

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on:23rd October, 2009*
Judgment Delivered on:5th November, 2009

CRL.APPEAL 694/2005

VIMAL KUMAR BAHL Appellant

Through: Mr. K.K.Sud, Sr. Advocate with
Ms. Nandita, Advocate &
Mr. Sunil Mehta, Advocate.

versus

DRI Respondent

Through: Mr.Satish Aggarwala,
with Mr. Shirish Aggarwal,
Advocates.

WITH

CRL.APPEAL 779/2005 &
Crl.M.A.Nos.11243/2006 & 4196/2008

SURINDER RAJ SINGH Appellant

Through: Mr. K.K.Sud, Sr. Advocate with
Ms. Nandita, Advocate & Mr.Sunil
Mehta, Advocate.

Versus

DRI Respondent.

Through: Mr. Satish Aggarwala,
with Mr. Shirish Aggarwal,
Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. On 17.4.2001 at about 9.30 AM pursuant to a secret information dated 16.04.2001 Ex. PW12/A received by A. K. Prasad PW-12 the officers of the Directorate of Revenue Intelligence, Headquarters, New Delhi (hereinafter referred to as the DRI) intercepted two cars bearing registration No.DL-3CQ-4785, a silver grey coloured Matiz car and DL-9C-3785 a white coloured Maruti car at the National Highway No.8, opposite Shiv Temple, Delhi-Gurgaon Road, Delhi. The occupant of the Maruti car introduced himself as Vimal Kumar Bahl and the occupant of the Matiz car introduced himself as Surender Raj Singh. The said cars were being driven by the said respective persons.

2. Investigative team was headed by P.R.Lakra PW-4 and joined by D.P.Saxena PW-2 and Sudhir Puthran PW-3. The DRI officials informed the apprehended persons that they were to be searched and if they so wished they have a right of getting their search effected either in the presence of a gazetted officer or a Magistrate. Notice under Section 50 of the Narcotic Drug and Psychotropic Substance Act, 1985 (hereinafter referred to as the NDPS Act) was served upon each of the two apprehended persons. The said notice served upon Vimal Kumar Bahl is Ex.PW-2/B and that served upon Surinder Raj Singh is Ex.PW-2/C. Both the persons declined this request and their endorsements appear at point B-1 to B-1 and C-1 to C-1 of Ex.PW-2/B and Ex.PW-2/C

respectively. These documents were witnessed by the Panchas i.e. PW Ashok Kumar and PW Rajesh Kumar.

3. The white Maruti vehicle was rummaged first; from the dickey of the said vehicle one blue coloured check canvas bag was recovered; on opening the same it was found to contain 17 packets containing a white substance. The registration certificate of the vehicle evidencing the ownership of Rajesh Pandoh was also seized. Nothing incriminating was recovered from the silver grey Matiz car. Registration certificate of the vehicle evidenced its ownership in the name of Urmil Guaba wife of Surinder Raj Singh was seized.

4. Personal search of both the apprehended persons was conducted vide memos Ex. PW2/F and Ex. PW2/G.

5. The blue coloured check canvas bag was examined which was found to contain 17 packets in all. They were marked as X-1 to X-15, Y-1 and Z-1. The field test kit opined that the powder contained in the said packets had tested positive for heroin; the total weight of the packets was 17.504 kgs. Four samples of 10 gms. each were drawn in duplicate from all the 17 packets; this was after mixing the contents of X-1 to X-10 and thereafter the mixing of the contents of X-11 to X-15, Y1 & Z1; remaining contraband as also the seized samples were sealed in khaki envelopes sealed with the DRI seal no.10 on papers slips affixed on each packet bearing the signatures of the public witnesses, both the accused as also the signatures of the complainant.

6. Panchnama Ex.PW-2/D was drawn running into 13 pages; each page having been signed by the Panch witnesses i.e. Ashok Kumar and Rajesh Kumar as also the complainant D.P.Saxena PW-2 and both the accused persons.

7. Statement of Vimal Kumar Bahl Ex.PW-1/B was recorded under Section 67 of the NDPS Act by Ms.Sanyogita Mishra PW-1. This statement is in the handwriting of Vimal Kumar Bahl and is running into seven pages. Statement of Surinder Raj Singh Ex. PW3/B was also recorded under Section 67 of the NDPS Act by Sudhir Puthran PW3 and this statement is also in the handwriting of Surinder Raj Singh running into six pages.

8. Accused persons were arrested at 23.50 hours on 17.4.2001 vide arrest memos Ex.PW1/G & Ex.PW1/H and the grounds of arrest were explained to them by PW-2. Compliance of Section 57 of the NDPS Act i.e. the report of the arrest and seizure by PW-2 to his senior officer was made vide document Ex.PW-1/G.

9. Mahavir Prasad PW-10 was the incharge of the godown of valuables at the New Customs House and the trunk containing the contraband was kept in his custody on 18.4.2001; entries in the register in the Valuable Godown are Ex.PW-10/A. The drawn samples were sent through PW-2 and received in the CRCL along with duplicate test memo by Sh. B.L.Jain PW-5 who issued receipt Ex.PW-5/A to the said effect. Narender Kumar PW-8 in his capacity as the Chemical Examiner, Grade-I personally verified the seals of the samples as per the description mentioned on the test memo

Ex.PW-2/K and under his supervision the report Ex.PW-5/B had been prepared testing the drawn samples as positive for heroin/diacetylmorphine i.e. a drug prohibited under the provisions of the NDPS Act.

10. The Maruti vehicle no. DL-9C-3785 was registered in the name of Rajesh Pandoh. Ex.PW-1/K was the letter addressed by B.K.Pandoh, the father of Rajesh Pandoh to PW-1 stating that this vehicle had been sold by his son Rajesh Pandoh to Dheeraj Manchanda PW-6. Ex.PW-6/A was the delivery receipt of this vehicle evidencing that Dheeraj Manchanda had sold this vehicle to one Ashu Malhotra PW-9 resident of D-120 Suraj Vihar, New Delhi, who in turn had lent it to Vimal Kumar Bahl for use.

