly, since PW 7 himself was the gazetted officer, it was not necessary for him to ensure compliance with Section 42 as held by this Court in *Prabha Shankar Dubey* v. *State of M.P.*[7] and lastly, so far as compliance with the requirement of Section 50 is concerned, it was found and indeed rightly that the offer to search the appellant was given to him in writing and on his giving consent, he was accordingly searched.

14. The High Court was, therefore, right in upholding the procedure followed by the raiding party for ensuring compliance with Section 50 and rightly held against the appellant on this issue. We find no ground to take a different view than the one taken by the High Court and accordingly uphold the finding on this issue against the appellant.

15. We have also carefully examined the record with a view to find out as to whether the appeal involves any ground other than the one urged. Having so examined, we find none except the one urged and decided against the appellant.

16. In the light of the foregoing discussion, we find no merit in this appeal. It thus fails and is accordingly dismissed.

17. As a result, the bail granted to the appellant by this Court by order dated 17-9-2007[1] is hereby cancelled and the appellant is directed to surrender before the trial court to undergo the remaining period of sentence awarded to him by the courts below.

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4 (2004) 5 SCC 188 : 2004 SCC (Cri) 1571 : 2004 SAR (Cri) 535

7 (2004) 2 SCC 56 : 2004 SCC (Cri) 420

1 *Sekhar Suman Verma* v. *Supt. of NCB*, Cri MP No. 9545 of 2007 in Criminal Appeal No. 317 of 2006, order dated 17-9-2007 (SC)

(2016) 13 Supreme Court Cases 119

(BEFORE ABHAY MANOHAR SAPRE AND ASHOK BHUSHAN, JJ.)

JAGAT SINGH .. Appellant;

Versus

STATE OF UTTARAKHAND .. Respondent.

Criminal Appeal No. 182 of 2013†, decided on June 29, 2016

Narcotics, Intoxicants and Liquor — Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 43, 50 and 8/20 — Search and seizure — Recovery of contraband in public place — Recovery made in presence of gazetted officer — Secret information received by officials concerned for making search of accused, properly recorded — Prosecution proved case beyond reasonable doubt — Conviction under Ss. 8/20 confirmed

— On receiving information, that a person was coming with contraband item, a team of Special Task Force reached the spot and intercepted appellant-accused, who was coming with a white plastic bag — On receiving information from police party, DSP (PW 5, gazetted officer) also reached at the spot — On search being made, appellant was found carrying 9.300 kg of cannabis (charas) — Appellant was convicted under Ss. 8/20, NDPS Act, which was upheld by High Court

— Held, recovery of contraband was made from appellant in public place — Hence, instant case fell under S. 43 — Again, regarding compliance with S. 50, prosecution proved, that PW 5, who was a gazetted officer, was called, and then in his presence, recovery of contraband was made from appellant — Thus, compliance with S. 50 was made in letter and spirit — In light of aforesaid two material issues, which were proved by prosecution by proper evidence, courts below rightly held, that prosecution proved their case beyond reasonable doubt against appellant — Further, appellant's contention, that since officials concerned did not record secret information, which they claimed to have received for making search from appellant, hence, non-recording of such information was fatal to case of prosecution, stands rejected, as information received was recorded as a fact in the record — In such facts and circumstances, conviction of appellant under Ss. 8/20, NDPS Act, is confirmed (Paras 12 to 15)

Jagat Singh v. *State of Uttarakhand*, 2011 SCC OnLine Utt 2064, *affirmed*

Appeal dismissed Y-D/57207/SR

Advocates who appeared in this case :
Rajeev Maheshwaranand Roy (Amicus Curiae), Advocate, for the Appellant;
Dinesh Kr. Garg, Ms Jagdev and Dhananjay Garg, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. 2011 SCC OnLine Utt 2064, *Jagat Singh* v. *State of Uttarakhand* 120*a*, 121*a*, 121*e-f*

† From the Judgment and Order dated 18-11-2011 of the High Court of Uttarakhand at Nainital in Crl. Jail Appeal No. 4 of 2010

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J.— This appeal is filed against the final judgment and order dated 18-11-2011 of the High Court of Uttarakhand at Nainital in *Jagat Singh* v. *State of Uttarakhand*[1] whereby the High Court dismissed the appeal filed by the appellant herein upholding the order dated 15-1-2010/19-1-2010 passed by the Special Judge (the NDPS Act)/Additional Sessions Judge/IVth Fast Track Court, Dehradun in Special Sessions Trial Case No. 30 of 2006 convicting the appellant under Sections 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") and sentenced him to undergo rigorous imprisonment for a period of ten years and a fine of Rs 1 lakh, in default of payment of fine, to undergo further simple imprisonment of two years.

Brief facts

2. On 28-5-2006, on receiving information that a person is coming with contraband item from Tyuni to Kalsi, a team of Special Task Force consisting of Sub-Inspector Ved Prakash Thapliyal (PW 1), Sub-Inspector Davender Singh (PW 2), Head Constable Bhawan Singh with Constables, Nagesh Pal, Vijender Singh, Mahender Singh and Harshvardhan along with driver Dhanveer Patwal proceeded in a vehicle bearing No. UA07-L 1777. When they reached near Chakbhool, they saw the appellant coming with white plastic bag suspecting that he is carrying contraband, intercepted him. On receiving the information from the police party, Dinesh Chander Rawat, Deputy Superintendant of Police (PW 5), a gazetted officer, also reached at the spot. After search being made, it was found that the appellant was carrying 9.300 kg of cannabis (charas). After taking 100 gm out of that, the contraband item was sealed in different pack and remaining more than 9 kg was sealed separately. FIR was registered against the appellant at Police Station Kalsi on 28-5-2006 at 9 p.m. as Crime No. 22 of 2006 for the offence punishable under Sections 8/20 of the NDPS Act. PW 6 investigated the crime and after completion of investigation, submitted the charge-sheet against the appellant.

3. After examination from forensic laboratory, the item was found as contraband item cannabis (charas). The Special Court (the NDPS Act), after hearing the parties on 5-10-2006, framed charge of offence punishable under Sections 8/20 of the NDPS Act.

4. The prosecution examined the witnesses. However, no evidence in defence was adduced.

5. The trial court, after hearing the parties, by judgment/order dated 15-1-2010/19-1-2010 in Special Sessions Trial No. 30 of 2006, found the appellant guilty of charge of offence punishable under Sections 8/20 of the NDPS Act and sentenced him to undergo imprisonment for a period of 10 years and a fine of rupees one lakh. Aggrieved by the said judgment of the trial court, the appellant through Superintendent of District Jail, Dehradun, filed an appeal from jail being Criminal Jail Appeal No. 04 of 2010 before the High Court.

1 2011 SCC OnLine Utt 2064

The High Court, by the impugned judgment dated 18-11-2011[1], dismissed the appeal and affirmed the judgment/order passed by the trial court.

a **6.** Aggrieved by the said judgment, the appellant has filed this appeal by way of special leave before this Court.

7. Heard Mr Rajeev Maheshwaranand, learned counsel appearing as Amicus Curiae for the appellant and Mr Dinesh Kumar Garg, learned counsel for the respondent.

b **8.** Mr Rajeev Maheshwaranand, learned counsel for the appellant (accused) while assailing the legality and correctness of the impugned order argued only one point. According to him, while making the search from the appellant with a view to find out as to whether the appellant was carrying any contraband, the prosecution failed to ensure compliance with the mandatory requirements of Section 42 read with Section 50 of the NDPS Act. It was his submission that no compliance, much less compliance in letter and spirit of the requirement c of these sections, was made as explained by this Court in several cases while effecting search from the appellant and this being a fatal infirmity in the case of prosecution, the appellant's conviction deserves to be set aside on this ground alone. It is this submission, the learned counsel for the appellant elaborated in his arguments.

d **9.** In reply, the learned counsel for the respondent while supporting the view taken by the two courts below urged that no case is made out to interfere in the impugned order. It was his submission that both the courts have rightly dealt with the issue on facts and in law including the one argued here and hence, the impugned order, which has rightly resulted in the appellant's conviction, does not call for any interference.

e **10.** Having heard the learned counsel for the parties and on perusal of the record of the case we find no merit in the appeal.

11. The High Court dealt with the issue in paras 6 to 9 as under: (*Jagat Singh case*[1], SCC OnLine Utt)

> "*6.* ... I have gone through the documentary and oral evidence on f record and found that it has nowhere come on the record that at the time when the accused was intercepted by police there were public men witnessing the incident. As such, there was no occasion on the part of the policemen to get the recovery memo signed from the witnesses of public. Otherwise, also normally the public is reluctant to be witnessed in such kind of cases.
>
> g *7.* Attention of this Court is drawn to the contradictions found in the statements of prosecution witnesses. Reference is made to the statement of PW 1, Sub-Inspector Ved Prakash Thapliyal and PW 5, Dinesh Chander Singh Rawat. PW 1 Sub-Inspector Ved Prakash Thapliyal has stated that the weights brought by the constable were of 5 kg, 2 kg, 1 kg, half kilogram, 200 gm and 100 gm. On the other hand (PW 5) Dinesh Singh Rawat has h stated that the weights of kilogram, 100 gm and 50 gm, etc. were brought. In

1 *Jagat Singh* v. *State of Uttarakhand*, 2011 SCC OnLine Utt 2064

the opinion of this Court such contradictions are minor in nature and on its basis the prosecution story cannot be disbelieved. It is pertinent to mention here the quantity of cannabis said to have been recovered from the accused is nine times more than the minimum commercial quantity, which could not be a planted one. Another contradiction pointed out by the learned Amicus Curiae is that in the statement of PW 1 Ved Prakash Thapliyal, 1805 hrs is said to be the time of arrest, while in the recovery memo it is mentioned as 1845 hrs. The statement made by the witness appears to have been made on 19-11-2007, and the incident relates to 28-5-2006, as such after a period of more than one year, a minor discrepancy in the time of arrest, cannot be said to be material to doubt the prosecution story; it is pointed out that when the recovery is made PW 5 Deputy Superintendent of Police Dinesh Singh Rawat (a gazetted officer) was called, and this fact itself indicates that prosecution story cannot be doubted lightly particularly in view of all the fact that the quantity of cannabis is 9.300 kg.

8. In the above circumstances, having considered submissions of the learned counsel for the parties, and after going through the lower court record, this Court does not find any illegality or wrong appreciation of evidence made by the trial court.

9. Therefore, the conviction and sentence recorded by the trial court requires no interference. Accordingly, the appeal is dismissed."

A perusal of the relevant portion from the impugned order quoted supra would go to show that the appellant did not urge the point before the High Court which he has urged here. Be that as it may, it has otherwise no substance.

12. We find from the record of the case that the recovery of contraband was made from the appellant in the public place. In this view of the matter, the case in hand fell under Section 43 of the NDPS Act. So far as compliance with Section 50 is concerned, the prosecution proved that PW 5, who was a gazetted officer, was called and then in his presence the recovery of contraband was made from the appellant. We, thus, find that compliance with Section 50 was made in letter and spirit as provided therein and, therefore, no fault can be found in ensuring its compliance.

13. In the light of these two material issues, which were proved by the prosecution by proper evidence, the two courts below, in our opinion, rightly held that the prosecution was able to prove their case beyond the reasonable doubt against the appellant and hence, the appellant had to suffer conviction as awarded by the trial court. We, therefore, concur with the finding of the two courts which, in our view, does not call for any interference in this appeal.

14. The learned counsel then urged that since the officials concerned did not record the secret information, which they claimed to have received for making search from the appellant and hence, non-recording of such information is fatal to the case of prosecution. We find no merit in the submission because the information received was recorded as a fact in the record. In this view of the matter, this submission is factually incorrect and hence, rejected.

15. The learned counsel then urged some points relating to facts. Similarly some points were so technical that they do not need any mention nor elaboration. We were, therefore, not impressed by any of these submissions. These submissions are, therefore, rejected being devoid of any merit.

16. In the light of foregoing discussion, we find no merit in the appeal. The appeal thus fails and is accordingly dismissed.

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(BEFORE ABHAY MANOHAR SAPRE AND ASHOK BHUSHAN, JJ.)

STATE OF RAJASTHAN .. Appellant;

Versus

JAGRAJ SINGH ALIAS HANSA .. Respondent.

Criminal Appeal No. 1233 of 2006†, decided on June 29, 2016

Narcotics, Intoxicants and Liquor — Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 42, 43, 50 and 8/15 — Relative scope of Ss. 42 and 43 — Search and seizure from personal jeep, at night, without warrant — Compliance with S. 42 — What amounts to/What amounts to breach thereof, explained

— Vehicle searched if personal/private, or, public service vehicle — Determination of

— Reiterated, compliance with S. 42 is mandatory in such a case as the present wherein the search was of a private vehicle — S. 43 not attracted in such a case — Search conducted in breach of Ss. 42(1) proviso and 42(2) — Accused seriously prejudiced — Conviction rightly reversed — Object and reasons for enactment of NDPS Act, summarised

— Search and seizure of opium powder from jeep at night, in which respondent-accused and another were sitting, besides the driver — Conviction of respondent was set aside by High Court — Search was conducted by SHO on secret information received from informer, at night and without warrant

— Held, breach of S. 42 is found in two parts — First, that there is presence of difference between secret information recorded by SHO and information sent to CO, his immediate superior — S. 42(2) requires, that where an officer takes down information in writing under S. 42(1), he shall send a copy thereof to his immediate officer senior — Communication which was sent to CO, was not as per information recorded — Thus, High Court rightly concluded that there was breach of S. 42(2) — Again, S. 42(1) proviso indicates, that in the event search has to be made between sunset and sunrise, the warrant would be necessary unless the officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of the offender, which grounds of his belief have to be recorded — Herein, no ground for belief as contemplated under S. 42(1) proviso was ever recorded by SHO, who proceeded to carry on search — Aforementioned is second non-compliance under S. 42(1) proviso, rightly adverted to by High Court

— Further, High Court correctly held that jeep was personal vehicle and could not be treated as public transport vehicle — Vehicles which can be used for public are public motor vehicles for which necessary permits have to be obtained — High Court has looked into the evidence and concluded that there was no material to indicate that there was any permit for running the jeep as public transport vehicle — Hence, finding of trial court, that jeep searched was

† From the Judgment and Order dated 24-11-2003 of the High Court of Judicature for Rajasthan at Jodhpur in SB Crl. A. No. 98 of 2001

being used to transport passengers, that as per Explanation to S. 43, that "public place" includes any public conveyance, the vehicle was a public transport vehicle and there was no need of any warrant or authority to search such a vehicle, rightly reversed by High Court

— Herein, prosecution itself has come with case that secret information was received from informer which was recorded and thereafter SHO along with police party proceeded towards the scene — It is not a case where SHO suddenly carried out search at a public place — When search is conducted after recording information under S. 42(1), provisions of S. 42 have to be complied with — Thus, present is not a case where S. 43 was attracted, hence, non-compliance with S. 42(1) proviso and S. 42(2), seriously prejudiced the accused — Therefore, no error was committed by High Court in setting aside conviction of respondent — No interference required — Motor Vehicles Act, 1988 — Ss. 2(33), (35) and 66 — "Public service vehicle" or "private service vehicle", "private vehicle", "personal vehicle" — Determination of (Paras 9 to 30)

State of Punjab v. *Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080; *Karnail Singh* v. *State of Haryana*, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887, *followed*

State of Punjab v. *Balbir Singh*, (1994) 3 SCC 299 : 1994 SCC (Cri) 634; *Saiyad Mohd. Saiyad Umar Saiyad* v. *State of Gujarat*, (1995) 3 SCC 610 : 1995 SCC (Cri) 564; *Directorate of Revenue* v. *Mohd. Nisar Holia*, (2008) 2 SCC 370 : (2008) 1 SCC (Cri) 415; *Beckodan Abdul Rahiman* v. *State of Kerala*, (2002) 4 SCC 229 : 2002 SCC (Cri) 791, *relied on*

Jagraj Singh v. *State*, Criminal Appeal No. 98 of 2001, decided on 24-11-2003 (Raj), *affirmed*

State of Rajasthan v. *Krishan Lal*, Criminal Appeal No. 1232 of 2006, order dated 3-4-2014 (SC); *State of H.P.* v. *Pirthi Chand*, (1996) 2 SCC 37 : 1996 SCC (Cri) 210, *referred to*

Abdul Rashid Ibrahim Mansuri v. *State of Gujarat*, (2000) 2 SCC 513 : 2000 SCC (Cri) 496; *Sajan Abraham* v. *State of Kerala*, (2001) 6 SCC 692 : 2001 SCC (Cri) 1217, *cited*

Appeal dismissed Y-D/57124/SR

Advocates who appeared in this case :
Vivek Ranjan Mohanty, Puneet Parihar and Milind Kumar, Advocates, for the Appellant;
Soumen T., R.D. Rathore and Dr Kailash Chand, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

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11. (1994) 3 SCC 299 : 1994 SCC (Cri) 634, *State of Punjab* v. *Balbir Singh* 692*a-b*, 697*e-f*, 698*b-c*, 700*c*, 700*d*, 700*d-e*

The Judgment of the Court was delivered by

ASHOK BHUSHAN, J.— This appeal has been filed by the State of Rajasthan against the judgment of the High Court of Judicature of Rajasthan at Jodhpur in *Jagraj Singh* v. *State*[1] dated 24-11-2003 acquitting the accused from the charges under Sections 8/15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") after setting aside the judgment and conviction order of the Special Judge (NDPS Cases), Hanumangarh, Rajasthan dated 31-5-2000 by which judgment the accused were sentenced to undergo 12 years' rigorous imprisonment with a fine of Rs 1,20,000 each. The accused were to undergo further rigorous imprisonment of one year each in case of not depositing the fine. Accused, Kishan Lal had filed Single Bench Criminal Appeal No. 397 of 2000 and accused, Jagraj Singh alias Hansa had filed Single Bench Criminal Appeal No. 98 of 2001. Both the appeals having been allowed by the High Court of Rajasthan, this appeal being Criminal Appeal No. 1233 of 2006 has been filed by the State of Rajasthan against the acquittal of Jagraj Singh alias Hansa. Criminal Appeal No. 1232 of 2006 has already been dismissed[2] by this Court.

2. The prosecution case in a nutshell is: Shishupal Singh, Station House Officer, Bhadra received a secret information on 9-8-1998 at 8 p.m. that a blue jeep Car No. HR 24 4057 would come and pass through Haryana via Sirsa. A memo was prepared regarding the above information which was also entered into roznamcha and information was also conveyed to the Circle Officer, Nohar at 8.05 p.m. on the same day through a constable. The Station House Officer along with certain other police personnel proceeded after taking two independent witnesses, namely, Hawa Singh and Karam Singh. At 10.15 p.m. jeep HR 24 4057 was seen coming from Sahaba. It was stated that one driver and two other persons were sitting who told their names as Jagraj Singh and Kishan Lal. Bags were lying in the jeep. The Station House Officer gave notice to Jagraj and Kishan Lal and thereafter search was conducted. Nine bags containing opium powder were recovered from the jeep for which the accused were having no licence. Opium powder was weighed and two samples of 200 gm each were taken from each bag. Seizure memo was prepared on the spot. Both the persons were arrested. Material was sealed and after reaching the police station, first information report being FIR No. 291/98 was registered. Samples were sent to Forensic Science Laboratory, Jaipur and on receiving a positive report, charge-sheet was filed against both the accused under Sections 8/15 of the Act. The prosecution produced 12 witnesses including Station House Officer, Shishupal Singh as PD 11. Two independent witnesses PD 2, Hawa Singh and PD 3, Karam Singh were declared hostile. The prosecution also produced documents, Exts. P-1 to P-40. The statements of the accused were recorded under Section 313 CrPC. Shri Ram Meena the then Circle Officer, Nohar was examined as Defence Witness 1.

1 Criminal Appeal No. 98 of 2001, decided on 24-11-2003 (Raj)

2 *State of Rajasthan* v. *Krishan Lal*, Criminal Appeal No. 1232 of 2006, order dated 3-4-2014 (SC)

3. Before the learned Sessions Judge, the accused contended that the mandatory provisions of Sections 42(1) and 42(2) as well as Section 50 of the NDPS Act have not been complied with; both the independent witnesses have not supported the status of recovery and that entire action had taken place at police station; the chain of events is not present so as to convict the accused. The test report is not admissible and readable. The contentions of the accused were refuted by the learned Special Public Prosecutor.

4. The learned Sessions Judge held that the information received by the Station House Officer was recorded as Ext. P-14 and the same was sent to the Circle Officer, Nohar by Ext. P-15. Hence, the Station House Officer has fully complied with the provisions of Sections 42(1) and 42(2). The Sessions Judge further held that the vehicle was being used to transport passengers as has been clearly stated by PW 4 Vira Ram, hence, as per Explanation to Section 43 of the NDPS Act, vehicle was covered within the ambit of public place. Therefore, there was no need of any warrant or authority to search. The learned Sessions Judge also found that Section 50 was complied with since notices were issued to both the accused before search. The Sessions Judge noted that although both the independent witnesses have turned hostile but the police officers and officials have been examined on behalf of the prosecution with whom the fact of enmity has not been proved. The chain of events was complete. After coming to the aforesaid conclusion, the learned Sessions Judge convicted both the accused.

5. Both the criminal appeals filed by Kishan Lal and Jagraj Singh were decided by a common judgment of the High Court dated 24-11-2003[1]. The High Court while allowing the appeal gave the following reasons and findings:

5.1. The secret information which was recorded as Ext. P-14 and in Ext. P-21 roznamcha it was not mentioned that "two persons will come from Jhunjhnu who are carrying powder of opium", whereas Ext. P-15, the information sent to the Circle Officer, Nohar which was also received by the Circle Officer, Nohar the above fact was mentioned which was missing in Exts. P-14 and P-21. In view of the above, Section 42(2) was not complied with.

5.2. The proviso to sub-section (1) of Section 42 provides that if such officer has reasons to believe, he may carry the search after recording the grounds of belief whereas no ground of belief as contemplated by the proviso was recorded in the present case and search took place after sunset which violates the provisions of Section 42(2) proviso.

5.3. The jeep which was the personal jeep of Vira Ram could not be treated as public transport vehicle. No evidence was brought on the record that there was any permit for public transport vehicle. The brother-in-law of Vira Ram i.e. Kartararam do not support the case that the vehicle was a public transport vehicle. Section 43 of the Act was not applicable; hence, the view of the court below that compliance with Section 42 was not necessary, is incorrect.

5.4. Further, the secret information from informer was received and recorded and search was conducted thereafter. The present was not a case of conducting the search at public place suddenly.

1 *Jagraj Singh* v. *State*, Criminal Appeal No. 98 of 2001, decided on 24-11-2003 (Raj)

5.5. The sealing of the material sample was not proper nor was the sample of seal deposited in the stock house. The seal vide which material has been sealed has not been kept safe anywhere, it remained in the possession of the officer who conducted the search.

5.6. The independent witnesses have not supported the case of the prosecution at all.

6. The State of Rajasthan feeling aggrieved against the judgment of the High Court has come up in this appeal. The learned counsel for the appellant has contended that there was compliance with the provisions of Sections 42(1) and 42(2) and moreover, the vehicle being used to carry passengers as has come in the statement of the owner of the vehicle Vira Ram PW 4 and the search being conducted at public place, by virtue of Section 43 there was no necessity of compliance with Section 42. It is further contended that minor discrepancy in Ext. P-14 and that of Ext. P-15 was inadvertent mistake due to which it cannot be said that the provisions of Section 42(1) were not complied with. It is contended that the Station House Officer and other police personnel accompanying the team have been examined and they have proved the recovery and chain of events. The High Court has committed error in acquitting the accused whereas there was sufficient ground and material to support the conviction order recorded by the Special Judge.

7. The learned counsel appearing for the accused have supported the judgment of the High Court and submit that compliance with the provisions of Sections 42(1) and 42(2) have been held to be mandatory by this Court and due to non-compliance with the said provisions, the conviction has rightly been set aside by the High Court. It is submitted that Section 43 of the Act is not attracted since the search was conducted after recording information from the informer and the Station House Officer himself in his statement had stated the facts for proving compliance with Section 42, hence, it cannot be said that compliance with Section 42 was not required more so the jeep was personal jeep of Vira Ram and the High Court has rightly held that there was no material to prove that jeep was a public transport vehicle. No permit from transport authority to ply the vehicle as a public transport vehicle had been filed or even pleaded.

8. We have considered the submissions of the learned counsel for the parties and have perused the record.

9. Whether the High Court committed error in acquitting the accused is the issue which needs to be considered in this appeal. Whether there was sufficient material to support the findings of the High Court regarding non-compliance with Section 42(1) and Section 42(2) and whether Section 43 was applicable in the present case are the other issues which need to be answered. Whether recovery as claimed by the prosecution is supported from the evidence on record and material and samples were properly sealed are other related issues.

10. The NDPS Act was enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. This Court had the occasion to consider the provisions of the NDPS Act in a large number of cases. This Court has noted that the object of the NDPS Act is to make

stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. This Court in *State of Punjab* v. *Balbir Singh*[3] has made the following observations: (SCC p. 315, para 15)

> "*15.* ... The object of the NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial."

11. To the similar effect are the observations of this Court in *Saiyad Mohd. Saiyad Umar Saiyad* v. *State of Gujarat*[4]. The following was stated in para 6 of the said judgment: (SCC pp. 614-15)

> "*6.* It is to be noted that under the NDPS Act punishment for contravention of its provisions can extend to rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years and also to fine which shall not be less than rupees one lakh but which may extend to rupees two lakhs, and the court is empowered to impose a fine exceeding rupees two lakhs for reasons to be recorded in its judgment. Section 54 of the NDPS Act shifts the onus of proving his innocence upon the accused; it states that in trials under the NDPS Act it may be presumed, unless and until the contrary is proved, that an accused has committed an offence under it in respect of the articles covered by it 'for the possession of which he fails to account satisfactorily'. Having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable, the legislature has enacted the safeguard contained in Section 50. To obviate any doubt as to the possession by the accused of illicit articles under the NDPS Act, the accused is authorised to require the search for such possession to be conducted in the presence of a gazetted officer or a Magistrate."

12. In the present case, Section 42 is relevant which is extracted as below:

> "**42.** ***Power of entry, search, seizure and arrest without warrant or authorisation.***—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of Central excise,

3 (1994) 3 SCC 299 : 1994 SCC (Cri) 634
4 (1995) 3 SCC 610 : 1995 SCC (Cri) 564

narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset—

(*a*) enter into and search any such building, conveyance or place;

(*b*) in case of resistance, break open any door and remove any obstacle to such entry;

(*c*) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and

(*d*) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

13. The High Court has come to the conclusion that there is breach of mandatory provisions of Section 42(1) and Section 42(2) and further Section 43 which was relied on by the Special Judge for holding that there was no necessity to comply with Section 42 is not applicable. We thus proceed to first examine the question as to whether there is breach of provisions of Section 42(1) and Section 42(2). The breach of Section 42 has been found in two parts. The first part is that there is difference between the secret information recorded in

Ext. P-14 and Ext. P-21 and the information sent to the Circle Officer, Nohar by Ext. P-15. It is useful to refer to the findings of the High Court in the above context, which is quoted below:

> "From the above examination, it is not found that Ext. P-14 the information which is stated to be received from the informer under Section 42(2) of the Act or Ext. P-21, the information given by the informer which is stated to be recorded in the roznamcha, copy whereof has been sent to C.O., Nohar, who was the then Senior Officer, rather, Ext. P-15, the letter which was sent, it is not the copy of Ext. P-14, but it is the separate memo prepared of their own. From the above examination, it is not found in the present case that Section 42(2) of the Act, 1985 is complied with."

14. What Section 42(2) requires is that where an officer takes down an information in writing under sub-section (1) he shall send a copy thereof to his immediate officer senior. The communication Ext. P-15 which was sent to the Circle Officer, Nohar was not as per the information recorded in Ext. P-14 and Ext. P-21. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).

15. Another aspect of non-compliance with Section 42(1) proviso, which has been found by the High Court needs to be adverted to. Section 42(1) indicates that any authorised officer can carry out search between sunrise and sunset without warrant or authorisation. The scheme indicates that in the event the search has to be made between sunset and sunrise, the warrant would be necessary unless the officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of the offender which grounds of his belief have to be recorded. In the present case, there is no case that any ground for belief as contemplated by the proviso to sub-section (1) of Section 42 or sub-section (2) of Section 42 was ever recorded by the Station House Officer who proceeded to carry on search. The Station House Officer has appeared as PD 11 and in his statement also he has not come with any case that as required by the proviso to sub-section (1), he recorded his grounds of belief anywhere. The High Court after considering the entire evidence has made the following observations:

> "Shishupal Singh, PD 11 by whom search has been conducted, on reaching at the place of occurrence by him no reasons to believe have been recorded before conducting the search of jeep bearing No. HR 24 4057 under Section 42(1), nor any reasons in regard to not obtaining the search warrant have been recorded. He has also not stated any such facts in his statements that he has conducted any proceedings in regard to compliance with proviso to Section 42(1). Since reasons to believe have not been recorded, therefore, under Section 42(2) it is not found on record that copy thereof has been sent to the senior officials. Shishupal Singh could be the best witness in this regard, who has not stated any fact in his statement regarding compliance with proviso to Section 42(1) and Section 42(2), sending of copy of reasons to believe recorded by him to his senior officials."

16. In this context, it is relevant to note that before the Special Judge also the breach of Sections 42(1) and 42(2) was contended on behalf of the defence. In para 12 of the judgment the Special Judge noted the above arguments of defence. However, the arguments based on non-compliance with Section 42(2) were brushed aside by observing that discrepancy in Ext. P-14 and Ext. P-15 is totally due to clerical mistake and there was compliance with Section 42(2). The Special Judge coming to compliance with the proviso to Section 42(1) held that the vehicle searched was being used to transport passengers as has been clearly stated by its owner Vira Ram, hence, as per the Explanation to Section 43 of the Act, the vehicle was a public transport vehicle and there was no need of any warrant or authority to search such a vehicle. The High Court has reversed the above findings of the Special Judge. We thus, proceed to examine as to whether Section 43 was attracted in the present case which obviated the requirement of Section 42(1) proviso.

17. Section 43 of the Act is as follows:

"**43.** ***Power of seizure and arrest in public place.***—Any officer of any of the departments mentioned in Section 42 may—

(*a*) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act;

(*b*) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.—For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

18. The Explanation to Section 43 defines the expression "public place" which includes any public conveyance. The word "public conveyance" as used in the Act has to be understood as a conveyance which can be used by the public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public motor vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers.

19. In the present case, it is not the case of the prosecution that the jeep HR 24 4057 had any permit for transporting the passengers. The High Court has looked into the evidence and come to the conclusion that there was no material to indicate that there was any permit for running the jeep as public transport vehicle. The High Court has further held that even Kartara Ram who as per the owner of the vehicle, Vira Ram, was using the vehicle, does not support that the jeep was used as public transport vehicle. The High Court held that personal jeep could not be treated as public transport vehicle.

20. The following observations were made by the High Court:

> "Kartara Ram is produced as PD 5, who has deposed the statement that Vira Ram is his brother-in-law (saala), on whose name jeep bearing No. HR 24 4057 is lying registered. He had employed Inderjit Singh as driver for that jeep. Person, namely, Krishan has never been employed as driver. This witness has been declared hostile and he has been examined too, who does not support the prosecution case. In this manner, Vira Ram is the owner of the jeep. According to him he had given the jeep to Kartara Ram, but Kartara Ram has not stated anywhere in his statement that this jeep was given to him and he used the same as public transport vehicle. Since powder of opium was caught in this jeep and even notice Ext. P-6 was also served upon him by the police, he with a view to save himself, can also depose such statement that Kartara used to use the jeep as public transport vehicle, whereas Kartara Ram PD 5 does not affirm this fact. Jeep was personal, it is clear on the record. In this manner, just on this ground that he has given the jeep to his brother-in-law and he used it to carry the passengers, the personal jeep could not be treated as public transport vehicle. However, the fact that jeep is used to carry the passengers has not been affirmed from the statements of Kartara Ram. There is no evidence on record on the basis of which it could be stated that jeep was public transport vehicle and they have the permit for it, rather it was the private vehicle and it is stated that Vira Ram himself is the owner of that vehicle."

21. There is nothing to impeach the aforesaid findings. We have also perused the statement of Vira Ram in which statement he has never even stated that he has any permit for running the vehicle as transport vehicle. He has stated that "*... I had given this jeep to Kartara Ram, resident of ... who is my relative to run it for transporting passengers*". Admittedly the jeep was intercepted and was seized by the police. In view of the above, the jeep cannot be said to be a public conveyance within the meaning of the Explanation to Section 43. Hence, Section 43 was clearly not attracted and the provisions of Section 42(1) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been complied with, the High Court did not commit any error in setting aside the conviction.

22. There is one more aspect which needs to be noted. The present is a case where the prosecution itself has come with case that secret information was received from the informer which information was recorded in Ext. P-14 and Ext. P-21 roznamcha and thereafter the Station House Officer along with

the police party proceeded towards the scene. The present is not a case where the Station House Officer suddenly carried out search at a public place. The Station House Officer in his statement has also come up with the facts and case to prove compliance with Section 42. When search is conducted after recording information under Section 42(1), the provisions of Section 42 have to be complied with. This Court in *Directorate of Revenue* v. *Mohd. Nisar Holia*[5] had occasion to consider Sections 41, 42 and 43 Explanation. The following was stated in para 14: (SCC pp. 377-78)

> "*14.* Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance with Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance with the said provision would not render the search a nullity. A distinction therefore must be borne in mind between a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance."

23. Thus the present is not a case where Section 43 can be said to have been attracted, hence, non-compliance with Section 42(1) proviso and Section 42(2) had seriously prejudiced the accused. This Court had occasion in a large number of cases to consider the consequence of non-compliance with the provisions of Sections 42(1) and 42(2), whether the entire trial stands vitiated due to above non-compliance or conviction can be set aside. In this context reference is made to the judgment of this Court in *State of Punjab* v. *Balbir Singh*[3]. In the above batch of cases, the High Court has acquitted the accused on the ground that search was conducted without conforming to the provisions of the NDPS Act. Sections 41, 42, 43 and other relevant provisions came up for consideration before this Court, referring to the provisions of Chapter IV the following was stated in para 8: (SCC pp. 311-12)

> "*8.* But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of Sections 41 and 42. Under Section 42, the empowered officer even without a warrant issued as provided under Section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given

5 (2008) 2 SCC 370 : (2008) 1 SCC (Cri) 415
3 (1994) 3 SCC 299 : 1994 SCC (Cri) 634

by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief. Sub-section (2) of Section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso, he shall forthwith send a copy thereof to his immediate official superior."

24. After referring to a large number of cases, this Court in *Balbir Singh case*[3] recorded the conclusion in para 25 which is to the following effect: (SCC pp. 320-22)

"*25.* The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act, etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorised officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

3 *State of Punjab* v. *Balbir Singh*, (1994) 3 SCC 299 : 1994 SCC (Cri) 634

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance with this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC, namely, Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer

or the Magistrate, would amount to non-compliance with Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay, etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

25. A three-Judge Bench in *Saiyad Mohd. Saiyad Umar Saiyad* v. *State of Gujarat*[4] after elaborate consideration of the provisions of the NDPS Act including Section 50 had endorsed the judgment of this Court in *Balbir Singh case*[3].

26. A Constitution Bench of this Court in *State of Punjab* v. *Baldev Singh*[6] had occasion to consider the provisions of the NDPS Act and several earlier judgments of this Court. The Constitution Bench noticed that the earlier judgments in *Balbir Singh case*[3] have found approval by a three-Judge Bench in *Saiyad Mohd. Saiyad Umar Saiyad* v. *State of Gujarat*[4] and a discordant note was struck by two-Judge Bench in *State of H.P.* v. *Pirthi Chand*[7]. The Constitution Bench approved the view of this Court in *Balbir Singh case*[3] that there is an obligation on authorised officer under Section 50 to inform the suspect that he has right to be informed in the presence of the gazetted officer. It was held by the Constitution Bench that if search is conducted in violation of Section 50 it may not vitiate the trial but that would render the recovery of illicit articles suspect and vitiates the conviction and sentence of the accused. What is said about non-compliance with Section 50 is also true with regard to non-compliance with Section 42 of the Act.

27. In *Beckodan Abdul Rahiman* v. *State of Kerala*[8] this Court had occasion to consider both Section 42 and Section 50. In the above case there was non-compliance with Section 42(2) as well as Section 50. It was also noticed that a Constitution Bench in *State of Punjab* v. *Baldev Singh*[6] has already laid down that the provisions of Sections 42 and 50 are mandatory and their non-compliance would render the investigation illegal. The following was held in paras 5 and 6: (*Beckodan Abdul case*[8], SCC p. 233)

"*5.* In this case the violation of the mandatory provisions is writ large as is evident from the statement of K.R. Premchandran (PW 1). After

4 (1995) 3 SCC 610 : 1995 SCC (Cri) 564
3 *State of Punjab* v. *Balbir Singh*, (1994) 3 SCC 299 : 1994 SCC (Cri) 634
6 (1999) 6 SCC 172 : 1999 SCC (Cri) 1080
7 (1996) 2 SCC 37 : 1996 SCC (Cri) 210
8 (2002) 4 SCC 229 : 2002 SCC (Cri) 791

recording the information, the witnesses are not shown to have complied with the mandate of sub-section (2) of Section 42 of the Act. Similarly the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in presence of a gazetted officer or Magistrate. ...

6. We are of the firm opinion that the provisions of sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution, which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted."

28. It is also relevant to note another Constitution Bench judgment of this Court in *Karnail Singh* v. *State of Haryana*[9] wherein this Court had again occasion to consider the provisions of Sections 42 and 50. The Constitution Bench noted the divergence of opinion in two earlier cases which has resulted in placing the matter before the larger Bench. The question was noticed in paras 1 to 3 of the judgment which are to the following effect: (SCC p. 543)

"*1.* In *Abdul Rashid Ibrahim Mansuri* v. *State of Gujarat*[10], a three-Judge Bench of this Court held that compliance with Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") is mandatory and failure to take down the information in writing and forthwith send a report to his immediate official superior would cause prejudice to the accused. In *Sajan Abraham* v. *State of Kerala*[11], which was also decided by a three-Judge Bench, it was held that Section 42 was not mandatory and substantial compliance was sufficient.

2. In view of the conflicting opinions regarding the scope and applicability of Section 42 of the Act in the matter of conducting search, seizure and arrest without warrant or authorisation, these appeals were placed before the Constitution Bench to resolve the issue.

3. The Statement of Objects and Reasons of the NDPS Act makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well-organised gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national Governments, this comprehensive law was enacted by Parliament enabling exercise of control over...."

9 (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887
10 (2000) 2 SCC 513 : 2000 SCC (Cri) 496
11 (2001) 6 SCC 692 : 2001 SCC (Cri) 1217

29. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance with requirement of Sections 42 and 50 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance with Section 42. The Constitution Bench noted the effect of the aforesaid two decisions in para 5. The present is not a case where insofar as compliance with Section 42(1) proviso even an argument based on substantial compliance is raised there is total non-compliance with Section 42(1) proviso. As observed above, Section 43 being not attracted, search was to be conducted after complying with the provisions of Section 42. We thus, conclude that the High Court has rightly held that non-compliance with Section 42(1) and Section 42(2) were proved on the record and the High Court has not committed any error in setting aside the conviction order.

30. In view of what has been stated above, it is not necessary for us to enter into the other reasons given by the High Court for setting aside the conviction order. The High Court has given sufficient reasons and grounds for setting aside the conviction order in which we do not find any infirmity so as to interfere in this appeal.

31. In the result the appeal is dismissed.

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(2016) 4 Supreme Court Cases 617

(BEFORE V. GOPALA GOWDA AND UDAY U. LALIT, JJ.)

SURENDER ALIAS KALA .. Appellant;

Versus

STATE OF HARYANA .. Respondent.

Criminal Appeal No. 50 of 2016†, decided on January 19, 2016

Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 18 — Recovery of 1 kg of opium — Investigation if an unfair/improper one — Special Judge found appellant guilty under S. 18 for being in possession of 1 kg of opium — High Court affirmed the view taken by trial court — Appellant submitted that as investigation was conducted by PW 6 SI *S* who himself was complainant, investigation by PW 6 SI *S* was improper — Held, in the instant case, search of appellant was conducted in presence of and under the instructions of PW 4, a gazetted officer — It was not PW 6 SI *S* alone who was involved in the investigation — No reason to differ from the view taken by High Court — Appeal dismissed (Paras 12 to 14)

PW 6, SI *S*, on usual patrol duty on 24-6-2002 received secret information that the appellant was selling opium and was roaming in the village in search of customers. This information was reduced to writing and was sent to police station for information, whereupon DDR, Ext. PC was recorded. PW 6 *S* and other police officials reached the bus-stand and apprehended the appellant. He was given an appropriate notice under Section 50 of the Act and he opted to be searched before a gazetted officer. A wireless message was sent to PW 4 *SS*, DSP Gohana who reached the spot. On the instructions of PW 4, personal search of the appellant was undertaken which resulted in recovery of 1kg 50gm opium from the possession of the appellant. FSL report was received wherein it was opined that the sample in question was opium. The appellant was ultimately convicted for the offence punishable under Section 18 of the Act.

Dismissing the appeal, the Supreme Court held as above.

Surender v. *State of Haryana*, Criminal Appeal No. 318-SB of 2004, order dated 11-12-2014 (P&H), *affirmed*

State v. *Rajangam*, (2010) 15 SCC 369 : (2012) 4 SCC (Cri) 714; *Megha Singh* v. *State of Haryana*, (1996) 11 SCC 709 : 1997 SCC (Cri) 267, *distinguished on facts*

J-D/56288/CR

Advocates who appeared in this case :
Rakesh Dahiya, Advocate, for the Appellant;
Sanjay Kr. Visen, Advocate, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. Criminal Appeal No. 318-SB of 2004, order dated 11-12-2014 (P&H), *Surender* v. *State of Haryana* 618*a*
2. (2010) 15 SCC 369 : (2012) 4 SCC (Cri) 714, *State* v. *Rajangam* 619*h*, 620*a*, 620*f-g*
3. (1996) 11 SCC 709 : 1997 SCC (Cri) 267, *Megha Singh* v. *State of Haryana* 620*a-b*, 620*b-c*, 620*e-f*, 620*f*

† Arising out of SLP (Crl.) No. 2082 of 2015

The Judgment of the Court was delivered by

UDAY U. LALIT, J.— Leave granted. This appeal is directed against the judgment and order dated 11-12-2014[1] passed by the High Court of Punjab and Haryana dismissing Criminal Appeal No. S-318-SB of 2004 preferred by the appellant against his conviction under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act") for being in possession of 1 kg of opium without any permit or licence.

2. According to the prosecution, PW 6, SI Satbir Singh was on usual patrol duty on 24-6-2002 along with other police officials at bus-stand of Village Bichpar, District Sonipat. Secret information was received by him that the appellant was selling opium and was roaming in the village in search of customers. This information was reduced to writing in the form of ruqa, Ext. PF and was sent to the police station for information, whereupon DDR, Ext. PC was recorded. PW 6 Satbir and other police officials reached the bus-stand and saw the appellant coming from Village Gangana side. He was apprehended. The appellant was told that he was suspected to be carrying opium in his possession and as such his personal search had to be undertaken and that he had a right to be searched in the presence of a gazetted officer or a Magistrate. The appellant was given an appropriate notice vide Ext. PA under Section 50 of the Act and by his reply, Ext. PA-1 he opted to be searched before a gazetted officer.

3. Thereafter, a wireless message was sent to PW 4, Shyam Singh Rana, DSP Gohana who reached the spot. The appellant was produced before him and PW 4 was also acquainted with the facts of the case. Thereafter, on the instructions of PW 4, personal search of the appellant was undertaken which resulted in recovery of opium from the possession of the appellant. The opium was found in a polythene bag tied in a cloth around the stomach of the appellant. On weighment, it was found to be 1kg 50gm. A sample was taken and put in a small plastic bag while the remainder was put in a bag of cloth. The sample and the remainder were separately sealed and taken in possession vide memo, Ext. PB. The seal was then handed over to PW 1, ASI Bishamber Lal. Thereafter ruqa, Ext. PC was sent to the police station for registration of crime, whereupon FIR, Ext. PC was recorded by PW 2, Head Constable Om Parkash.

4. The appellant along with the case property was produced before PW 3, Yad Ram, SHO of police station who verified the fact and put his own seal bearing impression "YR" on the sample as well as on the remainder. Thereafter, the sealed case property was handed over to the investigating officer who deposited the same with malkhana. In due course of time the FSL report, Ext. PD was received wherein it was opined that the sample in question was opium. After completion of investigation, the appellant was charge-sheeted and tried for having committed the offence punishable under Section 18 of the Act.

5. The prosecution in support of its case examined six witnesses. PW 1 ASI Bishamber Lal stated as under:

1 *Surender* v. *State of Haryana*, Criminal Appeal No. 318-SB of 2004, order dated 11-12-2014 (P&H)

"As contraband article was suspected with the accused so he was served with a notice, Ext. PA to opt about his search before a gazetted officer or a Magistrate, which is bearing my signatures. The accused opted for his search before a gazetted officer vide endorsement, Ext. PA-1 which is bearing my signatures."

6. PW 2 Head Constable Om Parkash in his deposition stated as under:

"On that day ASI Bishamber Lal deposited the case property with me, which was sealed with seal SS."

7. PW 3 SI Yad Ram in his deposition stated as under:

"On 24-6-2002, I was posted SI/HO, PS Baroda. On that day SI Satbir Singh had produced the accused now present in the court, two sealed parcels and the witnesses before me. I verified the investigation and affixed my own bearing inscription 'YR'. I directed SI Satbir Singh to deposit the case property with seals intact with MHC, PS Baroda."

8. PW 4 Shyam Singh Rana, DSP stated as under:

"I directed SI Satbir Singh to carry out the search of the accused. During the course of search SI Satbir Singh recovered opium wrapped in a cloth and tied with the stomach of the accused underneath the shirt and the vest of the accused wrapped in a polythene pack. On weighment, it was found to be one kilogram. SI Satbir Singh took out 50gm of opium from the recovered bulk and sealed the sample and the remainder into two separate parcels with the seal bearing inscription SS. Both the sealed parcels were taken into possession vide recovery memo, Ext. PB which was signed by ASI Bishamber Lal and HC Suresh Kumar and was attested by me also."

9. In his statement under Section 313 CrPC, the appellant denied the prosecution allegations and pleaded innocence. After considering the material on record and rival submissions, the Special Judge, Sonipat found the appellant guilty of the offence punishable under Section 18 of the Act and by his judgment and order dated 14-11-2004 sentenced him to undergo rigorous imprisonment for 5 years and to pay a fine of Rs 10,000, in default whereof to undergo further rigorous imprisonment for a period of 8 months.

10. The judgment of conviction and sentence was challenged by way of Criminal Appeal No. S-318–SB of 2004 in the High Court. After considering the entire material on record, the High Court by its judgment under appeal affirmed the view taken by the trial court and dismissed the appeal. The correctness of the view taken by the High Court is under challenge in the present appeal.

11. It was submitted by Mr Rakesh Dahiya, learned advocate appearing for the appellant that the investigation in the matter was conducted by PW 6 SI Satbir Singh who himself was the complainant. Relying on the decision of this Court in *State* v. *Rajangam*[2], the learned counsel submitted that the

2 (2010) 15 SCC 369 : (2012) 4 SCC (Cri) 714

investigation by PW 6 SI Satbir Singh was improper and the appellant was entitled to acquittal.

12. We have given anxious consideration to the submissions of the learned counsel. In *State* v. *Rajangam*[2], the High Court had acquitted the accused. Relying upon the decision of this Court in *Megha Singh* v. *State of Haryana*[3], the view taken by the High Court was affirmed by this Court in an appeal against acquittal. In *Megha Singh*[3] the accused was tried under the provisions of the TADA Act and the Arms Act for being in possession of a country-made pistol and three live cartridges. The prosecution did not examine any independent witness and simply relied upon the testimony of PW 3 investigating officer. There was also discrepancy in the depositions of PW 3 investigating officer and another police person, namely, PW 2. In the light of these facts, it was observed in *Megha Singh*[3] as under: (SCC pp. 710-11, para 4)

> "*4*. After considering the facts and circumstances of the case, it appears to us that there is discrepancy in the depositions of PWs 2 and 3 and in the absence of any independent corroboration such discrepancy does not inspire confidence about the reliability of the prosecution case. We have also noted another disturbing feature in this case. PW 3, Siri Chand, Head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being the complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161 CrPC. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation."

13. In *Megha Singh*[3], the search was not conducted in the presence of a gazetted officer, as is required in a case under the Act. In the instant case, the search of the appellant was conducted in the presence of and under the instructions of PW 4. The extracts of depositions of other prosecution witnesses show that it was not PW 6 SI Satbir Singh alone who was involved in the investigation. In our view the principle laid down in *Megha Singh*[3] and followed in *State* v. *Rajangam*[2] does not get attracted in the present matter. Relevant to note that this was not even a ground projected in support of the case of the appellant and does not find any reference in the judgment under appeal. We, therefore, reject the submission.

14. Having gone through the entirety of the matter, we do not find any reason to differ from the view taken by the High Court. We, therefore, dismiss this appeal.

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2 (2010) 15 SCC 369 : (2012) 4 SCC (Cri) 714
3 (1996) 11 SCC 709 : 1997 SCC (Cri) 267

(2015) 6 Supreme Court Cases 222

(BEFORE DIPAK MISRA AND S.A. BOBDE, JJ.)

MOHAN LAL .. Appellant;

Versus

STATE OF RAJASTHAN .. Respondent.

Criminal Appeal No. 1393 of 2010†, decided on April 17, 2015

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 13 to 22, 25 and 35 — Possession of contraband — Contraband hidden away in secret place by accused — Absence of physical control over the contraband, but accused exercising requisite control over contraband to give rise to culpable mental state — "Possession", held, is a flexible concept, and its meaning depends upon the contextual purpose and objective of statute concerned and an appropriate meaning has to be assigned to the word to effectuate the statutory object — Ordinarily, elements of possession are physical control and animus to control the thing concerned/contraband — However, even in absence of physical control of the contraband, culpable mental state of accused can arise if the accused still has the requisite degree of control over the contraband — Accused's conscious possession, in view of his special knowledge of location or site of contraband article, with animus and intention to retain exclusive control or dominion over it, would constitute offence punishable under S. 18 — Fact that accused after stealing opium from Magistrate Court's malkhana concealed it in a secret place and later led police party to discover the same, shows his conscious possession — Words and Phrases — "Possession", "conscious possession" — "Possession" when possible without actual physical control**

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 18 and 35 — Possession of contraband opium on date of coming into force of NDPS Act constitutes offence punishable under S. 18 — Continuity of offence — Even if offence of possession of contraband opium was committed prior to commencement of NDPS Act when S. 9 of Opium Act was in operation, if opium remained in possession of accused on date of coming into force of NDPS Act, without anything to show that he was divested of it meanwhile, possession being in continuum, S. 18 of NDPS Act, instead of S. 9 of Opium Act would be applicable — In such situation, no question of retrospective imposition of higher punishment under S. 18, instead of lower punishment under S. 9 of Opium Act, in violation of Art. 20(1) of the Constitution arises — Constitution of India — Art. 20(1) — Opium Act, 1878, S. 9**

C. **Constitution of India — Art. 20(1) — Prohibits conviction and sentence under ex post facto law but not trial of offence**

D. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 42, 43 and 57 — Substantial compliance with provisions made — No prejudice caused — Information of commission of offence by accused under S. 18 given to SI-cum-SHO (authorised officer), who made recovery of**

† From the Judgment and Order dated 16-7-2009 of the High Court of Judicature of Rajasthan at Jodhpur in S.B. Crl. A. No. 287 of 1989

contraband substance concealed at a public place at the instance of accused — Moreover, search and seizure of contraband substance, having been made at a public place by empowered officer, S. 43 is attracted and therefore, compliance with S. 42 not required — Further, substantial compliance with S. 57 having been made, question of prejudice does not arise

E. **Evidence Act, 1872 — S. 27 — Evidence regarding recovery of contraband article pursuant to information given by accused while in police custody in connection with another FIR, reliable — Accused not required to be arrested in respect of the same offence — Narcotic Drugs and Psychotropic Substances Act, 1985, Ss. 18 and 35**

F. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 42 and 44 — Delay in sending samples of seized contraband article to FSL — Effect — Till date of receipt of sealed packets of samples by chemical examiner, seal found to be intact — Held, delay inconsequential**

G. **Property Law — Possession — Whether a relative and functional concept — Purposive construction to be given "possession" keeping in mind statutory objective — Discretion available to Judges in applying abstract rule to a concrete set of facts — Held, over the years, it has been seen that courts have refrained from adopting a doctrinaire approach towards defining possession — A functional and flexible approach in defining and understanding possession as a concept is acceptable and thereby emphasis has been laid on different possessory rights according to the commands and justice of the social policy — Thus, the word "possession" in the context of any enactment would depend upon the object and purpose of the enactment and an appropriate meaning has to be assigned to the word to effectuate the said object — Words and Phrases — "Possession"**

An FIR was lodged at the police station on 13-11-1985 by PW 8, who was posted in the Court of the Magistrate, informing that at the intervening night of 12-11-1985/13-11-1985 it was found by him that the locks of the main gate of malkhana were broken open and the goods were lying scattered. As the details of the stolen articles could only be provided by the criminal clerk after he came from the Diwali holidays, an FIR was lodged for an offence under Section 457 IPC. The Presiding Officer PW 6, on being informed, visited the premises, got malkhana articles verified and got an inventory prepared by the Criminal Clerk, in charge of malkhana, PW 4, on 16-11-1985, and it was found that 10 kg 420 gm opium and some other articles were stolen from several packets. In connection with FIR No. 95 of 1985, the appellant was arrested for the offences punishable under Sections 457 and 380 IPC. While in custody, it was informed by him that he had broke open the lock of the malkhana of the court and stolen the opium and kept it in a white bag and concealed it in a pit dug by him underneath a small bridge. The appellant led to discovery in presence of independent witnesses. The bag and cloth were taken out by the accused digging the pit and the bag contained 10 kg and 200 gm of opium, the stolen contraband articles from the malkhana, which was the matter of investigation in FIR No. 96 of 1985. The seized stolen articles were packed separately, sealed and sent for FSL examination. After receiving the FSL report and completing the investigation, charge-sheet under Section 18 of the NDPS Act and Sections 457 and 380 IPC was filed before the appropriate court and eventually the matter

came up before the Court of Session. The trial court found the appellant guilty of the charges. Accordingly, it convicted the appellant under Section 18 of the NDPS Act and sentenced him to suffer rigorous imprisonment for 10 years and pay a fine of Rs 1 lakh, in default, to suffer one year's simple imprisonment and also for the offences punishable under Sections 457 and 380 IPC and imposing separate sentences for the said offences with a stipulation that all the sentences would run concurrently.

In appeal, it was contended that the incident, as per the prosecution, had occurred between 12-11-1985/13-11-1985 on which date the NDPS Act was not in force, for it came into force only on 14-11-1985 and hence, the offence was punishable under the Opium Act, 1878; that the alleged recovery was made on 16-1-1985 while the appellant was in custody in connection with FIR No. 95 of 1986 and not in custody in connection with this case i.e. FIR No. 96 of 1985; that the recovery of disclosure at the instance of the appellant-accused had not been proven; that he was never in possession of the said articles, and that there has been total non-compliance with Sections 42 and 57 of the NDPS Act and, therefore, the conviction was vitiated in law. The High Court repelled all the submissions and affirmed the conviction and sentence as recorded by the trial Judge.

Dismissing the appeal, the Supreme Court

Held :

Under Section 9 of the Opium Act, 1878 as well as under Section 18 of the NDPS Act "possession" of opium in contravention of the Act, rules etc. is an offence for which sentence is provided. The concept of possession is basically connected to "actus of physical control and custody". Attributing this meaning in the strict sense would be understanding the factum of possession in a narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word "possession". There is a degree of flexibility in the use of the said term and that is why the word "possession" can be usefully defined and understood with reference to the contextual purpose for the said expression. Over the years, courts have refrained from adopting a doctrinaire approach towards defining possession. A functional and flexible approach in defining and understanding the possession as a concept is acceptable and thereby emphasis has been laid on different possessory rights according to the commands and justice of the social policy. Thus, the word "possession" in the context of any enactment would depend upon the object and purpose of the enactment and an appropriate meaning has to be assigned to the word to effectuate the said object. (Paras 11 and 15)

The term "possession" ordinarily consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element. The word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act. It includes knowledge of a fact. That apart, Section 35 raises a presumption as to knowledge and culpable mental state from the possession of illicit articles. The expression "possess or possessed" is often used in connection with statutory offences of being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting Section 35 of the NDPS Act, 1985. (Paras 12, 16 and 17)

Noor Aga v. *State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748; *Bhola Singh* v. *State of Punjab*, (2011) 11 SCC 653 : (2011) 3 SCC (Cri) 454; *Dharampal Singh* v. *State of Punjab*, (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431, *relied on*

Oswald v. *Weigel*, 219 Kan 616 : 549 P 2d 568 (1976); *Collini* v. *State*, 487 SW 2d 132 (Tex Cr App 1972); *State* v. *Hornaday*, 105 Wash 2d 120 : 713 P 2d 71 (Wash 1986); *United States* v. *Craig*, 522 F 2d 29 (6th Cir 1975); *Garvey* v. *State*, 176 Ga App 268 : 335 SE 2d 640 (1985); *United States* v. *Morando-Alvarez*, 520 F 2d 882 (9th Cir 1975); *McConnell* v. *State*, 48 Ala App 523 : 266 So 2d 328 (1972); *United States* v. *Ellison*, 469 F 2d 413 (9th Cir 1972); *State* v. *Kelley*, 12 Or App 496 : 507 P 2d 837 (1973); *R.* v. *Buswell*, (1972) 1 WLR 64 : (1972) 1 All ER 75 (CA); *Avtar Singh* v. *State of Punjab*, (2002) 7 SCC 419 : 2002 SCC (Cri) 1769; *Sorabkhan Gandhkhan Pathan* v. *State of Gujarat*, (2004) 13 SCC 608 : (2006) 1 SCC (Cri) 508; *Madan Lal* v. *State of H.P.*, (2003) 7 SCC 465 : 2003 SCC (Cri) 1664, *cited*

Black's Law Dictionary; *Stroud's Dictionary*; Harris: "The Concept of Possession in English Law", *Oxford Essays in Jurisprudence* (Edited by A.G. Guest, First Series, Clarendon Press, Oxford, 1968), *relied on*

In the present case, the appellant had the requisite degree of control, even if the said narcotic substance was not within his physical control at that moment. A person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance even if he is not, at the moment, in physical control. The situation cannot be viewed differently when a person conceals and hides the prohibited narcotic substance in a public space. In the second category of cases, the person would be in possession because he has the necessary animus and the intention to retain control and dominion. The appellant-accused was in possession of the prohibited or contraband substance which was an offence when the NDPS Act came into force. Hence, he remained in possession of the prohibited substance and as such the offence under Section 18 of the NDPS Act is made out. The possessory right would continue unless there is something to show that he had been divested of it. On the contrary, the appellant led to discovery of the substance which was within his special knowledge, and, therefore, he was in possession of the contraband article when the NDPS Act came into force. In such a situation, the appellant-accused cannot take the plea that he had committed an offence under Section 9 of the Opium Act, 1878 and not under Section 18 of the NDPS Act on the premise that the new Act was not in force on the date of theft, as possession of the contraband article had taken place prior to coming into force of the NDPS Act. (Para 22)

Further, the contention of the appellant that if he is convicted under Section 18 of the NDPS Act, it would tantamount to retrospective operation of law imposing penalty which is prohibited under Article 20(1) of the Constitution has no substance. Article 20(1) gets attracted only when any penal law penalises with retrospective effect i.e. when an act was not an offence when it was committed and additionally the persons cannot be subjected to penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence. What has been prohibited under Article 20(1) is the conviction and sentence in a criminal proceeding under the ex post facto law and not the trial thereof. (Para 23)

Rao Shiv Bahadur Singh v. *State of Vindhya Pradesh*, AIR 1953 SC 394 : 1953 Cri LJ 1480, *relied on*

In the instant case, Article 20(1) of the Constitution would have no application. The actus of possession is not punishable with retrospective effect.

No offence is created under Section 18 of the NDPS Act with retrospective effect. What is punishable is possession of the prohibited article on or after a particular date when the statute was enacted, creating the offence or enhancing the punishment. Therefore, if a person is in possession of the banned substance on the date when the NDPS Act was enforced, he would commit the offence, for on the said date he would have both the "corpus" and "animus" necessary in law. As regards the State's contention, that the offence in question is a continuing offence, for the offence is basically of possession of the contraband articles, it must be held that on the date the NDPS Act came into force, the appellant-accused was still in possession of the contraband article. Thus, it was possession in continuum and hence, the principle with regard to continuing offence gets attracted. (Paras 24, 26 and 29)

Maya Rani Punj v. *CIT*, (1986) 1 SCC 445 : 1986 SCC (Tax) 220, *relied on*

State v. *A.H. Bhiwandiwalla*, 1954 SCC OnLine Bom 101 : AIR 1955 Bom 161, *held, approved*

Harjit Singh v. *State of Punjab*, (2011) 4 SCC 441 : (2011) 2 SCC (Cri) 286, *distinguished*

State of Bihar v. *Deokaran Nenshi*, (1972) 2 SCC 890 : 1973 SCC (Cri) 114; *Udai Shankar Awasthi* v. *State of U.P.*, (2013) 2 SCC 435 : (2013) 1 SCC (Civ) 1121 : (2013) 2 SCC (Cri) 708; *Rattan Lal* v. *State of Punjab*, AIR 1965 SC 444 : (1965) 1 Cri LJ 360; *T. Barai* v. *Henry Ah Hoe*, (1983) 1 SCC 177 : 1983 SCC (Cri) 143; *Basheer* v. *State of Kerala*, (2004) 3 SCC 609 : 2004 SCC (Cri) 1107; *Pratap Singh* v. *State of Jharkhand*, (2005) 3 SCC 551 : 2005 SCC (Cri) 742, *referred to*

Balakrishna Savalram Pujari Waghmare v. *Shree Dhyaneshwar Maharaj Sansthan*, AIR 1959 SC 798; *Gokak Patel Volkart Ltd.* v. *Dundayya Gurushiddaiah Hiremath*, (1991) 2 SCC 141 : 1991 SCC (Cri) 315; *CWT* v. *Suresh Seth*, (1981) 2 SCC 790 : 1981 SCC (Tax) 168; *Emperor* v. *Chhotalal Amarchand*, 1936 SCC OnLine Bom 42 : AIR 1937 Bom 1, *cited*

It is not possible to accept the further contention of the appellant that there had been non-compliance with Section 42 of the NDPS Act as the investigating officer has not reduced the information to writing and has also not led any evidence of having made a full report to his immediate official superior and that therefore, the conviction was vitiated. The High Court had taken note of the fact that the information was given to PW 12 and recovery was made by him who was the Sub-Inspector and SHO at the police station, a competent authority. The law is that literal compliance with requirements of sub-sections (1) and (2) of Section 42 is not required. Though total non-compliance with those requirements is impermissible, but delayed compliance with satisfactory explanation for the delay can, however, be countenanced. (Paras 30 and 31)

Karnail Singh v. *State of Haryana*, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887; *Rajinder Singh* v. *State of Haryana*, (2011) 8 SCC 130 : (2011) 3 SCC (Cri) 366, *explained* and *followed*

Abdul Rashid Ibrahim Mansuri v. *State of Gujarat*, (2000) 2 SCC 513 : 2000 SCC (Cri) 496; *Sajan Abraham* v. *State of Kerala*, (2001) 6 SCC 692 : 2001 SCC (Cri) 1217, *held, clarified*

Moreover, the High Court has further opined that in the case at hand, Section 43 of the NDPS Act applies, which contemplates seizure made in the public place. There is a distinction between Section 42 and Section 43 of the NDPS Act. If a search is made in a public place, the officer taking the search is not required to comply with sub-sections (1) and (2) of Section 42 of the NDPS Act. The seizure has taken place beneath a bridge of public road accessible to the public. The officer, Sub-Inspector is an empowered officer under Section 42. As

the place is a public place and Section 43 comes into play, the question of non-compliance with Section 42(2) does not arise. (Para 32)

Directorate of Revenue v. *Mohd. Nisar Holia*, (2008) 2 SCC 370 : (2008) 1 SCC (Cri) 415; *State (NCT of Delhi)* v. *Malvinder Singh*, (2007) 11 SCC 314 : (2008) 1 SCC (Cri) 683, *relied on*

The appellant's contention that there has been non-compliance with Section 57 of the NDPS Act is also unacceptable. On perusal of the evidence, it is clear that there has been substantial compliance with Section 57 of the NDPS Act and, therefore, the question of prejudice does not arise. Section 57 is not mandatory in nature and when substantial compliance is made, it would not vitiate the prosecution case. Sections 42, 50 and 57 of the NDPS Act operate in different fields and at different stages. (Paras 34, 36 and 35)

Sajan Abraham v. *State of Kerala*, (2001) 6 SCC 692 : 2001 SCC (Cri) 1217; *Karnail Singh* v. *State of Haryana*, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887; *Kishan Chand* v. *State of Haryana*, (2013) 2 SCC 502 : (2013) 2 SCC (Cri) 807, *explained* and *followed*

State of Punjab v. *Balbir Singh*, (1994) 3 SCC 299 : 1994 SCC (Cri) 634, *referred to*

The appellant was arrested in connection with FIR No. 95 of 1985 and while he was interrogated, he led to the discovery in connection with FIR No. 95 of 1985, he was arrested and while he was interrogated, he led to the discovery in connection with the stolen contraband articles from the malkhana which was the matter of investigation in FIR No. 96 of 1985. There is no doubt that the appellant was in police custody. Section 27 of the Evidence Act, 1872 provides that when any fact is deposed to as discovered in consequence of the information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to confession or not, as relates distinctly to the fact thereby discovered, may be proved. It is well settled that the components or portion which was the immediate cause of the discovery could be acceptable legal evidence. The words employed in Section 27 of the Evidence Act, 1872 does not restrict that the accused must be arrested in connection with the same offence. In fact, the emphasis is on receipt of information from a person accused of any offence. Therefore, when the appellant-accused was already in custody in connection with FIR No. 95 of 1985 and he led to the discovery of the contraband articles, the plea that it was not done in connection with FIR No. 96 of 1985, is absolutely unsustainable. The recovery has been proven to the hilt. (Para 37)

Mohd. Inayatullah v. *State of Maharashtra*, (1976) 1 SCC 828 : 1976 SCC (Cri) 199, *relied on*

As regards the last submission of the appellant that the seized articles were not sent immediately for chemical examination, the facts show that FSL report dated 15-9-1986 states that a letter along with a sealed packet was received with seals intact. The said report further mentions that the packet was covered in white cloth and on opening of the packet, the examiner found a cylindrical tin and the substance on examination was found to be an opium having 1.44% morphine. The seal being intact, the description of the case number and the impression of seal having been fixed on memo of recovery, there is no reason or justification to discard the prosecution case on the ground of delay on this score. (Para 38)

Hardip Singh v. *State of Punjab*, (2008) 8 SCC 557 : (2008) 3 SCC (Cri) 580, *relied on*

Mohan Lal v. *State of Rajasthan*, 2009 SCC OnLine Raj 3017, *affirmed*

R-D/54742/CR

Advocates who appeared in this case :

Ms Aishwarya Bhati, Ms Sanjoli Mittal, Anshuman, Amit Verma and Pawan Kumar, Advocates, for the Appellant;

Shiv Mangal Sharma, Additional Advocate General (Sitesh Narayan Singh, A. Mohapatra, Akshat Anand and Milind Kumar, Advocates) for the Respondent.

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41. 1936 SCC OnLine Bom 42 : AIR 1937 Bom 1, *Emperor* v. *Chhotalal Amarchand* 241*f-g*

The Judgment of the Court was delivered by

DIPAK MISRA, J.— Calling in question the legal pregnability of the judgment and order dated 16-7-2009[1] passed by the learned Single Judge of the High Court of Judicature of Rajasthan at Jodhpur whereby the learned Single Judge has affirmed the conviction and sentence recorded by the learned Additional Sessions Judge, Jodhpur in Sessions Case No. 9 of 1986 convicting the appellant under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") and sentencing him to suffer rigorous imprisonment for 10 years and pay a fine of Rs 1 lakh, in default, to suffer one year's simple imprisonment and also for the offences punishable under Sections 457 and 380 of the Penal Code, 1860 (IPC) and imposing separate sentences for the said offences with a stipulation that all the sentences would run concurrently.

2. The relevant facts giving rise to the prosecution are that on 13-11-1985, at 9.30 a.m., Bhanwarlal, PW 8, posted in the Court of the Magistrate, Osian, lodged an FIR, Ext. P-3, at Police Station Osian informing that when he went to the court to meet the night chowkidar, he was absent and it was found by him that locks of the main gate of the malkhana were broken and the goods were scattered. An information was given at the police station concerned, but as the details of the stolen articles could only be provided by the criminal clerk after he came from the Diwali holidays, an FIR was lodged for an offence under Section 457 IPC. After the courts reopened, the Presiding Officer Ummed Singh, PW 6, on being informed, visited the premises, got malkhana articles verified and got an inventory prepared by Narain Singh, Criminal Clerk, in charge of malkhana, PW 4, on 16-11-1985, and it was found that 10 kg 420 gm opium and some other articles were stolen from several packets.

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3. In the course of investigation, the accused Mohan Lal was arrested for the offences punishable under Sections 457 and 380 IPC. While in custody, it was informed by him that he had broke open the lock of the malkhana of the court and stolen the opium and kept it in a white bag and concealed it in a pit dug by him underneath a small bridge situate between Gupal Sariya and Madiyai. His disclosure statement has been brought on record as Ext. P 14-A. The appellant-accused led to discovery in presence of independent witnesses. The bag and cloth were taken out by the accused digging the pit and the bag contained 10 kg and 200 gm of opium as is reflected from seizure memo, Ext. P-6. 200 gm of opium was packed separately, sealed and sent for FSL examination. The remaining substance and other items were separately sealed. After receiving the FSL report and completing the investigation, charge-sheet under Section 18 of the NDPS Act and Sections 457 and 380 IPC was filed before the appropriate court and eventually the matter travelled to the Court of Session. The accused pleaded not guilty and claimed to be tried.

4. The prosecution, in order to substantiate the charges, examined 14 witnesses. The main witnesses are Ummed Singh, PW 6, the Magistrate concerned; Narain Singh, PW 4, the Criminal Clerk, in charge of malkhana; ASI Achlu Ram, PW 13; ASI Hanuman Singh, PW 3; Koja Ram, PW 10; Gulab Singh, PW 14 and Sub-Inspector-cum-SHO Bheem Singh, PW 12, are the witnesses to the recovery. The FSL report was exhibited as Ext. P-14. The defence chose not to examine any witness.

5. The learned trial Judge, on the basis of the evidence brought on record, found the accused guilty of the charges and accordingly convicted him, as has been stated hereinbefore. In appeal, it was contended that the incident, as per the prosecution, had occurred between 12-11-1985/13-11-1985 on which date the NDPS Act was not in force, for it came into force only on 14-11-1985 and hence, the offence was punishable under the Opium Act, 1878 (for short "the Opium Act"); that the alleged recovery was made on 16-1-1985 while the appellant was in custody in connection with FIR No. 95 of 1986 and not in custody in connection with this case i.e. FIR No. 96 of 1985; that the recovery of disclosure at the instance of the appellant-accused had not been proven and that he was never in possession of the said articles, and that there has been total non-compliance with Sections 42 and 57 of the NDPS Act and, therefore, the conviction was vitiated in law. The High Court repelled all the submissions and affirmed the conviction and sentence as recorded by the learned trial Judge.

6. We have heard Ms Aishwarya Bhati, learned counsel for the appellant and Mr Shiv Mangal Sharma, learned Additional Advocate General for the State of Rajasthan.

7. First, we shall deal with the issue of possession. The principal submission of Ms Bhati, learned counsel for the appellant is that the appellant cannot be convicted and punished under the NDPS Act when

admittedly the theft of contraband substance was committed prior to the coming into force of the NDPS Act, for the FIR was lodged prior to the coming into force of the NDPS Act. The learned counsel would submit that the offence of possession of contraband substance also commenced prior to coming into force of the NDPS Act as the FIR would clearly reveal that the theft was committed on the intervening night of 12-11-1985/13-11-1985, whereas the NDPS Act came into force on 14-11-1985.

8. The learned counsel would submit that the recovery of opium was done on 16-1-1986 pursuant to the disclosure statement made by the appellant-accused who was already under arrest in a different matter and under such circumstances, the appellant could not have been convicted under Section 18 of the NDPS Act, but should have been convicted under Section 9 of the Opium Act. Elaborating the said submission, the learned counsel has contended that the offence of possession of contraband substance was punishable under both the laws but there is a huge difference in the sentence prescribed. Under Section 9 of the Opium Act, the sentence was extendable to one year whereas under Section 18 of the NDPS Act, the prescribed punishment is minimum 10 years apart from imposition of huge fine. The learned counsel would submit that it is the settled principle of criminal jurisprudence that the accused cannot be subject to an offence under a new Act which was not in force on the date of theft and the possession of contraband articles, as a matter of fact, had taken place prior to coming into force of the NDPS Act. She has commended us to the decision in *Harjit Singh* v. *State of Punjab*[2].

9. The learned counsel would also contend that there can be rationalisation of structure of punishment, which is an ameliorative provision, for it reduces the punishment and the same can be made applicable to category of the accused persons. In that regard, she has drawn inspiration from *Rattan Lal* v. *State of Punjab*[3], *T. Barai* v. *Henry Ah Hoe*[4], *Basheer* v. *State of Kerala*[5] and *Pratap Singh* v. *State of Jharkhand*[6]. Pyramiding the said facet, it is urged by Ms Bhati that in the instant case, the sentence being higher for the offence of possession under the NDPS Act, such a provision cannot be made retrospectively applicable to him. To appreciate the said submission, it is appropriate to refer to Section 9 of the Opium Act. It reads as follows:

> "**9. *Penalty for illegal cultivation poppy, etc.***—Any person who, in contravention of this Act, or of rules made and notified under Section 5 or Section 8—
>
> (*a*) possesses opium, or
>
> (*b*) transports opium, or

2 (2011) 4 SCC 441 : (2011) 2 SCC (Cri) 286
3 AIR 1965 SC 444 : (1965) 1 Cri LJ 360
4 (1983) 1 SCC 177 : 1983 SCC (Cri) 143
5 (2004) 3 SCC 609 : 2004 SCC (Cri) 1107
6 (2005) 3 SCC 551 : 2005 SCC (Cri) 742

(*c*) imports or exports opium, or

(*d*) sells opium, or

(*e*) omits to warehouse opium, or removes or does any act in respect of warehoused opium,

and any person who otherwise contravenes any such rule, shall, on conviction before a Magistrate, be punished for each such offence with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both;

and, where a fine is imposed, the convicting Magistrate shall direct the offender to be imprisoned in default of payment of the fine for a term which may extend to six months, and such imprisonment shall be in excess of any other imprisonment to which he may have been sentenced."

10. On a perusal of the aforesaid provision, the possession of opium is an offence and the sentence is imprisonment for a term which may extend to one year or with fine which may extend to Rs 1000 or both. Section 18 of the NDPS Act provides for punishment for contravention in relation to opium poppy and opium. The provision as it stood at the relevant time reads as follows:

"**18.** ***Punishment for contravention in relation to opium poppy and opium***.—Whoever, in contravention of any provision of this Act, or any rule or order made or condition of licence granted thereunder, cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

11. When one conceives of possession, it appears in the strict sense that the concept of possession is basically connected to "actus of physical control and custody". Attributing this meaning in the strict sense would be understanding the factum of possession in a narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word "possession". The classical theory of the English law on the term "possession" is fundamentally dominated by Savigny-ian "corpus" and "animus" doctrine. Distinction has also been made in "possession in fact" and "possession in law" and sometimes between "corporeal possession" and "possession of right" which is called "incorporeal possession". Thus, there is a degree of flexibility in the use of the said term and that is why the word "possession" can be usefully defined and understood with reference to the contextual purpose for the said expression. The word "possession" may have one meaning in one connection and another meaning in another.

12. The term "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. One of the definitions of "possession" given in *Black's Law Dictionary* is as follows:

> "*Possession.*—Having control over a thing with the intent to have and to exercise such control. *Oswald* v. *Weigel*[7]. The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.
>
> The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint."

In the said *Dictionary*, the term "possess" in the context of narcotic drug laws means:

> "Term 'possess', under narcotic drug laws, means actual control, care and management of the drug. *Collini* v. *State*[8]. Defendant 'possesses' controlled substance when defendant knows of substance's presence, substance is immediately accessible, and defendant exercises 'dominion or control' over substance. *State* v. *Hornaday*[9]."

And again:

> "*Criminal law.*—Possession as necessary for conviction of offense of possession of controlled substances with intent to distribute may be constructive as well as actual, *United States* v. *Craig*[10]; as well as joint or exclusive, *Garvey* v. *State*[11]. The defendants must have had dominion and control over the contraband with knowledge of its presence and character. *United States* v. *Morando-Alvarez*[12].
>
> Possession, as an element of offense of stolen goods, is not limited to actual manual control upon or about the person, but extends to things under one's power and dominion. *McConnell* v. *State*[13].

7 219 Kan 616 : 549 P 2d 568 at p. 569 (1976)
8 487 SW 2d 132 at p. 135 (Tex Cr App 1972)
9 105 Wash 2d 120 : 713 P 2d 71 at p. 74 (Wash 1986)
10 522 F 2d 29 at p. 31 (6th Cir 1975)
11 176 Ga App 268 : 335 SE 2d 640 at p. 647 (1985)
12 520 F 2d 882 at p. 884 (9th Cir 1975)
13 48 Ala App 523 : 266 So 2d 328 at p. 333 (1972)

Possession as used in indictment charging possession of stolen mail may mean actual possession or constructive possession. *United States* v. *Ellison*[14].

To constitute 'possession' of a concealable weapon under statute proscribing possession of a concealable weapon by a felon, it is sufficient that defendant have constructive possession and immediate access to the weapon. *State* v. *Kelley*[15]."

13. In *Stroud's Dictionary*, the term "possession" has been defined as follows:

" 'Possession' [Drugs (Prevention of Misuse) Act, 1964 (c. 64), Section 1(1)]. A person does not lose 'possession' of an article which is mislaid or thought erroneously to have been destroyed or disposed of, if, in fact, it remains in his care and control (*R.* v. *Buswell*[16]).

14. Dr Harris, in his essay titled "The Concept of Possession in English Law"[17] while discussing the various rules relating to possession has stated that "possession" is a functional and relative concept, which gives the Judges some discretion in applying abstract rule to a concrete set of facts. The learned author has suggested certain factors which have been held to be relevant to conclude whether a person has acquired possession for the purposes of a particular rule of law. Some of the factors enlisted by him are: (*a*) degree of physical control exercised by person over a thing, (*b*) knowledge of the person claiming possessory rights over a thing, about the attributes and qualities of the thing, (*c*) the person's intention in regard to the thing, that is, "animus possessionis" and "animus domini", (*d*) possession of land on which the thing is claimed is lying, also the relevant intention of the occupier of a premises on which the thing is lying thereon to exclude others from enjoying the land and anything which happens to be lying there; and Judges' concept of the social purpose of the particular rule relied upon by the plaintiff.