11. On the basis of the aforementioned evidence which had been collected by the prosecution vide impugned judgment dated 12.8.2005 both the accused persons were held guilty for having committed offences punishable under Section 21 read with Section 29 of the NDPS Act. They were sentenced vide order of sentence dated 23.9.2005. Convict Vimal Kumar Bahl had been sentenced to undergo RI for a period of sixteen years and to pay a fine of Rs.2 lakh; in default of payment of fine to undergo RI for a period of two years. Convict Surinder Raj Singh had been sentenced to undergo RI for a period of 11 years and to pay a fine of Rs.1 lakh; in default of payment of fine to undergo RI for one year.

12. It is this judgment which is the subject matter of the present appeal.

13. On behalf of the accused the following arguments have been addressed:

(i) The Maruti Car no. DL-9C-3785 from the dickey of which the alleged contraband had been recovered was admittedly not in the name of Vimal Kumar Bahl; its registered owner is Rajesh Pandoh and Vimal Kumar Bahl had no connection with the same. Conscious possession of the drug qua Vimal Kumar Bahl has not been proved. Rajesh Pandoh has not come into the witness box. Dheeraj Manchanda PW-6 has stated that he had sold this vehicle to Ashu Malhotra through Pankaj; Pankaj has not been examined; Ashu Malhotra examined as PW-9 has not supported this version of the prosecution and had categorically stated that he had not lent this vehicle to Vimal Kumar Bahl as is the contention of the prosecution; the foundation of the version of the prosecution having been destroyed by this version of PW-9 it is clear that the prosecution has failed to establish that this vehicle from which the contraband had been recovered was in possession of Vimal Kumar Bahl; in the absence of this crucial averment not having been proved, the prosecution has no legs to stand. Identification by PW-9 of the photographs of the A1 are not a substantive evidence in the absence of PW-9 not identifying A1 in Court. For this preposition reliance has been placed upon 2001 SCC 1 138 U.A. Sakoor Sardhana vs. I.O. NCB. Attention has also been drawn to the testimony of I.K.Jatali PW-11, the landlord of B.K.Pandoh who has stated that B.K.Pandoh has left his premises about 8 to 10

years ago i.e. sometime in the year 1994; in these circumstances how the summons could have been served upon B.K.Pandoh by the DRI officials is not explained; Ex.PW-1/K the letter purported to have been written by B.K.Pandoh, the father of Rajesh Pandoh to the DRI officials is a sham document. The delivery receipt Ex.PW-6/A has given the address of Ashu Malhotra as of Suraj Vihar, Ghaziabad, which is different from the address given by Vimal Kumar Bahl in his statement under Section 67 of the NDPS Act; PW-9 Ashu Malhotra has given yet a different address. Occupation of the car by Vimal Kumar Bahl at the relevant time not having been proved, the obvious corollary is that the contraband recovered from this vehicle also cannot be foisted upon Vimal Kumar Bahl.

(ii) Statements under Section 67 of the NDPS Act are valueless; they are to be equated with a disclosure statement of an accused recorded under Section 26 of the Evidence Act and such statements having been made while the accused were in the custody of the police are presumably statements made under the coercion and pressure and have no value in the eyes of law. Reliance has been placed upon 2009 (2) Crimes 171 Union of India vs. Bal Mukand as also upon 2009 (3) Crimes 109 SC Raju Premji vs. Customs as also another judgment of Supreme Court reported in 2008 (9) Scale 681 Noor Aqa vs. State of Punjab & Anr. It is submitted that in this case the said statements were retracted by the accused persons on the very next day i.e. 18.4.2001 itself and

such a retracted confession is even otherwise valueless. The information collected in the said statements have not been verified; whether any Pakistani national by the name of Haji Aizam exists or not is not known.

(iii) Section 42 of the NDPS Act has not been complied with. The complaint had been filed on 4.7.2001; admittedly, along with the complaint the document Ex.PW-12/A the purported secret information had not been filed. On 5.12.2002 an application had been filed on behalf of the accused wherein it had been stated that there had been a non-compliance of the Section 42 of the NDPS Act as no such document purporting to be a secret information had been filed along with the complaint; the subsequent permission sought by the department to file this document on record was clearly mala fide. This document is fabricated and prepared as an afterthought. It was only on 7.1.2002 that this document had been permitted to be taken on record i.e. even after the date of the framing of charge. Attention has been drawn to the contents of Ex.PW-12/A. Admittedly, Sh.P.K.Mishra who had received this secret information has not been examined; he is the immediate superior of PW-12; it is submitted that on the second page of the document it has been mentioned that the secret intelligence was to the effect that Vimal Kumar Bahl would be handing over 17 kgs. heroin to Surinder Raj Singh at about 9 AM opposite Shiv Murti Temple; how this information could have been known on 16.4.2001 is not explained

as in the statements of the accused recorded under Section 67 of the NDPS Act Ex.PW-1/B and Ex.PW-3/B, both the accused persons have stated that in the course of their conversation on the way on 17.4.2001, Vimal Kumar Bahl had instructed Surinder Raj Singh to meet him at the Shiv Murti Temple; this information could not have been possibly known one day prior i.e. on 16.4.2001. This by itself clearly establishes that this document is a sham document.

(iv) There has been no compliance of the mandate of Section 50 of the NDPS Act; neither of the two documents i.e. Ex.PW-2/B and Ex.PW-2/C have made a reference to the word 'right' which is the essential ingredient required to be explained to the accused; in the absence of which the service of these notices would be an empty formality.

(v) The requirements of Section 57 of the NDPS Act have not been complied with. Attention has been drawn to Ex.PW-1/G where the information recorded by PW-2 has been forwarded to PW-1; it is submitted that Section 57 speaks of the particulars of the arrest and seizure to be given to the immediate official superior; PW-1 is not the immediate official superior of PW-2; non-compliance of this provision of law also vitiates the trial.

(vi) The standing instructions 1/88 of the DRI department containing the procedural safeguards to be followed for a search and seizure effected under the provisions of the NDPS Act have not been followed. The test memos are to be prepared in triplicate; along with a forwarding letter; PW-4 has stated that there were

two test memos which had been prepared; PW-5 in his cross-examination has admitted that there was no forwarding letter in this case and only test memos were received; test memos have not been prepared by the IO PW-2; Panchnama is also silent on this score. The documents are typedwritten which is not possible if the same were prepared at the spot; essential safeguards of sampling and seizure not having been followed in true letter and spirit, benefit of doubt has accrued in favour of the accused.

(vii) The burden of proof in a criminal trial is always on the prosecution. Resort cannot be taken to the provisions of the Section 35 and Section 54 of the NDPS Act until and unless the prosecution has discharged its initial burden. In the instant case this has not been done. The trial judge has wrongly in para 57 of the judgment shifted the onus from the prosecution to the defence by holding that the mental state and culpability of the offender can only be known to him for which an adverse presumption has been drawn against the accused.

(viii) There are inherent contradictions in the version of witnesses of the prosecution. Admittedly, the accused persons had been apprehended on the Delhi-Gurgaon Road but for reasons unexplained the search and seizure had been effected at the office i.e. at the ground floor of the Indraprastha Bhawan, I.P.Estate. No reasons are forthcoming as to why and how the investigation was shifted. Admittedly, the office of the DRI is a place which is closely guarded by the DRI officials. The unexplained threat and

pressures on apprehended persons in such a chagrined atmosphere would be much more than in a free atmosphere i.e. on the Gurgaon Highway where the accused persons had purportedly been apprehended; this speaks of the malafides of the department. The car from where the contraband had been recovered had not been produced in court; whether it had a dickey or not could not have been known to the accused; this is prejudicial to the interest of the accused. The key of the vehicle has also not been produced; physical evidence has evaporated.

(ix) The Panch witnesses have not been produced deliberately. This is for the reason that they were non-existent persons, adverse inference for withholding this material evidence has to be drawn against the prosecution; support has been drawn from the provisions of Section 114 (g) of the Indian Evidence Act.

(x) The reasons given by the judge are not only perfunctory but also non-discernable. He has mentioned that written submissions have been filed by the respective parties, but there is no discussion on the same. Attention has been drawn to paras 16, 29-55, 62, 78 and 84 of the impugned judgment.

14. Arguments have been heard. Record has been perused.

15. Possession and recovery of contraband from Maruti Car DL9C 3785:-

The white maruti vehicle bearing no.No.DL-9C-3785 is admittedly registered in the name of Rajesh Pandoh. The registration certificate of this vehicle had been seized from the

dash board of the car. This had triggered off the investigation qua the role of Rajesh Pandoh. PW-2 had issued summons to Rajesh Pandoh. B.K.Pandoh his father vide reply Ex.PW-1/K addressed to PW-1 stated that this vehicle had been sold to Dheeraj Manchanda of B-29, Lajpat Nagar-II, New Delhi on 23.2.2001. Dheeraj Manchanda PW-6 had been summoned in the office of PW-1 vide summons Ex.PW-1/O and his statement under Section 67 of the NDPS Act running into two pages Ex.PW-1/P was recorded. On oath PW-6 had stated that in February, 2001, he had purchased this car from Rajesh Pandoh and in the next month i.e. in March 2001 through Pankaj he had sold it to Ashu. Delivery receipt Ex. PW-6/A evidenced the sale of this vehicle to Ashu Malhotra through Pankaj and signatures of Pankaj at point A have been identified by PW-6.

16. Ashu Malhotra was summoned before Investigating Officer PW-1 through summons Ex.PW-1/H. He had given his statement under Section 67 of the NDPS Act on 25.4.2001 Ex.PW-1/J. Ashu Malhotra has come into witness box as PW-9. On oath he has deposed that he has no concern with the white maruti car; this witness was declared hostile and thereafter Special P.P. was allowed to cross-examine this witness. In his cross-examination PW-9 had denied that he had lent his vehicle to Vimal Kumar Bahl 2-3 days prior to the date of incident i.e. 17.4.2001 as Vimal Kumar Bahl was a family friend of theirs. He, however, admitted that he had given his statement Ex.PW-1/J to PW-1 pursuant to the

summons Ex.PW-1/H which he had admittedly received; he had also admitted his signatures on the two photographs Ex.PW-9/X and Ex.PW-9/Y in token of identification of Vimal Kumar Bahl. On oath he, however, categorically denied that he knows Vinod Kumar Bahl.

17. The vehement argument of the learned defence counsel is outlined on this version of PW-9 wherein he had denied that he had lent his maruti vehicle to Vimal Kumar Bahl; the argument being that admittedly the registered owner of the vehicle is Rajesh Pandoh and Ashu Malhotra denying that he knows Vimal Kumar Bahl or that he had ever lent his vehicle to Vimal Kumar Bahl, the question of Vimal Kumar Bahl being in possession of the vehicle does not arise; the entire evidence on this score has been fabricated. The very foundation of the case having not been established the consequent recovery of the contraband from this vehicle cannot now be foisted upon Vimal Kumar Bahl.

18. Record of the case does not support this submission of the learned defence counsel. There is no dispute that Vimal Kumar Bahl is not the registered owner of this vehicle; this is not the case of the prosecution. Prosecution version is that this vehicle was being driven by A-1 on the fateful day i.e. 17.4.2001 when pursuant to the secret information he had been apprehended and the contraband after having been transferred from the Matiz car of A-2 to the maruti vehicle of A-1, witnessed by PW-2, PW-3 and

PW-4, the subsequent recovery of the contraband from this vehicle established the conscious possession of this drug qua A-1.

19. Before adverting to the oral version of the witnesses, the statement of A-1 recorded under Section 67 of the DPS Act would be relevant. This statement Ex. PW-1/B was recorded by PW-1 pursuant to a summon Ex.PW-1/A issued by PW-1. This statement is running into seven pages; on page five it categorically recites,

“White maruti car No.DL-9C-3785 in possession of mine.”

20. The secret information Ex.PW-12/A recorded on 16.4.2001 one day prior to the incident also specifically records that Vimal Kumar Bahl would be coming in a white maruti car DL-9C-3785; the Panchnama Ex.PW-1/D, the first document prepared after the recovery also specifically recites that Vimal Kumar Bahl was driving the said vehicle at the time when the vehicle was intercepted and from the dickey of the said vehicle contraband was recovered.