15. The learned author has further proceeded to state that quite naturally the policies behind different possessory rules will vary and it would justify the courts giving varying weight to different factors relevant to possession according to the particular rule in question. According to Harris, Judges have at the back of their mind a perfect pattern in which the possessor has complete, exclusive and unchallenged physical control over the subject; full knowledge of its existence; attributes and location, and a manifest intention to act as its owner and exclude all others from it. As a further statement he elucidates that courts realise that justice and expediency compel constant modification of the ideal pattern. The person claiming possessory rights over a thing may have a very limited degree of physical control over the object or

14 469 F 2d 413 at p. 415 (9th Cir 1972)

15 12 Or App 496 : 507 P 2d 837 at p. 837 (1973)

16 (1972) 1 WLR 64 : (1972) 1 All ER 75 (CA)

17 Published in *Oxford Essays in Jurisprudence* (Edited by A.G. Guest, First Series, Clarendon Press, Oxford, 1968).

he may have no intention in regard to an object of whose existence he is unaware of, though he exercises control over the same or he may have clear intention to exclude other people from the object, though he has no physical control over the same. In all this variegated situation, states Harris, the person concerned may still be conferred the possessory rights. The purpose of referring to the aforesaid principles and passages is that over the years, it has been seen that courts have refrained from adopting a doctrinaire approach towards defining possession. A functional and flexible approach in defining and understanding the possession as a concept is acceptable and thereby emphasis has been laid on different possessory rights according to the commands and justice of the social policy. Thus, the word "possession" in the context of any enactment would depend upon the object and purpose of the enactment and an appropriate meaning has to be assigned to the word to effectuate the said object.

16. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act. The said provision reads as follows:

> "**35.** ***Presumption of culpable mental state.***—(1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> *Explanation.*—In this section 'culpable mental state' includes intention, motive, knowledge, of a fact and belief in, or reason to believe, a fact.
>
> (2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

17. On a perusal of the aforesaid provision, it is plain as day that it includes knowledge of a fact. That apart, Section 35 raises a presumption as to knowledge and culpable mental state from the possession of illicit articles. The expression "possess or possessed" is often used in connection with statutory offences of being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting Section 35 of the NDPS Act.

18. In *Noor Aga* v. *State of Punjab*[18], the Court noted Section 35 of the NDPS Act which provides for presumption of culpable mental state and further noted that it also provides that the accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. The Court also referred to Section 54 of the NDPS Act which places the burden to prove on the accused as regards possession of the contraband articles on account of the same satisfactorily. Dealing with the

18 (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748

constitutional validity of Sections 35 and 54 of the NDPS Act, the Court ruled thus: (SCC p. 449, para 55)

> "*55.* The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore, examine the effect thereof vis-à-vis the question as to whether the prosecution has been able to discharge its burden hereinafter."

And thereafter proceeded to state that: (SCC p. 450, paras 58-59)

> "*58.* Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is 'beyond all reasonable doubt' but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.
>
> *59.* With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

19. In *Bhola Singh* v. *State of Punjab*[19], the Court, after referring to the pronouncement in *Noor Aga*[18], concurred with the observation that only after the prosecution has discharged the initial burden to prove the foundational facts, then only Section 35 would come into play. While dislodging the conviction, the Court stated: (*Bhola Singh case*[19], SCC pp. 655-56, para 11)

> "*11.* … it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting narcotics still lay on the prosecution, as would be clear from the word 'knowingly', and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence

19 (2011) 11 SCC 653 : (2011) 3 SCC (Cri) 454

18 *Noor Aga* v. *State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748

of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. The only evidence which the prosecution seeks to rely on is the appellant's conduct in giving his residential address in Rajasthan although he was a resident of Fatehabad in Haryana while registering the offending truck cannot by any stretch of imagination fasten him with the knowledge of its misuse by the driver and others."

20. Having noted the approach in the aforesaid two cases, we may take note of the decision in *Dharampal Singh* v. *State of Punjab*[20], when the Court was referring to the expression "possession" in the context of Section 18 of the NDPS Act. In the said case opium was found in the dickey of the car when the appellant was driving himself and the contention was canvassed that the said act would not establish conscious possession. In support of the said submission, reliance was placed on *Avtar Singh* v. *State of Punjab*[21] and *Sorabkhan Gandhkhan Pathan* v. *State of Gujarat*[22]. The Court, repelling the argument, opined thus: (*Dharampal Singh case*[20], SCC pp. 613-15, paras 12-13 & 15-16)

"*12*. We do not find any substance in this submission of the learned counsel. The appellant Dharampal Singh was found driving the car whereas appellant Major Singh was travelling with him and from the dickey of the car 65 kg of opium was recovered. The vehicle driven by the appellant Dharampal Singh and occupied by the appellant Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused.

13. It needs no emphasis that the expression 'possession' is not capable of precise and completely logical definition of universal application in the context of all the statutes. 'Possession' is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established, the accused who claims that it was not a conscious possession has to establish it because it is within his special knowledge.

* * *

20 (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431

21 (2002) 7 SCC 419 : 2002 SCC (Cri) 1769

22 (2004) 13 SCC 608 : (2006) 1 SCC (Cri) 508

15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to satisfactorily account for the possession of opium.

16. Once possession is established the court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in *Madan Lal* v. *State of H.P.*[23], wherein it has been held as follows: (SCC p. 472, paras 26-27)

> '*26*. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.
>
> *27*. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.' "

21. From the aforesaid exposition of law it is quite vivid that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others.

22. In the case at hand, the appellant, we hold, had the requisite degree of control when, even if the said narcotic substance was not within his physical control at that moment. To give an example, a person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance even if he is not, at the moment, in physical control. The situation cannot be viewed differently when a person conceals and hides the prohibited narcotic substance in a public space. In the second category of cases, the person would be in possession because he has the necessary animus and the

23 (2003) 7 SCC 465 : 2003 SCC (Cri) 1664

intention to retain control and dominion. As the factual matrix would exposit, the appellant-accused was in possession of the prohibited or contraband substance which was an offence when the NDPS Act came into force. Hence, he remained in possession of the prohibited substance and as such the offence under Section 18 of the NDPS Act is made out. The possessory right would continue unless there is something to show that he had been divested of it. On the contrary, as we find, he led to discovery of the substance which was within his special knowledge, and, therefore, there can be no scintilla of doubt that he was in possession of the contraband article when the NDPS Act came into force. To clarify the situation, we may give an example. A person had stored 100 bags of opium prior to the coming into force of the NDPS Act and after coming into force, the recovery of the possessed article takes place. Certainly, on the date of recovery, he is in possession of the contraband article and possession itself is an offence. In such a situation, the appellant-accused cannot take the plea that he had committed an offence under Section 9 of the Opium Act and not under Section 18 of the NDPS Act.

23. After dealing with the concept of possession, we think it apt to address the issue raised by the learned counsel for the appellant that he could have been convicted and sentenced under the Opium Act, as that was the law in force at the time of commission of an offence and if he is convicted under Section 18 of the NDPS Act, it would tantamount to retrospective operation of law imposing penalty which is prohibited under Article 20(1) of the Constitution of India. Article 20(1) gets attracted only when any penal law penalises with retrospective effect i.e. when an act was not an offence when it was committed and additionally the persons cannot be subjected to penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence. The article prohibits application of ex post facto law. In *Rao Shiv Bahadur Singh* v. *State of Vindhya Pradesh*[24], while dealing with the import under Article 20(1) of the Constitution of India, the Court stated that what has been prohibited under the said article is the conviction and sentence in a criminal proceeding under the ex post facto law and not the trial thereof. The Constitution Bench has held that: (AIR p. 398, para 9)

> "*9.* ... what is prohibited under Article 20 is only conviction or sentence under an 'ex post facto' law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time cannot 'ipso facto' be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular court or by a particular procedure, except insofar as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved."

24. In the instant case, Article 20(1) would have no application. The actus of possession is not punishable with retrospective effect. No offence is created under Section 18 of the NDPS Act with retrospective effect. What is

24 AIR 1953 SC 394 : 1953 Cri LJ 1480

punishable is possession of the prohibited article on or after a particular date when the statute was enacted, creating the offence or enhancing the punishment. Therefore, if a person is in possession of the banned substance on the date when the NDPS Act was enforced, he would commit the offence, for on the said date he would have both the "corpus" and "animus" necessary in law.

25. We would be failing in our duty, if we do not analyse the decision in *Harjit Singh*[2]. In the said case the Court was dealing with the Notification dated 18-11-2009 that has replaced the part of the Notification dated 19-10-2001. Dealing with the said aspect, the Court held: (SCC p. 444, paras 13-14)

> "*13*. Notification dated 18-11-2009 has replaced the part of the Notification dated 19-10-2001 and reads as under:
>
> 'In the Table at the end after Note 3, the following Note shall be inserted, namely:
>
> (4) The quantities shown in Column 5 and Column 6 of the Table relating to the respective drugs shown in Column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.'
>
> *14*. Thus, it is evident that under the aforesaid notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment. However, the submission is not acceptable as it is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18-11-2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned."

The present fact situation is absolutely different and, therefore, the said decision has no applicability to the case at hand.

26. The learned counsel for the State has contended that the offence in question is a continuing offence, for the offence is basically of possession of the contraband articles. He has commended us to the authority in *State of Bihar* v. *Deokaran Nenshi*[25], wherein it has been held that: (SCC p. 892, para 5)

> "*5*. A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability

2 *Harjit Singh* v. *State of Punjab*, (2011) 4 SCC 441 : (2011) 2 SCC (Cri) 286

25 (1972) 2 SCC 890 : 1973 SCC (Cri) 114

for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

27. Mr Shiv Mangal Sharma, learned Additional Advocate General for the State has also drawn inspiration from *Udai Shankar Awasthi* v. *State of U.P.*[26] In the said case, while dealing with the concept of continuing offence, after referring to Section 472 of the Criminal Procedure Code, 1973 (CrPC) the Court has stated that the expression "continuing offence" has not been defined in CrPC because it is one of those expressions which does not have a fixed connotation and, therefore, the formula of universal application cannot be formulated in this respect. The Court referred to *Balakrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan*[27] and *Gokak Patel Volkart Ltd.* v. *Dundayya Gurushiddaiah Hiremath*[28] and eventually held thus: (*Uday Shankar Awasthi case*[26], SCC p. 446, para 29)

> "*29.* Thus, in view of the above, the law on the issue can be summarised to the effect that, in the case of a continuing offence, the ingredients of the offence continue i.e. endure even after the period of consummation, whereas in an instantaneous offence, the offence takes place once and for all i.e. when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue."

28. In this context, it would be fruitful to refer to a three-Judge Bench decision in *Maya Rani Punj* v. *CIT*[29]. In the said case, the Court approved what has been said by the High Court of Bombay in *State* v. *A.H. Bhiwandiwalla*[30]. For the sake of completeness, we reproduce the relevant paragraph: (*Maya Rani Punj case*[29], SCC p. 457, para 18)

> "*18.* In *State* v. *A.H. Bhiwandiwalla*[30] (a decision referred to in *CWT* v. *Suresh Seth*[31]), Gajendragadkar, J. (as he then was), after quoting the observations of Beaumont, C.J. in an earlier Full Bench decision[32] of that Court observed: (*A.H. Bhiwandiwalla case*[30], SCC OnLine Bom para 18)
>
> > '*18.* Even so, this expression has acquired a well-recognised meaning in criminal law. If an act committed by an accused person constitutes an offence and if that act continues from day to day, then

26 (2013) 2 SCC 435 : (2013) 1 SCC (Civ) 1121 : (2013) 2 SCC (Cri) 708
27 AIR 1959 SC 798
28 (1991) 2 SCC 141 : 1991 SCC (Cri) 315
29 (1986) 1 SCC 445 : 1986 SCC (Tax) 220
30 1954 SCC OnLine Bom 101 : AIR 1955 Bom 161
31 (1981) 2 SCC 790 : 1981 SCC (Tax) 168
32 *Emperor* v. *Chhotalal Amarchand*, 1936 SCC OnLine Bom 42 : AIR 1937 Bom 1

from day to day a fresh offence is committed by the accused so long as the act continues. Normally and in the ordinary course an offence is committed only once. But we may have offences which can be committed from day to day and it is offences falling in this latter category that are described as continuing offences.' "

29. We have dwelled upon the said submission, as the learned counsel for the State has seriously addressed that it is a continuing offence. We have already opined that on the date the NDPS Act came into force, the appellant-accused was still in possession of the contraband article. Thus, it was possession in continuum and hence, the principle with regard to continuing offence gets attracted.

30. It is submitted by Ms Aishwarya Bhati, learned counsel for the appellant that there has been non-compliance with Section 42 of the NDPS Act and hence, the conviction is vitiated. It is urged by her that the investigating officer has not reduced the information to writing and has also not led any evidence of having made a full report to his immediate official superior. The High Court has taken note of the fact that information was given to Bheem Singh, PW 12, and recovery was made by him who was the Sub-Inspector and SHO at the police station. That apart, in this context, we may refer with profit to the Constitution Bench decision in *Karnail Singh* v. *State of Haryana*[33], wherein the issue which emerged for consideration is whether Section 42 of the NDPS Act is mandatory and failure to take down the information in writing and forthwith sending a report to his immediate officer superior would cause prejudice to the accused? The Court was required to reconcile the decisions in *Abdul Rashid Ibrahim Mansuri* v. *State of Gujarat*[34] and *Sajan Abraham* v. *State of Kerala*[35]. The Constitution Bench[33] explaining the position opined that *Abdul Rashid*[34] did not require about literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham*[35] hold that requirement of Sections 42(1) and 42(2) need not be fulfilled at all. The larger Bench[33] summarised the effect of two decisions. The summation is reproduced below: (*Karnail Singh case*[33], SCC p. 555, para 35)

"(*a*) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (*a*) to (*d*) of Section 42(1).

(*b*) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible

33 (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887

34 (2000) 2 SCC 513 : 2000 SCC (Cri) 496

35 (2001) 6 SCC 692 : 2001 SCC (Cri) 1217

or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (*a*) to (*d*) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(*c*) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally *precede* the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(*d*) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001." (emphasis in original)

31. In *Rajinder Singh* v. *State of Haryana*[36], placing reliance on the Constitution Bench[33] decision, it has been opined that total non-compliance with the provisions of sub-sections (1) and (2) of Section 42 of the Act is impermissible but delayed compliance with satisfactory explanation for the delay can, however, be countenanced.

32. In the present case, the High Court has noted that the information was given to the competent authority. That apart, the High Court has further opined that in the case at hand Section 43 applies. Section 43 of the NDPS Act contemplates seizure made in the public place. There is a distinction between Section 42 and Section 43 of the NDPS Act. If a search is made in a public place, the officer taking the search is not required to comply with sub-sections (1) and (2) of Section 42 of the NDPS Act. As has been stated earlier, the seizure has taken place beneath a bridge of public road accessible

36 (2011) 8 SCC 130 : (2011) 3 SCC (Cri) 366

33 *Karnail Singh* v. *State of Haryana*, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887

to the public. The officer, Sub-Inspector is an empowered officer under Section 42 of the Act. As the place is a public place and Section 43 comes into play, the question of non-compliance with Section 42(2) does not arise. The aforesaid view gets support from the decisions in *Directorate of Revenue* v. *Mohd. Nisar Holia*[37] and *State (NCT of Delhi)* v. *Malvinder Singh*[38].

33. The learned counsel for the appellant has also contended that there has been non-compliance with Section 57 of the NDPS Act, which reads as follows:

> "**57.** ***Report of arrest and seizure.***—Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior."

34. A three-Judge Bench in *Sajan Abraham*[35], placing reliance on *State of Punjab* v. *Balbir Singh*[39], has held that Section 57 is not mandatory in nature and when substantial compliance is made, it would not vitiate the prosecution case. In *Karnail Singh*[33], the Constitution Bench, while explaining the ratio laid down in *Sajan Abraham*[35], analysed the requirement of Sections 42(1) and 42(2) and opined that the said pronouncement never meant that those provisions need not be fulfilled at all. However, the Constitution Bench has not delved into the facet of Section 57 of the NDPS Act.

35. In *Kishan Chand* v. *State of Haryana*[40], the Court while dealing with the compliance with Sections 42, 50 and 57, has opined thus: (SCC p. 513, paras 21-22)

> "*21.* When there is total and definite non-compliance with such statutory provisions, the question of prejudice loses its significance. It will per se amount to prejudice. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance.
>
> *22.* The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance with these provisions in their entirety, the court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevance. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance with the provision."

37 (2008) 2 SCC 370 : (2008) 1 SCC (Cri) 415
38 (2007) 11 SCC 314 : (2008) 1 SCC (Cri) 683
35 *Sajan Abraham* v. *State of Kerala*, (2001) 6 SCC 692 : 2001 SCC (Cri) 1217
39 (1994) 3 SCC 299 : 1994 SCC (Cri) 634
33 *Karnail Singh* v. *State of Haryana*, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887
40 (2013) 2 SCC 502 : (2013) 2 SCC (Cri) 807

After so stating, the Court proceeded to address the separate rights and protection under the said provisions and in that context ruled: (*Kishan Chand case*[40], SCC pp. 513-14, para 24)

> "*24.* Reliance placed by the learned counsel appearing for the State on *Sajan Abraham*[35] is entirely misplaced, firstly in view of the Constitution Bench judgment of this Court in *Karnail Singh*[33]. Secondly, in that case the Court was also dealing with the application of the provisions of Section 57 of the Act which are worded differently and have different requirements, as opposed to Sections 42 and 50 of the Act. It is not a case where any reason has come in evidence as to why the secret information was not reduced to writing and sent to the higher officer, which is the requirement to be adhered to 'pre-search'. The question of sending it immediately thereafter does not arise in the present case, as it is an admitted position that there is total non-compliance with Section 42 of the Act. The sending of report as required under Section 57 of the Act on 20-7-2000 will be no compliance, factually and/or in the eye of the law to the provisions of Section 42 of the Act. These are separate rights and protections available to an accused and their compliance has to be done in accordance with the provisions of Sections 42, 50 and 57 of the Act. They are neither interlinked nor interdependent so as to dispense compliance of one with the compliance of another. In fact, they operate in different fields and at different stages. That distinction has to be kept in mind by the courts while deciding such cases."

36. In the instant case, on perusal of the evidence, it is clear that there has been substantial compliance with Section 57 of the NDPS Act and, therefore, the question of prejudice does not arise.

37. Ms Bhati, learned counsel for the appellant has also contended that the appellant was in custody in connection with FIR No. 95 of 1985 and while in custody, he suffered a disclosure statement and led to the discovery of the contraband articles. Submission of the learned counsel for the appellant is that the said statement cannot be taken aid of for the purpose of discovery in connection with the present case. It is demonstrable from the factual matrix that in connection with FIR No. 95 of 1985, he was arrested and while he was interrogated, he led to the discovery in connection with the stolen contraband articles from the malkhana which was the matter of investigation in FIR No. 96 of 1985. There is no shadow of doubt that the appellant-accused was in police custody. Section 27 of the Evidence Act, 1872 provides that when any fact is deposed to as discovered in consequence of the information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to confession or not, as relates distinctly to the fact thereby discovered, may be proved. It is well settled in law that the components or portion which was the immediate cause of the discovery could be acceptable legal evidence (see

40 *Kishan Chand* v. *State of Haryana*, (2013) 2 SCC 502 : (2013) 2 SCC (Cri) 807
35 *Sajan Abraham* v. *State of Kerala*, (2001) 6 SCC 692 : 2001 SCC (Cri) 1217
33 *Karnail Singh* v. *State of Haryana*, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887

Mohd. Inayatullah v. *State of Maharashtra*[41]). The words employed in Section 27 does not restrict that the accused must be arrested in connection with the same offence. In fact, the emphasis is on receipt of information from a person accused of any offence. Therefore, when the appellant-accused was already in custody in connection with FIR No. 95 of 1985 and he led to the discovery of the contraband articles, the plea that it was not done in connection with FIR No. 96 of 1985, is absolutely unsustainable. Be it stated here, that the recovery has been proven to the hilt. The accused, accompanied by the witnesses, had gone beneath the bridge built between Gupal Sariya and Madiyai and he himself had removed the big stone and dug the earth and took out the packet which was bound in a long cloth from which a packet was discovered and the said packet contained 10 kg and 200 gm of opium. The learned trial Judge as well as the High Court has, by cogent and coherent reasons, accepted the recovery. On a scrutiny of the same, we also find that there is nothing on record to differ with the factum of recovery of the contraband articles.

38. Another submission that has been advanced by the learned counsel for the appellant is that the seized articles were not sent immediately for chemical examination. The FSL report, Ext. P-14 dated 15-9-1986 states that a letter along with a sealed packet was received with seals intact. The said report further mentions that the packet was covered in white cloth and on opening of the packet, the examiner found a cylindrical tin and the substance on examination was found to be an opium having 1.44% morphine. The seal being intact, the description of the case number and the impression of seal having been fixed on memo of recovery, there is no reason or justification to discard the prosecution case on the ground of delay on this score.

39. In *Hardip Singh* v. *State of Punjab*[42], a two-Judge Bench while dealing with the question of delay in sending the samples of opium to the FSL, opined that it was of no consequence, for the fact of the recovery of the said sample from the possession of the appellant had been proven and established by cogent and reliable evidence and that apart, it had also come in evidence that till the date of parcels of samples were received by the chemical examiner, the seal put on that parcel was intact. Under these circumstances, the Court ruled that the said facts clearly proves and establishes that there was no tampering with the aforesaid seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same opium which was recovered from the possession of the appellant. The plea that there was 40 days' delay was immaterial and would not dent the prosecution case.

40. In view of the aforesaid analysis, we do not perceive any substance in this appeal and accordingly, the same is dismissed.

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41 (1976) 1 SCC 828 : 1976 SCC (Cri) 199 : AIR 1976 SC 483

42 (2008) 8 SCC 557 : (2008) 3 SCC (Cri) 580

(2015) 8 Supreme Court Cases 39

(BEFORE PINAKI CHANDRA GHOSE AND UDAY U. LALIT, JJ.)

STATE OF HARYANA .. Appellant;

Versus

ASHA DEVI AND ANOTHER .. Respondents.

Criminal Appeal No. 1953 of 2009†, decided on May 12, 2015

A. **Narcotics, Intoxicants and Liquor — Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 20 and 52 — Search and seizure — Recovery of contraband — Erroneous assessment of evidence by courts below — Acquittal based upon such assessment — Held, not proper — No independent witness could be examined, as no public person agreed to do so — Further, it was mere conjecture that one of the accused could not have escaped in presence of 5 police personnel — Lastly, samples of seized contraband were properly dealt with throughout and found to be ganja — Prosecution had sufficiently proved guilt of both accused — Their acquittal reversed — Conviction under S. 20 confirmed**

The conduct of a raid at the house of the respondent-accused (husband and wife), led to recovery of a bag containing 11 kg of ganja. On seeing the police party, the respondent husband managed to escape, but, the respondent wife was apprehended. Two samples of 200 gm each were taken from the bag and sealed with letters "RP" and "MS" on the seal. Afterwards, the case property and both samples were produced before the Judicial Magistrate, who broke the seals of the case property as well as one of the samples. He verified the material, photographs were taken and contraband was weighed. Thereafter, the sample was resealed with the seal of "RP". Eventually, the trial court acquitted both the respondents, which was affirmed by the High Court. Both the courts below relied on three main points to acquit the respondents, which are: (*i*) that there was no independent witness; (*ii*) that the respondent husband could not have fled in the presence of five police officers; and (*iii*) that the link evidence of the possession of seal "RP" transferring from ASI to IO, was not proved.

Allowing the appeal, the Supreme Court

Held :

It is the consistent statement of DSP and IO, that none of the public persons who were available when the contraband was seized, acceded to their request of joining the investigation as an independent witness. The courts below found it unbelievable but no reason for the same was rendered. Such consistent statement enhances the veracity of circumstances as put forth by both. Again, the finding of courts below, that the respondent husband could not have fled away, is based on assumption and conjecture. There is nothing in the evidence which could show that he could not have run away. There are positive statements by several prosecution witnesses, that he ran away on seeing the police party and these statements have withstood test of cross-examination as well. Moreover, there is no evidence to disprove the fact that the respondent husband ran away. Further, the controversy regarding possession of seal with which samples of contraband

† From the Judgment and Order dated 10-12-2007 of the High Court of Punjab and Haryana at Chandigarh in Crl. Misc. No. 560-MA of 2007

were sealed and tampering of samples was not established. The samples were properly dealt with throughout and found to be ganja. The movement of sample was proved and found to be regular. Hence, the prosecution has sufficiently proved its case to establish the guilt of both the accused. Therefore, the assessment of evidence and consideration of the matter as regards the aforesaid three points by both the courts, is erroneous and cannot be termed as a possible view. Hence, the respondents are guilty under Section 20 for possession of 11 kg of ganja. Therefore, their acquittal stands reversed and they are convicted under Section 20. (Paras 10 to 16)

State of Haryana v. *Asha Devi*, Criminal Misc. No. 560-MA of 2007, decided on 10-12-2007 (P&H), *reversed*

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 20 — Sentencing — Hearing to accused on — Mandate of S. 235(2) CrPC — Prosecution establishing guilt of respondent-accused for possessing 11 kg of ganja — Their conviction under S. 20, NDPS Act, recorded — It is a fundamental requirement of fair play, that accused, who was hitherto concentrating on prosecution evidence on question of guilt, should, on being found guilty, be asked if he has anything to say or any evidence to tender on question of sentence — Hence, before sentencing, following such principle, respondents given chance to place facts before Supreme Court and appellant State was further directed to find out about conduct of respondents after incident and to inform Court — Respondents not found to be implicated in any other matter — After giving due weightage to mitigating as well as aggravating circumstances, held, as respondents were in possession of small quantity, hence, they are sentenced to 5 yrs' SI — Criminal Procedure Code, 1973 — S. 235(2) — Passing of order of sentence — Providing of opportunity of hearing to convict before sentencing — Mandatory nature of — Giving of due weightage to mitigating and aggravating circumstances — Requirement of (Paras 13 to 15)**

Allauddin Mian v. *State of Bihar*, (1989) 3 SCC 5 : 1989 SCC (Cri) 490, *applied*

Appeal allowed Y-D/55099/CR

Advocates who appeared in this case :

Rakesh K. Mudgal, Additional Advocate General (Dinesh Mudgal and Sanjay Kr. Visen, Advocates) for the Appellant;

Ravi Kr. Tomar and Dinesh S. Badiar, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. Criminal Misc. No. 560-MA of 2007, decided on 10-12-2007 (P&H), *State of Haryana* v. *Asha Devi* **(reversed)** 40*g-h*, 42*e-f*, 46*c*
2. (1989) 3 SCC 5 : 1989 SCC (Cri) 490, *Allauddin Mian* v. *State of Bihar* 44*c*, 46*a-b*

The Judgment of the Court was delivered by

PINAKI CHANDRA GHOSE, J.— This appeal has been filed by the State of Haryana against the judgment and order dated 10-12-2007 of the High Court of Punjab and Haryana at Chandigarh in *State of Haryana* v. *Asha Devi*[1], whereby the High Court has declined to grant leave to the State to appeal against the acquittal of the respondents.

1 Criminal Misc. No. 560-MA of 2007, decided on 10-12-2007 (P&H)

2. The facts of this case, as per the prosecution story, are that on 3-2-2006, when Sub-Inspector Ram Phal, ASI Rishiraj, Constable Surender Singh, Lady Constables Babita Rani and Promila, were on patrol duty in a police vehicle which was being driven by Constable Darshan Singh, near Chimni Bai Dharamshala, NIT No. 3, SI Ram Phal received a secret information that Om Prakash, son of Moti Lal, and his wife Asha Devi, residents of Gali No. 1, Jhuggi Kalyanpuri, bring ganja (intoxicated drug) from Madhya Pradesh and supply in Faridabad and if a raid is conducted at their house, ganja in heavy quantity would be recovered. On receiving this information, the aforesaid police team raided the house of Om Prakash. On seeing the police party, Om Prakash managed to escape by scaling over the wall of the house. Asha Devi also tried to escape but she was apprehended with the help of lady constables. On query she disclosed her name as Asha, wife of Om Prakash and also disclosed that the man who had escaped from the house was Om Prakash.

3. A notice in writing under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act", for short) was served on her informing her of the right to either allow the Sub-Inspector to take search of her house or opt for the search in presence of some gazetted officer or a Magistrate. Asha Devi consented for search of her house in the presence of some gazetted officer. Accordingly, Shri Maharaj Singh, the then Deputy Superintendent of Police, NIT, Faridabad, reached the spot and in his presence the house of Asha Devi was searched. Asha Devi unpacked a box, took out a bag containing ganja and produced it before the Sub-Inspector. The bag was weighed and found to be containing 11 kg of ganja out of which two samples of 200 gm each were taken and sealed with letters "RP" and "MS" on the seal. Both the samples along with the residue and the specimen seal impressions were taken into possession by the police under the recovery memo which was prepared by IO Ramphal and witnessed by ASI Tej Ram and ASI Rishiraj and attested by DSP Maharaj Singh and thumb mark of Asha Devi. The case property along with the samples and the witnesses were produced before the Station House Officer, who after verifying the facts affixed his seal thereon and were deposited in the Moharrer Police Malkhana.

4. A case was registered against accused Asha Devi under Section 20 of the NDPS Act and she was arrested. Thereafter, on 4-2-2006, the case property and both samples were produced before the learned Judicial Magistrate, First Class, Faridabad. The learned Judicial Magistrate broke the seals on the case property as well as one of the samples. The learned Judicial Magistrate verified the material, photographs were taken and contraband was weighed; thereafter the sample was resealed with the seal of "RP". The Judicial Magistrate directed the investigating officer to deposit the material to Judicial malkhana. After investigation, accused Asha Devi was charged under Section 20 of the NDPS Act and accused Om Prakash was charged under Sections 28 and 29 of the NDPS Act. The accused pleaded not guilty and hence the case was committed for trial.

5. The trial court examined ten prosecution witnesses and two defence witnesses. After going through the prosecution evidence and after hearing the learned counsel for the parties, the trial court did not find favour with the prosecution version as according to it, on receiving the secret information, the Sub-Inspector did not join any independent witness during the investigation of the case despite the fact that they were available at the spot. It further found that the seal "RP" was entrusted to ASI Rishiraj after sealing the case property and samples on 3-2-2006; so, IO Ramphal could not have possessed that seal the next day when the case property was produced before the learned Judicial Magistrate. However, the learned Judicial Magistrate has testified to the fact that sample was resealed after verification, photograph and weighment with the seal of "RP". The learned trial court found it irreconcilable that seal "RP" could have been available with the learned Judicial Magistrate when ASI Rishiraj was not there. Further, the trial court found that non-production of ASI Rishiraj as prosecution witness creates more suspicion. Also, ASI Tej Raj (PW 2) had chased the accused Om Prakash when he was trying to run away but he was unable to apprehend him. This part of the story was also not believed by the trial court for the reason that five constables were standing outside the house of Om Prakash and it was not possible for Om Prakash to have scaled the wall of the house. The trial court found the evidence of the prosecution as completely inconsistent and untrustworthy and held that the prosecution has failed to prove its charges against the accused beyond all shadows of reasonable doubt and accordingly, acquitted the accused of the charges levelled against them.

6. The State moved an application before the High Court of Punjab and Haryana at Chandigarh, seeking leave to appeal against the order of acquittal passed by the trial court. The High Court vide its judgment and order dated 10-12-2007[1], declined to grant leave to the State to appeal against the acquittal of the respondents and dismissed the application filed by the State. The State of Haryana has, thus, impugned the judgment of the High Court before us.

7. We have heard the learned counsel appearing for the State of Haryana as also the learned counsel appearing for the respondent-accused.

8. The High Court was of the view that the trial court after going through the prosecution evidence and hearing the learned counsel for the parties, rightly acquitted the accused as it did not find favour with the prosecution version and so far as the search conducted in the presence of the gazetted officer is concerned, the same was nothing but a casual approach adopted by the gazetted officer while effecting the recovery of the contraband (ganja) and the investigating officer did not offer any plausible explanation. ASI Rishiraj was present with the seal which was used at the time of effecting the recovery, no explanation was offered by the prosecution as to how the seal continued to remain in possession of ASI Rishiraj from the date of seizure.

1 *State of Haryana* v. *Asha Devi*, Criminal Misc. No. 560-MA of 2007, decided on 10-12-2007 (P&H)

The only presumption which the trial court drew is that the possibility of sample being tampered with is not ruled out. The High Court was of the view that it is not a fit case where leave to appeal is made out in favour of the State of Haryana and, therefore, declined the same.

9. We find that the High Court and the trial court both relied on three main points to decide the matter against the State — (*i*) no independent witness; (*ii*) Om Prakash could not have fled in presence of five police officers; and (*iii*) the link evidence of the possession of seal "RP" transferring from ASI Rishiraj to IO Ramphal is not proved. The assessment of evidence and consideration of the matter as regards these three points by both the courts, in our view, is erroneous and cannot be termed as a possible view.

10. We find that both DSP Maharaj Singh as well as IO Ramphal have deposed that public persons were available when the contraband was seized; however, none of the public persons acceded to their request of joining the investigation as an independent witness. The courts below have found it unbelievable but no reason for the same is rendered. In our opinion, the consistent statement of both DSP as well as IO rather enhances the veracity of the circumstances as put forth by them. With respect to the finding of the courts below that Om Prakash could not have fled away after scaling the wall and the police constables would not have failed to catch hold of him: we find the courts below have proceeded on assumption and conjecture. There is nothing in the evidence which could show that Om Prakash could not have run away. There are positive statements by several prosecution witnesses that he ran away on seeing the police party and these statements have withstood the test of cross-examination as well. Further, no other evidence was led to disprove the fact of running away of accused Om Prakash. So, we are of the view that the High Court and the trial court were not correct in arriving at the said finding.

11. There has been a controversy with respect to possession of seal. The controversy is that IO Ramphal had given the seal "RP" to ASI Rishiraj on 3-2-2006 after sealing the contraband and samples thereof. However, the next day when the case property was produced before the learned Judicial Magistrate, after verification it was resealed again with "RP". The courts below found the case of prosecution as doubtful inasmuch as that when the seal "RP" was in possession of ASI Rishiraj, how could it have been with IO Ramphal the next day. We find, the more important evidence was with respect to the sample which was sealed with "RP". There is clear evidence that initially the samples were taken and sealed with "RP" and "MS" on 3-2-2006 at the place of seizure and thereafter, on same day, SHO Vikram Singh also sealed the said samples with "SS". There is uncontroverted evidence to the fact that the samples were produced before the learned Judicial Magistrate, where seal of one sample was broken and resealed with "RP". Thereafter, the sample was deposited in Judicial malkhana from where it was sent to FSL. The FSL report notes that the seal was intact and the sample was untampered.

12. All the persons who possessed the contraband sample have been brought on record to support that no tampering was done with the samples. The defence failed to bring out anything in the cross-examination of the witnesses with respect to tampering of the samples. Thus, we find that the samples were properly dealt with throughout and the same was found to be ganja. Going further, with respect to the seal that was handed over to ASI Rishiraj, the defence failed to cross-examine IO Ramphal as to how did he got possession of seal back from ASI Rishiraj. Under these circumstances, we do not believe that the prosecution was duty-bound to explain the movement of the seal from one person to another in the given circumstances. Since, the movement of sample has been proved and found to be regular, the prosecution has sufficiently proved its case to establish the guilt of the accused in the present case.

13. We have noticed the decision of this Court in *Allauddin Mian* v. *State of Bihar*[2]. In the said decision, this Court held as under: (SCC pp. 20-21, para 10)

> "*10*. Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the Judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the Judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. That sub-section reads as under:
>
> > '**235. (2)** If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.'
>
> The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to

2 (1989) 3 SCC 5 : 1989 SCC (Cri) 490

choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr Garg was, therefore, justified in making a grievance that the trial court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31-3-1987, on the same day before the accused could absorb and overcome the shock of conviction they were asked if they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high decree of concern for the statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made, as in this case, without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the court, the court's decision on the sentence would be vulnerable. We need hardly mention that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiori, therefore, the principle of fair play must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing, is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of sub-section (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. We think as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender. In the present case, as pointed out earlier, we are afraid that the learned trial Judge did not attach sufficient importance to the mandatory requirement of sub-section (2) of Section 235 of the Code. The High Court also had before it only the scanty material placed before the learned Sessions Judge when it confirmed the death penalty."

14. Thus, we find the respondent-accused guilty under Section 20 of the NDPS Act for possession of 11 kg of ganja. The commercial quantity of ganja is 20 kg or more, and the accused are in possession of small quantity as per the notification of the Central Government providing small and

commercial quantities of various contrabands. In view of this, we convict the accused persons (Asha Devi and her husband Om Prakash) under Section 20 of the NDPS Act and sentence them to simple imprisonment for five years.

15. Before sentencing, following the principle laid down in *Allauddin Mian*[2], this matter was adjourned, giving a chance to the respondent-accused to place facts before us and further directed the appellant to find out about the conduct of the respondents after this incident and to inform this Court. On the adjourned date, the learned counsel for the appellant and the learned counsel for the respondent-accused expressed that the respondents thereafter were not found to be implicated in any other matter. After hearing the learned counsel for the parties and after giving due weightage to the mitigating as well as the aggravating circumstances placed before us, we think that it would be proper for us to convict the accused persons with the sentence passed by us, which would serve the purpose.

16. Accordingly, we set aside the judgment and order[1] passed by the High Court as also by the trial court and direct that the respondent-accused shall be taken into custody forthwith to undergo the sentence. The appeal is accordingly allowed.

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2 *Allauddin Mian* v. *State of Bihar*, (1989) 3 SCC 5 : 1989 SCC (Cri) 490

1 *State of Haryana* v. *Asha Devi*, Criminal Misc. No. 560-MA of 2007, decided on 10-12-2007 (P&H)

(2015) 6 Supreme Court Cases 674

(BEFORE DIPAK MISRA AND N.V. RAMANA, JJ.)

KULWINDER SINGH AND ANOTHER .. Appellants;

Versus

STATE OF PUNJAB .. Respondent.