21. It is relevant to point out that at no stage has A-1 put up any defence that this maruti vehicle was not in his possession on the fateful day; the witnesses to the recovery PW-2. PW-3 and PW-4 have not been cross-examined on this score and no suggestion has also been given to either of them that on 17.4.2001 when A-1 was apprehended with the contraband, this vehicle was not in his possession or he was not driving it. A bald suggestion has been given to PW-1 that the accused was not in possession of the said car and that Ashu Malhotra had not lent it to him. This witness i.e.

PW-1 was not an eye-witness to the recovery; she had only recorded the statement of A-1 under Section 67 of the NDPS Act. The recovery witnesses i.e. the PW-2, PW-3 and PW-4 have not been suggested this defence which is now sought to be propounded.

22. The second stage when the accused is permitted to adduce his defence strategy, in a criminal trial is at the stage when his statement under Section 313 of the Cr.P.C. is recorded. In this entire statement there is no specific averment that this vehicle i.e. the maruti car No.DL-9C-3785 was not in his possession on the fateful day. Question nos.2,3,4 and 5 specifically state that maruti car bearing no. DL-3CQ-4785 was intercepted on the fateful day which was in the occupation of A-1, secreting a narcotic drug and being transported in the said vehicle; at this stage also there is a routine reply given by A-1 that this version is false; no specific averment has been made that this vehicle was not in his possession on the fateful day.

23. The third stage when the accused is permitted to set up his defence is at the stage of evidence of the defence; no evidence has been adduced by A-1.

24. It would be relevant to point out that the entire investigation with relation to the ownership and possession of the vehicle started after the registration certificate of the vehicle was recovered from its dash board. The owner of the vehicle Rajesh Pandoh through his father informed PW-1 that this vehicle had

been sold to Pw-6. PW-6 appeared before the investigating officer and gave his statement corroborating the version of B.K.Pandoh that he had purchased this vehicle from his son Rajesh Pandoh. This version was reiterated on oath by PW-6. PW-6 had led the investigative team to the role of Ashu Malhotra as he was the purchaser and the transferee of this vehicle which is evident from the deposition of PW-6. Ashu Malhotra in the witness box had denied his friendship with A-1 but at the same time he had admitted that he received a summon Ex.PW-1/H. This document recites that PW-1 had summoned him in her office i.e. the officer of the DRI in connection with the seizure of 17.5 Kg of a white substance suspected to be heroin on 17.4.2001 from a white maruti car No.DL-9C-3785. This summon is addressed at HIG Flat-9, Chandan Nagar near Surya Nagar, Ghazaibad, U.P. PW-9 has also admitted that he has given his statement Ex.PW-1/J which is hand written running into two pages before PW-1. In this statement he has admitted that on 16.4.2001 Vimal Kumar Bahl i.e. A-1 had telephonically asked him to lend him his maruti 800 bearing No.DL-9C-3785. He had thereafter left the vehicle in Defence Colony Market in front of Col. Kabab Restaurant. Further details of Vimal Kumar Bahl i.e. about his father's name being O.P. Bahl and his residence at the IIInd Floor Hudson Lane had also been recorded. Statement has been signed at point A by PW-9 and phone No.4623148 had been penned by him. PW-9 has also put his signatures on the two photographs Ex. PW-9/X and Ex.PW-

9/Y in token of the identification of A-1. The telephone number given by PW-9 in this version Ex. PW-1/J which was recorded on 25.4.2001 is the same number which has been given by A-1 in his statement under Section 67 of the NDPS Act wherein on page five he has stated that he knows Ashu Malhotra for the last 17-18 years and his telephone number is 4623148. In his statement A-1 has further stated that father of Ashu Malhotra used to deal in watches in Lajpat Rai Market which has been confirmed by PW-9 in his statement Ex.PW-1/J. Ex.PW-1/B i.e. the statement of A-1 under Section 67 of the NDPS Act was recorded on 17.4.2001 and Ex. PW-1/J was recorded on 25.4.2001; the information contained in both the versions are corroborative of one another. It is also not the case of PW-9 that he had made any complaint to any higher authority that he had been coerced or forced or pressurized to give this statement Ex.PW-1/J.

25. In T. Shanker Prasad v. State of Andhra Pradesh 2004 (1) JCC 200 the Court while dealing with the question of a hostile witness had held that if the judge find that in the process of the testimony of that witnesses, the credit of the witness has not been completely shaken, he may after reading and considering evidence of the said witness accept it in the light of the other evidence on record and relying upon that part of his testimony which he found to be creditworthy and act upon it. It is a well established rule of criminal jurisprudence that for certain purposes

the statement of even a hostile witness can be believed. Gagan Kanojia v. State of Punjab 2007(2) Supreme 23.

26. In the instant case by applying the aforesaid principle, it is clear that PW-9 had subsequently been won over; he has, however, not disputed his version which he had given before the Investigating Officer Ex.PW-1/J which statement was recorded under Section 67 of the NDPS Act. Such a statement is not at par with a statement recorded by the police under Section 161 of the Cr. P.C.; it can be used to lend assurance; version of PW-9 on oath admitting that he had appeared before the Investigating Officer in relation to a case of recovery of 17.5 kg of heroin from a white maruti car bearing No.DL-9C-3785 and details elicited in the said version which information corroborated the information given by A-1 in Ex.PW-1/B and which facts have not been disputed by PW-9; the necessary corollary is that PW-9 in one way or the other is trying to protect A-1 for some ulterior purpose.

27. However, accepting the version of PW-9 as it is, it has been established that PW-9 was known to A-1, he had identified him in the photograph as well; why would Ex.PW-1/K, PW-6, Ex.PW-6/A lie about the ownership of this disputed vehicle; neither had any axe to grind; the investigation qua this vehicle had in fact been set into motion after the recovery of its registration certificate evidencing the vehicle in the name of Rajesh Pandoh.

28. PW-2 D.P. Saxena is the Investigating Officer of this case; PW-3 Sudhir Puthran, the Intelligence Officer; P.R.Lakra PW-4, the

Deputy Director of the DRI; all have witnessed the aforementioned recovery. These witnesses have categorically stated that the maruti car no.DL-9C-3785 was being driven by Vimal Kumar Bahl at the time when it was intercepted on the Delhi-Gurgaon Road; they have further categorically stated that the narcotic drug was transferred from silver grey matiz to the white colour maruti car and it was only thereafter that the occupants of the cars were apprehended by the raiding party. A1 has not been nailed on his photo identification by PW-9 alone; judgment relied upon by defence counsel on this score is of no help to him.

29. PW-7 Chander Bhan, official from Licensing Office, had appeared in the office of DRI pursuant to the summons issued to him. He had produced the entire record of this vehicle; the file of the same has been exhibited in the Court as Ex. PW-7/DA1 to 32 pages. Record has established that this vehicle continues to be registered in the name of Rajesh Pandoh. M.K.Jetali PW-11 was the landlord of B.K.Pandoh father of Rajesh Pandoh; PW-11 has deposed that B.K.Pandoh was a tenant in his premises for about 8 to 10 years and he had left the premises sometimes in the year 1994. He has further stated that relations of B.K.Pandoh and PW-12 were cordial and he used to come to visit him even after leaving the tenanted premises; Ex.PW-11/A addressed to B.K.Pandoh had been handed over by him to B.K.Pandoh. This answers the submission of learned defence counsel that although

B.K.Pandoh had shifted his residence from Vivek Vihar yet he was in touch with PW-11 who had handed over Ex.PW-11/A to him.

30. This vehicle has been exhibited in the court as Ex.P-1; the non-seizure of the key does not in any manner dent the case of the prosecution; it is obvious that without the key the car would not have been set in motion; non seizure of the same is nothing but inconsequential.

31. The aforementioned oral and documentary evidence has established that on the fateful day at 9.30 AM on 17.4.2001 the raiding party had apprehended two vehicles i.e. a maruti car No.DL-9C-3785 and a matiz car bearing No.DL-3CQ-4785; maruti car was in occupation and being driven by Vimal Kumar Bahl; the drug was transferred from matiz car to the dickey of the maruti car and thereafter the recovery of the same was effected. The recovery of this drug contained in 17 packets from dickey of this car and the conscious possession of the same qua A-1 has been fully established.

Section 67:

32. Vimal Kumar Bahl pursuant to the summons Ex.PW-1/A served upon him by PW-1 had given his statement in his own handwriting running into seven pages, under Section 67 of the NDPS Act. The said statement is Ex.PW-1/B. This was recorded on 17.4.2001 by PW-1 bearing his endorsement at point B. Each page of the said statement has been signed at point A by Vimal Kumar Bahl. In her cross-examination PW-1 has stated that this

statement is based exclusively on the disclosure statement made by Vimal Kumar Bahl; she denied the suggestion that this statement was not voluntary. This statement was recorded after 6.00 PM on 17.4.2001.

33. Surinder Raj Singh tendered his statement under Section 67 of the NDPS Act before Sudhir Puthran PW-3 which is Ex. PW-3/B. This is also in the handwriting of Surinder Raj Singh and runs into six pages. Summons had been issued by PW-3 to A-2 vide Ex.PW-3/A. Each page of Ex.PW-3/B has been signed by A-2 at points B as also by PW-3 at points A. On oath PW-3 has stated that at about 6.00 PM PW-4 had asked him to record this statement of A-2.

34. It is, thus, clear that the respective statements of both the accused persons Ex.PW-1/B and Ex.PW-3/B were recorded after 6.00 PM on 17.4.2001 by two independent officers of the DRI i.e. the statement of A-1 by PW-1 and the statement of A-2 by PW-3. They were recorded at almost the same time. Till this time the accused were not under arrest; they had been arrested at 23.45 hours on 17.04.2001, vide arrest memos Ex.PW-1/G & Ex.PW-1/H.

35. Ex.PW-1/B & Ex.PW-3/B have been perused. The vehement argument of the learned defence counsel is that no verification on the facts elicited in these statements has been done; in the absence of which the department is not in a position to categorically state that the so called voluntary versions given by the accused in these statements are correct or not.

36. This submission has little force. It is not in dispute that from the evidence on record it has been established that the statements were recorded almost simultaneously. In Ex.PW-1/B, A-1 has given the details of his family i.e. his parents living in Dehradun along with his youngest brother; his other two brothers living separately in Dehradun; his father O.P. Bahl was running a watch business in the Paltan Bazar under the name and style of M/s Gian chand & Bros; his father being 75 years of age and being a retired man; his mother being a house wife; his sister married to an advocate in Delhi; he having started the business of watches in Lajpat Rai Market under the name of Vimal Watch Co. and thereafter A-1 had gone to Bomaby to carry on business of marine products. This statement further recites that he had requested his friend Surinder Raj Singh to take delivery of the narcotic drug on payment of Rs. 1,02,000/- from a person at Ravi Dhaba; further that on the fateful day his car was behind the car of Surinder Raj Singh and he was watching him and on the way he had instructed Mr.Singh to meet him at the Shiva Temple.

37. Statement Ex.PW-3/B of A-2 corroborates that Vimal Kumar Bahl was engaged in the export of fisheries from Bomaby; he is the son of Mr.O.P.Bahl; he had been requested by his friend Vimal Kumar Bahl to take delivery of a bag containing the narcotic drug from a person outside Ravi Dhaba, Manesar, Gurgaon on payment of Rs.1,02,000/-; further that on the fateful day i.e. on 17.4.2001 on the way Vimal Kumar Bahl told him to follow him and stop

outside the Shiv Temple at Delhi- Gurgaon Road; A-2 had a Matiz car which was purchased in the name of his wife financed by the Standard Chartered Bank on EMI of Rs.7500/-. His father's name is Jagtar Singh , mother's name is Manjit Kaur, his elder brothers is Rajinder Singh and his younger brother is Inderjeet Singh; name of his wife is Urmil Gauba and she is daughter of H.L.Vashist.