Criminal Appeal No. 681 of 2011†, decided on May 5, 2015

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 35 and 15 — Recovery of contraband from truck — Factum of conscious possession — Invocation of presumption of culpable mental state — Expressions 'conscious' and 'possession' — Meaning of, restated — Conviction confirmed — Held, once possession of contraband is established, accused is presumed to be in conscious possession — Further, if accused takes a stand that he was not in conscious possession, he has to establish the same — Herein, defence plea that both appellant-accused were only travelling in truck and had no knowledge of what the bags contained, rejected**

— Held, evidently, appellants were found sitting in truck carrying 110 bags of poppy husk weighing 4180 kg — At the instance of police, when truck was stopped, had appellants no knowledge about contents of bags, they would not have run away from spot — That apart, they absconded for few days from their village — Further, they have not taken plea that they were taking any lift in truck — Their presence in truck has been proven by prosecution — Again, it is not a small bag lying in corner of truck that appellants can advance plea that they were not aware of it — Their presence, which has been proven, establishes their control over bags — Circumstances clearly establish that they were aware of poppy husk inside bags — Therefore, there can be no iota of doubt that they were in conscious possession of same — Hence, in such situation, appellants' plea that they were not in conscious possession of said articles, rejected — Words and Phrases — "Conscious", "possession" — Meanings of, restated

(Paras 16 to 19)

Madan Lal v. *State of H.P.*, (2003) 7 SCC 465 : 2003 SCC (Cri) 1664; *Dharampal Singh* v. *State of Punjab*, (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431; *Mohan Lal* v. *State of Rajasthan*, (2015) 6 SCC 222; *Ram Singh* v. *Central Bureau of Narcotics*, (2011) 11 SCC 347 : (2011) 3 SCC (Cri) 181, *relied on*

Satta v. *State of Punjab*, Criminal Appeal No. 384-SB of 1998, order dated 27-11-2008 (P&H), *affirmed*

Supt. & Remembrancer of Legal Affairs v. *Anil Kumar Bhunja*, (1979) 4 SCC 274 : 1979 SCC (Cri) 1038; *Gunwantlal* v. *State of M.P.*, (1972) 2 SCC 194 : 1972 SCC (Cri) 678; *Heath* v. *Drown*, 1973 AC 498 : (1972) 2 WLR 1306 : (1972) 2 All ER 561 (HL); *Sullivan* v. *Earl of Caithness*, 1976 QB 966 : (1976) 2 WLR 361 : (1976) 1 All ER 844 (DC), *cited*

† From the Judgment and Order dated 27-11-2008 of the High Court of Punjab and Haryana at Chandigarh in Crl. A. No. 384-SB of 1998

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 15 — Recovery of contraband from truck — Test identification parade (TIP) — Non-conduct of — Defence plea of non-establishment of identity of both appellant-accused, because of — But, two witnesses identified appellants in court — Nothing elicited in cross-examination to discard their testimony — Conviction not vitiated**

— Held, identification parades belong to stage of investigation, and there is no provision in CrPC which obliges investigating agency to hold, or confers a right upon accused to claim, TIP — They do not constitute substantive evidence and these parades are essentially governed by S. 162 CrPC — Failure to hold TIP would not make inadmissible evidence of identification in court — Weight to be attached to such identification should be a matter for courts of fact

— Herein, there is no dispute that TIP was not held — But, two witnesses, PWs 2 and 3 (who had stopped truck carrying bags of poppy husk, in which appellants were also found sitting), have identified appellants in court — As per their evidence, they had seen appellants in torchlight and they had also seen them running away — Evidence that they chased appellants, but could not apprehend them — Courts below took note of fact, that it was 4.00 a.m. in the month of April and, therefore, it was not all that dark and with help of torchlight, they could have identified accused persons — Nothing was elicited in cross-examination to discard testimony of these witnesses — Hence, aforesaid plea, rejected — Conviction of appellants, not vitiated — Evidence Act, 1872 — S. 9 — Criminal Procedure Code, 1973 — S. 162 — Criminal Trial — Identification — Test Identification Parade (TIP) — Non-conduct of — Effect of (Paras 10 to 15)

Matru v. *State of U.P.*, (1971) 2 SCC 75 : 1971 SCC (Cri) 391; *Santokh Singh* v. *Izhar Hussain*, (1973) 2 SCC 406 : 1973 SCC (Cri) 828; *Malkhansingh* v. *State of M.P.*, (2003) 5 SCC 746 : 2003 SCC (Cri) 1247; *Visveswaran* v. *State*, (2003) 6 SCC 73 : 2003 SCC (Cri) 1270, *relied on*

Satta v. *State of Punjab*, Criminal Appeal No. 384-SB of 1998, order dated 27-11-2008 (P&H), *affirmed*

C. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 50 and 15 — Search and seizure — Recovery of contraband from truck — Compliance with S. 50, not required — Held, S. 50 is not applicable to search of vehicle/container/bag/premises — S. 50 only applies in case of personal search of person — But it is not extended to search of vehicle or container or bag or premises — Herein, it is undisputed that bags containing poppy husk were seized from truck in which appellants were sitting — Thus, it is not a case of personal search of person — Therefore, appellants' contention is rejected — Their conviction is confirmed**

(Paras 20 to 22)

Megh Singh v. *State of Punjab*, (2003) 8 SCC 666 : 2004 SCC (Cri) 58; *State of H.P.* v. *Pawan Kumar*, (2005) 4 SCC 350 : 2005 SCC (Cri) 943; *Jarnail Singh* v. *State of Punjab*, (2011) 3 SCC 521 : (2011) 1 SCC (Cri) 1191; *Ram Swaroop* v. *State (Govt. of NCT of Delhi)*, (2013) 14 SCC 235 : (2014) 4 SCC (Cri) 166, *relied on*

Satta v. *State of Punjab*, Criminal Appeal No. 384-SB of 1998, order dated 27-11-2008 (P&H), *affirmed*

D. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 15 — Recovery of contraband from truck — No independent witness examined to substantiate allegation of prosecution as they had been allegedly won over by accused — But, evidence of official witnesses, trustworthy and credible — Prosecution case, trustworthy — Held, no reason not to rest conviction on basis of such evidence of official witnesses — Conviction confirmed**

— Appellant-accused were found sitting in truck carrying 110 bags of poppy husk weighing 4180 kg — Plea of appellant-accused, that no independent witness was examined to substantiate allegation of prosecution — Tenability — *L* and *H* (who had joined investigating officer at the time of search and seizure) were not examined by prosecution — Explanation offered, that investigating agency was of view that they were won over — Held, said explanation has been totally substantiated inasmuch as they have been examined as defence witnesses — In such a situation, no adverse inference can be drawn for non-examination of said witnesses — That apart, case of prosecution cannot be rejected solely on ground that independent witnesses have not been examined when, evidently, case put forth by prosecution is trustworthy — When evidence of official witnesses is trustworthy and credible, there is no reason not to rest conviction on basis of such evidence — Herein, evidence is unimpeachable and beyond reproach and witnesses cited by prosecution can be believed and their evidence has been correctly relied upon by courts below to record a conviction — What is necessary for proving prosecution case is not quantity but quality of evidence — Hence, conviction of appellants, confirmed — Criminal Trial — Witnesses — Suborned/Won-over witness (Paras 23 and 24)

State (Govt. of NCT of Delhi) v. *Sunil*, (2001) 1 SCC 652 : 2001 SCC (Cri) 248, *relied on*

Satta v. *State of Punjab*, Criminal Appeal No. 384-SB of 1998, order dated 27-11-2008 (P&H), *affirmed*

Appeal dismissed Y-D/54900/CR

Advocates who appeared in this case :
J.P. Dhanda, Advocate, for the Appellants;
Jayant K. Sud, Additional Advocate General (Vishal Dabas, B. Singh, Ajay P. Tushir and Ms Kavita Wadia, Advocates) for the Respondent.

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4. (2011) 3 SCC 521 : (2011) 1 SCC (Cri) 1191, *Jarnail Singh* v. *State of Punjab* 683*e*
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10. (2003) 6 SCC 73 : 2003 SCC (Cri) 1270, *Visveswaran* v. *State* 680*a*
11. (2003) 5 SCC 746 : 2003 SCC (Cri) 1247, *Malkhansingh* v. *State of M.P.* 679*f*
12. (2001) 1 SCC 652 : 2001 SCC (Cri) 248, *State (Govt. of NCT of Delhi)* v. *Sunil* 684*a*
13. (1979) 4 SCC 274 : 1979 SCC (Cri) 1038, *Supt. & Remembrancer of Legal Affairs* v. *Anil Kumar Bhunja* 680*g*
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15. (1973) 2 SCC 406 : 1973 SCC (Cri) 828, *Santokh Singh* v. *Izhar Hussain* 679*e-f*
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17. (1972) 2 SCC 194 : 1972 SCC (Cri) 678, *Gunwantlal* v. *State of M.P.* 681*a*
18. (1971) 2 SCC 75 : 1971 SCC (Cri) 391, *Matru* v. *State of U.P.* 679*e*

The Judgment of the Court was delivered by

DIPAK MISRA, J.— In this appeal, two appellants, namely, Kulwinder Singh and Amrik Singh faced trial along with three others for the offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") before the Special Court, Sangrur and were found guilty for the said offence and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs 1 lakh each and, in default of payment of fine, to suffer rigorous imprisonment for a further period of one year. The conviction and sentence were called in question before the High Court in Criminal Appeal No. 384-SB of 1998 and the High Court after reappreciating the evidence, gave[1] the stamp of approval to the same.

2. The prosecution case, as unfurled, is that on 17-4-1988, Jarnail Singh, ASI, along with other police officials was patrolling on the canal bridge in the area of Village Raidhriana. In the early part of the morning, a truck bearing No. DIL 781 came from the side of Village Raidhriana and it was proceeding towards the canal bridge. When the truck reached near the police party, Jarnail Singh, gave a signal with a torchlight and asked the driver to stop. After the vehicle stopped, it was circled by the police officials. The driver of the truck, on enquiry, disclosed his name as Balwinder Singh and Devender Singh and Bagga Singh were sitting by his side on the front seat. Jagminder Singh and four others were sitting on the back side of the truck and on a query being made, all except Jagminder Singh jumped from the truck and took to their heels. Chase by the police party was unsuccessful. The persons who were successful in running away were Satta alias Satnam Singh, Amrik Singh, Kulwinder Singh alias Kala and Jagdev Singh alias Jagga.

3. The investigating officer apprehended Jagminder Singh, Balwinder Singh, Devinder Singh and Bagga Singh; and in their presence, the vehicle was searched. On a search being made, the police found 110 bags of poppy husk and each bag contained 38 kg. Samples were collected from each bag,

1 *Satta* v. *State of Punjab*, Criminal Appeal No. 384-SB of 1998, order dated 27-11-2008 (P&H)

duly sealed and recovery memos were prepared and eventually they were sent for chemical examination. The present appellant-accused and Satta alias Satnam Singh were arrested on 11-5-1988 by ASI Gurdas Singh, PW 1. In course of investigation, the investigating agency recorded statements of certain witnesses, obtained FSL report and ultimately placed the charge-sheet before the Magistrate concerned, who in turn committed the matter to the Special Court under the NDPS Act. The accused persons pleaded not guilty and claimed to be tried.

4. The prosecution in order to substantiate the charge, examined seven witnesses. The main witnesses are ASI Gurdas Singh, PW 1; Jagjivan Singh, PW 2; Ajit Singh, PW 3 and Om Prakash, PW 7. ASI Jarnail Singh could not be examined as he had expired before the commencement of the evidence of the prosecution. The appellant-accused took the plea that they were brought from the village and falsely implicated in the case and there was no recovery effected from them. The defence in support of its stand examined nine witnesses, DW 1 to DW 9.

5. The learned trial Judge appreciating the evidence on record found the appellants and two others guilty of the offence and sentenced them, as has been stated hereinbefore. Being dissatisfied with the judgment of conviction and order of sentence, the appellants along with two others preferred Criminal Appeal No. 384 of 1998 and Bagga Singh and Balwinder Singh preferred separate appeals.

6. It was contended before the High Court that the identity of the appellants was not established during the trial inasmuch as no identification parade was conducted by the investigating officer; that the prosecution had not proved that the appellant-accused were in conscious possession of the poppy husk; that Labh Singh and Harvinder Singh though had joined the investigating officer at the time of alleged search and seizure, they were not examined by the prosecution; and that the prosecution had miserably failed to prove the involvement of the appellants in the crime in question. The High Court dealt with each of the contentions and found no merit in any of them and resultantly dismissed the appeal.

7. We have heard Mr J.P. Dhanda, learned counsel for the appellants and Mr Jayant K. Sud, learned Additional Advocate General for the State.

8. The learned counsel for the appellants, apart from raising the similar contentions which had been raised before the High Court, has also urged that there has been non-compliance with Section 50 of the NDPS Act, which vitiates the conviction. He has also emphasised on the issue of conscious possession by the appellants and has seriously criticised non-conducting of the test identification parade. The learned counsel for the State, per contra, has contended that in the instant case there was no need for holding a test identification parade inasmuch as PW 2 and PW 3 have identified the accused persons in court and they had occasion to see the appellants as they had stopped the truck and had time to see them and their evidence has not been dented despite roving cross-examination. The learned counsel for the

State would also contend that the running away of the accused persons from the spot and their abscondence thereafter prove the factum of their special knowledge about the contents in the bags loaded in the truck and that establishes the conscious state of their mind.

9. Resisting the submission about the non-examination of independent witnesses, namely, Labh Singh and Harvinder Singh, it is contended by the learned counsel for the State that as they were won over by the defence, the prosecution thought it appropriate not to examine them as their witnesses and the same has been proven to be a fact, for they have been examined as defence witnesses. As regards non-compliance with Section 50 of the NDPS Act, it is submitted by the learned counsel for the respondent State that as the recovery was from a truck there was no need for compliance with Section 50 of the NDPS Act.

10. First, we shall deal with the facet of test identification parade. There is no dispute that the test identification parade has not been held in this case. The two witnesses, namely, PW 2 and PW 3 have identified the appellant-accused in court. As per their evidence they had seen the appellant-accused in torchlight and they had also seen them running away. It has also come in the evidence that they chased them but they could not be apprehended. The learned trial Judge as well as the High Court has taken note of the fact that it was 4.00 a.m. in the month of April and, therefore, it was not all that dark and with the help of torchlight, they could have identified the accused persons. The suggestion given to these witnesses is absolutely vague. Nothing really has been elicited in the cross-examination to discard the testimony of these witnesses.

11. In *Matru* v. *State of U.P.*[2], it has been held that the identification test does not constitute substantive evidence and it is primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation of an offence is proceeding on the right lines.

12. In *Santokh Singh* v. *Izhar Hussain*[3], it has been observed that the identification can only be used as corroborative of the statement in court.

13. In *Malkhansingh* v. *State of M.P.*[4] it has been held thus: (SCC pp. 751-52, para 7)

> "7. ... The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact."

2 (1971) 2 SCC 75 : 1971 SCC (Cri) 391
3 (1973) 2 SCC 406 : 1973 SCC (Cri) 828
4 (2003) 5 SCC 746 : 2003 SCC (Cri) 1247

14. In this context, reference to a passage from *Visveswaran* v. *State*[5], would be apt. It is as follows: (SCC p. 78, para 11)

> "*11.* ... The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence."

15. In the case at hand, as the witnesses have identified the appellant-accused in the court and except giving a bald suggestion that they have not seen the accused persons, there is nothing in the cross-examination we are disposed to accept the identification in court. Hence, the submission canvassed by the learned counsel for the appellants on this score pales into insignificance.

16. The next ground of assail pertains to factum of conscious possession. The submission of the learned counsel for the appellants is that they were only moving in the truck and had no knowledge what the bags contained. As the evidence on record would show, two of the accused persons were sitting by the side of the driver and the rest of the accused persons were sitting on the body of the truck. 110 bags of poppy husk weighing 4180 kg were in the truck. At the instance of the police when the truck was stopped, had the appellant-accused no knowledge about the contents of the bags, they would not have run away from the spot. That apart, they absconded for few days from their village. They have not taken the plea that they were taking any lift in the truck and their presence in the truck has been proven by the prosecution. It is not a small bag lying in the corner of the truck that the appellant-accused can advance the plea that they were not aware of it. In the instant case, there were 110 bags of poppy husk being carried in the truck. Their presence which has been proven, establishes their control over the bags. The circumstances clearly establish that they were aware of the poppy husk inside the bags and in such a situation, it is difficult to accept that they were not in conscious possession of the said articles.

17. In this context reference to the decision in *Madan Lal* v. *State of H.P.*[6] would be fruitful wherein it has been held thus: (SCC p. 472, paras 22-25)

> "*22.* The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supt. & Remembrancer of Legal Affairs* v. *Anil Kumar Bhunja*[7] to work out a completely logical and precise definition of 'possession' uniformly applicable to all situations in the context of all statutes.

5 (2003) 6 SCC 73 : 2003 SCC (Cri) 1270

6 (2003) 7 SCC 465 : 2003 SCC (Cri) 1664

7 (1979) 4 SCC 274 : 1979 SCC (Cri) 1038

23. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. As noted in *Gunwantlal* v. *State of M.P.*[8] possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

25. The word 'possession' means the legal right to possession (see *Heath* v. *Drown*[9]). In an interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See *Sullivan* v. *Earl of Caithness*[10].)"

18. In *Dharampal Singh* v. *State of Punjab*[11], it has been ruled that the expression "possession" is not capable of precise and complete logical definition of universal application in the context of all the statutes. Recently, in *Mohan Lal* v. *State of Rajasthan*[12], after referring to certain authorities, this Court has held as follows: (*Mohan Lal case*[12], SCC pp. 238-39, paras 21-22)

"*21*. From the aforesaid exposition of law it is quite vivid that the term 'possession' for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the 'chattel' i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others.

22. In the case at hand, the appellant, we hold, had the requisite degree of control when, even if the said narcotic substance was not within his physical control at that moment. To give an example, a person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance even if he is not, at the moment, in physical control. The situation cannot be viewed differently when a

8 (1972) 2 SCC 194 : 1972 SCC (Cri) 678

9 1973 AC 498 : (1972) 2 WLR 1306 : (1972) 2 All ER 561 (HL)

10 1976 QB 966 : (1976) 2 WLR 361 : (1976) 1 All ER 844 (DC)

11 (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431

12 (2015) 6 SCC 222

person conceals and hides the prohibited narcotic substance in a public space. In the second category of cases, the person would be in possession because he has the necessary animus and the intention to retain control and dominion."

19. In view of the aforesaid enunciation of law, once possession is found, the accused is presumed to be in conscious possession as has been held in *Ram Singh* v. *Central Bureau of Narcotics*[13]. If the accused takes a stand that he was not in conscious possession, he has to establish the same, as has been held in *Dharampal Singh*[11]. As the materials brought on record would show, the appellant-accused were sitting in the truck; their presence in the truck has been clearly established; and they had run away from the spot and absconded for some days from the village. It is proven that there were 110 bags of poppy husk in the truck and the appellant-accused were in control of the articles in the truck. Therefore, there can be no iota of doubt that they were in conscious possession of the same. In view of the aforesaid analysis, we do not find any force in the submission of the learned counsel for the appellants.

20. The next contention that has been raised by the learned counsel for the appellants relates to non-compliance with Section 50 of the NDPS Act. It is undisputed that the bags containing poppy husk were seized from the truck. Thus, it is not a case of personal search of a person. In *Megh Singh* v. *State of Punjab*[14], it has been held that Section 50 only applies in case of personal search of a person, but it is not extended to a search of a vehicle or a container or a bag or premises.

21. In *State of H.P.* v. *Pawan Kumar*[15], it has been held that: (SCC pp. 359-60, paras 10-11)

"*10*. We are not concerned here with the wide definition of the word 'person', which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad commonsense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilised society. Therefore, the most appropriate meaning of the word 'person' appears to be—'the body of a human being as presented to public view usually with its appropriate coverings and clothing'. In a civilised society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article

13 (2011) 11 SCC 347 : (2011) 3 SCC (Cri) 181

11 *Dharampal Singh* v. *State of Punjab*, (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431

14 (2003) 8 SCC 666 : 2004 SCC (Cri) 58

15 (2005) 4 SCC 350 : 2005 SCC (Cri) 943

to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word 'person' would mean a human being with appropriate coverings and clothings and also footwear.

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a *thaila*, a *jhola*, a *gathri*, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word 'person' occurring in Section 50 of the Act."

Similar view has been expressed in *Jarnail Singh* v. *State of Punjab*[16] and *Ram Swaroop* v. *State (Govt. of NCT of Delhi)*[17].

22. In view of the aforesaid, the submission that non-compliance with Section 50 vitiates the conviction, leaves us unimpressed.

23. The last plank of submission of the learned counsel for the appellants is that no independent witness has been examined to substantiate the allegation of the prosecution. It is worth to note that Labh Singh and Harvinder Singh have not been examined by the prosecution. The explanation has been offered that the investigating agency was of the view that they had been won over. The said explanation has been totally substantiated inasmuch as they have been examined as defence witnesses. In such a situation, no adverse inference can be drawn for non-examination of the said witnesses. That apart, the case of the prosecution cannot be rejected solely on the ground that independent witnesses have not been examined when, on the perusal of the evidence on record the Court finds that the case put forth by the prosecution is trustworthy. When the evidence of the official witnesses is trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence.

16 (2011) 3 SCC 521 : (2011) 1 SCC (Cri) 1191

17 (2013) 14 SCC 235 : (2014) 4 SCC (Cri) 166

In this regard, it is profitable to reproduce a passage from *State (Govt. of NCT of Delhi)* v. *Sunil*[18] which reads as follows: (SCC p. 662, para 21)

> "*21.* We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hangover persisted during post-Independence years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence, when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions."

24. In the case at hand, the evidence is unimpeachable and beyond reproach and the witnesses cited by the prosecution can be believed and their evidence has been correctly relied upon by the trial court and the High Court to record a conviction. It is well settled in law that what is necessary for proving the prosecution case is not the quantity but the quality of the evidence.

25. In view of the aforesaid premised reasons, we do not perceive any merit in this appeal and it is accordingly dismissed.

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18 (2001) 1 SCC 652 : 2001 SCC (Cri) 248

(2015) 13 Supreme Court Cases 598

(BEFORE JAGDISH SINGH KHEHAR AND ARUN KUMAR, JJ.)

LAXMI NAGAPPA KOLI .. Appellant;

Versus

NARCOTIC CONTROL BUREAU AND ANOTHER .. Respondents.

Criminal Appeal No. 2149 of 2014†, decided on September 26, 2014

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 8, 17, 18 and 52-A — Chemical examination — Re-testing of samples — When not warranted — Tests already conducted strongly indicating absence of narcotic substance — No exceptional circumstances**

— Two samples of seized material were sent for testing, to CFSL, Hyderabad and CFSL, Mumbai — According to report of CFSL Hyderabad, heroin was not detected in the sample — According to report of CFSL, Mumbai, sample was composed of Nitrogen bearing organic compound — For exact identification of the sample, more instrumental analysis like IR Spectroscopy was required — Courts below ordered a third sample tested from an approved forensic science laboratory — Sustainability

— Held, it is no doubt true that Forensic Science Laboratory, Mumbai, in its report dt. 7-3-2013 had clearly opined that it did not have sufficient infrastructure to test sample provided to it by respondents, and as such, required respondents to have the same tested by another laboratory — What however, cannot be overlooked is, that a separate sample which was sent to Forensic Science Laboratory, Hyderabad, which clearly recorded a conclusion that sample contained Paracetamol and Fervunulin — The instant determination by Forensic Science Laboratory, Hyderabad is clear, categorical and specific — The same cannot be overlooked under any circumstances — The instant case is not a case which presents a situation of extreme exceptional circumstances narrated in *Thana Singh*, (2013) 2 SCC 590 — At no point in time, can the report submitted by Forensic Science Laboratory, Hyderabad be ignored — Moreover, Mumbai laboratory had returned a clear finding, that sample tested by it was a "Nitrogen based organic compound" — Heroin is not a Nitrogen based compound, and as such, even the second sample, according to test report did not contain heroin — Thus, no fruitful purpose will be served by sending another sample to any third laboratory — Criminal Procedure Code, 1973 — S. 293 — Evidence Act, 1872, S. 45 (Paras 6 and 7)

B. **Narcotics, Intoxicants and Liquor — Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 8, 17, 18 and 52-A — Heroin — Chemical composition — Not a Nitrogen based compound**

Thana Singh v. *Central Bureau of Narcotics*, (2013) 2 SCC 590 : (2013) 2 SCC (Cri) 818, *distinguished on facts*

Laxmi Nagappa Koli v. *Narcotic Control Bureau*, Criminal Revision Application No. 211 of 2013, decided on 19-7-2013 (Bom), *reversed*

Appeal allowed J-D/54822/SR

† Arising from SLP (Crl.) No. 7115 of 2013

Advocates who appeared in this case :

H.E. Mooman, Sherali S. Khan, Satbir S. Pillania [for R.C. Gubrele (Advocate-on-Record) (NP)] Advocates, for the Appellant;

Tushar Mehta, Additional Solicitor General [Ms Ranjana Narayan and Ms Madhurima Tatia, [for B. Krishna Prasad (Advocate-on-Record) (NP)] Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2013) 2 SCC 590 : (2013) 2 SCC (Cri) 818, *Thana Singh* v. *Central Bureau of Narcotics* 599*g-h*, 600*d-e*
2. Criminal Revision Application No. 211 of 2013, decided on 19-7-2013 (Bom), *Laxmi Nagappa Koli* v. *Narcotic Control Bureau* **(reversed)** 599*g*, 600*g*

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J.— Leave granted. It is not a matter of dispute that the seizure admittedly took place on 17-2-2013. It was alleged that the seized material was heroin. Two samples of the seized material were sent for testing. The first one to the Central Forensic Science Laboratory, Hyderabad, and the other to the Central Forensic Science Laboratory, Mumbai.

2. The report of the Central Forensic Science Laboratory, Hyderabad, was to the following effect:

> "The exhibits were analysed by Colour Test, TLC and Gas Chromatography — Mass Spectroscopy (GC-MS) methods. Based upon the above methods the results are given below.
>
> *Heroin has not been detected in Ext. S-II. However, Paracetamol and Fervunulin detected in Ext. S-II.*" (emphasis supplied)

3. The result of the Forensic Science Laboratory, Mumbai was as under:

> "The sample is in the form of light brown-coloured powder. It is composed of Nitrogen bearing organic compound. *For exact identification of the sample u/r more instrumental analysis like IR Spectroscopy is required, which is not available here at present. Therefore, sample may be forwarded to CFSL Hyderabad.* Remnant sample is being returned in a sealed envelope. The facsimile of seal affixed on sealed envelope is given below." (emphasis supplied)

4. Premised on the fact, that the Central Forensic Science Laboratory, Mumbai was not fully equipped, to chemically test the sample sent to it for examination, the respondents before this Court moved an application, for getting a third sample tested from an approved forensic science laboratory. The instant prayer made by the respondents was acceded to by the Special Judge, NDPS, Thane, vide an order dated 30-4-2013. A challenge raised to the above order passed by the trial court, was rejected by the High Court, through the impugned order dated 19-7-2013[1].

5. During the course of hearing, the learned counsel for the appellant assailed the determination of the courts below, in having the third sample tested. In this behalf, reliance was placed on the decision rendered by this Court in *Thana Singh* v. *Central Bureau of Narcotics*[2]. Our pointed attention was invited to the following observations recorded in the above judgment: (SCC p. 601, para 27)

1 *Laxmi Nagappa Koli* v. *Narcotic Control Bureau*, Criminal Revision Application No. 211 of 2013, decided on 19-7-2013 (Bom)

2 (2013) 2 SCC 590 : (2013) 2 SCC (Cri) 818

"27. Therefore, keeping in mind the array of factors discussed above, we direct that, after the completion of necessary tests by the laboratories concerned, results of the same must be furnished to all parties concerned with the matter. *Any requests as to re-testing/re-sampling shall not be entertained under the NDPS Act as a matter of course. These may, however, be permitted, in extremely exceptional circumstances, for cogent reasons to be recorded by the Presiding Judge. An application in such rare cases must be made within a period of fifteen days of the receipt of the test report; no applications for re-testing/re-sampling shall be entertained thereafter. However, in the absence of any compelling circumstances, any form of re-testing/re-sampling is strictly prohibited under the NDPS Act.*" (emphasis supplied)

6. We have given our thoughtful consideration to the submissions advanced at the hands of the learned counsel for the rival parties. It is no doubt true that the Forensic Science Laboratory, Mumbai, in its report dated 7-3-2013 had clearly opined that it did not have sufficient infrastructure to test the sample provided to it by the respondents, and as such, required the respondents to have the same tested by another laboratory. What however, cannot be overlooked is, that a separate sample which was sent to the Forensic Science Laboratory, Hyderabad, which clearly recorded a conclusion that the sample contained Paracetamol and Fervunulin. The instant determination by the Forensic Science Laboratory, Hyderabad is clear, categorical and specific. The same cannot be overlooked under any circumstances.

7. It is in the above factual scenario, that we have to determine whether a third sample could be sent for testing, before some other forensic science laboratory, in terms of the observations made by this Court in *Thana Singh case*[2]. We are of the view that the instant case is not a case which presents a situation of extreme exceptional circumstances, narrated in the above judgment. At no point in time, can the report submitted by the Forensic Science Laboratory, Hyderabad be ignored. Moreover, the learned counsel for the appellant, during the course of hearing contended that even the report of the Forensic Science Laboratory, Mumbai, clearly establishes that the sample sent to it did not contain heroin. In this behalf it was submitted that the Mumbai laboratory had returned a clear finding, that the sample tested by it was a "Nitrogen based organic compound". It was submitted that heroin is not a Nitrogen based compound, and as such, even the second sample, according to the test report did not contain heroin. The abovementioned factual position (in respect of the report of the Mumbai laboratory), was not disputed by the learned counsel for the respondents. In the above view of the matter, no fruitful purpose will be served by sending another sample to any third laboratory.

8. For the reasons recorded hereinabove, we are satisfied that the order dated 30-4-2013 passed by the Special Judge, NDPS, Thane, and the impugned order passed by the High Court dated 19-7-2013[1] deserve to be set aside. The same are accordingly hereby set aside.

9. The instant appeal is allowed in the aforesaid terms.

———

2 *Thana Singh* v. *Central Bureau of Narcotics*, (2013) 2 SCC 590 : (2013) 2 SCC (Cri) 818

1 *Laxmi Nagappa Koli* v. *Narcotic Control Bureau*, Criminal Revision Application No. 211 of 2013, decided on 19-7-2013 (Bom)

(2015) 15 Supreme Court Cases 235

(BEFORE H.L. DATTU, C.J. AND ARUN MISHRA AND AMITAVA ROY, JJ.)

ARUTLA SHANKARAIAH .. Appellant;

Versus

STATE OF ANDHRA PRADESH .. Respondent.

Criminal Appeal No. 1117 of 2008, decided on August 18, 2015

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 8(c) r/w S. 20(b) — Recovery of five kilograms of ganja — It is enough to establish possession of place of recovery on part of accused and it is not necessary to establish ownership thereof on part of accused**

— Asst. Excise Superintendent, on reliable information searched the house owned by appellant's father but which was in possession of appellant and five kilograms of ganja was recovered — Trial court convicted appellant for the offence under S. 8(c) r/w S. 20(b) of the Act — High Court reappreciated the entire evidence on record and noticed that the search had been conducted at 9:40 a.m. and therefore there was no violation of S. 42 of the Act — High Court further noticed that evidence on record was sufficient to establish that the appellant was in possession of said house from which ganja was seized — Appellant submitted that the prosecution failed to establish that the appellant was in possession of ganja as: appellant was not owner of said house where ganja was seized and said house was, in fact, owned by appellant's father — It was submitted that mere fact that appellant was present in said house at the time of search would not, in and of itself, establish that appellant was in possession of ganja seized from said house — Held, mere fact that appellant was not in ownership of said house where ganja was seized does not in and of itself disprove prosecution case — Material on record reveals that prosecution was able to conclusively establish that appellant was in sole possession of said house — Factum of lack of ownership is, therefore, irrelevant and does not exculpate appellant (Paras 8, 11 and 12)

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 8(c) r/w S. 20(b) — Recovery of five kilograms of ganja — Quantum of sentence**

— Trial court convicted appellant and sentenced him to undergo rigorous imprisonment for three years and a fine of Rs 5000 — High Court reduced the sentence imposed to rigorous imprisonment for one year while maintaining the fine imposed by trial court — Appellant's contention for further reduction of sentence regarding poor socio-economic condition and the fact that the proceedings against him have been continuing for more than a decade, held, not enough for further reduction of sentence, taking into consideration the seriousness of offence committed by appellant and large quantity of ganja, as much as five kilograms, involved in the present case, sentence imposed by High Court is appropriate (Para 13)

Arutla Shankaraiah v. *State of A.P.*, Criminal Appeal No. 463 of 2002, order dated 22-8-2007 (AP), *affirmed*

Appeal dismissed J-D/55707/SR

Advocates who appeared in this case :
D. Ramakrishna Reddy (for Ms T. Anamika), Advocate, for the Appellant;
Krishna K. Singh (for S. Udaya K. Sagar) and D. Mahesh Babu (NP), Advocates, for the Respondent. *a*

Chronological list of cases cited ***on page(s)***

1. Criminal Appeal No. 463 of 2002, order dated 22-8-2007 (AP), *Arutla Shankaraiah* v. *State of A.P.* 236*b*, 237*f-g*, 238*e*

ORDER

1. This appeal is directed against the judgment and order passed by the *b* High Court of Andhra Pradesh at Hyderabad in *Arutla Shankaraiah* v. *State of A.P.*[1] dated 22-8-2007. By the impugned judgment and order, the High Court has confirmed the order of conviction passed by the trial court in CC No. 52 of 1996 dated 2-4-2002. However, the High Court has modified the sentence imposed by the trial court.

2. The prosecution case is that on 21-9-1994, the Asst. Excise *c* Superintendent, Nagarkurnool (PW 3), acting on reliable information received by him that contraband had been stored in House No. 2-72, collected panch witnesses (PW 1 and PW 2) and proceeded to the said house. PW 3 searched the house with the assistance of the Sub-Inspector, Excise (PW 5). The search revealed five kilograms of ganja which was immediately seized, together with two samples of the same in the presence of PWs 1 and *d* 2. The appellant was then arrested and sent for remand.

3. Subsequently, the investigation was completed and a charge-sheet was submitted before the trial court and taken on file as CC No. 52 of 1996. The appellant appeared before the trial court and was furnished with copies of the relevant documents. The trial court framed charge against the appellant under Section 8(*c*) read with Section 20(*b*) of the Narcotic Drugs and Psychotropic *e* Substances Act, 1985 (for short "the Act"). The charge was read over and explained to the appellant who then pleaded not guilty. Consequently, the case was committed to trial.

4. The prosecution examined five witnesses and produced five documents, while no witnesses were produced by the defence. The appellant's statement was recorded under Section 313 of the Code of *f* Criminal Procedure (for short "the Code") wherein he denied the allegations levelled against him.

5. The trial court considered the evidence on record, as also the arguments of the parties and noticed that the evidence on record revealed that the appellant was in exclusive possession of the said house where the ganja was recovered and the mere fact that he did not own the said house did not *g* disprove the fact that he was in exclusive possession of the said house. The appellant had failed to give any alternative explanation for his sole presence in the said house at the time of the search and seizure of the ganja.

h

1 Criminal Appeal No. 463 of 2002, order dated 22-8-2007 (AP)

6. The trial court further noticed that the mere fact that one of the panch witnesses, PW 2, had turned hostile, would not in and of itself render the testimony of PW 1 unreliable and, therefore, rejected the appellant's contention that he should be given the benefit of doubt since he was not in conscious possession of the ganja. Based on the testimonies of PWs 1, 3 and 5 and other material on record, the trial court concluded that the prosecution has been able to prove its case beyond reasonable doubt and that the appellant had been in possession of ganja without a valid licence or permit. Thus, the trial court convicted the appellant and sentenced him to undergo rigorous imprisonment for three years and a fine of Rs 5000 for the offence under Section 8(*c*) read with Section 20(*b*) of the Act.

7. Aggrieved by the judgment and order passed by the trial court the appellant preferred appeal before the High Court inter alia, contending that the search conducted at the said house by PW 3 and the seizure of the ganja were in violation of the mandatory provisions of Section 42 of the Act, and, that the said house where the ganja was found was not owned by the appellant and therefore he could not be held responsible for the presence of ganja at the said house. With regard to sentence, the appellant further contended that he ought to be treated leniently since he hails from a poor family, was aged only 30 years and the quantity of ganja seized was only five kilograms.

8. By the impugned judgment and order dated 22-8-2007, the High Court reappreciated the entire evidence on record and noticed that the search had been conducted at 09:40 a.m. and therefore there was no violation of Section 42 of the Act. The High Court further noticed that the evidence on record was sufficient to establish that the appellant was in possession of the said house from which the ganja was seized. Thus, the High Court concluded that there was sufficient material on record to show that the appellant was in illegal possession of five kilograms of ganja and that the trial court had not committed any error in convicting the appellant. With regard to the question of sentence, the High Court, in light of the facts and circumstances of the case, reduced the sentence imposed to rigorous imprisonment of one year while maintaining the fine imposed by the trial court.

9. Aggrieved by the judgment and order passed[1] by the High Court, the appellant is before us in this appeal.

10. We have heard the learned counsel for the parties to the lis and have carefully perused the evidence on record, including the judgments and orders passed by the courts below.

11. The learned counsel for the appellant would submit that the prosecution has failed to establish that the appellant was in possession of the ganja. The appellant was not the owner of the said house where the ganja was seized and the said house was, in fact, owned by the appellant's father. The mere fact that the appellant was present in the said house at the time of the

1 *Arutla Shankaraiah* v. *State of A.P.*, Criminal Appeal No. 463 of 2002, order dated 22-8-2007 (AP)

search would not, in and of itself, establish that the appellant was in possession of the ganja seized from the said house. Therefore, given that possession was an essential element of the offence under Section 8(*c*) read with Section 20(*b*) of the Act, the appellant cannot be convicted. Per contra, the respondent State would support the judgment and order passed by the High Court.

12. Having considered the submissions made before us and after going through the entire evidence on record, the appellant's case fails to convince us. The mere fact that the appellant was not in ownership of the said house where the ganja was seized does not in and of itself disprove the prosecution case. The material on record reveals that the prosecution was able to conclusively establish that the appellant was in sole possession of the said house. The factum of lack of ownership is, therefore, irrelevant and does not exculpate the appellant.

13. With regard to the question of sentence, the appellant has contended that, in light of the appellant's poor socio-economic condition and the fact that the proceedings against him have been continuing for more than a decade, the sentence imposed on the appellant should be reduced to the duration of sentence that has already been undergone by him. However, this contention of the learned counsel for the appellant has also failed to convince us. Taking into consideration the seriousness of the offence committed by the appellant and the large quantity of ganja—as much as five kilograms—involved in the present case, we find that the sentence imposed by the High Court is appropriate.

14. In light of the aforesaid, we are of the considered opinion that the judgment and order[1] passed by the High Court does not suffer from any infirmity whatsoever and does not require our interference.

15. Accordingly, the appeal stands dismissed. If the appellant-accused is on bail, we direct the jurisdictional police authorities to take him into custody forthwith to serve out the remaining period of the sentence awarded by the High Court. Ordered accordingly.

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1 *Arutla Shankaraiah* v. *State of A.P.*, Criminal Appeal No. 463 of 2002, order dated 22-8-2007 (AP)

[CITED ORDER]

(2014) 13 Supreme Court Cases 17

(BEFORE C.K. THAKKER AND TARUN CHATTERJEE, JJ.)

UNION OF INDIA .. Petitioner;

Versus

PRADEEP SHIVRAM DHOND AND ANOTHER .. Respondents.

SLPs (Crl.) No. 4976 of 2006† with No. 5767 of 2006,
decided on April 20, 2007

Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 80, 8 to 10, 37 and 2(xiv) — Prosecution under NDPS Act — Bail — Grounds and considerations — S. 80 provision regarding Drugs and Cosmetics Act, 1940 — Effect — Whether special statute (NDPS Act) should take precedence over general statute (1940 Act) — Matter referred to Chief Justice for being placed before a three-Judge Bench — Constitution of India, Art. 141

Collector of Customs v. *Ahmadalieva Nodira*, (2004) 3 SCC 549 : 2004 SCC (Cri) 834; *State of Uttaranchal* v. *Rajesh Kumar Gupta*, (2007) 1 SCC 355 : (2007) 1 SCC (Cri) 356, *referred to*

SS-M/53659/SR

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1. (2007) 1 SCC 355 : (2007) 1 SCC (Cri) 356, *State of Uttaranchal* v. *Rajesh Kumar Gupta* 17*f*
2. (2004) 3 SCC 549 : 2004 SCC (Cri) 834, *Collector of Customs* v. *Ahmadalieva Nodira* 17*e-f*

ORDER

1. Our attention has been invited by the learned counsel to two decisions of this Court, namely, a decision of three-Judge Bench in *Collector of Customs* v. *Ahmadalieva Nodira*[1] and subsequent decision of two-Judge Bench in *State of Uttaranchal* v. *Rajesh Kumar Gupta*[2].

2. Reference was also made of Section 80 of the Narcotic Drugs and Psychotropic Substances Act, 1985 which reads as under:

> "**80.** ***Application of the Drugs and Cosmetics Act, 1940 not barred.***— The provisions of this Act or the Rules made thereunder shall be in addition to, and not in derogation of, the Drugs and Cosmetics Act, 1940 (23 of 1940) or the Rules made thereunder."

3. In our opinion, in view of the fact that the effect of Section 80 requires to be considered, we grant leave and direct the Registry to place the papers before the Hon'ble the Chief Justice for placing the matter before a three-Judge Bench.