38. This version in Ex.PW-3/B qua the relationship of A-2 with A-1 and the statement of A-1 has also been corroborated by Ashu Malhotra in his statement Ex.PW-1/J. Ex.PW-1/J has detailed that the father of Vimal Kumar Bahl is Mr.O.P.Bahl; they had a shop in Lajpat Rai Market; Vimal Kumar Bahl is doing business of export of marine products; earlier he was carrying on business of watches from his shop at Lajpat Rai Market; Ashu Malhotra has penned his residence number 4623148 which is also the phone number given by A-1 of Ashu Malhotra in Ex.PW-1/B. While addressing arguments on the quantum of sentence on 23.8.2005 this submission that A-1 was doing export of marine products has been corroborated by his counsel.

39. Information contained in Ex.PW-3/B has been confirmed by Urmil Gauba when she had come into the witness box as DW-1. On oath she had admitted that that her father-in-law's name is Jagtar Singh, her mother-in-law's name is Manjeet Kaur; her elder brother-in-law is Rajinder Singh and her younger brother-in-law is Inderjeet Singh; her father's name is H.L.Vashist who has retired from the Railways. All these facts i.e. the details of the family

history given by A-2 on 17.4.2001 in Ex. PW-3/B have been corroborated on a much later date i.e. 21.4.2004 by his wife when she had come into witness box as DW-1. DW-1 had also given a false statement that her husband A1 cannot write English; this is contrary to Ex.PW-3/B which is in the handwriting of A2; A2 has not denied that his statement is not in his hand; even in his retraction application he has only stated that he was coerced to write this statement; for this incorrect statement of DW-1 Court is inclined to draw an adverse inference against A-2 for having projected a false defence.

40. In these circumstance, there is little doubt left with this Court but to hold that the statement given by each of the accused i.e. Ex. PW-1/B and Ex. PW-3/B are their voluntary versions detailing the facts which were only in their special know how and not known to any other person; submission of learned defence counsel that these facts have not been verified is, thus, falsified.

41. Within 24 hours of their arrest both the accused persons were produced before a magistrate i.e. on 18.4.2001; they had purportedly retracted their confessions; retracted confession of Vimal Kumar Bahl is mark DX; there is no exhibit on the retraction of Surinder Raj Singh. Order sheet of 18.4.2001 is relevant and reproduced below:-

“..... Heard on application for granting judicial remand of both these accused. Ld. SSP stated that accused have been arrested on the night of 17.4.2001 on the ground that 17 Kg of Heroin has been recovered from the car of accused No.1 and they have admitted their involvement in their statement U/s 67 of NDPS Act

inter alia. He made a request that their judicial remand may be granted. Defence counsel presented a retraction application before each of the accused which has been signed by both the accused in the court in my presence. Thereafter both the applications placed on the record. Defence counsel is directed to supply the copy of both these applications to the SPP who is at liberty to file reply of the same. Ld. Defence counsel submitted that he will supply the copy of this application to SPP on or before the next date against receipt.

File perused. Judicial remand of both the accused is granted till 2.5.2001.

At this stage an application is moved by defence counsel signed by the accused no.2 stating that he is ill and he be allowed to take medicine with him. Request allowed. He can take medicine with him for his personal use which he will use after getting the same certified from Jail Doctor.

At this another application is moved by defence counsel for having legal interviews with the accused. Legal interview of accused is allowed for 10 minutes by the counsel Sh.Mehta."

42. A-1 in mark DX has stated that he has been falsely implicated in the case; the officers had maltreated him; he was coerced and forced to write false statement as per the dictation of the officers.

43. The retracted confession of A-2 Surinder Raj Singh has been signed by him at point A and inter alia read as under:-

" I respectfully submit that I have been falsely implicated by the officers of the DRI on false allegation. I was not allowed even to meet my advocate. I was maltreated, beaten and was forced, induced and coerced to make a confessional statement on the dictation of the DRI officers.

44. It is relevant to state that both the accused persons were also medically examined on the same day i.e. on 18.4.2001. They were examined in the LNJP Hospital and this is evident from the documents Ex.PW-2/H1 & Ex.PW-2/H2 that is the application submitted by the Investigating Officer to the Chief Medical Officer

of the LNJP Hospital seeking their medical examination. The endorsement of the concerned doctor categorically records that both the accused persons were conscious and well oriented with their condition stable; no fresh injuries were recorded on the person of either of the two accused at the time of their examination. Their versions in their retracted confession that they have been beaten by the officers of the DRI, have thus no force.

45. It is also clear that a retracted confession drafted by the Advocate had been placed before the accused persons who had blindly signed on the same; it was a legal formality on the legal advise of the respective counsels for the accused; legal interview with the counsel was yet to take place; such a retraction even otherwise has no value.

46. In Kanhaiyalal v. Union of India 2008 I AD(Cr.)(S.C.) 277, Supreme Court had held that the statement made by an accused at a time when he was not under arrest the bar of section 24 to 27 of Evidence Act would not operate nor would the provisions of Article 20(3) of the Constitution be attracted. In Raj Kumar Karwal v. Union of India & Ors. (1990) 2 SCC 409, it has been held that power of an officer-in-charge of a Police Station under Section 53 of the NDPS Act are not to be read as the power of the “police officer” within the meaning of Section 25 of the Evidence Act; a statement under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the Cr.P.C., unless it is made under threat or coercion; this being a vital difference, a

statement under Section 67 of the NDPS Act is excluded from the operation of Sections 24 to 27 of the Evidence Act.

47. Judgments relied upon by the accused do not come to his aid. In Bal Mukund(supra) Supreme Court had held that a conviction cannot be based merely on a statement under Section 67 of the NDPS Act; further the confessional statement of a accused cannot be used as a substantive evidence against another co-accused. This proposition is not in quarrel. In Raju Premji (supra) it has been held that the voluntariness of a confession under Section 67 has to be judged on the facts and circumstances of each case; in Noor Aga (supra) the physical evidence being the case property including the samples were destroyed and not produced in Court and no convincing explanation for such non-production having been given by the Department; this fact had weighed heavily in the mind of the Court while recording an acquittal. Its conclusion is contained in para no.160 of the said judgment. It inter alia reads as follows:-

“160. Our aforementioned findings may be summarized as follows:-

1. The provisions of Sections 35 and 54 are not ultra vires the Constitution of India.
2. However, procedural requirements laid down therein are required to be strictly complied with.
3. There are a large number of discrepancies in the treatment and disposal of the physical evidence. There are contradictions in the statements of official witnesses. Non-examination of independent witnesses and the nature of confession and the circumstances of the recording of such confession do not lead to the conclusion of the appellant's guilt.
4. Finding on the discrepancies although if individually examined may not be fatal to the case of the prosecution but if cumulative view of the scenario is taken, the prosecution's case must be held to be lacking in credibility.

5. The fact of recovery has not been proved beyond all reasonable doubt which is required to be established before the doctrine of reverse burden is applied. Recoveries have not been made as per the procedure established by law.
6. The investigation of the case was not fair.
We, therefore, are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly."

48. The Supreme Court in this case had not conclusively decided on the powers vested under Section 53 of the NDPS Act; arguments of the learned defence counsel on this score are without force. It is, thus clear that a statement made before an officer vested with the powers under Section 53 of the NDPS Act cannot be equated with a statement made under Section 161 of the Cr.P.C. before a police officer and a statement made before such an officer would not be excluded by virtue of provisions of Section 25 to 27 of the Evidence Act; this question not having been examined and conclusively decided by the Supreme Court in the Noor Aga case cited supra. In this view of the matter, this judgment does not come to the aid of the petitioner on this ground.

49. In this case accused persons had been arrested at 23.45 hours; their statements under Section 67 of the NDPS Act were recorded sometime after 6 PM; i.e. when they were not under arrest; bar of Sections 24-27 of the Evidence Act would not operate. Ex.PW-1/B and Ex.PW-3/B are not hit by Section 25 to 27 of the Evidence Act; they were correctly relied upon by the trial Judge for the purpose of corroboration. Para no.137 of the

impugned judgment clearly states that the statement of the accused under Section 67 of the NDPS Act have only been used to lend assurance to the conclusion which otherwise has been well established even in the absence of such statements. It is also not the case of the accused that these statements have formed the sole basis of the conviction of the accused.

Section 42:-

50. There is no dispute to the proposition that the provisions of Section 42 of NDPS Act are mandatory; there is a distinction between Section 42 and Section 43 of the said Act; Section 42 relates to the procedure to be adopted in a case where the recovery has been effected from a private place and Section 43 applies to the procedure to be adopted when the recovery is effected from a public place.

51. Section 42 and Section 43 contemplate two different situations. Section 42 authorises an officer of the departments enumerated therein who are duly empowered in this behalf, to enter into and search any such building conveyance or place, 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 etc. is kept or concealed in any building conveyance and place. This power can be exercised freely between sunrise and sunset but between sunset and sunrise if such an officer proposes to enter and search such building, conveyance or enclosed place, he must record the grounds for his

belief that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence of facility for the escape of an offender.

52. Section 43 of the NDPS Act provides that any officer of any of the departments mentioned in Section 42 may seize in any public place or in transit any narcotic drugs or psychotropic substance etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorized to detain and search any person whom he has reason to believe to have committed an offence punishable under the Act. Explanation to Section 43 lays down that 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.

53. The argument urged before this Court is that there has been a non-compliance of Section 42 of the NDPS Act; this document Ex.PW-12/A had not been filed along with the complaint and had been filed subsequently i.e. even after the stage of framing of charge. Attention has been drawn to the order dated 7.2.2002 wherein the Court has permitted this document to be taken on record. Attention has also been drawn to Ex.PW-12/A i.e. the purported secret information as also a respective statements of the accused recorded under Section 67 of the NDPS Act i.e. the Ex.PW-1/B and Ex. PW-3/B. In Ex. PW-1/B, it has been stated by A-1,

“I was behind Surinder Singh in white maruti DL-9C-3785 and watching them on my way to Delhi. I instructed Mr.Singh to meet me at Shiva Temple, Delhi-Gurgaon Road, Delhi.”

A-2 in Ex.PW-3/B has stated,

“On the way Vimal told me to follow him and stop out side Shiva Temple at Delhi- Gurgaon Road.”

It has been vehemently been argued that this conversation between A-1 and A-2 wherein A-1 instructed A-2 to meet him at Shiva Temple on the Delhi-Gurgaon Road was a conversation made between the two accused while they were on the way and as such could not have found mention in Ex.PW-12/A which was recorded one day prior i.e. 16.04.2001 to an actual conversation which was held on 17.4.2001.

54. This argument has little force as perusal of Ex.PW-12/A clearly recites that the intelligence gathered was to the effect that Surender Raj Singh was involved in the procurement of narcotic drug and supply of the same; he was using a silver grey colour matiz car bearing no. DL-3CQ-4785; they along with Bezamin Franco used to meet at Defcol Junction restaurant; intelligence developed on the activities of Vimal Kumar Bahl and Surinder Raj Singh evidenced that they would be carrying approximately 17 Kg heroin in the matiz car at around 9.30 AM opposite Shivmurti Temple, Highway No.8, Delhi Gurgaon Road, where Vimal Kumar Bahl would be coming in a white maruti car. This intelligence was a detailed information; the quantity of the contraband, vehicle

make/colour/number details and the residential address of both the accused were all penned in this document; the intelligence was also to the effect that two co-accused would be meeting opposite Shiv Murti Temple on the Delhi-Gurgaon Road. The conversation of A-1 and A-2 on the way was only a confirmation of these facts.

55. Ex.PW-12/A is dated 16.4.2001. This document is in the handwriting of A.K.Prasad PW-12 who has confirmed this on oath. PW-12 had forwarded this information to his senior officer Mr. P.K. Mishra. Non-examination of P.K.Mishra does not dent the version of the prosecution in any manner. PW-12 was reporting to Mr.P.K.Mishra, Deputy Director, on the questioned date i.e. 16.4.2001 and thereafter. This is the categorical version of PW-12 in his cross-examination.

56. Ex.PW-12/A had inadvertently not been filed along with the complaint; the fact that there was secret information/secret intelligence before the accused persons were apprehended is specifically found mentioned in Ex.PW-1/D which was the Panchnama prepared on 17.4.2001 and records this fact. The notices under Section 50 of the NDPS Act served upon accused, Ex.PW-2/B and Ex.PW-2/C also states that the officers of the DRI have reason to believe that narcotic drug has been concealed. These documents are also dated 17.4.2001.