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† From the Judgment and Order dated 7-2-2006 in Crl. A. No. 6787 of 2005 of the High Court of Bombay

1 (2004) 3 SCC 549 : 2004 SCC (Cri) 834

2 (2007) 1 SCC 355 : (2007) 1 SCC (Cri) 356

(2014) 6 Supreme Court Cases 664

(BEFORE DR B.S. CHAUHAN AND DR A.K. SIKRI, JJ.)

KRISHAN KUMAR .. Appellant;

Versus

STATE OF HARYANA .. Respondent.

Criminal Appeal No. 1563 of 2010†, decided on May 23, 2014

Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 50 and 18 — Search of bag carried by accused — Compliance with S. 50 — Not required — Recovery of contraband from bag in possession of accused, proved by prosecution — Conviction confirmed

— Appellant-accused was spotted by police party at a bus-stand, holding a plastic bag in his hand — On seeing the police party, appellant tried to conceal his presence — He was apprehended on suspicion and notice under S. 50 was served upon him, seeking his consent as to whether he wanted his search to be made in presence of a gazetted officer or a Magistrate — Appellant desired that plastic bag which he was carrying be searched in presence of a Magistrate — Thereupon, PW 2 (Tahsildar) was summoned to place of recovery, and in his presence, search of bag of appellant was conducted — Opium weighing 5 kg was found in the bag which was in possession of appellant — Eventually appellant was convicted under S. 18 by High Court — Contentions of appellant were that PW 2 was not discharging duties of a Magistrate and, therefore, there was violation of S. 50; that prosecution could not prove that PW 2 was discharging duties of Executive Magistrate as well; that, when appellant had specifically chosen to get himself searched in presence of Magistrate, and search was not conducted in presence of Magistrate, mandatory requirement of S. 50 was violated and it should have resulted in acquittal of appellant

— Held, S. 50 has no application herein — It is applicable only where search of a person is involved — It is not made applicable in those cases where no search of a person is to be conducted — In instant case, appellant was carrying a bag which was to be searched, and on his request, PW 2 was summoned, in whose presence search was conducted, which pertained to a bag — Reiterated, when search and recovery from a bag, briefcase, container, etc. is to be made, provisions of S. 50 are not attracted — Moreover, even proceeding on basis that S. 50 applies, requirement of S. 50 is search by gazetted officer or nearest Magistrate — Undisputedly, PW 2 was a gazetted officer — Therefore, even otherwise, requirement of S. 50 was fulfilled — Hence, held, prosecution has established guilt of appellant by leading cogent evidence and guilt is proved beyond reasonable doubt — There is no scope of interference with said findings — Conviction of appellant, confirmed (Paras 10 to 14)

† From the Judgment and Order dated 23-3-2010 in Crl. A. No. 421-SBA of 2001 of the High Court of Punjab and Haryana at Chandigarh

Ajmer Singh v. *State of Haryana*, (2010) 3 SCC 746 : (2010) 2 SCC (Cri) 475, *followed*

State of Haryana v. *Krishan Kumar*, Criminal Appeal No. 421-SBA of 2001, order dated 23-3-2010 (P&H), *affirmed*

Krishan Kumar v. *State of Haryana*, Criminal Appeal No. 565-SB of 1995, order dated 29-1-1999 (P&H), *referred to*

State of Punjab v. *Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080; *Ali Mustaffa Abdul Rahman Moosa* v. *State of Kerala*, (1994) 6 SCC 569 : 1995 SCC (Cri) 32; *Pooran Mal* v. *Director of Inspection (Investigation)*, (1974) 1 SCC 345 : 1974 SCC (Tax) 114; *Madan Lal* v. *State of H.P.*, (2003) 7 SCC 465 : 2003 SCC (Cri) 1664; *Kalema Tumba* v. *State of Maharashtra*, (1999) 8 SCC 257 : 1999 SCC (Cri) 1422; *Gurbax Singh* v. *State of Haryana*, (2001) 3 SCC 28 : 2001 SCC (Cri) 426; *State of H.P.* v. *Pawan Kumar*, (2005) 4 SCC 350 : 2005 SCC (Cri) 943, *cited*

Appeal dismissed Y-D/53265/CR

Advocates who appeared in this case :
Tripurari Rai, Prabhat Kumar and K.C. Dua, Advocates, for the Appellant;
Ms Nupur Choudhary and Kamal Mohan Gupta, Advocates, for the Respondent.

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2. Criminal Appeal No. 421-SBA of 2001, order dated 23-3-2010 (P&H), *State of Haryana* v. *Krishan Kumar* 665*f-g*, 667*b-c*
3. (2005) 4 SCC 350 : 2005 SCC (Cri) 943, *State of H.P.* v. *Pawan Kumar* 670*e-f*, 671*b*
4. (2003) 7 SCC 465 : 2003 SCC (Cri) 1664, *Madan Lal* v. *State of H.P.* 670*c-d*
5. (2001) 3 SCC 28 : 2001 SCC (Cri) 426, *Gurbax Singh* v. *State of Haryana* 670*d-e*
6. (1999) 8 SCC 257 : 1999 SCC (Cri) 1422, *Kalema Tumba* v. *State of Maharashtra* 670*d*
7. (1999) 6 SCC 172 : 1999 SCC (Cri) 1080, *State of Punjab* v. *Baldev Singh* 669*b*, 669*b-c*, 670*d-e*, 670*e*
8. Criminal Appeal No. 565-SB of 1995, order dated 29-1-1999 (P&H), *Krishan Kumar* v. *State of Haryana* 666*c-d*
9. (1994) 6 SCC 569 : 1995 SCC (Cri) 32, *Ali Mustaffa Abdul Rahman Moosa* v. *State of Kerala* 669*b-c*
10. (1974) 1 SCC 345 : 1974 SCC (Tax) 114, *Pooran Mal* v. *Director of Inspection (Investigation)* 669*b-c*

The Judgment of the Court was delivered by

DR A.K. SIKRI, J.— That the present statutory appeal is directed against the impugned order dated 23-3-2010[1] whereby the High Court has convicted the appellant by reversing the judgment of the trial court, which had acquitted the appellant of the charges under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act").

2. As per the case of the prosecution, on 15-9-1992 the appellant was spotted by the police party headed by Sub-Inspector, Mohinder Singh at Bus-stand Ratta Khera. At that time, the appellant was having a plastic bag in his hand. On seeing the police party, the appellant had tried to conceal his presence by sitting near the water tank on the pretext of passing urine. The

1 *State of Haryana* v. *Krishan Kumar*, Criminal Appeal No. 421-SBA of 2001, order dated 23-3-2010 (P&H)

appellant was apprehended on suspicion and notice (Ext. P-A) under Section 50 of the Act was served upon him seeking his consent as to whether he wanted his search to be made in the presence of a gazetted officer or a Magistrate. The reply of the appellant to the notice is Ext. P-A/1 whereby he desired that the plastic bag, which he was carrying, be searched in the presence of a Magistrate. Thereupon Chet Ram, Tahsildar (PW 2) was summoned to the place of recovery and in his presence the search of the bag of the appellant was conducted. Opium weighing 5 kg was found in the bag which was in possession of the appellant. After separating a sample weighing 50 gm, the sample and the remaining opium were separately sealed with the seal bearing impression "MS", which was entrusted to Khema Ram, Chaukidar, who had joined in the police party from Bus-stand Ratta Khera.

3. After the trial, the appellant was convicted of the charge under Section 18 of the Act vide judgment dated 8-6-1995 passed by the trial court.

4. The appellant appealed against his conviction. The appeal was decided on 29-1-1999[2] by the High Court. The conviction was set aside on a technical ground and the matter was remitted back to the trial court. It will be pertinent to mention here that the said appeal was allowed primarily on the ground that it was not clear as to whether Chet Ram, Tahsildar in whose presence the search of the bag of the appellant was conducted, was discharging the duties of a Magistrate as well or not. As pointed out above, when the appellant was served with notice under Section 50 of the Act seeking his consent about his search he had desired that he be searched in the presence of a Magistrate. It is on this request that Chet Ram, Tahsildar was summoned. The contention of the appellant before the High Court was that Chet Ram was not discharging the duties of a Magistrate and, therefore, there was violation of Section 50 of the Act. Since this aspect was not examined while convicting the appellant of the aforesaid offence, the appeal was allowed and the matter was remitted back. This is clear from the following order passed by the High Court:

> "Resultantly, the appeal is allowed. The judgment and order of the trial court stand set aside and directions are given to the trial court to recall Chet Ram and get an elucidation from him as to whether he was discharging the duties of a Magistrate on the date of the recovery of opium or not. Prosecution will also be at liberty to lead such evidence in support of their case in order to show that Chet Ram was bestowed with powers of magistracy. The accused will also have the liberty to lead such evidence to rebut the case of the prosecution."

5. After the remand, the statement of Chet Ram (PW 2) was recorded afresh by the trial court. The opportunity was given to the prosecution as well as the appellant to produce additional evidence. In support of its case that Chet Ram was conferred with the duties of an Executive Magistrate as well, the prosecution produced photostat copy of Haryana Government Notification No. 21/39/78-JJ(4) Part II published on 16-6-1982 (Ext. P-X)

2 *Krishan Kumar* v. *State of Haryana*, Criminal Appeal No. 565-SB of 1995, order dated 29-1-1999 (P&H)

whereby all the Tahsildars in the State of Haryana were appointed as Executive Magistrates and affidavit of Chet Ram, Tahsildar-cum-Executive Magistrate dated 25-6-1999 was placed on record.

6. The trial court after recording the additional evidence as aforesaid, considered the matter again and this time it passed judgment dated 14-12-1999 acquitting the appellant. The reason for acquittal was that the prosecution could not prove that Chet Ram was discharging the duties as a Magistrate on the date of recovery of opium. The photocopy of Gazette Notification dated 16-6-1982 (Ext. P-X) was not acted upon by the trial court on the ground that the original notification was not produced for perusal.

7. The State filed an appeal against the aforesaid judgment. The High Court vide impugned judgment[1] has rejected the contention of the appellant and reversed the finding of the trial court, holding that it was not right for the trial court to discard the said notification only on the ground that the original was not produced, when there was no reason for the trial court to doubt the authenticity of the said notification. It was, more so, when Chet Ram had even filed his affidavit dated 25-6-1999 stating that he had been promoted from the post of Naib Tahsildar to the post of Tahsildar in May 1983.

8. In the aforesaid backdrop, the High Court analysed the testimony of Chet Ram and other witnesses to come to the conclusion that recovery of the contraband from the bag of the appellant was proved by the prosecution. This analysis is summed up by the High Court in the following manner:

> "In this case, Assistant Sub-Inspector Guriya Ram (PW 1), Chet Ram, Tahsildar-cum-Executive Magistrate (PW 2) and Sub-Inspector Mohinder Singh (PW 3) had appeared in support of the prosecution case. No ill will or animosity is attributed on the part of any of the three witnesses examined by the prosecution qua the accused. The recovery was effected by the police officials in the discharge of their official duties and they had no axe to grind against the accused. There was no reason for the police to plant 5 kg of opium upon the accused. Under the circumstances, non-examination of Chaukidar Khema Ram, who had joined in the police party, does not in any manner render the prosecution case unworthy of credit. The statements of the official witnesses cannot be rejected merely because of their official status. In fact, no discrepancy worth the name was noticed in the statements of Assistant Sub-Inspector Guriya Ram (PW 1), Tahsildar-cum-Executive Magistrate Chet Ram (PW 2) and Sub-Inspector Mohinder Singh (PW 3)."

Resultantly, the High Court allowed the appeal of the State and convicted the appellant under Section 18 of the Act, sentencing him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs 1 lakh. It is also directed that in default of payment of fine, the appellant shall undergo further rigorous imprisonment for 1 year.

1 *State of Haryana* v. *Krishan Kumar*, Criminal Appeal No. 421-SBA of 2001, order dated 23-3-2010 (P&H)

9. Mr Tripurari Rai, learned counsel appearing for the appellant tried to persuade us to restore the findings of the trial court holding that the prosecution could not prove that Chet Ram was discharging the duties of Executive Magistrate as well. Referring to the provisions of Section 50 of the Act his submission was that these provisions were mandatory in nature. In the instant case, when the appellant had specifically chosen to get himself searched in the presence of the Magistrate and the search was not conducted in the presence of the Magistrate, mandatory requirement of Section 50 of the Act had been violated and it should have resulted in the acquittal of the appellant.

10. We are of the opinion that the entire argument is misdirected. In fact, the exercise undertaken by the courts below viz. whether Chet Ram was discharging the duties of Executive Magistrate or not was totally irrelevant as Section 50 of the Act has no application in the present case. Section 50 of the Act, which is the sheet anchor of the appellant's defence reads as under:

> "**50.** ***Conditions under which search of persons shall be conducted.***— (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.
>
> (2) If such requisition is made, the officer may detain the person until he can bring him before the gazetted officer or the Magistrate referred to in sub-section (1).
>
> (3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct the search be made.
>
> (4) No female shall be searched by anyone excepting a female.
>
> (5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest gazetted officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest gazetted officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).
>
> (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

It is clear from the reading of the aforesaid provision that it is applicable only where search of a person is involved. It is not made applicable in those cases where no search of a person is to be conducted.

11. In the instant case the appellant was carrying a bag which was to be searched and on his request Chet Ram was summoned in whose presence search was conducted which pertained to a bag. In *Ajmer Singh* v. *State of*

Haryana[3] this aspect is specifically considered and dealt with. Following an earlier Constitution Bench judgment, the Court held that when search and recovery from a bag, briefcase, container, etc. is to be made, the provisions of Section 50 of the Act are not attracted. It is so stated in the following manner: (SCC pp. 751-52, paras 14-17)

> "*14*. The object, purpose and scope of Section 50 of the Act was the subject-matter of discussion in a number of decisions of this Court. The Constitution Bench of five Judges of this Court in *State of Punjab* v. *Baldev Singh*[4] after exhaustive consideration of the decisions of this Court in *Ali Mustaffa Abdul Rahman Moosa* v. *State of Kerala*[5] and *Pooran Mal* v. *Director of Inspection (Investigation)*[6], have concluded in para 57: (*Baldev Singh case*[4], SCC pp. 208-10)
>
> (I) When search and seizure is to be conducted under the provisions of the Act, it is imperative for him to inform the person concerned of his right of being taken to the nearest gazetted officer or the nearest Magistrate for making search.
>
> (II) Failure to inform the accused of such right would cause prejudice to an accused.
>
> (III) That a search made by an empowered officer, on prior information, without informing the accused of such a right may not vitiate trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction is solely based on the possession of the illicit article recovered from his person, during such search.
>
> (IV) The investigating agency must follow the procedure as envisaged by the statute scrupulously and failure to do so would lead to unfair trial contrary to the concept of justice.
>
> (V) That the question as to whether the safeguards provided in Section 50 of the Act have been duly observed would have to be determined by the court on the basis of the evidence at the trial and without giving an opportunity to the prosecution to establish the compliance with Section 50 of the Act would not be permissible as it would cut short a criminal trial.
>
> (VI) That the non-compliance of the procedure i.e. informing the accused of the right under sub-section (1) of Section 50 may render the recovery of contraband suspect and conviction and sentence of an accused bad and unsustainable in law.
>
> (VII) The illicit article seized from the person of an accused during search conducted without complying with the procedure

3 (2010) 3 SCC 746 : (2010) 2 SCC (Cri) 475
4 (1999) 6 SCC 172 : 1999 SCC (Cri) 1080
5 (1994) 6 SCC 569 : 1995 SCC (Cri) 32
6 (1974) 1 SCC 345 : 1974 SCC (Tax) 114

under Section 50, cannot be relied upon as evidence for proving the unlawful possession of the contraband.

15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in *Madan Lal* v. *State of H.P.*[7] The Court has observed: (SCC p. 471, para 16)

> '*16.* A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see *Kalema Tumba* v. *State of Maharashtra*[8], *State of Punjab* v. *Baldev Singh*[4] and *Gurbax Singh* v. *State of Haryana*[9]). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh case*[4]. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.'

16. In *State of H.P.* v. *Pawan Kumar*[10] this Court has stated: (SCC p. 360, para 11)

> '*11.* A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a *thaila*, a *jhola*, a *gathri*, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or

7 (2003) 7 SCC 465 : 2003 SCC (Cri) 1664
8 (1999) 8 SCC 257 : 1999 SCC (Cri) 1422
4 (1999) 6 SCC 172 : 1999 SCC (Cri) 1080
9 (2001) 3 SCC 28 : 2001 SCC (Cri) 426
10 (2005) 4 SCC 350 : 2005 SCC (Cri) 943

placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.'

17. After discussion on the interpretation of the word 'person', this Court concluded: (*Pawan Kumar case*[10], SCC p. 361, para 14)

'*14.* ... that the provisions of Section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which [the accused] may be carrying.'

The Court further observed: (SCC p. 369, para 27)

'*27.* ... In view of the discussion made earlier, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag which was being carried by the accused.' "

12. Moreover, even if we proceed on the basis that Section 50 applies, we find that the requirement of Section 50 is the search by gazetted officer or nearest Magistrate. It was not disputed by the learned counsel for the appellant, at the time of arguments, that Chet Ram was a gazetted officer. Therefore, even otherwise we find that the requirement of Section 50 was fulfilled.

13. A half-hearted attempt was made by Mr Rai to dig loopholes in the prosecution story. He argued that though Chaukidar was also present at the time of search, he was not produced as a witness; the prosecution did not join any independent witness at the time of seizure of opium from the appellant even when witnesses were present near the spot; and that there was an inordinate delay in sending the sample to the forensic science laboratory. After going through the record, we find that there is no merit in any of these submissions which are adequately taken care of by the courts below. We may re-emphasise that the appellant was convicted by the trial court in the first instance. However, the matter was remanded back by the High Court to the trial court only to find out as to whether Chet Ram was the Executive Magistrate or not. Therefore, this was the limited inquiry which was to be conducted. On that aspect, we have already straightened the legal position which goes against the appellant.

14. On merits, we find that the prosecution has established the guilt of the appellant by leading cogent evidence and the guilt is proved beyond reasonable doubt. There is no scope of interference with the said findings.

15. We thus, do not find any merit in this appeal. The appeal is hereby dismissed.

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10 *State of H.P.* v. *Pawan Kumar*, (2005) 4 SCC 350 : 2005 SCC (Cri) 943

STATE OF RAJASTHAN VS PARMANAND AND ANR

Bench: Hon'ble Mr. Justice Ranjana Prakash Desai, Hon'ble Mr. Justice Madan B. Lokur

Decided on 28 February, 2014

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.78 OF 2005

State of Rajasthan Appellant
Vs.
Parmanand & Anr. Respondents

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. The respondents were tried by the Special Judge (NDPS Cases), Chhabra, District Baran for offences under Section 8 read with Section 18 and under Section 8 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. The case of the prosecution was that on 13/10/1997 during Kota Camp at Iklera, P.N. Meena, Sub-Inspector, Office of the Narcotics Commissioner, Kota received information at 1900 hours in the evening that the respondents were to handover about 10 Kg opium on 14/10/1997 in the morning between 4.00 a.m. to 6.00 a.m. at Nangdi-Tiraha, Iklera, Chhipabaraud Road to a smuggler. This information was entered by SI Meena in the diary and he forwarded it to the Investigating Officer J.S. Negi, Superintendent. J.S. Negi sent this information through Constable B.L. Meena to Assistant Narcotic Commissioner, Kota. Thereafter, raiding party was formed. The raiding party was headed by Superintendent J.S. Negi. The raiding party reached Nangdi-Tiraha by a Government vehicle. Independent witnesses Ramgopal and Gopal Singh were called by SI Qureshi.

Their consent was obtained. At about 4.25 a.m., the respondents came from the village Rajpura. On seeing the raiding party, they tried to run away but they were stopped. Enquiry was made with both the respondents in the presence of the independent witnesses by SI Qureshi. The respondents gave their names. Respondent No. 1 Parmanand had one white colour gunny bag of manure in his left hand. SI Qureshi told the respondents that he had to take their search. They were told about the provisions of Section 50 of the NDPS Act. They were told that under Section 50(1) of the NDPS Act, they had a right to get themselves searched in the presence of any nearest Magistrate or any gazetted officer or in the presence of Superintendent J.S. Negi of the raiding party. One written notice to that effect was given to them. On this notice, appellant Surajmal gave consent in writing in Hindi for himself and for appellant Parmanand

and stated that they are ready to get themselves searched by SI Qureshi in the presence of Superintendent J.S. Negi. He also put his thumb impression.

Thereafter, bag of respondent No. 1 Parmanand was searched by SI Qureshi. Inside the bag in a polythene bag some black material was found. The respondents told him that it was opium and they had brought it from the village. The weight of the opium was 9 Kg. 600 gms. Necessary procedure of drawing samples and sealing was followed. The respondents were arrested. After completion of the investigation, respondent no. 1 Parmanand was charged for offence under Section 8 read with Section 18 of the NDPS Act and respondent No.2 Surajmal was charged for offence under Section 8 read with Section 18 and for offence under Section 8 read with Section 29 of the NDPS Act. The prosecution examined 11 witnesses. The important witnesses are PW-5 J.S. Negi, the Superintendent, PW-9 SI Meena and PW-10 SI Qureshi. The respondents pleaded not guilty to the charge. They contended that the police witnesses had conspired and framed them. The case is false.

3. Learned Special Judge convicted respondent No.1 Parmanand under Section 8 read with Section 18 of the NDPS Act and respondent No.2 Surajmal under Section 8 read with Section 28 of the NDPS Act. They were sentenced for 10 years rigorous imprisonment each and a fine of Rs.10 lakhs each. In default of payment of fine, they were sentenced to undergo rigorous imprisonment for two years.

4. Aggrieved by the said judgment and order, the respondents preferred an appeal to the Rajasthan High Court. By the impugned order, the Rajasthan High Court acquitted the respondents. Hence, this appeal by the State.

5. Mr. Imtiaz Ahmed, learned counsel for the State of Rajasthan submitted that the High Court was wrong in coming to the conclusion that there was no compliance with Section 50 of the NDPS Act. Counsel submitted that PW-10 SI Qureshi has clearly stated that the respondents were communicated their right under Section 50(1) of the NDPS Act. A written notice was also given to them and only after they consented to be searched by PW-10 SI Qureshi in the presence of PW-5 J.S. Negi, the Superintendent, that the search of their person and search of bag of respondent No.1 Parmanand was conducted. Counsel submitted that the High Court was also wrong in disbelieving independent pancha witnesses. Counsel urged that the impugned order is perverse and deserves to be set aside.

6. Ms. Nidhi, learned counsel for the respondents, on the other hand, submitted that admittedly notice under Section 50 of the NDPS Act was a joint notice. The respondents were entitled to individual notice. The search is, therefore, vitiated. In this connection, counsel relied on judgment of the Punjab and Haryana High Court in Paramjit Singh and Anr. v. State of Punjab[1] and judgment of the Bombay High Court in Dharamveer Lekhram Sharma and Another v. The State of Maharashtra and Ors.[2]. Counsel submitted that search was a farce. The High Court has, therefore, rightly acquitted the respondents.

7. The question is whether Section 50 of the NDPS Act was complied with or not. Before we go to the legalities, it is necessary to see what exactly the important police

witnesses have stated about compliance of Section 50 of the NDPS Act. The gist of the evidence of the police witnesses PW-5 J.S. Negi, the Superintendent, PW-9 SI Meena and PW-10 SI Qureshi is that the respondents were informed that they have a right to be searched in the presence of a gazetted officer or a nearest Magistrate or before J.S. Negi, the Superintendent, who was present there. They were given a written notice. On that notice, respondent No.2 gave his consent in Hindi in his handwriting that he and respondent No.1 Parmanand are agreeable to be searched by PW-10 SI Qureshi in the presence of PW-5 J.S. Negi, the Superintendent. He signed on the notice in Hindi and put his thumb impression. Respondent No.1 Parmanand did not sign. There is nothing to show that respondent No.1 Parmanand had given independent consent. Search was conducted. PW-10 SI Qureshi did not find anything on the person of the respondents. Later on, he searched the bag which was in the left hand of respondent No.1 - Parmanand. In the bag, he found black colour material which was tested by chemical kit. It was found to be opium.

8. In State of Punjab v. Balbir Singh[3], this Court held that Section 50 of the NDPS Act is mandatory and non-compliance thereof would vitiate trial. In State of Himachal Pradesh v. Pirthi Chand[4], this Court held that breach of Section 50 does not affect the trial. There were divergent views on this aspect and, therefore, a reference was made to the Constitution Bench. Out of the three questions of law, which the Constitution Bench dealt with in State of Punjab v. Baldev Singh[5], the question which is relevant for the present case is whether it is the mandatory requirement of Section 50 of the NDPS Act that when an officer duly authorized under Section 42 of the NDPS Act is about to search a person, he must inform him of his right under sub-section (1) thereof of being taken to the nearest gazetted officer or nearest Magistrate. The conclusions drawn by the Constitution Bench, which are relevant for this case could be quoted.

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

9. In this case, the conviction is solely based on recovery of opium from the bag of respondent No.1 - Parmanand. No opium was found on his person. In Kalema Tumba v. State of Maharashtra[6], this Court held that if a person is carrying a bag or some other article with him and narcotic drug is recovered from it, it cannot be said that it was found from his person and, therefore, it is not necessary to make an offer for search in the presence of a gazetted officer or a Magistrate in compliance of Section 50 of the NDPS Act. In State of Himachal Pradesh v. Pawan Kumar[7], three- Judge Bench of this Court held that a person would mean a human being with appropriate coverings and clothing and also footwear. A bag, briefcase or any such article or container etc. can under no circumstances be treated as a body of a human being. Therefore, it is not possible to include these articles within the ambit of the word person occurring in Section 50 of the NDPS Act. The question is, therefore, whether Section 50 would be applicable to this case because opium was recovered only from the bag carried by respondent No.1 - Parmanand.

10. In Dilip & Anr. v. State of Madhya Pradesh[8], on the basis of information, search of the person of the accused was conducted. Nothing was found on their person. But on search of the scooter they were riding, opium contained in plastic bag was recovered. This Court held that provisions of Section 50 might not have been required to be complied with so far as the search of the scooter is concerned, but keeping in view the fact that the person of the accused was also searched, it was obligatory on the part of the officers to comply with the said provisions, which was not done. This Court confirmed the acquittal of the accused.

11. In Union of India v. Shah Alam[9], heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following Dilip, it was held that since the provisions of Section 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.

12. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanands bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

13. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to

inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 Surajmal is stated to have signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand did not sign.

14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parnanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

15. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to

the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Courts view is perverse. The appeal is, therefore, dismissed.

HON'BLE MR. JUSTICE
RANJANA PRAKASH DESAI)

HON'BLE MR. JUSTICE (MADAN B. LOKUR)

NEW DELHI;

FEBRUARY 28, 2014.

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[1] 1997(1) CRIMES 242

[2] 2001(1) CRIMES 586

[3] (1994) 3 SCC 299

[4] (1996) 2 SCC 37

[5] (1999) 6 SCC 172

[6] (1999) 8 SCC 257

[7] (2005) 4 SCC 350

[8] (2007) 1 SCC 450

[9] (2009) 16 SCC 644

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(2014) 13 Supreme Court Cases 344

(BEFORE H.L. DATTU AND DIPAK MISRA, JJ.)

YASIHEY YOBIN AND ANOTHER .. Appellants;

Versus

DEPARTMENT OF CUSTOMS, SHILLONG .. Respondent.

Criminal Appeal No. 1199 of 2010, decided on February 20, 2013

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 50 — Search of bag belonging to accused — Recovery of contraband — Requirements of S. 50, reiterated, not attracted when there is no inextricable connection between search of a person and bag — On facts, held, during search conducted in residence of A-1, on search of contents of bag brought by co-accused A-2 contraband substance was seized by officials — Inextricable connection between search of a person and bag not established here but rather it was only search of bag and therefore search and seizure conducted by gazetted officer did not require compliance with S. 50** **(Para 11)**

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 50 — "Any person" — Meaning of — Reiterated, language employed "any person" under S. 50 would naturally mean a human being or a living individual unit and not an artificial person — It would not bring within its ambit any non-living creature viz. bags, containers, briefcase or any such other article — They are given a separate name and are identifiable as such — They cannot even remotely be treated to be a body part of a human being** **(Para 9)**

Inspector of Customs PW 11, Inspector of Police and Superintendent of Police on specific information from local police conducted search of the premises of A-1 in the presence of two independent witnesses. A quantity of heroin was recovered from A-2 at the instance of A-1, when A-1 instructed his wife to contact A-2 asking him to get bag containing heroin. It is when A-2 turned up with the bag that the said bag containing contraband heroin was searched and seized from A-2 by the Customs Officials. Duly sealed samples were sent for chemical examination to the forensic science laboratory and reports tested positive for heroin.

On the question whether there is a breach of provisions of Sections 50 and 42 of the NDPS Act, the Supreme Court

Held :

In cases where line of separation is thin and fine between search of a person and an artificial object, test of inextricable connection is to be applied and then conclusion is to be reached as to whether search was that of a person or not. (Para 10)

In the instant case, the bag was brought by A-2 and contents of the bag were taken out by him and given for search which was thereafter seized by the officials after having found contraband substance. In such a case inextricable connection between search of a person and bag cannot be established but rather it is only search of bag and therefore search and seizure conducted by the gazetted officer need not comply with requirements under Section 50. (Para 11)

State of Haryana v. *Suresh*, (2007) 15 SCC 186 : (2010) 3 SCC (Cri) 528; *State of H.P.* v. *Pawan Kumar*, (2005) 4 SCC 350 : 2005 SCC (Cri) 943; *State of Punjab* v. *Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080; *Megh Singh* v. *State of Punjab*, (2003) 8 SCC 666 : 2004 SCC (Cri) 58; *Namdi Francis Nwazor* v. *Union of India*, (1998) 8 SCC 534 : 1998 SCC (Cri) 1516, *relied on*

b C. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 42 — Search and Seizure — Compliance with requirements of S. 42 — When required — Held, since search was conducted and contraband was seized by a gazetted officer from residential premises of A-1, S. 42 not applicable**

Held :

A perusal of Section 42 contemplates two situations. It contemplates entry c into and search of any building, conveyance or enclosed place at any time between sunrise and sunset by an officer authorised under the Act with a reason to believe that any narcotic substance or any other controlled substance is kept or concealed in such premises; and secondly, if search is made between sunset and sunrise, requirement of the proviso to Section 42 is to be complied with under which officer authorised under the Act is to record grounds of his belief. But if the search is made by an officer authorised under Section 41(2) of the Act, then d the said officer is said to be acting under Section 41(2) and therefore compliance under Section 42 is not necessary at all. A gazetted officer is an empowered officer and so when a search is carried out in his presence and under his supervision, provisions of Section 42 have no application. (Paras 14 and 15)

Union of India v. *Satrohan*, (2008) 8 SCC 313 : (2008) 3 SCC (Cri) 620; *M. Prabhulal* v. *Directorate of Revenue Intelligence*, (2003) 8 SCC 449 : 2003 SCC (Cri) 2024; *Mohd. Hussain Farah* v. *Union of India*, (2000) 1 SCC 329 : 2000 SCC (Cri) 191, *relied on*

e *State of Punjab* v. *Balbir Singh*, (1994) 3 SCC 299 : 1994 SCC (Cri) 634; *Abdul Rashid Ibrahim Mansuri* v. *State of Gujarat*, (2000) 2 SCC 513 : 2000 SCC (Cri) 496; *Beckodan Abdul Rahiman* v. *State of Kerala*, (2002) 4 SCC 229 : 2002 SCC (Cri) 791, *cited*

D. **Criminal Trial — Sentence — Age of accused/Juvenile — Old age of appellant-accused — A-1 old and suffering from several ailments — Held, keeping this aspect in view, sentence of A-1 under NDPS Act modified from** f **13 yrs to 10 yrs RI — Narcotics, Intoxicants and Liquor — Narcotic Drugs and Psychotropic Substances Act, 1985, Ss. 8(c) and 21(c) (Para 17)**

SB-M/53233/SR

Chronological list of cases cited ***on page(s)***

9. (1999) 6 SCC 172 : 1999 SCC (Cri) 1080, *State of Punjab* v. *Baldev Singh* 347*f-g*
10. (1998) 8 SCC 534 : 1998 SCC (Cri) 1516, *Namdi Francis Nwazor* v. *Union of India* 348*a*
11. (1994) 3 SCC 299 : 1994 SCC (Cri) 634, *State of Punjab* v. *Balbir Singh* 348*f-g*

ORDER

1. This appeal is directed against the judgment and order passed by the High Court of Judicature of Guwahati at Shillong Bench in Criminal Appeal No. 5 (SH) of 2006, dated 6-9-2007. By the impugned judgment and order, the High Court has affirmed the judgment and order passed by the Special Court (NDPS) in Criminal (NDPS) No. 26 of 2003.

2. The factual matrix of the case in brief is: the Inspector of Customs working in the office of the Commissioner of Customs, NER, Shillong, PW 11, received information from the Special Operation Team of Meghalaya Police that Yasihey Yobin, A-1, has stored huge quantity of heroin in his residence. On receipt of such information, PW 4 Inspector of Customs, PW 2 Inspector and PW 7 Superintendent of Police conducted search of the premises of A-1 in the presence of two other independent witnesses. In the course of search, the heroin though not recovered from A-1 but was recovered from Accused 2, Lisihey Ngwazah (A-2) at the instance of A-1, when A-1 instructed his wife to contact A-2 asking him to get the bag containing heroin. It is when A-2 turned up with the bag that the said bag containing contraband heroin was searched and seized from A-2 by the Customs Officials. Thereafter, necessary steps were taken to send the duly sealed samples for chemical examination to the forensic science laboratory and the reports tested positive for heroin.

3. The appellants were thereafter put to trial before the Special Court, NDPS. The trial court after appreciating the evidence on record has come to the conclusion that both the accused persons were in conscious possession of the said contraband substance and therefore convicted the appellants under Sections 8(*c*) and 21(*c*) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act", for short). Accordingly, Appellant 1 was convicted with rigorous imprisonment of 13 years along with a fine of Rs 1 lakh and in default, to undergo further imprisonment. Appellant 2 was convicted with rigorous imprisonment of 10 years along with a fine of Rs 1 lakh and in default, to undergo further imprisonment.

4. Being aggrieved by the judgment and order passed by the trial court, the appellants had filed appeals before the High Court. The High Court vide its impugned judgment and order affirmed the conviction and sentence so passed by the trial court. It is the correctness or otherwise of the judgment and order passed by the High Court which is called in question by the appellants in this appeal.

5. Shri Altaf Ahmed, learned Senior Counsel appearing for Accused 1 and 2 would strenuously contend that there is breach of Sections 50 and 42 of the Act while search and seizure of contraband substance by the Customs Officer and, therefore, the judgment and order passed by the trial court and so confirmed by the High Court requires to be taken exception to by this Court

and in aid of his submission has also taken us through some of the decisions of this Court.

6. Per contra, Shri P.P. Malhotra, learned Additional Solicitor General ably supports the judgment and order passed by the trial court and confirmed by the High Court.

7. At this stage, we intend to clarify that certain observations made by the High Court is not the correct legal position but that will not impair the complexion of this appeal.

8. Shri Altaf Ahmed would submit that there was no recovery of the contraband goods by the Customs Officer from the possession of Accused 1 and secondly, that when Accused 2 was searched, the officers of the Department had not complied with the provisions of Section 50 of the Act.

9. The trial court and the High Court while answering the aforesaid issues have concurrently come to the conclusion that Accused 2 was not searched by the Customs Officers but it was only the bag in possession of A-2 containing contraband which was searched and seized. The language employed "any person" under Section 50 of the Act would naturally mean a human being or a living individual unit and not an artificial person. It would not bring within its ambit any non-living creature viz. bags, containers, briefcase or any such other article. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be a part of the body of a human being. The scope and ambit of Section 50 was examined in considerable detail in *State of Haryana* v. *Suresh*[1] and in a three-Judge Bench decision in *State of H.P.* v. *Pawan Kumar*[2], wherein it is observed that when a person is not searched, only the bag, container or the suitcase is searched, the provisions of Section 50 cannot be pressed into service. The items like bag, briefcase, or any such article or container, etc. are not a part of a human being as it would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. In common parlance it could be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. but it is not possible to include these articles within the ambit of the word "person" defined in Section 50 of the Act.

10. This position in law is settled by the Constitution Bench in *State of Punjab* v. *Baldev Singh*[3] and in *Megh Singh* v. *State of Punjab*[4], where application of Section 50 is only in case of search of a person as contrasted to search of premises, vehicles or articles. But in cases where the line of separation is thin and fine between search of a person and an artificial object, the test of inextricable connection is to be applied and then conclusion is to be reached as to whether the search was that of a person or not. The above

1 (2007) 15 SCC 186 : (2010) 3 SCC (Cri) 528 : AIR 2007 SC 2245

2 (2005) 4 SCC 350 : 2005 SCC (Cri) 943

3 (1999) 6 SCC 172 : 1999 SCC (Cri) 1080 : AIR 1999 SC 2378

4 (2003) 8 SCC 666 : 2004 SCC (Cri) 58

test has been noticed in *Namdi Francis Nwazor* v. *Union of India*[5], wherein it is held that if the search is of a bag which is inextricably connected with the person, Section 50 of the Act will apply, and if it is not so connected, the provisions will not apply. It is when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that the bag was not found on the accused person.

11. In the instant case, the bag is brought by A-2 and the contents of the bag are taken out by him and given for search which is thereafter seized by the officials after having found contraband substance. In such a case the inextricable connection between the search of a person and the bag cannot be established but rather it is only the search of the bag and therefore the search and seizure conducted by the gazetted officer need not comply with the requirements under Section 50 of the Act.

12. Shri Altaf Ahmed would further contend that when the Customs Officers had searched and seized the contraband in the residence of Accused 1, the officers had not complied with the requirements of Section 42 of the Act.

13. The first impression of ours was that Shri Altaf Ahmed may be justified in canvassing the above proposition. But, on a deeper consideration and after looking into the decision of this Court in *Union of India* v. *Satrohan*[6], we see no merit in the contention canvassed. In the aforesaid decision it is stated as under: (SCC p. 320, para 13)

> "*13. ... '14. ...* It can, thus, be seen that Sections 42 and 43 do not require an officer to be a gazetted officer whereas Section 41(2) requires an officer to be so. A gazetted officer has been differently dealt with and more trust has been reposed in him can also be seen from Section 50 of the NDPS Act which gives a right to a person about to be searched to ask for being searched in the presence of a gazetted officer. The High Court is, thus, right in coming to the conclusion that since the gazetted officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42. The decision in *State of Punjab* v. *Balbir Singh*[7], *Abdul Rashid Ibrahim Mansuri* v. *State of Gujarat*[8] and *Beckodan Abdul Rahiman* v. *State of Kerala*[9] on the aspects under consideration or neither relevant nor applicable.'*"

5 (1998) 8 SCC 534 : 1998 SCC (Cri) 1516

6 (2008) 8 SCC 313 : (2008) 3 SCC (Cri) 620

7 (1994) 3 SCC 299 : 1994 SCC (Cri) 634

8 (2000) 2 SCC 513 : 2000 SCC (Cri) 496

9 (2002) 4 SCC 229 : 2002 SCC (Cri) 791

* **Ed.**: As observed in *M. Prabhulal* v. *Directorate of Revenue Intelligence*, (2003) 8 SCC 449, p. 457, para 14 : 2003 SCC (Cri) 2024.

14. A perusal of Section 42 contemplates two situations. It contemplates entry into and search of any building, conveyance or enclosed place at any time between sunrise and sunset by an officer authorised under the Act with a reason to believe that any narcotic substance or any other controlled substance is kept or concealed in such premises; and secondly, if the search is made between the sunset and sunrise, the requirement of the proviso to Section 42 is to be complied with under which the officer authorised under the Act is to record the grounds of his belief. But if the search is made by an officer authorised under Section 41(2) of the Act then the said officer is said to be acting under Section 41(2) and therefore compliance under Section 42 is not necessary at all. This principle is reiterated in *M. Prabhulal* v. *Directorate of Revenue Intelligence*[10] and in *Mohd. Hussain Farah* v. *Union of India*[11], wherein it is observed that a gazetted officer is an empowered officer and so when a search is carried out in his presence and under his supervision, the provision of Section 42 has no application.

15. In view of the observation and the law laid down by this Court, since the search is conducted and the contraband is seized by a gazetted officer from the residential premises of A-1, the proviso to Section 42(1) of the Act is not attracted.

16. Before concluding, Shri Altaf Ahmed, would submit that there are serious discrepancies in the investigation done by the Customs Officers while conducting the search and seizure of the contraband from the possession of Accused 2 in the house of Accused 1. In our opinion, the so-called contradictions pointed out by the learned Senior Counsel are not fatal to the proceedings.

17. Shri Altaf Ahmed, would submit that the trial court in course of its order has observed that Accused 1 is old and is suffering from several ailments and therefore requests for modification of the sentence ordered by the trial court and so confirmed by the High Court. We see merit in the submission made by the learned Senior Counsel. Keeping this aspect in view, we modify the sentence of Accused 1 from 13 years to 10 years. However, insofar as the conviction of Accused 2 is concerned, we are not inclined to grant any remission and accordingly confirm the judgment and order passed by the trial court and so confirmed by the High Court and maintain the fine imposed on him. We further direct that the appellants will surrender after six weeks to serve out the remaining period of sentence. Their bail bonds stand cancelled.

18. The criminal appeal is disposed of accordingly. Ordered accordingly.

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10 (2003) 8 SCC 449 : 2003 SCC (Cri) 2024

11 (2000) 1 SCC 329 : 2000 SCC (Cri) 191

(2013) 16 Supreme Court Cases 31

(BEFORE A.K. PATNAIK AND A.K. SIKRI, JJ.)

TOFAN SINGH .. Appellant;

Versus

STATE OF TAMIL NADU .. Respondent.

Criminal Appeal No. 152 of 2013†, decided on October 8, 2013

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 67, 42, 53, 52, 57 and S. 8(c) r/w S. 21(c) and S. 8(c) r/w S. 29 — Statement (alleged confession) under S. 67, recorded by an NDPS officer (i.e. an investigating officer under S. 53) who was also allegedly the officer who made the seizure and arrest under S. 42 — Conviction, whether can be made solely on basis of such confession i.e. whether such confessions can be treated as substantive evidence to record conviction — Relevance of fact that such confession was retracted — Matter referred to larger Bench for deciding the specific issues numbered [(A)(i) to (A)(iii)] and the related issues raised in the submissions being numbered [(B)(i) to (B)(v)]**

— Issues specifically referred were: (A)(i) whether IO (an NDPS officer) under S. 53 would qualify as a "police officer" thereby attracting the provisions of Ss. 24 to 25 of Evidence Act, 1872 and Art. 20(3) of Constitution to a retracted confession; (A)(ii) whether the statement under S. 67, NDPS Act can be treated as a confession if the NDPS officer is not

† From the Judgment and Order dated 18-6-2012 of the High Court of Madras in Crl. A. No. 8 of 2010

treated a "police officer"; and (A)(iii) whether statements under pari materia provisions like 108 of the Customs Act, 1962 and S. 14 of the Excise Act are akin to or are qualitatively different from S. 67 statement under NDPS Act

— The issues that were raised in the submissions were: (B)(i) whether confessions under S. 67, NDPS Act can be treated as substantive evidence when no oath is administered, when person recording confession is allegedly discharging duties of a police officer (i.e. prevention and detection of crime involving offences triable in a criminal court and having penal consequences), thereby making the statements under S. 67, NDPS Act no better than S. 161 CrPC statements; (B)(ii) whether NDPS officers under S. 53, NDPS Act who are recording confessions under S. 67, NDPS Act can be held as "persons in authority" under S. 24 of Evidence Act, thereby making them similar to police officers; (B)(iii) whether the reasons for holding Customs Officers as police officers in some cases like *Abdul Rashid*, (2001) 9 SCC 578 and *Noor Aga*, (2008) 16 SCC 417 would also apply to NDPS officers; (B)(iv) whether an officer under S. 42 of NDPS Act is distinct and different from an officer under S. 53 of NDPS Act; (B)(v) whether trial was vitiated due to non-compliance with S. 57, NDPS Act in present case; and (B)(vi) whether conviction of A-3 could have been made without the confessional statement

— Evidence Act, 1872 — Ss. 24 to 26 — Constitution of India — Art. 20(3) — Criminal Procedure Code, 1973 — Ss. 161, 162, 164, 173, 313, 4(2) and 5 — Customs Act, 1962 — S. 108 — Prevention of Terrorism Act, 2002 — S. 32 — Central Excise Act, 1944 — S. 14 — Police Act, 1861 — Ss. 20, 23 and 25 — Constitution of India — Art. 141 — Words and Phrases — "Police officer"

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 37, 67, 42, 53 and 52 and S. 8(c) r/w S. 21(c) and S. 8(c) r/w S. 29 — Appeal against conviction — Bail application pending appeal before Supreme Court, when may be allowed**

— Conviction for offences under S. 8(c) r/w S. 21(c) as well as for the offences under S. 8(c) r/w S. 29, NDPS Act — Out of 10 yrs of sentence, accused already having undergone 9 yrs and reference to larger Bench being required on the validity of conviction made allegedly on the sole basis of uncorroborated and retracted confessions under S. 67, NDPS Act — Effect — Pending reference to larger Bench, bail application of accused allowed subject to conditions as to deposit of security deposit of Rs 50,000 and two sureties of same amount to the satisfaction of trial court — Constitution of India — Arts. 136 and 141 — Bail during pendency of appeal and reference to larger Bench in NDPS matter

A-1 to A-4 were tried and convicted by the trial court and their appeals were dismissed by the High Court. Only A-3 (appellant herein) preferred appeal before the Supreme Court. A-3 had been convicted for offences under Section 8(*c*) read with Section 21(*c*) as well as for the offences under Section 8(*c*) read with Section 29 of the NDPS Act. A-3 was sentenced to undergo 10 years' rigorous imprisonment and to pay a fine of Rs one lakh. In

default whereof, it was ordered that the A-3 would undergo rigorous imprisonment for a further period of one year.

a A-3 submitted that prosecution case was solely based on his confessional statement, which was illegally recorded. And A-3 retracted from the confessional statement also. A-3 submitted that pure facts without his confessional statement did not bring out any incriminating materials against him. The prosecution however, disputed this and submitted that train tickets, telephone records and seizure made from the Ambassador car in which A-3 was travelling indicated b that A-3 was carrying 5.250 kg of heroin from Rajasthan to Chennai (by train first and then by car) with the intention of smuggling it to Sri Lanka. On facts, A-3 submitted that in the secret information on basis of which the raiding party intercepted the car did not disclose the name of A-3. And that the heroin was recovered from the back seat at the instance of A-1 and A-2. And that A-3 was sitting on the front seat of the car. And that prosecution has not examined two drivers of said car who could have been the best witnesses in this regard. And c that prosecution has not recovered any mobile phone from him (A-3) which would link him with other co-accused persons.

Referring the matter to a larger Bench, the Supreme Court

Held :

A-3 submitted that the prosecution case hinges solely upon the confessional d statement of A-3 (Ext. P-9), which was recorded by PW 2 under Section 67 NDPS Act, and the same person acted as the investigating officer in the present case. Thus A-3 submitted that there was no evidence worth the name implicating A-3 except the purported confessional statement of A-3 recorded under Section 67, NDPS Act. (Paras 18 and 19)

A-3 submitted that the purported confessional statement (Ext. P-9) recorded by PW 2 under Section 67, NDPS Act, did not have any evidentiary value. e (Para 19.1)

A-3 further submitted that there is no power under Sections 67 or 42, NDPS Act to either record confessions or substantive evidence which can form the basis for conviction of an accused as found in Section 15, TADA or Section 32, POTA or Section 108(4), Customs Act, 1962 or Section 14(3), Central Excise Act, 1944. The statements under Section 67 are not recorded after administration f of oath as is required under Section 164(5) CrPC, the officers are not competent to administer oaths and, therefore, the statements under Section 67, NDPS Act no better than to statements under Section 161 CrPC and not confessions. And that officers empowered under Section 42, NDPS Act and conferred with powers to enter, search, seize or arrest are "police officers" properly so-called and hence statements made to such officers would be hit by Sections 24 and 25 of the g Evidence Act. And that the status of a statement recorded by an officer under Section 42 of the NDPS Act can at best be recorded as "extra-judicial confession" and no conviction can be based solely on the basis of extra-judicial confessions. And that in any case the statement under Section 67 was retracted and as such the confession in the present case is a retracted confession which ought to have been investigated and could have been used only to corroborate h other evidence and not as a substantive evidence itself. And that no conviction can be based on uncorroborated retracted confessional statement.

(Paras 19.1.1 to 19.1.5 and 24.1)

Badaku Joti Svant v. *State of Mysore*, AIR 1966 SC 1746 : 1966 Cri LJ 1353 : (1966) 3 SCR 698; *Raja Ram Jaiswal* v. *State of Bihar*, AIR 1964 SC 828 : (1964) 1 Cri LJ 705 : (1964) 2 SCR 752; *State of Punjab* v. *Barkat Ram*, AIR 1962 SC 276 : (1962) 1 Cri LJ 217 : (1962) 3 SCR 338; *Noor Aga* v. *State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748, *referred to* a

A-3 further submitted that an officer under Section 42, NDPS Act would be different and distinct from an officer under Section 53, NDPS Act. In the present case, PW 2 recorded the statement of A-3 under Section 67 and thereafter arrested him. PW 2 was, required to forward the statement as well as A-3 to the investigating officer in terms of Section 52(3), NDPS Act. Instead, he himself b became the investigating officer in the present case, which amounted to non-compliance with Section 52(3) read with Section 58, NDPS Act. Fair investigation demands existence of an independent investigating agency which is also contemplated and is evident from the scheme of the NDPS Act. Therefore, PW 2 could not have been made an investigating officer in the present case after he has already acted and exercised powers under Section 42, NDPS Act. c

(Paras 19.2 to 19.2.2 and 24.2)

A-3 submitted that trial was vitiated because of non-compliance with the provisions of Section 57, NDPS Act. The report contemplated under Section 57 ought to have been made by PW 6 (the seniormost officer among the raiding team) to his immediate superior officer but instead, in the present case PW 7 (one of the raiding party members) submitted a report to PW 6 with regard to d seizure and PW 2 submitted report to PW 6 under Section 57 with regard to arrest of the A-3. And therefore, A-3 could not have been convicted.

(Paras 19.3 to 19.3.2 and 24.3)

The State submitted that the officer recording statement under Section 67 is not a "police officer" and, therefore, such a statement is not hit by Sections 24 to 27 of the Evidence Act or Article 20(3) of the Constitution of India. And that as e per Section 67 of the NDPS Act, any officer referred to in Section 42 of the NDPS Act was empowered to obtain a statement. Once the said statement is made it can also be construed as confessional statement since there is no specific provision in the NDPS Act to obtain the confessional statement from the accused. Therefore, such a statement of the appellant was rightly relied upon resulting into his conviction. And that Sections 42, 53 and 67 of the NDPS Act f do not bar the officer authorised under the Act to conduct, search, seize, investigate and enquire into the matter. (Paras 20 and 22)

Kanhaiyalal v. *Union of India*, (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474; *Raj Kumar Karwal* v. *Union of India*, (1990) 2 SCC 409 : 1990 SCC (Cri) 330, *referred to*

The State also highlighted incriminating facts as per the records which as per State proves that A-3 was in possession of the heroin 5.250 kg and carried it g from Rajasthan to Chennai with intention to smuggle the same to Sri Lanka, when he was caught. And that conviction and sentence of A-3 was rightly recorded by the courts below, which warranted no interdicting by the Supreme Court. (Para 23)

In *Kanhaiyalal*, (2008) 4 SCC 668, the only reason to conclude that an officer under Section 53 of the NDPS Act was not a police officer was based on h the observations in *Raj Kumar Karwal*, (1990) 2 SCC 409, SCC p. 423, para 20.

The aforesaid observations are without any detailed discussion or the reasons to support the conclusion arrived at. There is no provision under the NDPS Act which takes away the power of filing a report under Section 173 CrPC which is available with an officer-in-charge of a police station. There is no legal basis to suggest that the said power is not available with the officer under Section 53, NDPS Act. Above all, the judgment in *Raj Kumar Karwal case* was considered by the Supreme Court in few cases but without giving imprimatur. And subsequent judgments have held that the officer under Section 53 of the Customs Act is a police officer and would, therefore, attract the provisions of Section 25 of the Evidence Act. No doubt, *Abdul Rashid*, (2001) 9 SCC 578 and *Noor Aga*, (2008) 16 SCC 417 were the cases under the Customs Act. But the reasons for holding custom officer as police officer would have significant bearing while considering the issue in the context of the NDPS Act as well. It would be more so when the schemes and purport of the two enactments are kept in mind.

(Paras 28 to 33)

Noor Aga v. *State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748; *Kanhaiyalal* v. *Union of India*, (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474; *Raj Kumar Karwal* v. *Union of India*, (1990) 2 SCC 409 : 1990 SCC (Cri) 330; *Abdul Rashid* v. *State of Bihar*, (2001) 9 SCC 578 : 2002 SCC (Cri) 1084, *referred to*

Raja Ram Jaiswal v. *State of Bihar*, AIR 1964 SC 828 : (1964) 1 Cri LJ 705 : (1964) 2 SCR 752; *Pon Adithan* v. *Narcotics Control Bureau*, (1999) 6 SCC 1 : 1999 SCC (Cri) 1051, *cited*

Further, the NDPS Act is a complete code dealing with offences, procedures and punishments. Its provisions, therefore, have to be strictly construed and the safeguards provided therein have to be scrupulously and honestly followed.

(Para 34)

State of Punjab v. *Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080; *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416 : 1997 SCC (Cri) 92; *Union of India* v. *Bal Mukund*, (2009) 12 SCC 161 : (2010) 1 SCC (Cri) 541; *Balbir Singh* v. *State of Haryana*, (1987) 1 SCC 533 : 1987 SCC (Cri) 193, *referred to*

On the strength of Sections 20, 23 and 25 of the Police Act, 1861 and Section 4(2) CrPC, A-3 submitted that persons categorised as "police officers" can do all the activities and the statute gives them the power to enable them to discharge their duties efficiently. Of the various duties mentioned in Section 23, the more important duties are to prevent the commission of offences and public nuisances and to detect and bring offenders to justice and to apprehend all persons whom the police officer is legally authorised to apprehend. And that the primary objective of an NDPS Officer is to detect and prevent crime defined under the provisions of the Act and thereafter the procedure has been prescribed to bring the offenders to justice. Thus, the officers under the NDPS Act are "Police Officers" and statements made to such officers are inadmissible in evidence. A-3 drew the attention of the Court to pertinent observation made in *Barkat Ram*, AIR 1962 SC 276 (AIR pp. 283-84, paras 33-34) regarding the high purpose of Sections 25 to 27 of the Evidence Act, that is, preventing police torture to extort confession and that this purpose is equally applicable to other officers empowered with duty to detect and investigate into crimes and for that purpose are in a position to extract confessions from the accused. The said

submission of A-3 regarding the said observation necessitates a re-look into the ratio of *Kanhaiyalal*, (2008) 4 SCC 668. It is more so when the Supreme Court has already doubted the dicta in *Kanhaiyalal case* in *Nirmal Singh Pehlwan*, (2011) 12 SCC 298. (Paras 38 to 40)

Kanhaiyalal v. *Union of India*, (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474, *held, doubted*

State of Punjab v. *Barkat Ram*, AIR 1962 SC 276 : (1962) 1 Cri LJ 217 : (1962) 3 SCR 338; *Noor Aga* v. *State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748; *Nirmal Singh Pehlwan* v. *Inspector, Customs*, (2011) 12 SCC 298 : (2012) 1 SCC (Cri) 555, *referred to*

Queen Empress v. *Babu Lal*, ILR (1884) 6 All 509, *cited*

Stephen: *Introduction to the Evidence Act*, p. 171, *referred to*

Therefore, the matter needs to be referred to a larger Bench for reconsideration of the issue as to whether the officer investigating the matter under the NDPS Act would qualify as police officer or not. (Para 41)

In this context, the other related issue viz. whether the statement recorded by the investigating officer under Section 67, NDPS Act can be treated as confessional statement or not, even if the officer is not treated as police officer also needs to be referred to the larger Bench, inasmuch as it is intermixed with a facet of the first issue as to whether such a statement is to be treated as statement under Section 161 CrPC or it partakes the character of statement under Section 164 CrPC. (Para 42)

As far as this second related issue is concerned, A-3 argued that the provisions of Section 67, NDPS Act cannot be interpreted in the manner in which the provisions of Section 108 of the Customs Act or Section 14 of the Excise Act had been interpreted by a number of judgments and there is a qualitative difference between the two sets of provisions. Insofar as Section 108 of the Customs Act is concerned, it gives power to the custom officer to summon persons "to give evidence" and produce documents. Identical power is conferred upon the Central Excise Officer under Section 14 of the Act. However, the wording to Section 67 of the NDPS Act is altogether different. This difference has been pointed out by the Andhra Pradesh High Court in *Shahid Khan*, 2001 Cri LJ 3183 (AP). (Para 43)

Shahid Khan v. *Director of Revenue Intelligence*, 2001 Cri LJ 3183 (AP), *referred to*

The Registry is accordingly directed to place the matter before the Hon'ble the Chief Justice for the decision of this appeal by a larger Bench after considering the issues specifically referred as above. (Para 44)

As against the sentence of 10 years awarded to the appellant (A-3) he has already undergone more than 9 years of sentence. In these circumstances, it is a fit case to suspend the further sentence till the disposal of this appeal by the larger Bench. The appellant shall be released on bail on furnishing security in the sum of Rs 50,000 (rupees fifty thousand) with two sureties of the same amount, to the satisfaction of the trial court. (Para 45)

Tofan Singh v. *State of T.N.*, SLP (Cri) No. 6663 of 2012, order dated 18-1-2013 (SC), *referred to*

Badrilal Sharma v. *Narcotics Control Bureau*, Criminal Appeal No. 814 of 2009, decided on 18-6-2012 (Mad), *cited*

SS-D/52451/SR

Advocates who appeared in this case :

Sushil Kr. Jain, Puneet Jain, Ms Christi Jain, Ms Ruchika Gohil, Anurag Gohil, Pramod Sharma and Ms Pratibha Jain, Advocates, for the Appellant;

S. Nanda Kumar, Chetan Chawla, Ms Soniya Malhotra and B. Krishna Prasad, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. SLP (Cri) No. 6663 of 2012, order dated 18-1-2013 (SC), *Tofan Singh* v. *State of T.N.* 38*b-c*
2. Criminal Appeal No. 814 of 2009, decided on 18-6-2012 (Mad), *Badrilal Sharma* v. *Narcotics Control Bureau* 38*b*, 38*c*, 43*f-g*, 44*c-d*
3. (2011) 12 SCC 298 : (2012) 1 SCC (Cri) 555, *Nirmal Singh Pehlwan* v. *Inspector, Customs* 57*e-f*, 57*f*
4. (2009) 12 SCC 161 : (2010) 1 SCC (Cri) 541, *Union of India* v. *Bal Mukund* 54*d*
5. (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748, *Noor Aga* v. *State of Punjab* 47*a-b*, 53*e*, 53*f*, 54*a*, 57*f*, 57*g*, 58*a*
6. (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474, *Kanhaiyalal* v. *Union of India* **(held, doubted)** 48*g*, 49*a*, 52*b-c*, 53*e*, 57*e-f*, 57*f*
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11. (1997) 1 SCC 416 : 1997 SCC (Cri) 92, *D.K. Basu* v. *State of W.B.* 54*c-d*
12. (1990) 2 SCC 409 : 1990 SCC (Cri) 330, *Raj Kumar Karwal* v. *Union of India* 48*g-h*, 49*a*, 52*c*, 52*d*, 52*g-h*, 53*a*, 53*a-b*, 53*e*, 57*g*
13. (1987) 1 SCC 533 : 1987 SCC (Cri) 193, *Balbir Singh* v. *State of Haryana* 54*d*
14. AIR 1966 SC 1746 : 1966 Cri LJ 1353 : (1966) 3 SCR 698, *Badaku Joti Svant* v. *State of Mysore* 46*d-e*, 53*c*
15. AIR 1964 SC 828 : (1964) 1 Cri LJ 705 : (1964) 2 SCR 752, *Raja Ram Jaiswal* v. *State of Bihar* 46*e*, 53*a*, 53*c-d*, 53*d-e*
16. AIR 1962 SC 276 : (1962) 1 Cri LJ 217 : (1962) 3 SCR 338, *State of Punjab* v. *Barkat Ram* 46*e*, 55*h*
17. ILR (1884) 6 All 509, *Queen Empress* v. *Babu Lal* 56*f-g*

The Judgment of the Court was delivered by

A.K. SIKRI, J.— The appellant herein, Tofan Singh, was listed as Accused 3 in the trial for the offences under Section 8(*c*) read with Section 21(*c*) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as "the NDPS Act") as well as for the offences under Section 8(*c*) read with Section 29 of the NDPS Act. This trial, conducted by the Special Judge, Additional Special Court, under the NDPS Act, Chennai, resulted in the conviction of the appellant holding him guilty of the offences under the aforesaid provisions of the Act. As a consequence of the said judgment dated 18-12-2009 convicting him under the provisions of the NDPS Act, the learned Special Judge sentenced the appellant to undergo 10 years' rigorous imprisonment and to pay a fine of Rs one lakh. In

default whereof, it was ordered that the appellant would undergo rigorous imprisonment for a further period of one year. Identical sentences were imposed for the offences under Section 8(*c*) read with Sections 21 and 29 of the NDPS Act, 1985 with the direction that both the sentences had to be undergone by the appellant concurrently.

2. The appeal filed by the appellant against the order of the Special Judge, Additional Special Court, has been dismissed by the High Court of Judicature of Madras vide judgment dated 18-6-2012[1] thereby maintaining the conviction as well as the sentence awarded by the Special Judge, Additional Special Court under the NDPS Act, Chennai. Dissatisfied and undeterred by the judgments of the courts below, the appellant preferred the special leave petition in which the leave was granted on 18-1-2013[2]. However, at the same time, bail application preferred by the appellant was rejected and appeal was posted for hearing. This is how the present appeal arises against the impugned judgment dated 18-6-2012[1] of the High Court of Judicature of Madras.

3. The allegations against the appellant (along with five others out of whom two are absconding) were that 5.250 kg of heroin was seized from these accused persons which they were carrying and attempting to export out of India. As per the complaint filed by the Intelligence Officer, NCB, Chennai in this behalf, the prosecution case is stated, in a summary form, as below.

4. On 23-10-2004, the Intelligence Officer, NCB, South Zone Unit, Mr L.S. Aruldoss (PW 7), received information at about 9.00 p.m. that one Prem alias Kannan alias Sudeshwaran resident of Nanganallur, Chennai was procuring narcotic drugs from Guddu Singh resident of Rajasthan with the assistance of one Bapulal resident of Pattalam, Chennai, for trafficking it from Chennai to Sri Lanka and that they had made arrangements for the supply of 5 kg of heroin through his two persons, who were identified to Bapulal by Guddu Singh and those two persons were arriving at Chennai on the next day by Jaipur Express. It was further reported that the said Bapulal and Kannan had planned to leave at 10.00 p.m. on 23-10-2004 to Nellore, Andhra Pradesh, in a white Ambassador car bearing Registration No. TN 01 K 0923 and on reaching Chennai, Prem alias Kannan alias Sudeshwaran would receive the heroin and smuggle it out to Sri Lanka.

5. After receiving the information, Mr L.S. Aruldoss, the Intelligence Officer (PW 7) discussed the matter with other officers, namely, Mr Gunabalan (PW 6) and Mr A. Sendhil Murugan (PW 10) resulting into

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1 *Badrilal Sharma* v. *Narcotics Control Bureau*, Criminal Appeal No. 814 of 2009, decided on 18-6-2012 (Mad)

2 *Tofan Singh* v. *State of T.N.*, SLP (Cri) No. 6663 of 2012, order dated 18-1-2013 (SC), wherein it was directed:

> "Leave granted. Application for bail is rejected. Post for hearing on 13-2-2013 (NMD)."

the orders by Mr Gunabalan (PW 6) to proceed with the case. Accordingly, on 24-10-2004, at about 9.00 a.m., PW 6, PW 7, and PW 10 and two other staff members viz. one sepoy and driver left NCB office and reached the scene of occurrence at 11.00 a.m. On the instruction of PW 6, PW 7 procured two independent witnesses viz. S. Gopi (PW 8) and one Krishnamurthy (not examined). They intercepted the Ambassador car bearing Registration No. TN 01 K 0923 and found that there were six passengers inside the car. On the front seat, there were two drivers, namely, Satyakeerthi and Mariappan and next to driver Mariappan, the appellant herein was sitting. On the back seat Prem alias Kannan alias Sudeshwaran (Accused 2) of, Bapulal (Accused 1) of Chennai and Badrilal Sharma (Accused 4) were seated. After the police party enquired as to whether there were any narcotic drugs, Accused 1 and 2 who were seated on the back seat, took out one green colour bag from beneath their seat and handed it over to Mr Aruldoss (PW 7) stating that it contains 5 kg of heroin. The recoveries were, thereafter, effected and the accused persons were arrested for commission of the offences under the NDPS Act. The two drivers of the Ambassador car were, thereafter, allowed to go. The appellant and the other accused persons were arrested by the raiding party.

6. While the four accused persons including the appellant were arrested, the other two accused, namely, Guddu Singh alias Vikram Singh and Ravi could not be arrested and were absconding. The statements of the arrested accused persons were recorded by Mr A. Sendhil Murugan, Intelligence Officer. The appellant also gave his statement under Section 67 of the NDPS Act as per which he confessed to the commission of the crime.

7. The case was, thereafter, handed over to Mr R. Murugan (PW 2) for investigation. After completing the investigation, he filed a report under Section 173 of the Code of Criminal Procedure, 1973 before the Special Judge under the NDPS Act. Charges were framed and the matter went on trial. The prosecution examined as many as 10 witnesses. Among them were Mr L.S. Aruldoss, Intelligence Officer, NCB (PW 7), Mr Gunabalan, Superintendent (PW 6), Mr A. Sendhil Murugan (PW 10), Mr R. Murugan (PW 2), Smt Saraswathy Chakravarthy, Chemical Examiner in Customs House Laboratory at Chennai (PW 4), Mr T. Sridhar (PW 5).

8. The information relating to the commission of the offence has been taken note of and discussed by the trial court as well as the High Court in the impugned judgment in detail. It is not necessary to burden this judgment with all those details as our purpose would be served by referring to those aspects which are essential for the purposes of the present appeal. We may state that the prosecution had also produced Exts. P-1 to P-81 and MOs 1 to 19 during the trial. After examining the prosecution witnesses, statements of the accused persons under Section 313 of the Code of Civil Procedure (hereinafter to be referred as "the Code") were recorded. The accused persons denied the same and stated as follows:

A-1: Denied the incriminating evidence against him and stated that he was compelled to come to the NCB office and a false case is foisted against him and gave a written statement stating that the NCB officers came to his house between 12.30 to 1.00 p.m. on 25-10-2004 and took him to their office at Chennai in the presence of his wife and his children and have forcibly taken the signatures on some papers written in Hindi and that he is not connected with the other accused and that he was not occupant of the car as alleged in the case and he was not aware of the contraband seized and examined defence witnesses on his behalf, namely, Mr Vinay, son of A-1, DW 1 and Dr Somasundaram, DW 2.

A-2: Denying the incriminating evidence against him stated that he was taken from Nanganallur to the NCB office and that he was not allowed to talk before the Judge during remand.

A-3: Stated that summon was not issued to him and Rs 1600 and train tickets were seized from him at Chennai Central Railway Station and he was beaten and forced to sign in the NCB office on blank papers and stated that it is a false case.

A-4: Stated that he was arrested at Nellore Railway Station while he was coming from train and his signatures were obtained forcibly and the Intelligence Officer Mr Karthikeyan (PW 3) has foisted a false case against him due to quarrel in the train between him and the Intelligence Officer and that he was working in the RPF and is not connected with the contraband seized and gave a written statement stating that he travelled in mufti to go to Tirupathi and got down at Chennai Central Railway Station and was arrested and false case was foisted against him due to wordy quarrel with the officer and that Section 67 statement was obtained by force and torture and that he was not carrying any narcotic drug.

Thereafter, the accused persons produced two witnesses who were examined and one document Ext. D-1 was marked.

9. Defence evidence is as follows:

DW 1: The NCB officers came at about 1.00 p.m. on 25-10-2004 and searched the house of A-1 and they obtained his signature and his mother's signature in blank papers by threatening them. A-2 has not gone anywhere during September and October of 2004 and he was at home doing cloth business. A-1 was taken from his office and arrested. The other accused had never contacted A-2 over phone at any time.

DW 2: Dr Somasundaram has recommended A-1 for treatment for paralysis at Royapettah Hospital and his case-sheet containing 21 pp. for treatment from January 2008 to 25-9-2008 is Ext. D-1.

10. It would be relevant to point that two of the accused persons, namely, Guddu Singh alias Vikram Singh and Ravi were absconding and they could not be procured during the trial, resulting into splitting up of case as new CC No. 9 of 2007. Thereafter, the trial proceeded against the other four accused

persons which led to their conviction, as mentioned above. All these four accused persons had filed the appeal which has been dismissed by the High Court of Judicature of Madras vide the impugned judgment. However, out of the four convicted persons, only the appellant herein has preferred the present appeal.

Judgment of the trial court

11. The learned trial court in its judgment dated 18-12-2009, after pointing out the main prosecution evidence as well as the defence, noted that the gist of the prosecution case was that the six accused persons had hatched criminal conspiracy at Nellore, Andhra Pradesh, Chennai and to procure, possess, transport and attempt to export out of India 5.250 kg of heroin to. Accused 2 had indulged in financing for purchase of heroin for which he entered India without registering himself as a foreigner. The heroin, which was seized, was being taken for the said export which was intercepted in the manner stated below:

> "As per the prosecution, after the information was received by Mr L.S. Aruldoss, Intelligence Officer (PW 9) on 23-10-2004 and discussed with Mr Gunabalan, Superintendent (PW 6) and Mr A. Sendhil Murugan, Intelligence Officer (PW 10) and further action was sanctioned, the raiding party consisting of PW 6, PW 7, PW 10 with sepoy and driver, left the NCB office in the vehicle mini bus bearing Registration No. TN 09 C 3113 on 24-10-2004 at 9.00 a.m. and had reached GNT Road 100 ft Road Junction at 11.00 a.m. Two independent witnesses, namely, Mr S. Gopi (PW 8) and Krishnamurthy were also associated. When they were mounting surveillance at about 12.00 noon, they noticed an Ambassador car bearing Regd. No. TN 01 K 0923 coming towards Chennai which was intercepted by the raiding authority and the heroin in question seized in the manner already explained above. The case argued by the prosecution was that the conspiracy hatched between Accused 1 to 4 was proved by the seizure of Ext. P-4 train ticket PNR No. 840-7161615 dated 14-10-2004 and Ext. P-41 the booking particulars disclose the name of **A-2**, **A-2** and Rajesh and the place of travel from Mumbai to Madras and another passenger name though it was mentioned in it was given as Shahid by A-1 in his further voluntary statement in Hindi, Ext. P-6 of which the free English translation is Ext. P-77 in which it is stated that Shahid is the person through whom money was sent to Guddu Singh which in fact is within the special knowledge of A-1. In the same manner Ext. P-5 telephone bills were seized from the residence of A-1 and when A-21 was questioned about the telephone numbers Faroth and Sarola A-2 has stated in Ext. P-77 that these numbers belong to Guddu Singh and his brother through which he used to talk about smuggling of heroin. In the English translation of voluntary statement of A-3, Ext. P-78 of which the Hindi version is Ext. P-10 it is stated that A-3 met Guddu Singh who introduced him to A-4 and told him that A-4 is working in RPF, Bhawani Mandi, Rajasthan and

that A-4 would travel with him in uniform in Jaipur Chennai Express and handed over a bag containing 5 kg of heroin stating that it should be handed over to A-1 at Nellore who was already introduced to A-3 on 13-10-2004. The version of A-3 in Ext. P-78 that he travelled in Jaipur Chennai Express from Shamgarh is corroborated by the seizure of two train tickets Ext. P-61 and Ext. P-62 from Shamgarh to Chennai from A-3 and ID card of A-4, Ext. P-63 discloses that A-3 was working in RPF. Ext. P-79 is the voluntary statement of A-4 which is free English translation of the Hindi statement of Ext. P-74 in which A- (*sic*) has stated that he boarded Jaipur Express on 22-10-2004 and met A-3 in Bhopal in the train and that he knew that A-3 brought narcotic drug with him. Conspiracy could be proved only through the conduct of the accused. A-3 and A-4 had travelled with the contraband in the train and have met A-1 and A-2 at Nellore and handed over the same and boarded in the Ambassador car only due to the previous meeting of minds by fixing the time and place of handing over the contraband to the accused concerned. From the proved conduct of A-1 to A-4 it is clear that they have involved themselves in the illegal trafficking of heroin. Ext. P-21 call analysis discloses that 07425-284050 in the name of Bhuvan Singh of M.P. was frequently in touch with A-2 and A-2 mobile numbers. A-1 in his voluntary statement Ext. P-2 has stated that Guddu Singh's number is 07425-284050 through which he used to contact A-3 and Guddu Singh. Hence, the prosecution contended that the charges against A-1 to A-4 for possession and transportation of heroin for export from India and conspiracy under Section 8(*c*) read with Sections 21(*c*) and 29 of the NDPS Act were well proved."

12. Insofar as the charge under Section 28 of the NDPS Act is concerned, the trial court held that the said charge was not proved against the accused persons, inasmuch as at the stage of preparation to commit the offence of illegal export of contraband, the car was intercepted and search and seizure conducted which resulted in the recovery of the contraband. As such, the accused persons were apprehended in the middle of the operation and since the attempt to commit the offence of export had not yet begun, it could not be said that the accused persons had committed any act which could be considered as a step towards the commission of offence of export of the contraband. The accused persons were, thus, acquitted of the charge under Section 28 of the NDPS Act.

13. Likewise, the trial court held that charge under Section 27-A of the NDPS Act foisted upon Accused 2 was not proved as no oral or documentary evidence was produced in the form of bank passbook or income particulars or documents regarding the money transactions between the seller and the purchaser of heroin. Moreover, there was no oral or documentary evidence to show that Accused 2 had failed to register himself as a foreigner or that he had entered into India without valid and legal documents and thus, he was acquitted of the charge under Section 3(3) of the Passport (Entry into India)

Act, 1920 read with Rule 3(*a*) as well as under Section 14 of the Foreigners Act, 1946.

14. While discussing the main charge levelled under Section 8(*c*) read with Sections 21(*c*) and 29 of the NDPS Act, the trial court noted that the defence counsel had sought for discard of the prosecution case on the following grounds:

(*i*) Voluntary statement recorded under Section 67 of the NDPS Act had been retracted and so, they had no evidentiary value.

(*ii*) There was violation of Section 50 of the NDPS Act as there was non-compliance with the provisions thereof.

(*iii*) Driver of the vehicle was not examined which was fatal to the prosecution case.

(*iv*) Sample sent for analysis and the seized contraband were not one and the same.

(*v*) There was no link evidence which vitiated the trial.

(*vi*) Names of Accused 3 (the appellant) and Accused 4 were not mentioned in the information which was received by the Intelligence Officer and, therefore, they were wrongly included in the charge-sheet.

(*vii*) There was a violation of Standing Order 1/88 inasmuch as samples were not submitted to the Chemical Examiner within 72 hours of seizure and the report was not submitted within 15 days of receipt of contraband for analysis.

(*viii*) Statements under Section 67 were not recorded in accordance with law, as no statutory warning under Section 164 of the Code of Criminal Procedure was given to the accused persons before recording the statement.

15. The trial court discussed the arguments predicated on the aforesaid defence but found the same to be meaningless. On the basis of prosecution evidence, the trial court concluded that the prosecution was able to prove the charges under Section 8(*c*) read with Section 21(*c*) and Section 29 of the NDPS Act and convicted and sentenced the accused persons in the manner mentioned in the beginning of this judgment.

Judgment of the High Court

16. A perusal of the impugned judgment[1] reveals that as many as six arguments were advanced before the High Court, attacking the findings of the learned trial court. Taking note of these grounds of appeal, the High Court framed the questions in para 12 of the judgment. We reproduce hereinbelow those six questions formulated by the High Court which reflected the nature of defence:

1 *Badrilal Sharma* v. *Narcotics Control Bureau*, Criminal Appeal No. 814 of 2009, decided on 18-6-2012 (Mad)

(*i*) Whether Section 50 of the NDPS Act is complied with or not?

(*ii*) Whether the provisions of Section 42 of the NDPS Act is complied with or not?

(*iii*) Whether non-examination of drivers and non-seizure of vehicle/car are fatal to the case of the prosecution?

(*iv*) Whether Section 67 statement of the accused is reliable?

(*v*) Whether Accused 2 is entitled to invoke Section 30 of the NDPS Act?

(*vi*) Whether conviction and sentence passed by the trial court is sustainable?

17. Obviously, all these questions have been answered by the High Court against the appellant herein as the outcome of the appeals has gone against the appellant. However, it is not necessary to mention the reasons/rationale given by the High Court in support of its conclusion in respect of each and every issue. We say so because of the reason that all the aforesaid contentions were not canvassed before us in the present appeal. Thus, eschewing the discussion which is not relevant for these appeals, we would be narrating the reasons contained in the impugned judgment[1] only in respect of those grounds which are argued by Mr Sushil Kumar Jain, learned counsel appearing for the appellant, that too while taking note of and dealing with those arguments.

The arguments

18. After giving a brief description of the prosecution case, insofar as the alleged involvement of the appellant is concerned, Mr Sushil Kumar Jain drew our attention to the following aspects as per the prosecution case itself:

(*a*) In the present case in the prior secret information with the police, there was no prior information with regard to the appellant herein. The secret information (Ext. P-72) does not disclose the name of the appellant at all.

(*b*) On the date of incident also, the appellant was found sitting on the front seat along with the two drivers who have been let off by the investigating agency itself and the Ambassador car from which the recoveries had been effected has also not been seized. The said drivers could have been the best witnesses but they have not been examined by the prosecution.

(*c*) The recovery of the narcotic substance was made at the instance of A-1 and A-2 (and not the appellant herein), who while sitting on the back seat took out a green colour bag from beneath their seat and handed it over to PW 7. The appellant cannot be said to be in conscious possession of the narcotic substance.

(*d*) In the search conducted of the appellant herein, the raiding party found Indian currency of Rs 680 (vide Ext. P-11) which is MO 15 and

1 *Badrilal Sharma* v. *Narcotics Control Bureau*, Criminal Appeal No. 814 of 2009, decided on 18-6-2012 (Mad)

two second class train tickets from Shamgarh to Chennai. Thus no incriminating material has been recovered from the appellant. Further there is also no recovery of any mobile phone from the appellant herein which could link the appellant with the other co-accused.

(*e*) The prosecution case hinges solely upon the confessional statement of the appellant herein (Ext. P-9), which was recorded by PW 2 R. Murugan under Section 67 of the Act, and the same person acted as the investigating officer in the present case.

19. From the above, Mr Jain argued that there was no evidence worth the name implicating the appellant except the purported confessional statement of the appellant recorded under Section 67 of the NDPS Act. After drawing the aforesaid sketch, Mr Jain endeavoured to fill therein the colours of innocence insofar as the appellant is concerned with the following legal submissions:

19.1. It was argued that the conviction of the appellant is based upon a purported confessional statement (Ext. P-9) recorded by PW 2 R. Murugan under the provisions of Section 67 of the NDPS Act, which did not have any evidentiary value. Mr Jain submitted in this behalf that:

19.1.1. There is no power under Section 67 of the NDPS Act to either record confessions or substantive evidence which can form the basis for conviction of an accused, inasmuch as:

(*i*) The scheme of the Act does not confer any power upon an officer empowered under Section 42 to record confessions since neither a specific power to record confession has been conferred as was provided under Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) or under Section 32 of the Prevention of Terrorism Act, 2002 (POTA) nor the power under Section 67 is a power to record substantive "evidence" as in Section 108 of the Customs Act or Section 14 of the Central Excise Act which are deemed to be judicial proceedings as specifically provided under Section 108(4) of the Customs Act or Section 14(3) of the Central Excise Act.

(*ii*) The power under Section 67 has been conferred upon an officer under Section 42 so that such officer can effectively perform his functions. The power under Section 67 is incidental to and intended to enable an officer under Section 42 to effectively exercise his powers of entry, search, seizure or arrest which is provided under Section 42 of the Act. The powers under Section 67 are powers to "call for information" which information can thereafter form the basis for satisfaction of "reasons to believe by personal knowledge or information" appearing in Section 42 and which is a jurisdictional basis and a precondition to exercise powers under Section 42 of the Act. Absence of reasons to believe or information would render the exercise under Section 42 of the Act bad in law and hence in order to derive the said information power has been conferred under Section 67 to an officer empowered under

Section 42. This statement is, therefore, merely "information" subject to investigation and cannot be treated as substantive evidence.

19.1.2. Pitching this argument to the next level, it was submitted that the power under Section 67(*c*) of the Act is merely a power to examine any person acquainted with the facts and circumstances of the case. Such statements are not required in law to be truthful as provided under Section 161(2) of the Criminal Procedure Code, which required the person making statement to a police officer under Section 161 CrPC to make a true statement. Even such a statement made under Section 161 CrPC is not a substantive evidence on which a conviction can be based. Statements under Section 67 are not required in law to be given truthfully and hence cannot in any case be treated to be a substantive evidence. Further statements under Section 67 are not recorded after administration of oath as is required under Section 164(5) of the Criminal Procedure Code, the officers are not competent to administer oaths and, therefore, the statements under Section 67 cannot be substantive evidence for recording conviction.

19.1.3. Taking the arguments to a still higher pedestal, Mr Jain's effort was to demonstrate that the officer recording the statement was a police officer and, therefore, such a statement was hit by Section 25 of the Evidence Act. He submitted that an officer empowered under Section 42 of the Act has been conferred with substantive powers which are powers available to a police officer for detection and prevention of crime. The learned counsel placed heavy reliance upon the ratio of the judgment of the Constitution Bench of this Court in *Badaku Joti Svant* v. *State of Mysore*[3] which accepted a broader view, as laid down in *Raja Ram Jaiswal* v. *State of Bihar*[4] and *State of Punjab* v. *Barkat Ram*[5]. It was submitted that in view of the ratio of the above judgments, officers empowered under Section 42 and conferred with powers to enter, search, seize or arrest are "police officers" properly so-called and hence statements made to such officers would be hit by the provisions of Section 25 of the Evidence Act. In any case such officers would come within the meaning of the term "person in authority" and hence the statements recorded by such officers would be hit by the provisions of Section 24 of the Evidence Act especially since the statements were not voluntary and had been retracted by the accused.

19.1.4. In the alternate, the submission of Mr Jain was that even if it is assumed, without admitting, that Section 67 confers powers to record confessions, the status of a statement recorded by an officer under Section 42 of the Act can at best be recorded as "extra-judicial confession" and no conviction can be based solely on the basis of extra-judicial confessions.

19.1.5. It was also argued that in any case the statement under Section 67 was retracted and as such the confession in the present case is a retracted

3 AIR 1966 SC 1746 : 1966 Cri LJ 1353 : (1966) 3 SCR 698
4 AIR 1964 SC 828 : (1964) 1 Cri LJ 705 : (1964) 2 SCR 752
5 AIR 1962 SC 276 : (1962) 1 Cri LJ 217 : (1962) 3 SCR 338

confession which ought to have been investigated and could have been used only to corroborate other evidence and not as a substantive evidence itself. He submitted that no conviction can be based on uncorroborated retracted confessional statement as held in *Noor Aga* v. *State of Punjab*[6].

19.2. The next submission of Mr Jain was that there was complete absence of fair investigation and non-compliance with the provisions of Section 52(3) of the Act:

19.2.1. Pointing out that in the present case the appellant had been arrested by PW 2 R. Murugan after recording statement under Section 67 of the Act, the learned counsel made a fervent plea to the effect that it was evident that PW 2 R. Murugan was exercising purported powers conferred to an officer under Section 42 of the Act. It was submitted that Section 52(3) of the Act casts an obligation on an officer empowered under Section 42 of the Act to forward, without unnecessary delay every person arrested or article seized to either an officer in charge of a police station or an officer empowered under Section 53. According to him, since there is an obligation to forward such person arrested or article seized, to an officer under Section 53 or an officer in charge of the police station, it necessarily follows that an officer under Section 42 would be different and distinct from an officer invested with the task of investigation i.e. either the officer in charge of the police station or an officer empowered under Section 53 of the Act. In the present case, however, PW 2 R. Murugan recorded the statement of the appellant under Section 67 and thereafter arrested him. He was, therefore, required to forward the statement as well as the appellant to the investigating officer in terms of Section 52(3). Instead, he himself became the investigating officer in the present case, which amounted to non-compliance with Section 52(3) read with Section 58 of the Act.

19.2.2. Fair investigation demands existence of an independent investigating agency which is also contemplated and is evident from the scheme of the NDPS Act. It was submitted that since Section 58 of the Act provides for punishment for vexatious entry, search, seizure and arrest, the conduct of the officer arresting or an officer under Section 42 is the subject-matter of investigation by an independent agency and hence PW 2 R. Murugan could not have been made an investigating officer in the present case after he has already acted and exercised powers under Section 42 of the Act.

19.3. Another submission of Mr Jain was that trial was initiated (*sic* vitiated) because of non-compliance with the provisions of Section 57 of the Act:

19.3.1. It was submitted that Section 57 requires that whenever any person makes any arrest or seizure under the Act, then a report thereof has to be submitted of such arrest or seizure to his immediate superior officer. In the present case the raiding party comprised of PW 6 Gunabalan, Superintendent

6 (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748

PW 7 Aruldoss, Intelligence Officer, PW 10 Sendhil Murugan, Intelligence Officer and two other staff members i.e. one sepoy and one driver. It was submitted that the seniormost officer among the raiding team was PW 6 Gunabalan who was, therefore, exercising powers under Section 42 of the Act and the other officers being his subordinates were assisting him in exercise of such powers. Therefore, the report contemplated under Section 57 ought to have been made by PW 6 Gunabalan to his immediate superior officer but instead, in the present case PW 7 Aruldoss has submitted a report to PW 6 Gunabalan under Section 57 of the Act with regard to seizure and PW 2 R. Murugan has submitted report to PW 6 Gunabalan under Section 57 with regard to arrest of the appellant herein.

19.3.2. It is, thus, submitted that there is a complete non-compliance with the provisions of Section 57 of the Act which has vitiated the safeguards provided under the Act and as such the appellant could not have been convicted.

20. Arguing on behalf of the prosecutor, Mr S. Nanda Kumar, learned counsel submitted that the appellant had given voluntary statement that discloses his involvement in the commission of the offence along with other accused persons. In the statement he has categorically admitted having bringing 5.250 kg of heroin/narcotic substance from Maniki Village, District Mandsaur, Rajasthan to Chennai by Jaipur Chennai Express along with other co-accused Badrilal Sharma wearing RPF Uniform till Nellore, Andhra Pradesh. He has also admitted that, thereafter, the other accused, namely, Guddu Singh alias Vikram Singh and Bapulal Jain picked them in a car and proceeded to Chennai. It is on the way that these accused persons were caught by the respondent's officials and based on their confession as well as the material seized, the case was registered. He also pointed out that it has come on record that Babulal Jain (declared as absconder) and Guddu Singh were involved in the similar offence by selling 8 kg of heroin on earlier occasions which was handed over to Prem alias Kannan, a Sri Lankan national, another co-accused in this case. It was the second time that the accused persons planned to smuggle the heroin to.

21. Refuting the submissions of the appellant, it was submitted that the confessional statement recorded under Section 67 of the NDPS Act could be acted upon, as the officer recording statement under this provision under Section 67 is not a "police officer" and, therefore, such a statement is not hit by the provisions of Sections 24 to 27 of the Evidence Act or Article 20(3) of the Constitution of India. His submission was that law on this aspect had already been settled by the judgment of this Court in *Kanhaiyalal* v. *Union of India*[7] as well as *Raj Kumar Karwal* v. *Union of India*[8]. The learned counsel pointed out that the judgment relied upon by the appellant pertains to other Acts like the Customs Act, etc. whereas the aforesaid judgments specifically

7 (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474

8 (1990) 2 SCC 409 : 1990 SCC (Cri) 330

dealt with the nature of duties performed by officers under the NDPS Act and, therefore, on this issue *Raj Kumar*[8] and *Kanhaiyalal*[7] were the binding precedents. He also submitted that as per Section 67 of the NDPS Act, any officer referred to in Section 42 of the NDPS Act was empowered to obtain a statement. Once the said statement is made it can also be construed as confessional statement since there is no specific provision in the Act to obtain the confessional statement from the accused. Therefore, such a statement of the appellant was rightly relied upon resulting into his conviction.

22. The learned counsel for the State also countered the submission of the appellant that the officer acting under Section 53 of the NDPS Act i.e. the investigating officer had to be necessarily different from the officer who is acting under Section 42 of the NDPS Act. He submitted that Sections 42, 53 and 67 of the NDPS Act do not bar the officer authorised under the Act to conduct, search, seizure, investigate and enquire into the matter. His submission was that the depositions of PW 2 Murugan, Intelligence Officer, PW 6 Gunabalan, Superintendent and PW 10 Sendhil Murugan, Intelligence Officer establish that they are empowered to act under Sections 42, 53 and 67 of the NDPS Act.

23. The learned counsel also highlighted incriminating facts as per the records viz. the raid team was led by PW 6 Gunabalan, Superintendent along with PW 10 A. Sendhil Murugan, Intelligence Officer and one Aruldoss, Intelligence Officer. Also two other officials conducted the raid and made a search and seizure of the heroin on 24-10-2004 at 1200 hrs at GNT Road, 100 ft road, Madhavaram in Chennai where the vehicles come from Nellore, Andhra Pradesh towards Chennai Junction. After the seizure, PW 2 Murugan enquired into the matter as per the direction of the Superintendent. He also obtained the voluntary statement under Section 67 of the NDPS Act. The accused also gave another statement for supply of heroin to Guddu Singh. The confessional statement of Badrilal Sharma, who travelled along with accused/appellant was also recorded. The confessional statement of absconded accused viz. Babulal Jain is also on the original record. In addition to that, the identity card of Badrilal Sharma and the train tickets of the appellant and Badrilal Sharma, as both of them travelled together, have come on record. All this proves that the appellant was in possession of the heroin 5.250 kg and carried it from Rajasthan to Chennai with intention to smuggle the same to, when he was caught. He thus pleaded that conviction and sentence of the appellant was rightly recorded by the courts below, which warranted no interdicting by this Court.

24. From the arguments noted above, it would be clear that the appellant has challenged the conviction primarily on the following grounds:

8 *Raj Kumar Karwal* v. *Union of India*, (1990) 2 SCC 409 : 1990 SCC (Cri) 330

7 *Kanhaiyalal* v. *Union of India*, (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474

24.1. The conviction is based solely on the purported confessional statement recorded under Section 67 of the NDPS Act which has no evidentiary value inasmuch as:

(*a*) The statement was given to and recorded by an officer who is to be treated as "police officer" and is thus, hit by Section 25 of the Evidence Act.

(*b*) No such confessional statement could be recorded under Section 67 of the NDPS Act. This provision empowers to call for information and not to record such confessional statements. Thus, the statement recorded under this provision is akin to the statement under Section 161 CrPC.

(*c*) In any case, the said statement having been retracted, it could not have been the basis of conviction and could be used only to corroborate other evidence.

24.2. There was absence of fair investigation and non-compliance with the provisions of Section 52(3) of the NDPS Act. This submission is primarily based on the argument that same person cannot be an officer under Section 42 of the NDPS Act as well as investigating officer under Section 52 of the said Act.

24.3. Non-compliance with Section 57 of the NDPS Act is also alleged because of the reason that PW 7 who was the seniormost officer among the raiding team has submitted the report under Section 57 of the NDPS Act with regard to arrest of the appellant to PW 6. Instead PW 6 should have submitted the report of such arrest to PW 7.

25. We shall take up these arguments in seriatim for our discussion.

Evidentiary value of statement under Section 67 of the NDPS Act

26. Before examining this contention of the appellant, it would be apposite to take note of the provisions of Sections 42, 53 and 67 of the NDPS Act. These provisions read as under:

"**42.** ***Power of entry, search, seizure and arrest without warrant or authorisation***.—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs, control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or

forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset—

(*a*) enter into and search any such building, conveyance or place;

(*b*) in case of resistance, break open any door and remove any obstacle to such entry;

(*c*) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and

(*d*) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

* * *

53. ***Power to invest officers of certain departments with powers of an officer in charge of a police station***.—(1) The Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of the Department of Central Excise, Narcotics, Customs, Revenue Intelligence or the Border Security Force or any class of such officers with the powers of an officer in charge of a police station for the investigation of the offences under this Act.

(2) The State Government may, by notification published in the Official Gazette, invest any officer of the Department of Drugs Control, Revenue or Excise or any class of such officers with the powers of an officer in charge of a police station for the investigation of offences under this Act.

* * *

67. ***Power to call for information, etc***.—Any officer referred to in Section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provision of this Act—

(*a*) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;

(*b*) require any person to produce or deliver any document or thing useful or relevant to the enquiry;

(*c*) examine any person acquainted with the facts and circumstances of the case."

27. We have already taken note of the contentions of counsel for the parties on the interpretation of the aforesaid provisions. To recapitulate in brief, the submission of Mr Jain is that there is no power in Section 67 of the NDPS Act to either record confessions or substantive evidence which can form the basis for conviction of the accused. It is also argued that, in any case, such a statement is not admissible in evidence as the excise official recording the statement is to be treated as "police officer" and thus, the evidential value of the statement recorded before him is hit by the provisions of Section 25 of the Evidence Act.

28. The learned counsel for the respondent had pointed out that in *Kanhaiyalal* v. *Union of India*[7], it has been categorically held that the officer under Section 53 is not a police officer. In arriving at that conclusion the two-Judge Bench judgment had followed the earlier judgment in *Raj Kumar Karwal* v. *Union of India*[8].

29. Had the matter rested at that, the aforesaid dicta laid down by the two-Judge Bench would have been followed by us. However, on the reading of the aforesaid judgment, we find that the only reason to conclude that an officer under Section 53 of the NDPS Act was not a police officer was based on the following observations: (*Raj Kumar Karwal case*[8], SCC p. 423, para 20)

> "*20.* ... These provisions found in Chapter V of the Act show that there is nothing in the Act to indicate that all the powers under Chapter XII of the Code, including the power to file a report under Section 173 of the Code have been expressly conferred on officers who are invested with the powers of an officer in charge of a police station under Section 53, for the purpose of investigation of offences under the Act."

30. We find, prima facie, in the arguments of Mr Jain to be meritorious when he points out that the aforesaid observations are without any detailed discussion or the reasons to support the conclusion arrived at. Mr Jain's fervent plea to depart from the view taken in the said judgment deserved consideration as there is no provision under the NDPS Act which takes away the power of filing a report under Section 173 of the Code which is available with an officer in charge of a police station. He further argued that the provision of Section 173 are contained in Chapter XII of the Code and since all powers of an officer in charge of a police station has been conferred, there is no legal basis to suggest that the said power is not available with the officer under Section 53 of the Act. Above all, we find that the judgment in *Raj Kumar Karwal*[8] was considered by this Court in few cases but without giving imprimatur, as can be seen below.

7 (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474

8 (1990) 2 SCC 409 : 1990 SCC (Cri) 330

31. *Abdul Rashid* v. *State of Bihar*[9], this Court after noticing the judgment in *Raj Kumar Karwal*[8], chose to apply the Constitution Bench judgment in *Raja Ram Jaiswal*[4] and observed thus: (SCC pp. 580-81, para 1)

> "*1.* ... Mr B.B. Singh also brought to our notice a judgment of this Court in *Raj Kumar Karwal* v. *Union of India*[8] in support of the contention that even a Superintendent of Excise under the Bihar and Orissa Excise Act is not a police officer and as such a confessional statement made to him would be admissible in evidence. In the aforesaid case, the question for consideration is whether the officers of the Department of Revenue Intelligence (DRI) invested with powers of officer in charge of a police station under Section 53 are police officers or not within the meaning of Section 25, and this Court answered that those officers are not police officers. This decision is in pari materia with the Constitution Bench decision[3] in 1966 and does not in any way detract from the conclusion of this Court in *Raja Ram*[4] which we have already noticed. In *Pon Adithan* v. *Narcotics Control Bureau*[10] this question had not directly been in issue and the only question that was raised is whether the statement made was under threat and pressure. It is obvious that a statement of confession made under threat and pressure would come within the ambit of Section 24 of the Evidence Act. This decision therefore would not be direct authority on the point in issue. In the aforesaid premises, the decision of *Raja Ram*[4] would apply to the alleged confessional statement made by the appellant to the Superintendent of Excise and therefore would be inadmissible in evidence."

32. Both the said judgments i.e. *Raj Kumar Karwal*[8] as well as *Kanhaiyalal*[7] were thereafter considered by this Court in *Noor Aga* v. *State of Punjab*[6] where the court has, after considering the entire scheme of the Customs Act, held that the officer under Section 53 of the Customs Act is a police officer and would, therefore, attract the provisions of Section 25 of the Evidence Act. It observed: (*Noor Aga case*[6], SCC p. 457, para 76)

> "*76.* Section 53 of the Act empowers the Customs Officers with the powers of the Station House Officers. An officer invested with the power of a police officer by reason of a special statute in terms of sub-section (2) of Section 53 would, thus, be deemed to be police officer and for the said purposes of Section 25 of the Act shall be applicable."

9 (2001) 9 SCC 578 : 2002 SCC (Cri) 1084

8 *Raj Kumar Karwal* v. *Union of India*, (1990) 2 SCC 409 : 1990 SCC (Cri) 330

4 *Raja Ram Jaiswal* v. *State of Bihar*, AIR 1964 SC 828 : (1964) 1 Cri LJ 705 : (1964) 2 SCR 752

3 *Badaku Joti Svant* v. *State of Mysore*, AIR 1966 SC 1746 : 1966 Cri LJ 1353 : (1966) 3 SCR 698

10 (1999) 6 SCC 1 : 1999 SCC (Cri) 1051

7 *Kanhaiyalal* v. *Union of India*, (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474

6 (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748

33. No doubt, *Abdul Rashid*[9] and *Noor Aga*[6] were cases under the Customs Act. But the reasons for holding custom officer as police officer would have significant bearing even when we consider the issue in the context of the NDPS Act as well. It would be more so when the schemes and purport of the two enactments are kept in mind. The NDPS Act is purely penal in nature. In contradistinction, as far as the Customs Act and the Central Excise Act are concerned, their dominant object is to protect the revenue of the State and penal provisions to punish the person found offending those laws are secondary in nature.

34. Further, the NDPS Act is a complete code relating to narcotic substances, and dealing with the offences and the procedure to be followed for the detection of the offences as well as for the prosecution and the punishment of the accused. The provisions are penal provisions which can, in certain cases, deprive a person of his liberty for a minimum period of 10 years and can also result in sentences which can extend up to 20 years or even death sentence under certain circumstances. The provisions therefore have to be strictly construed and the safeguards provided therein have to be scrupulously and honestly followed. (See *Baldev Singh*[11]; *D.K. Basu* v. *State of W.B.*[12], para 28; *Union of India* v. *Bal Mukund*[13], paras 26-28 and *Balbir Singh* v. *State of Haryana*[14].)

35. We have also to keep in mind the crucial test to determine whether an officer is a police officer for the purpose of Section 25 of the Evidence Act viz. the "influence or authority" that an officer is capable of exercising over a person from whom a confession is obtained. The term "police officer" has not been defined under the Code or in the Evidence Act and, therefore, the meaning ought to be assessed not by equating the powers of the officer sought to be equated with a police officer but from the power he possesses from the perception of the common public to assess his capacity to influence, pressure or coercion on persons who are searched, detained or arrested. The influence exercised has to be, assessed from the consequences that a person is likely to suffer in view of the provisions of the Act under which he is being booked. It, therefore, follows that a police officer is one who:

(*i*) is considered to be a police officer in "common parlance" keeping into focus the consequences provided under the Act.

(*ii*) is capable of exercising influence or authority over a person from whom a confession is obtained.

36. We would also like to point out that Mr Sushil Kumar Jain had referred to the provisions of the Police Act as well to support his submission. The preamble of the Police Act, 1861 (5 of 1861), which is an Act for the

9 *Abdul Rashid* v. *State of Bihar*, (2001) 9 SCC 578 : 2002 SCC (Cri) 1084

6 *Noor Aga* v. *State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748

11 *State of Punjab* v. *Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080

12 (1997) 1 SCC 416 : 1997 SCC (Cri) 92

13 (2009) 12 SCC 161 : (2010) 1 SCC (Cri) 541

14 (1987) 1 SCC 533 : 1987 SCC (Cri) 193

regulation of a group of officers who come within the meaning of the word "police" provides:

> "WHEREAS it is expedient to reorganise the police and to make it a more efficient instrument for the prevention and detection of crime; it is enacted as follows:"

37. Mr Jain argued that from the above, it can be seen that the primary object of any police establishment is prevention and detection of crime which may be provided for under the Penal Code or any other specific law enacted for dealing with particular offences and bring the guilty to justice. It was submitted by him that if special authorities are created under special enactments for the same purpose i.e. prevention and detection of crime, such authorities would be "police" and have to be understood in the said perspective. Sections 23 and 25 of the Police Act, 1861 lay down the duties of the police officers and Section 20 of the Police Act, 1861 deals with the authority and provides that they can exercise such authority as provided under the Police Act and any Act for regulating criminal procedure. Section 4(2) of the Criminal Procedure Code provides that:

> "**4. (2)** All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

38. On the strength of these provisions, the argument of the learned counsel for the petitioner was that persons categorised as "police officers" can do all the activities and the statute gives them the power to enable them to discharge their duties efficiently. Of the various duties mentioned in Section 23 of the Police Act, 1861, the more important duties are to prevent the commission of offences and public nuisances and to detect and bring offenders to justice and to apprehend all persons whom the police officer is legally authorised to apprehend. It is clear, therefore, in view of the nature of the duties imposed on the police officer, the nature of the authority conferred and also the purpose of the Police Act, that the powers which the police officers enjoy are powers for the effective prevention and detection of crime in order to maintain law and order. According to the learned counsel, a comparison to the powers of the officers under the provisions of the NDPS Act makes it clear that the duties and responsibilities of the officers empowered under the Act are comparable to those of the police officers and, therefore, they ought to be construed as such. It is submitted that the primary objective of an NDPS Officer is to detect and prevent crime defined under the provisions of the Act and thereafter the procedure has been prescribed to bring the offenders to justice. Thus, the officers under the Act are "police officers" and statements made to such officers are inadmissible in evidence.

39. He also drew our attention to the following pertinent observation of this Court in *State of Punjab* v. *Barkat Ram*[5]: (AIR pp. 283-84, paras 33-34)

5 AIR 1962 SC 276 : (1962) 1 Cri LJ 217 : (1962) 3 SCR 338

"*33.* ... Section 5(2) of the Code of Criminal Procedure also contemplates investigation of, or inquiry into, offences under other enactments regulating the manner or place of investigation, that is, if an act creates an offence and regulates the manner and place of investigation or inquiry in regard to the said offence, the procedure prescribed by the Code of Criminal Procedure will give place to that provided in that Act. If the said Act entrusts investigation to an officer other than one designated as police officer, he will have to make the investigation and not the police officer. In this situation, the mere use of the words 'police officer' in Section 25 of the Evidence Act does not solve the problem, having regard to permissible rules of interpretation of the term 'police officer' in that section. It may mean any one of the following categories of officers: (*i*) a police officer who is a member of the police force constituted under the Police Act; (*ii*) though not a member of the police force constituted under the Police Act, an officer who by statutory fiction is deemed to be a police officer in charge of a police station under the Code of Criminal Procedure; and (*iii*) an officer on whom a statute confers powers and imposes duties of a police officer under the Code of Criminal Procedure, without describing him as a police officer or equating him by fiction to such an officer. Now, which meaning is to be attributed to the term 'police officer' in Section 25 of the Evidence Act? In the absence of a definition in the Evidence Act, it is permissible to travel beyond the four corners of the statute to ascertain the legislative intention. What was the meaning which the legislature intended to give to the term 'police officer' at the time the said section was enacted? That section was taken out of the Criminal Procedure Code, 1861 (25 of 1861) and inserted in the Evidence Act of 1872 as Section 25. Stephen in his *Introduction to the Evidence Act* states at p. 171 thus:

> 'I may observe, upon the provisions relating to them, that Sections 25, 26 and 27 were transferred to the Evidence Act verbatim from the Code of Criminal Procedure, Act 25 of 1861. They differ widely from the law of England, and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody.'

So too, Mahmood, J., in *Queen Empress* v. *Babu Lal*[15], gave the following reasons for the enactment of Section 25 of the Evidence Act at ILR p. 523:

> '... the legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and that those malpractices went to the length of positive torture; nor do I doubt that the legislature, in laying down such stringent rules, regarded the evidence of police officers as untrustworthy, and the object of the rules was to put a stop to the

ILR (1884) 6 All 509

extortion of confession, by taking away from the police officers the advantage of proving such exported confessions during the trial of accused persons.'

It is, therefore, clear that Section 25 of the Evidence Act was enacted to subserve a high purpose and that is to prevent the police from obtaining confessions by force, torture or inducement. The salutary principle underlying the section would apply equally to other officers, by whatever designation they may be known, who have the power and duty to detect and investigate into crimes and is for that purpose in a position to extract confessions from the accused.

34. ... Shortly stated, the main duties of the police are the prevention and detection of crimes. A police officer appointed under the Police Act of 1861 has such powers and duties under the Code of Criminal Procedure, but they are not confined only to such police officers. As the State's power and duties increased manifold, acts which were at one time considered to be innocuous and even praiseworthy have become offences, and the police power of the State gradually began to operate on different subjects. Various Acts dealing with Customs, Excise, Prohibition, Forest, Taxes, etc. came to be passed, and the prevention, detection and investigation of offences created by those Acts came to be entrusted to officers with nomenclatures appropriate to the subject with reference to which they functioned. It is not the garb under which they function that matters, but the nature of the power they exercise or the character of the function they perform is decisive. The question, therefore, in each case is, does the officer under a particular Act exercise the powers and discharge the duties of prevention and detection of crime? If he does, he will be a police officer."

40. In our view the aforesaid discussion necessitates a re-look into the ratio of *Kanhaiyalal case*[7]. It is more so when this Court has already doubted the dicta in *Kanhaiyalal*[7] in *Nirmal Singh Pehlwan*[16] wherein after noticing both *Kanhaiyalal*[7] as well as *Noor Aga*[6], this Court observed thus: (*Nirmal Singh Pehlwan case*[16], SCC p. 302, para 15)

"*15.* We also see that the Division Bench in *Kanhaiyalal case*[7] had not examined the principles and the concepts underlying Section 25 of the Evidence Act, 1872 vis-à-vis Section 108 of the Customs Act and the powers of a Customs Officer who could investigate and bring for trial an accused in a narcotic matter. The said case relied exclusively on the judgment in *Raj Kumar case*[8]. The latest judgment in point of time is *Noor Aga case*[6] which has dealt very elaborately with this matter. We thus feel it would be proper for us to follow the ratio of the judgment in

7 *Kanhaiyalal* v. *Union of India*, (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474

16 *Nirmal Singh Pehlwan* v. *Inspector, Customs*, (2011) 12 SCC 298 : (2012) 1 SCC (Cri) 555

6 *Noor Aga* v. *State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748

8 *Raj Kumar Karwal* v. *Union of India*, (1990) 2 SCC 409 : 1990 SCC (Cri) 330

Noor Aga case[6] particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with."

41. For the aforesaid reasons, we are of the view that the matter needs to be referred to a larger Bench for reconsideration of the issue as to whether the officer investigating the matter under the NDPS Act would qualify as police officer or not.

42. In this context, the other related issue viz. whether the statement recorded by the investigating officer under Section 67 of the Act can be treated as confessional statement or not, even if the officer is not treated as police officer also needs to be referred to the larger Bench, inasmuch as it is intermixed with a facet of the 1st issue as to whether such a statement is to be treated as statement under Section 161 of the Code or it partakes the character of statement under Section 164 of the Code.

43. As far as this second related issue is concerned we would also like to point out that Mr Jain argued that the provisions of Section 67 of the Act cannot be interpreted in the manner in which the provisions of Section 108 of the Customs Act or Section 14 of the Excise Act had been interpreted by a number of judgments and there is a qualitative difference between the two sets of provisions. Insofar as Section 108 of the Customs Act is concerned, it gives power to the custom officer to summon persons "to give evidence" and produce documents. Identical power is conferred upon the Central Excise Officer under Section 14 of the Act. However, the wording to Section 67 of the NDPS Act is altogether different. This difference has been pointed out by the Andhra Pradesh High Court in *Shahid Khan* v. *Director of Revenue Intelligence*[17].

44. The Registry is accordingly directed to place the matter before the Hon'ble the Chief Justice for the decision of this appeal by a larger Bench after considering the issues specifically referred as above.

45. We find from the record that as against the sentence of 10 years awarded to the appellant he has already undergone more than 9 years of sentence. In these circumstances, we deem it a fit case to suspend further sentence till the disposal of this appeal by the larger Bench. The appellant shall be released on bail on furnishing security in the sum of Rs 50,000 (rupees fifty thousand) with two sureties of the same amount, to the satisfaction of the trial court.

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6 *Noor Aga* v. *State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748

17 2001 Cri LJ 3183 (AP)

(2013) 14 Supreme Court Cases 527

(BEFORE A.K. PATNAIK AND RANJAN GOGOI, JJ.)

Criminal Appeal No. 486 of 2013†

VIJAY JAIN .. Appellant;

Versus

STATE OF MADHYA PRADESH .. Respondent.

With

Criminal Appeal No. 484 of 2013

NILESH SURYAKANT SHAH .. Appellant;

Versus

STATE OF MADHYA PRADESH .. Respondent.

Criminal Appeals No. 486 of 2013 with No. 484 of 2013, decided on June 20, 2013

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 8 and 21(c) — Non-production of seized material before trial court — Conviction thereunder — Unsustainability of — Only oral evidence to prove seizure of contraband substance from accused — Insufficiency of — Reiterated**

— Raiding party nabbed *N*, other accused, and later appellant-accused for possessing brown sugar — Such seized brown sugar not produced during trial — Both accused convicted and sentenced for 10 yrs' RI — High Court confirmed the conviction — Untenability of

— Held, seized contraband substances were produced in suitcase before trial court contrary to evidence of PW 11 — No mention in deposition of PW 11 that brown sugar kept in suitcase — Though samples of alleged substance were prepared but PW 3 stated that those samples were not prepared in his presence — PW 2 stated that witness were never taken to the site from where contraband substances were alleged to have been seized — Therefore, it can safely be said that prosecution did not produce brown sugar before trial court — Evidence of PW 2 and 3 did not establish seizure of brown sugar from appellants-accused — Hence, their conviction set aside — Criminal Procedure Code, 1973, Ss. 51, 173 and 465 (Paras 11 and 12)

† From the Judgment and Order dated 21-2-2011 of the High Court of Madhya Pradesh, Bench at Indore in Crl. A. No. 1048 of 2007

Jitendra v. *State of M.P.*, (2004) 10 SCC 562 : 2004 SCC (Cri) 2028; *Ashok* v. *State of M.P.*, (2011) 5 SCC 123 : (2011) 2 SCC (Cri) 547, *relied on*

Noor Aga v. *State of Punjab* (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748, *explained*

Vijay Jain v. *State of M.P.*, Criminal Appeal No. 1048 of 2007, decided on 21-2-2011 (MP), *reversed*

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 52, 54, 42, 43, 44, 45, 49, 50, 52-A r/w Ss. 15 to 32 — Seizure of contraband substances from accused — Production thereof before trial court — Necessity of — Reiterated — Held, it is necessary for prosecution to establish that contraband substances were seized from the accused — Best way to prove such seizure is to produce the contraband material before trial court — Mere oral evidence to establish seizure of contraband substance from accused not sufficient (Para 10)**

Jitendra v. *State of M.P.*, (2004) 10 SCC 562 : 2004 SCC (Cri) 2028, *explained* and *relied on*

G-M/52038/SR

Advocates who appeared in this case :

Sushil Kr. Jain, Puneet Jain and Ms Pratibha Jain, Advocates, for the Appellant;

Ms Ayesha Choudhary, Musharraf Choudhary and C.D. Singh, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2011) 5 SCC 123 : (2011) 2 SCC (Cri) 547, *Ashok* v. *State of M.P.* 529*d-e*, 531*g*
2. Criminal Appeal No. 1048 of 2007, decided on 21-2-2011 (MP), *Vijay Jain* v. *State of M.P.* **(reversed)** 528*f*
3. (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748, *Noor Aga* v. *State of Punjab* 531*a*, 531*b-c*, 531*d*
4. (2004) 10 SCC 562 : 2004 SCC (Cri) 2028, *Jitendra* v. *State of M.P.* 529*d*, 530*g*, 531*e*

JUDGMENT

1. These are appeals by way of special leave under Article 136 of the Constitution of India against the judgment and order dated 21-2-2011 of the Madhya Pradesh High Court, Indore Bench in *Vijay Jain* v. *State of M.P.*[1]

2. The facts very briefly are that on 5-5-2004, R.C. Pathak, Thanedar Incharge (TI) of Police Station Annapura conducted raid at 1515 hrs at Kshitij Apartment, Usha Nagar Square and apprehended Nilesh Suryakant Shah, the appellant in Criminal Appeal No. 484 of 2013 outside Flat No. 305 of the apartment as he was alleged to have been carrying brown sugar in a suitcase. After seizing the alleged brown sugar from Nilesh, R.C. Pathak entered Flat No. 305 and apprehended the appellant, Vijay Jain as it was alleged that he also had brown sugar in his clothes. R.C. Pathak also seized the alleged brown sugar from Vijay. Thereafter he handed over investigation to his successor, R.D. Bhardwaj, Thanedar Incharge of Raj Nagar Police Station and after investigation charge-sheet was filed against Nilesh and

1 Criminal Appeal No. 1048 of 2007, decided on 21-2-2011 (MP)

Vijay for the offence under Sections 8/21 (*c*) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act").

a **3.** The two appellants denied the charges and trial was conducted by the Special Judge (NDPS), Indore. At the trial, the prosecution examined as many as 12 witnesses. Shirish Babu Tiwari and Manoj Dubey who witnessed the seizure were examined as PWs 2 and 3. R.C. Pathak was examined as PW 11 and Lokendra Singh Yadav who was incharge of the malkhana in which the brown sugar was said to have been stored was examined as PW 5.
b The learned Special Judge (NDPS), Indore by judgment dated 17-8-2007, convicted the appellants and sentenced them both to 10 years' rigorous imprisonment and imposed a fine of Rs 1 lakh on each. Aggrieved, the appellants filed Criminal Appeals Nos. 1048 and 1172 of 2007 before the High Court, but by the impugned common judgment, the High Court maintained the conviction and sentence and dismissed the appeals.
c Aggrieved, the appellants have filed these appeals.

4. Mr Sushil Kumar Jain, learned counsel appearing for the appellants raised several contentions to assail the conviction of both the appellants. For deciding these appeals, we will only consider the contention of Mr Jain that the contraband goods have not been produced before the trial court. He submitted that this Court has held in *Jitendra* v. *State of M.P.*[2] that where
d there is non-production of the contraband goods alleged to have been seized from the accused, the conviction for the offence under Section 20(*b*) of the NDPS Act cannot be sustained. He also cited the decision of this Court in *Ashok* v. *State of M.P.*[3] in which a similar view has been taken that where the narcotic drug or the psychotropic substance alleged to have been seized from the possession of the accused is not produced before the trial court as a
e material exhibit and there is no explanation for its non-production, there is no evidence to connect the forensic expert report with the drug or the substance that was seized from the possession of the accused and in such a case the conviction is not maintainable.

5. Mr Jain further submitted that although the contention that the
f contraband goods were not produced before the court was raised, the trial court recorded a finding that on 24-2-2005, the seized materials were deposited in the court and this finding was arrived at by referring to Item 4 in the order-sheet of the court dated 24-2-2005. He submitted that the trial court has held that a suitcase had been produced before the court and the seized articles were kept in the suitcase. He submitted that the evidence of PW 11 on the contrary is that a big suitcase from the store of materials was produced
g before the trial court and when the lock of the suitcase was broken and the suitcase was opened, a big packet wrapped in cloth was found and a blue-coloured polythene was seen in which clothes were there. He submitted that the finding of the trial court, therefore, that the contraband goods were produced in the court was perverse as there was no evidence whatsoever to

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2 (2004) 10 SCC 562 : 2004 SCC (Cri) 2028

3 (2011) 5 SCC 123 : (2011) 2 SCC (Cri) 547

support the said finding. He argued that though a submission was also made before the High Court on behalf of the appellants that the contraband was not produced in the court, the High court brushed aside the submission by recording a bald finding that the contraband has been produced before the court without delay. He submitted that the finding of the High Court that the contraband has been produced in court is, therefore, contrary to the evidence recorded.

6. Mr Jain submitted that the prosecution had also taken a stand in the alternative before the trial court that the contraband goods were destroyed and, produced before the trial court only the samples of the contraband goods. He referred to the provisions of Section 52-A of the NDPS Act to submit that in a case of destruction of contraband goods the procedure as laid down in sub-section (2) of Section 52-A of the Act has to be followed and in case of destruction, the inventory prepared at the time before destruction and the photographs of the narcotic drugs and psychotropic substances and the list of samples drawn under sub-section (2) of Section 52-A of the Act as certified by the Magistrate are treated as primary evidence in respect of the offence. He vehemently argued that since no such procedure has been followed, the alternative plea taken by the prosecution that the contraband goods have been destroyed and could not be produced before the court cannot be accepted.

7. Mr Jain also submitted that PW 3 in his evidence before the court has admitted that the police personnel did not take search of anyone in front of him and there was no action in front of him regarding seizure of the brown sugar from any person nor any action was done regarding preparation of samples and sealing nor was any action taken in front of him with regard to affixing chits and seizing the materials nor with regard to arrest of any person. He submitted that PW 3 also stated in his evidence that his signatures were only taken on A to A part of Exhibits P-5 to P-6 and B to B part of Exhibits P-3 and P-4 and from A to A part of Exhibits P-7 to 26 in the panchnama. He vehemently argued that prosecution has thus not been able to prove through PW 3 that the contraband goods were actually seized from the possession of the appellants. He pointed out that PW 3 in fact has been declared hostile. He submitted that similarly PW 2 has stated in his evidence that no panch was taken to the site and that would show that the signatures were taken in the panchnama by the police without taking the seizure witnesses to the place where the materials were alleged to have been seized from the possession of the appellants. He submitted that the facts in this case, therefore, are similar to the case in *Jitendra*[2] in which this Court found that the panch witnesses had turned hostile and held that in the absence of non-production of the seized drugs the conviction under the NDPS Act was not maintainable.

8. Ms Ayesha Choudhary, learned counsel appearing for the State of Madhya Pradesh, on the other hand, relied on the judgments of the trial court

2 *Jitendra* v. *State of M.P.*, (2004) 10 SCC 562 : 2004 SCC (Cri) 2028

as well as the High Court for the findings recorded therein that the contraband goods were produced before the court. In the alternative, she submitted that it has been held by this Court in *Noor Aga* v. *State of Punjab*[4] that even if it is accepted for the sake of arguments that the bulk quantity of heroin was destroyed, the samples were essentially to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the NDPS Act. She submitted that since the samples of the contraband goods in this case which were seized from the two appellants were produced and marked as Exhibits A-1, A-2 and B-1, B-2, the prosecution has been able to establish the fact of recovery of the contraband goods from the two appellants.

9. Para 96 of the judgment of this Court in *Noor Aga case*[4] on which the learned counsel for the State very strongly relies is quoted hereinbelow: (SCC p. 464)

> "*96.* Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act."

Thus in para 96 of the judgment in *Noor Aga case*[4] this Court has held that the prosecution must in any case produce the samples even where the bulk quantity is said to have been destroyed. The observations of this Court in the aforesaid paragraph of the judgment do not say anything about the consequence of non-production of the contraband goods before the court in a prosecution under the NDPS Act.

10. On the other hand, on a reading of this Court's judgment in *Jitendra case*[2], we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in *Ashok*[3] this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant.

4 (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748

2 *Jitendra* v. *State of M.P.*, (2004) 10 SCC 562 : 2004 SCC (Cri) 2028

3 *Ashok* v. *State of M.P.*, (2011) 5 SCC 123 : (2011) 2 SCC (Cri) 547

11. In the present case, finding of the trial court that the seized contraband goods were produced in a suitcase is contrary to the evidence of PW 11, which is to the following effect:

"*81. Note.*—A big suitcase from the store materials on which No. 466/05 is written has been received in a white cloth along with seal of the sealing material. In this the lock is of numbers and the lock is not getting open because of this AGP is directed to call some technical person for opening the lock, on this AGP had called Shri Shakoor who expressed that the lock is of numbers and cannot be opened, it can be broken. In the case, the evidence material is important and therefore it was directed to break the lock, the lock was opened. In the suitcase on the opening a big packet wrapped in cloth was found but the cloth is torn and blue colour polythene is being seen in which clothes are there. The cloth which is rolled on blue colour polythene there is no seal visible on it, nor any description is being seen, because the cloth is damp and has been in contaminated condition and is torn and no note is marked on it. In the polythene there are 5 pants and 5 shirts which are in wet condition.

* * *

111. Today I cannot say that in what colour bag the rest of the substance was packed in the bag. The material which was seized from Vijay Jain, out of it two samples 25-25 gm were made and marked B-1 and B-2 which were shown to the witness when he said that they were taken out from the material found with Vijay Jain on site. No other packet except the two samples and rest of material were made on the site. The said both packets which have been submitted in the court are sealed and on them the seizure chit is not affixed showed the B-1 and B-2 packet and asked that the seal of police station is affixed then the witness said the seal of police station is affixed then the witness said that it is the seal of the Tahsildar, Indore. Leaving aside rest of the substance and mobile the other seized material from Vijay is submitted in the court. This is true that I had not given the mobile for sealing to the Incharge of stores. Today I cannot say where that mobile is."

Thus the only evidence before the court was that in the suitcase in which the contraband goods were allegedly kept when opened, there was only a big packet wrapped in cloth and the cloth was torn and there was a blue-coloured polythene in which there were clothes. There is no mention in the evidence of PW 11 of any brown sugar having been found in the suitcase. There is, however, evidence that samples were prepared of 25-25 gm which were shown to the witnesses and were marked B-1 and B-2 but we find that PW 3 has stated before the court in his examination that these samples were not prepared in his presence and PW 2 has stated before the court that the witnesses were not taken to the site where the materials were seized.

12. We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the

appellants and as the evidence of the witnesses (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable.

13. In the result, we allow these appeals and set aside the impugned judgment of the trial court as well as the High Court. The appellants are stated to be in jail. They shall be released forthwith if not required in connection with any other case.

(2013) 12 Supreme Court Cases 446

(BEFORE P. SATHASIVAM AND J.S. KHEHAR, JJ.)

RAVINDERSINGH ALIAS RAVI PAVAR .. Appellant;

Versus

STATE OF GUJARAT .. Respondent.

Criminal Appeals No. 334 of 2013† with Nos. 335 of 2013‡ and 336 of 2013††, decided on February 22, 2013

Criminal Procedure Code, 1973 — Ss. 439 and 437 — Co-conspirator in manufacture of, and seller of spurious liquor (A-11) and supplier of raw material therefor (A-2) in State with complete prohibition — Bail denied — Hooch (country-made liquor) tragedy case — Strict view against accused — Reason for — Dealing in spurious liquor is a crime against society — Bail cancelled — Methyl alcohol (methanol) used in preparing country liquor — More than 100 people dying and more than 200 falling ill after consuming spurious liquor — Bail sought by a person alleged to be conspiring with main accused and actively participating in sale of illicit liquor — State Government also filing SLP against High Court order granting bail to supplier of raw material — Accused pleading ignorance about poisonous effect of methyl alcohol — Held, poisonous nature of methyl alcohol is a well-known fact — Feigned ignorance about it is not a ground for bail — Three years' stay in jail as an undertrial — Held, bail not deserved even on this count — Criminal liability of supplier of raw material — State where

1 *Anil* v. *State of Maharashtra*, Criminal Appeal No. 186 of 1996, decided on 21-9-2007 (Bom)

† Arising out of SLP (Crl.) No. 3334 of 2012. From the Judgments and Orders dated 10-2-2012 of the High Court of Judicature of Gujarat at Ahmedabad in Crl. Misc. Application No. 1281 of 2012

‡ Arising out of SLP (Crl.) No. 4026 of 2012

†† Arising out of SLP (Crl.) No. 4027 of 2012

there is complete prohibition (like State of Gujarat) — Supplier of raw material (methyl and ethyl alcohol), held, is also liable in such State — Bail cancelled but liberty given for moving fresh application if trial continues beyond one year — Criminal Trial — Clues and Tell-Tale Signs/Forensics — Toxicology — Methyl alcohol (methanol) — Poisonous effect — Narcotics, Intoxicants and Liquor — Bombay Prohibition Act, 1949 (25 of 1949) — Ss. 65(a) to (e), 66(1)(b), 67(1-A), 72, 75, 81 and 83 — Spurious liquor leading to more than 100 people dying and more than 200 falling ill — Penal Code, 1860, Ss. 302, 307, 328, 272, 273, 201, 109, 114 and 120-B

Held :

The material on record shows that the appellant A-11 was not a mere supplier of spurious alcohol but he was involved in the criminal conspiracy of manufacturing spurious liquor along with the main co-accused, A-1, and selling the same at various places through his men. The statements of various persons support the greater role played by the appellant-accused. (Paras 13 and 14)

It is a well-known fact that methanol is a poisonous substance and by adding the same while manufacturing spurious alcohol, it can have devastating results and can cause death or severe damage to health or injuries to anyone who consumes it. Such type of offences, as in the case on hand, are against the society at large and who commit the same do not deserve any leniency, particularly, in the State of Gujarat where complete prohibition is being followed. Merely because the appellant-accused had spent three years as an undertrial prisoner, taking note of the gravity of the offence, he is not entitled for bail. In view of the gravity of the offence, death of a number of persons, injury to several others and the impact on the society as a whole, the appellant A-11 is not at all entitled to bail at this stage and the High Court has rightly denied his application for bail. (Para 17)

Similarly A-2 who is the respondent in the SLP filed by the State, also does not deserve bail. In a State having prohibition policy, supply of raw material for liquor, its production and distribution are illegal and A-2 has supplied those poisonous chemicals such as ethyl and methyl alcohol to A-1 for the manufacture of spurious country-made liquor. It is a matter of common knowledge that if any one consumes liquor manufactured out of ethyl/methyl alcohol, it would have very adverse effect on the body which can cause death or bodily injury as is likely to cause death. Considering the nature of the offence and the manner in which A-2 supplied those poisonous chemicals despite having full knowledge about its consequences, the respondent (A-2) does not deserve liberty of remaining on bail. In a State like Gujarat, which strictly prohibits the use of alcohol in any form whatsoever, the accused caused death and injuries to several persons by supplying spurious country-made liquor. Taking a serious view of the matter, the complexity of the crime, the role played by the accused persons as well as the number of casualties, it is not a fit case for grant of bail. (Paras 25 to 28)

Ravindrasingh v. *State of Gujarat*, Criminal Misc. Application No. 1281 of 2012, decided on 10-2-2012 (Guj), *affirmed*

Jayesh Hiralal Thakkar v. *State of Gujarat*, Criminal Misc. Application No. 12384 of 2011, decided on 29-9-2011 (Guj), *reversed*

K-D/51450/SR

Advocates who appeared in this case :

K.T.S. Tulsi and Uday U. Lalit, Senior Advocates (Amit Sharma, Ms Hemantika Wahi, Ms Pinky Behra, Ms Nandini Gupta, Yogesh Ravani, Shiv Mangal Singh, Ms Abhinandini Sharma and T. Mahipal, Advocates) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. Criminal Misc. Application No. 1281 of 2012, decided on 10-2-2012 (Guj), *Ravindrasingh* v. *State of Gujarat* 448*c*, 449*c-d*
2. Criminal Misc. Application No. 12384 of 2011, decided on 29-9-2011 (Guj), *Jayesh Hiralal Thakkar* v. *State of Gujarat* **(reversed)** 448*d-e*, 451*a-b*, 454*c-d*

The Judgment of the Court was delivered by

P. SATHASIVAM, J.— Leave granted in all the special leave petitions. Ravindersingh alias Ravi Pavar has preferred appeal arising out of SLP (Crl.) No. 3334 of 2012 before this Court against the final judgment and order dated 10-2-2012 passed by the High Court of Gujarat at Ahmedabad in *Ravindrasingh* v. *State of Gujarat*[1] whereby the High Court dismissed his application filed under Section 439 of the Code of Criminal Procedure, 1973 (in short "the Code") seeking regular bail in CR No. 252 of 2009 registered with Odhav Police Station, Ahmedabad for the offences punishable under Sections 302, 307, 328, 272, 273, 201, 109, 114, 120-B of the Penal Code, 1860 ("IPC", for short) and Sections 65(*a*), (*b*), (*c*), (*d*), (*e*), 66(1)(*b*), 67-1A, 72, 75, 81 and 83 of the Bombay Prohibition Act, 1949.

2. The State of Gujarat, aggrieved by the judgment and order dated 29-9-2011, passed by the High Court in *Jayesh Hiralal Thakkar* v. *State of Gujarat*[2] whereby the High Court enlarged one Jayesh Hiralal Thakkar (A-2) on bail in connection with CR No. 161 of 2009 registered with Kagdapith Police Station, Ahmedabad for the offences punishable under Sections 120-B, 302, 307, 328, 272, 273, 201, 217, 221, 109 and 114 IPC and Sections 65(*a*), (*b*), (*c*), (*d*), (*e*), 66(1)(*b*), 68, 72, 75, 81 and 83 of the Bombay Prohibition Act, 1949 and CR No. 252 of 2009 registered with Odhav Police Station, Ahmedabad for the very same offences, has filed the other two appeals arising out of Special Leave Petitions Nos. 4026 and 4027 of 2012.

3. Since the subject-matter of all the three appeals is one and the same, they are being disposed of by this common judgment.

SLP (Criminal) No. 3334 of 2012

4. The case relates to the hooch tragedy which resulted into the death of 147 persons and serious physical injuries to 205 others after consuming spurious country-made liquor consisting poisonous chemical methyl alcohol in different parts of Ahmedabad City, Gujarat, in July 2009 for which case has been registered against several accused persons under various sections of IPC and the Bombay Prevention Act, 1949 with Odhav and Kagdapith Police Stations vide CRs Nos. 252 and 161 of 2009 respectively.

1 Criminal Misc. Application No. 1281 of 2012, decided on 10-2-2012 (Guj)

2 Criminal Misc. Application No. 12384 of 2011, decided on 29-9-2011 (Guj)

5. The charge framed against Ravindersingh alias Ravi Pavar (Accused 11) is that he was a party to a meeting held with other accused persons prior to the date of the incident wherein they conspired to manufacture and distribute country-made liquor consisting poisonous chemical methyl alcohol, in order to gain financial benefit, by selling the same due to its low cost. The charge-sheet further proceeds that as a part of criminal conspiracy, he along with other accused, agreed to manufacture and distribute/sell such liquor to suppliers in spite of the knowledge that on consumption of the same, it can cause death or severe physical damage/injury to the consumer.

6. When the appellant-accused moved an application under Section 439 of the Code in connection with CR No. 252 of 2009, before the High Court, on going into the specific allegations against him, his role and involvement in the hooch tragedy which resulted into more than 147 deaths in the city of Ahmedabad and after satisfying prima facie case as well as considering the gravity of the crime punishable under Section 302, etc. the High Court rejected[1] his third successive bail application.

7. Mr K.T.S. Tulsi, learned Senior Counsel for the appellant, after taking us through the allegations in the charge-sheet and connected materials submitted that in the absence of any material that the appellant had any knowledge that illicit liquor was poisonous or that he had any intention to cause the death of the deceased persons at the most it is the case under Section 304 IPC and not under Section 302 IPC. He further submitted that the High Court failed to consider that the co-accused, alleged to be having similar role as that of the appellant as well as those accused allegedly having graver role, have already been granted bail and, therefore, on the ground of parity also, the appellant-accused deserves to be enlarged on bail on the same terms and conditions.

8. Ms Hemantika Wahi, learned counsel appearing for the State, by taking us through the allegations mentioned in the charge-sheet, statement of witnesses and the gravity of the offence submitted that in view of the appellant's association with the main accused, namely, Vinod alias Dagri (A-1) and also taking note of the fact that he is a "habitual offender" involved in many similar offences, it is not desirable to enlarge him on bail and according to her, the High Court was fully justified in dismissing his bail application.

9. We have carefully considered the allegations, materials placed, gravity of the offence, etc. in detail.

10. Normally, while considering the application for bail, it is not necessary for the court to assess the materials placed by either side, to discuss and arrive at a definite conclusion. However, taking note of the gravity of the offence, we have no other option except to deal with those aspects confining to the disposal of the bail application.

1 *Ravindrasingh* v. *State of Gujarat*, Criminal Misc. Application No. 1281 of 2012, decided on 10-2-2012 (Guj)

11. The charge-sheet (Annexure P-3) filed along with the special leave petition gives the details of involvement/role played by the accused persons. The role of the present appellant (A-11) reads as under: *a*

> "Accused 11 Ravindersingh alias Ravi s/o Jayramsingh Pavar mentioned in Column 1 who was doing the business of country and foreign liquor with his partners, Column 1 Accused 29 and 30 and having the criminal history and remaining in contact with Accused 1 for obtaining cheap country liquor having methyl alcohol made the partnership with Accused 1 and obtained county liquor having methyl *b* alcohol from Accused 1 and in spite of being aware of the fact that it caused physical harm which cause caused death of the persons brought it from Vanthvadi Village on 6-7-2009 through his persons, Accused 32 and 33 and sold it on cheap rates to Column 1 Accused 27, 28 and 31 and Column 2 Accused 1 and 2 and also selling it at his own liquor stand place situated in Bapunagar area behind General Hospital through his *c* persons and on drinking caused the death of the persons and also causing the serious injuries to the people fulfilled the criminal conspiracy and on 6-7-2009 lots of people died in Ahmedabad City drinking the poisonous liquor and admitted into the hospitals and in spite of knowing the said facts continued to sell the poisonous country liquor, committed the serious nature offence and thereafter disposed off the evidence had *d* disposed off the chemicalised poisonous liquor which is in his possession."

12. Mr Tulsi, learned Senior Counsel for the appellant-accused has contended that the only allegation against him is that he has simply sold the country-made liquor and prima facie no case is being made out against him for manufacturing spurious liquor and, therefore, he cannot be charged under *e* Sections 302, 307 and 328 IPC. On going through the entire materials, we are unable to accept the same.

13. The materials placed by the prosecution show that the appellant was not just a supplier of alcohol but was one of the main conspirators along with Vinod alias Dagri (A-1) in the manufacture of spurious alcohol along with other co-accused. It is the case of the prosecution as established by the *f* statement of witnesses that the appellant, along with main accused, with a view to earn easy money, hatched a conspiracy for manufacturing spurious alcohol from methyl alcohol, very well knowing that it is poisonous and can cause death or severe physical damage/injury on consumption. The statements of various persons relied on by the prosecution support the above stand. The investigation further revealed that on the next day of the hooch *g* tragedy in July 2009, the appellant and his two associates had gone to one Farzana Banu to sell the huge stock of spurious liquor, since the premises of the appellant was raided by the police.

14. A perusal of the reasoning of the High Court as well as the materials placed by the prosecution prima facie establish that the appellant was not a mere supplier of spurious alcohol but he was involved in the criminal *h* conspiracy of manufacturing spurious liquor along with the main co-accused

Vinod alias Dagri (A-1) and selling the same at various places through his men. The statements of various persons including one Dahiben support the greater role played by the appellant-accused.

15. Mr Tulsi, learned Senior Counsel has also claimed parity with the co-accused Jayesh Hiralal Thakker (A-2), who has been granted bail by the High Court, vide order dated 29-9-2011[2], in the similar offence and claimed similar order in respect of the present appellant Ravindersingh alias Ravi Pavar. He also brought to our notice that bail has been granted to one Minaben (A-27) on 20-7-2011 and the State has not filed any special leave petition before this Court. As far as grant of bail to Jayesh Hiralal Thakker is concerned, the State has filed Special Leave Petitions (Criminal) Nos. 4026 and 4027 of 2012, which we are going to consider after the conclusion of the present appeal. Hence, the appellant cannot claim parity with the co-accused Jayesh Hiralal Thakker. Insofar as the order granting bail to A-27 is concerned, we were taken through the reasons appended to her bail application and also of the fact that she being a lady, we are of the view that the appellant cannot claim parity with the said accused in claiming bail.

16. Apart from the above materials, the learned counsel for the State has also brought to our notice that the appellant is a "habitual offender" and is facing more than 20 cases including similar cases under the various provisions of IPC and the Bombay Prohibition Act, 1949. It is further pointed out that there is every likelihood that if the appellant-accused is released on bail, he would threaten the witnesses and again indulge in sale of spurious liquor.

17. It is a well-known fact that methanol is a poisonous substance and by adding the same while manufacturing spurious alcohol, it can have devastating results and can cause death or severe damage to health or injuries to anyone who consumes it. Further, such type of offences, as in the case on hand, are against the society at large and who commit the same do not deserve any leniency, particularly, in the State of Gujarat where complete prohibition is being followed. Merely because the appellant-accused had spent three years as an undertrial prisoner, taking note of the gravity of the offence, he is not entitled for bail. As observed earlier, in view of the gravity of the offence, death of a number of persons, injury to several others and the impact on the society as a whole, we hold that the appellant is not at all entitled to bail at this stage and the High Court has rightly denied his application for bail, consequently, the appeal of the accused fails and the same is dismissed.

Appeals filed by the State

SLPs (Criminal) Nos. 4026 and 4027 of 2012

18. The abovementioned appeals have been preferred by the State wherein the respondent Jayesh Hiralal Thakker (A-2) is an accused in CR

2 *Jayesh Hiralal Thakkar* v. *State of Gujarat*, Criminal Misc. Application No. 12384 of 2011, decided on 29-9-2011 (Guj)

No. 161 of 2009 registered with Kagdapith Police Station, Ahmedabad and CR No. 252 of 2009 registered with Odhav Police Station, Ahmedabad and in both the cases, he has been charged under various sections of IPC and the Bombay Prohibition Act, 1949, as mentioned earlier and was granted bail by the High Court.

19. The respondent is Accused 2 in CR No. 252 of 2009 and CR No. 161 of 2009 registered at Odhav and Kagdapith Police Stations respectively wherein total of 147 persons died and 205 persons were seriously injured after consuming spurious liquor prepared from chemicals like ethanol and methanol, which were supplied by the respondent-accused, who was trading in those hazardous chemicals, to Vinod alias Dagri (A-1) for the preparation of country-made liquor. It is highlighted by the prosecution that during the course of investigation, it was revealed that the respondent (A-2) is a prime conspirator and had indulged in supplying methyl alcohol for manufacturing country-made liquor. According to the prosecution, the statements recorded from seven witnesses reveal about the involvement of the respondent. It is also projected by the prosecution that one of the witnesses stated that near the petrol pump at Mogar, there is a godown and two barrels were put in his vehicle to be delivered to A-1, who was the mastermind in preparation of country-made liquor out of methyl alcohol, supplied by A-2 at Village Vanthwadi. It is also their case that the respondent (A-2) had purchased about 500-600 plastic and iron barrels as per his requirement and again in the month of July, he purchased 70 more barrels. The prosecution has also projected that A-2 had sufficient knowledge about the properties of methyl alcohol and that it is poisonous to use in the preparation of country liquor. Despite this, the respondent used to obtain the same illegally from the tankers coming from Kutch and Mumbai through the absconding co-accused and kept the same in his custody without permit and supplied it to Vinod alias Dagri (A-1) for the preparation of liquor. All these particulars form part of the charge-sheet filed on 5-9-2009.

20. The specific allegations in the charge-sheet about the respondent (A-2) are as under:

> "Accused 2 Jayesh Hiralal Thakkar stated in Column 1 having the criminal antecedents who is running illegal business of chemicals at the godown situated at the petrol pump located at Village Mogar, in company of the Accused 3 named in Column 1 and through Accused 3, 4 and 5 mentioned in Column 2 had illegally obtained the poisonous methyl alcohol from the tankers coming from Bombay and Kutch, possessed the same without any pass or permit, and in spite of having knowledge regarding poisonousness of methyl alcohol and that it is to be used in preparing liquor Accused 4, 5, 6, 7 and 8 had sold the poisonous methyl alcohol to Accused 1 for manufacturing degenerated poisonous country liquor and thereby have played active role in the conspiracy with the view to earn monetary profit and after the declaration of hooch tragedy

disposed of the methyl alcohol within their possession and had gone on run and thereby have committed serious offence."

21. The information furnished by the prosecution clearly shows that in a State having complete prohibition policy, the supply of raw material for liquor, its production and distribution are illegal. It is also demonstrated that the respondent (A-2) has illegally supplied poisonous chemicals like ethyl and methyl alcohol to A-1 for the manufacture of country-made liquor. It is not in dispute that if anyone consumes liquor manufactured out of ethyl/methyl alcohol, it would have a very adverse effect on the body and can cause death or bodily injury as is likely to cause death. In spite of the abundant materials placed by the prosecution and even after taking note of the fact that the samples sent to the forensic science laboratory (FSL) for analysis confirmed the presence of methanol and ethanol and also of the fact that A-2 has supplied those materials to A-1, the claim that he had no knowledge about all these aspects is unacceptable. Though the learned Single Judge of the High Court perused and verified the expert opinion of the medical officer, the FSL report and noted that poisonous chemical is found, after casually finding that there is no "meeting of mind" and "agreement for criminal conspiracy" accepted the case of A-2 and enlarged him on bail.

22. The other reason given by the High Court is that the whole transaction in the said business of A-2 was looked after by his nephew and in view of the fact that he has already disposed of the petrol pump, concluded that prima facie ingredients of Sections 299 and 300(4) IPC would not attract and enlarged him on bail after imposing certain conditions.

23. We have already noted that because of the conduct of A-2 in supplying ethanol and methanol to A-1 for preparation of spurious liquor, several casualties and injuries were resulted and in view of the acceptable materials, we are unable to accept the reasoning of the High Court. We are constrained to observe that the High Court, in a casual way, has concluded that since his business was looked after by his nephew and he also disposed of his petrol pump, A-2 cannot be blamed, which according to us, is not a valid ground for enlarging him on bail.

24. In Para 5 of the rejoinder-affidavit, the State has highlighted that A-2 is a "habitual offender" and there are 22 cases pending against him in various police stations. It is also mentioned in the counter-affidavit that during the period while he was granted temporary bail by the High Court, he indulged in an offence of theft and a case was registered against him vide ICR No. 92 of 2011 under Section 379 IPC by Vasad Police Station for which he was arrested on 10-8-2011 and later enlarged on bail. It is also brought to our notice that the respondent (A-2), while on regular bail, was arrested on 13-9-2012 in Vadodara City in connection with Javaharnagar Police Station crime registered vide ICR No. 94 of 2012 under Sections 407, 408 and 120-B and later on he was released on bail.

25. Taking note of all these aspects, his antecedents, the gravity and nature of offence, loss of human lives, the impact on the social fabric of the society and his continuous involvement in criminal activities while on bail, we are satisfied that the respondent (A-2) does not deserve to continue to remain on bail.

26. In a State having prohibition policy, supply of raw material for liquor, its production and distribution are illegal and A-2 has supplied those poisonous chemicals such as ethyl and methyl alcohol to A-1 for the manufacture of spurious country-made liquor. It is a matter of common knowledge that if anyone consumes liquor manufactured out of ethyl/methyl alcohol, it would have very adverse effect on the body which can cause death or bodily injury as is likely to cause death.

27. Under these circumstances, considering the nature of the offence and the manner in which A-2 supplied those poisonous chemicals despite having full knowledge about its consequences, we are satisfied that the respondent (A-2) does not deserve liberty of remaining on bail. Accordingly, the judgment and order dated 29-9-2011 passed by the High Court in *Jayesh Hiralal Thakkar* v. *State of Gujarat*[2] is set aside. The respondent (A-2) is directed to surrender before the court concerned within a period of two weeks from today, failing which, necessary steps be taken for his arrest in order to put him in jail.

28. It is unfortunate to note that in a State like Gujarat, which strictly prohibits the use of alcohol in any form whatsoever, the accused caused death and injuries to several persons by supplying spurious country-made liquor. Taking a serious view of the matter, the complexity of the crime, the role played by the accused persons as well as the number of casualties, we are of the view that it is not a fit case for grant of bail.

29. In the light of the above discussion, the appeal of the accused Ravinder Singh alias Ravi Pavar is dismissed. We direct the trial Judge to proceed with the trial on day-to-day basis avoiding unnecessary adjournments. It is made clear that if the trial continues beyond one year from today, they are free to file fresh application before the trial court. In that event, it is for the court concerned to dispose of the bail application on merits. It is made clear that whatever observations made above are only for the purpose of disposal of the bail application. It is for the trial court to decide on the basis of the materials placed before it in accordance with law.

30. The appeal of Ravindersingh alias Ravi Pavar (A-11) is dismissed and the appeals filed by the State are allowed.

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2 Criminal Misc. Application No. 12384 of 2011, decided on 29-9-2011 (Guj)

(2012) 7 Supreme Court Cases 719

(Record of Proceedings)

(BEFORE T.S. THAKUR AND GYAN SUDHA MISRA, JJ.)

UNION OF INDIA .. Petitioner;

Versus

MOHANLAL AND ANOTHER .. Respondents.

SLP (Crl.) No. 8450 of 2010†, decided on April 11, 2012

Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 52-A and 8/18(b) r/w S. 29 — Handling and disposal of hazardous physical substances i.e. seized narcotic drugs and psychotropic substances under (there being a danger of re-circulation of seized contraband into system) — Procedure prescribed by Standing Order No. 1 of 1989 dt. 13-6-1989 — Whether being complied with by investigating authorities throughout the country as specifically directed by Government of India Circular dt. 23-2-2011 — Such doubts arising because in present case seizure not being proved as prosecution failing to produce seized contraband or prove the destruction of the seized contraband as per the prescribed procedure — High Court therefore, reversing conviction and sentence imposed by trial court for offences under Ss. 8/18(b) r/w S. 29 — Considering hazardous nature of physical substances in such cases and danger of its being re-circulated, amicus curiae appointed to assist Court in this regard by referring to materials, weak links in chain of procedure of search, disposal or destruction of narcotics and for suggesting remedial steps, if any, needed to plug the holes

Mohanlal Patidar v. *Union of India*, Criminal Appeal No. 193 of 2008, order dated 5-1-2010 (MP), *referred to*

Standing Order 1 of 1989, dated 13-6-1989; Circular dated 23-2-2011, issued by Ministry of Finance, Department of Revenue, Government of India, *referred to*

[**Ed.**: In *Noor Aga* v. *State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748, the Supreme Court had expressed concern over non-adherence to procedures prescribed by Standing Order No. 1 of 1989 dated 13-6-1989. The relevant paragraphs of the said case in this regard i.e. paras 87, 91, 92, 100, 119(2), 119(3) may be referred to as well.]

SS-D/50097/CR

Advocates who appeared in this case :

Anoop G. Chaudhary, Senior Advocate (Ms Sushma Manchanda, Prabhat Kumar Rai and Shreekant N. Terdal, Advocates) for the Petitioner;

Sunil Verma, Pradeep Kr. Kaushik and Sanjay Sharawat, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. Criminal Appeal No. 193 of 2008, order dated 5-1-2010 (MP), *Mohanlal Patidar* v. *Union of India* 720*a*

† From the Judgment and Order dated 5-1-2010 in Crl. A. No. 193 of 2008, of the High Court of Madhya Pradesh at Indore

ORDER

1. Leave granted. This appeal arises out of an order[1] passed by the High Court of Judicature of Madhya Pradesh, Indore acquitting the respondents of an offence punishable under Sections 8/18(*b*) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The trial court had, while convicting the respondents, sentenced them to undergo imprisonment for a period of 10 years each and besides payment of a fine of Rs 1,00,000 each. In default of payment they were required to undergo further rigorous imprisonment for a period of one year each.

2. In appeal, the High Court has reversed the conviction and acquitted the respondents primarily on the ground that there was no evidence to prove the destruction of the seized opium as per the procedure prescribed under Section 52-A of the Act before the conclusion of the trial. The High Court also held that since the seized contraband had not been produced before the trial court, the seizure itself was not proved by the prosecution.

3. When the matter came up before us, our attention was drawn by Mr Anoop G. Chaudhary, learned Senior Counsel for the appellants to Standing Order No. 1 of 1989 dated 13-6-1989 that prescribed the procedure for sampling, seizure, safe keeping, disposal of the seized contraband. Mr Chaudhary, submitted that the procedure prescribed by Standing Order 1 of 1989 is being followed throughout the country and that the Ministry of Finance, Department of Revenue, Government of India has in terms of a Circular dated 23-2-2011 impressed upon the Chief Secretary to the police heads concerned to ensure that the instructions given and the procedure prescribed in the Standing Order is strictly adhered to.

4. We have been taken through the contents of the Standing Order also which prescribes the procedure for search, disposal and destruction of the seized contraband. We are not, however, very sure whether the said procedure is being followed as it ought to be. The pilferage of the contraband and its return to the marketplace for circulation is, in our opinion, a major hazard against which the system must guard at all cost if necessary by making suitable changes wherever the same are called for. Before any exercise to that end is undertaken it is necessary to examine whether the procedure is being followed in letter and spirit.

5. For that purpose we request Mr Ajit Kumar Sinha, learned Senior Counsel to assist this Court as amicus curiae and identify if possible, by reference to the Standing Order and the available material, the weak links in the chain of the procedure of search, disposal or destruction of the narcotics and the remedial steps, if any, needed to plug the holes. To that extent we are inclined to enlarge the scope of this appeal for we are of the view that the hazardous nature of the substance seized in large quantities all over the

1 *Mohanlal Patidar* v. *Union of India*, Criminal Appeal No. 193 of 2008, order dated 5-1-2010 (MP)

country must not be let loose on the society because of human failure or failure of the system that is purported to have been put in place.

a **6.** The Registry shall furnish to Mr Sinha a complete set of the paper books with all the annexures including the Standing Order and the Circular dated 23-2-2011, a copy whereof has been filed by Mr Chaudhary in the course of the hearing today. The appeal shall then be listed for further hearing on 2-5-2012. A copy of the order may be furnished to Mr Chaudhary and also to Mr Ajit Kumar Sinha.

b Court Masters

(2011) 15 Supreme Court Cases 176

(BEFORE H.S. BEDI AND CHANDRAMAULI KR. PRASAD, JJ.)

DAULAT RAM AND ANOTHER .. Appellants;

Versus

CRIME BRANCH (NARCOTICS)
MANDSAUR, MADHYA PRADESH .. Respondent.

Criminal Appeal No. 259 of 2006†, decided on January 27, 2011

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 8 r/w S. 18 — Licence to grow opium — Breach of terms of licence — Conviction confirmed — Three kg of opium each recovered from pits on the pointing out of appellants — Appellants gave their confessions respectively, stating therein that they had withheld opium to sell it in the market in an unauthorised manner — Sentenced to 10 yrs' RI and a fine of Rs 1 lakh — High Court dismissed the appeal — Appellants contended that opium which was produced had to be reported to Lambardar for final accounting — Held, an overall accounting of opium has to be made after notification has been issued identifying percentage of opium that should be in the hands of a producer — There is an obligation under R. 13 of 1985 Rules to make a declaration to Lambardar as to the quantity of opium produced everyday — No evidence or suggestion to show that opium which had been recovered had been declared or accounted for before Lambardar — The fact that it had been buried three feet underground and far away from the residence of appellants clearly shows that the intention to stash away the opium for sale in an authorised way — Narcotic Drugs and Psychotropic Substances Rules, 1985, R. 13** **(Paras 7 and 8)**

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 8 r/w S. 18 — Appreciation of evidence — Independent witness — Opium recovered from 3 ft underground pit — Evidence of official witnesses**

† From the Judgment and Order dated 20-9-2004 of the High Court of Madhya Pradesh Indore Bench, Indore in Crl. A. No. 259 of 2001

supported by recovery of opium and also by confessions made by appellants — Independent witnesses not supporting prosecution, held immaterial (Para 9)

Bheru Lal v. *State of Rajasthan*, (2003) 2 Raj LW 1056 (Raj), *distinguished on facts*

J-M/47324/SR

Advocates who appeared in this case :
Ashok Kr. Sharma and Avinash Kr. Jain, Advocates, for the Appellants;
J.S. Attri, Senior Advocate (Ms Sadhana Sandhu, Ms Rashmi and Ms Sushma Suri, Advocates) for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2003) 2 Raj LW 1056 (Raj), *Bheru Lal* v. *State of Rajasthan* 178*d*, 178*d-e*

ORDER

1. This appeal arises out of the following facts: the appellants herein, both brothers, Daulat Ram and Mangilal, sons of Hurdabai, were living with their mother at Village Dorana. Hurdabai had been issued a licence to grow opium in her land and the appellants were looking after the cultivation on her behalf.

2. On 5-4-1997, reports were received in the Narcotics Office that Hurdabai was not depositing the entire yield of opium with the Lambardar. The ASI Crime Branch (Narcotics), Balaram, PW 2, and the District Opium Officer, Satyaveer Singh Choudhary, PW 6, along with other members of a raiding party reached Village Dorana at 2.00 p.m., and on an inquiry it was ascertained that the allegations appeared to be correct. The appellants were, accordingly, apprehended and interrogated by the ASI and during interrogation Daulat Ram admitted that some of the undeclared opium had been hidden in his field. Thereafter Mangilal, the appellant was also interrogated and he made a similar statement.

3. The raiding party then visited the field of Daulat Ram and after digging the pit at the place pointed out by him, took out a polythene bag which when weighed was found to contain 3 kg of opium. Similarly, Mangilal took the officers to the place which he had identified and another 3 kg of opium was recovered from another pit. The appellants also gave their confessions Exts. P-16 and P-17 respectively, stating therein that they had withheld the opium to sell it in the market in an unauthorised manner.

4. On the completion of the investigation, the appellants were charged under Section 8 read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act"). The trial court relying on the evidence of PW 1 Bhanwarilal Patwari who had identified the fields as belonging to Hurdabai and in particular the evidence of PW 2, PW 5 and PW 6 and also on the confessions made by the accused held that the case against them had been proved beyond doubt. The appellants were each sentenced to 10 years' rigorous imprisonment and a fine of Rs 1 lakh with a default sentence. An appeal taken to the High Court too was dismissed.

5. Before us, today, Mr Ashok Kumar Sharma, the learned amicus curiae for the appellants, has raised one basic argument. He has submitted that as per the Act and Rule 13 of the Narcotic Drugs and Psychotropic Substances

Rules, 1985, framed thereunder the opium which was produced had to be reported to the Lambardar and it was only after the final notification had been issued and the production had been quantified that the final accounting had to be made and not at any stage prior thereto. It has also been pointed out that the two independent witnesses having not supported the prosecution there was no independent evidence against the appellants.

6. Mr J.S. Attri, the learned Senior Counsel for the respondents has, however, supported the judgment of the courts below.

7. We have considered the arguments advanced by the learned counsel. It is true, as contended by Mr Sharma, that an overall accounting of the opium has to be made after the notification has been issued identifying the percentage of opium that should be in the hands of a producer. However, there is an obligation under Rule 13 of the 1985 Rules to make a declaration to the Lambardar as to the quantity of opium produced everyday. There is no evidence or suggestion to show that the opium which had been recovered had been declared or accounted for before the Lambardar. On the contrary the fact that it had been buried three feet underground and far away from the residence of the appellants clearly shows that the intention was to stash away the opium for sale in an authorised way.

8. Mr Sharma has, however, cited *Bheru Lal* v. *State of Rajasthan*[1] to contend that till the final quantification had been made the opium could not be said to be contraband. We find that some of the conclusions drawn in the cited judgment are too far reaching and basically ignore Rule 13 which requires a day to day accountability before the Lambardar. On facts, it is also apparent that the opium in *Bheru Lal case*[1] had been recovered from the residential house of the accused.

9. In the case before us, as per the prosecution story, the opium had been recovered from 3 ft underground. It is equally true that no independent witness has supported the prosecution story. The evidence of the official witnesses is, however, supported by the recovery of the opium and also by the confessions made by the appellants.

10. The appeal is, accordingly, dismissed.

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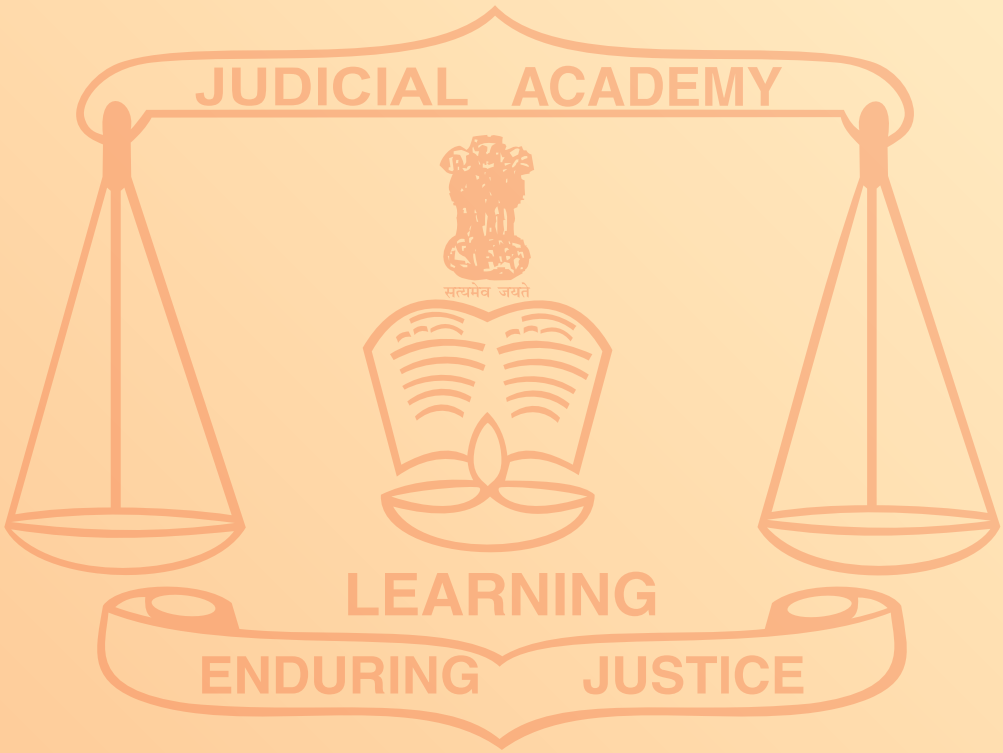

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