57. In this view of the matter, the submission of the learned defence counsel that Ex. PW-12/A has been prepared subsequently

and is a fabricated document, appears to be meritless. Trial Judge has correctly appreciated this evidence and held that there has been a compliance of Section 42 of the NDPS Act.

58. This apart, it would be relevant to state that accused persons have been apprehended on the National High Way No.8 on the Delhi Gurgaon Road. The recovery of the contraband had been effected at the DRI Office i.e. the ground Floor, B- Block, Indrapratha Bhawan, I.P. State, New Delhi. This is a public place; applicability of Section 42 does not arise. Section 43 is the applicable provision.

59. In Narayanswamy Ravishanker v. Asstt. Director, Directorate of Revenue Intelligence 2007 Cri.L.J. 27, the seizure of the drug had been effected at the Airport; Section 43 was held to be the applicable section; there was no requirement for the procedure of Section 42 to be followed. In State of Haryana v. Jarnail Singh & Ors. 2004(2) JCC 1026, recovery of contraband had been effected from a tanker which was moving on the public highway. Supreme Court had held that Section 43 would apply to the facts of the case and there would be no requirement of the officer conducting the search to record the ground of his belief as contemplated by the proviso to Section 42. In this judgment, relying upon M. Prabhu Lal v. The Assistant Director, Directorate of Revenue Intelligence JT 2003 (Suppl.2) SC 459, it had been further held that where search is conducted by a gazetted officer himself acting under Section 41

of the NDPS Act it was not necessary to comply with the requirements of Section 42.

60. In the instant case, the recovery having been effected from a public place, it is clear that the Section 43 would be applicable. P.R.Lakra, PW4 is an officer of the rank of a Deputy Director; he was the gazetted officer heading the raiding team and the search was conducted in his presence. On this count also provisions of Section 42 do not have to be resorted to.

Section 50:-

61 Notice under Section 50 of the NDPS Act was served upon both the accused persons. Ex.PW-2/B is the notice served upon Vimal Kumar Bahl and Ex.PW-2/C is the notice served upon Surinder Raj Singh; both these notices are in the hand writing of PW-3 and this has come in his deposition; these documents categorically recite that there is intelligence that narcotic drug had been concealed in the respective vehicle of each of the accused which was in their occupation at the time of interception by the DRI officers; accused persons had been apprised of their rights of having their search conducted in the presence of a magistrate or a gazetted officer. These notices had been signed at point X by PW-2; reply of A-1 appears at point B1 to B1 on Ex.PW-2/B and reply of A-2 appears at point C1 to C1 on Ex.PW-2/C. A-1 had replied that he does not require his search in the presence of a magistrate or a gazetted officer; A-2 has agreed for search of his car and person by any officer of the DRI. The Panches i.e. Ashok

Kumar and Rajesh had also signed at point C and D of the respective notices.

62. There is no dispute that the word “right” has not been mentioned in either of these documents but a reading of the contents of these documents clearly show that both the accused persons had been apprised of this option of having their search conducted either in the presence of a magistrate or a gazetted officer and it is only after they had understood the contents of the same that they had given their replies at points B1 to B1 and C1 to C1 on Ex.PW-2/B and Ex.PW-2/C; their signatures in lieu of having received the notices appear at point B. The oral versions of PW-2 and PW-3 have also been perused. The notices were also given in the presence of PW-4. PW-2 in his cross-examination has admitted that the notices were prepared at the ground floor and after that on the ground floor the bag containing the contraband was opened; so also is the version of PW-3 and PW-4; PW-2 has further stated that no other document was prepared at the ground floor except the notices Ex.PW-2/B and Ex.PW-2/C; this is also corroborated by the version of PW-3 and PW-4. The mandate of Section 50 of the NDPS Act stood complied with.

63. In the instant case, the contraband had been recovered from the dicky of the maruti vehicle driven by A-1. The recovery had not been effected from the personal search of the accused; Section 50 even otherwise would not apply. In Narayanswamy Ravishanker v. Astt. Director, Directorate of Revenue Intelligence

2007 Cri.L.J. 27, it has been held by Supreme Court that where search is undertaken not of a person but a suit case applicability of Section 50 is excluded. In State of Haryana v. Jarnail Singh & Ors. 2004(2) JCC 1026, where contraband had been recovered from a tanker i.e. a vehicle, not being the case of a personal search, Section 50 was held inapplicable.

64. In the instant case as well provisions of Section 50 are not attracted.

65. Section-57:-

Ex.PW-1/G is the intimation given by PW-2 to his immediate senior officer i.e. the PW-2; that PW-2 is the immediate senior officer of PW-1 has been reiterated by both PW-2 and PW-1. This is even otherwise a directory provision which stood complied with.

66. Standing instruction no.1/88/ sampling procedure not followed:-

PW-2 has on oath detailed the manner in which the samples were drawn; out of the 17 packets 4 duplicate samples were drawn after homogenous mixing; these details also find mention in the panchnama Ex. PW-1/D. The drawn samples were put into zip lock polythene bags and then put into a khaki envelope which was pasted with gum and sealed with the DRI seal no.10 and also pasted with a paper slip containing the date and signatures of the witnesses, both the accused as also signatures of the complainant on each and every samples. Fascimile of the DR seal no.10 was also affixed on each page of the panchnama.

67. On the following day i.e. on 18.4.2001 PW-2 deposited these samples with PW-10 posted as In-charge of the godown of the valuables situated at New Customs House, New Delhi. PW-10 has deposed that he had received these samples entries of which were entered in his register; photocopy of the entries have been proved as Ex.PW-10/A. On the same day PW-2 had taken one set of these samples along with the test memo in duplicate, in an intact condition and handed them over to the Chemical Examiner, PW-5 vide acknowledgment receipt Ex.PW-5/A. PW-5 has corroborated this version; he has on oath deposed that he had received four sample packets with the seals intact along duplicate test memo through PW-2 and he had issued receipt Ex.PW-5/A. These samples were examined under the direct supervision of PW-8, the then Chemical Examiner and the report was prepared on the back page of the test memo Ex.PW-2/K; it was under his supervision that these samples had been taken out from strong room by PW-5 and the chemist. The report dated 18.12.2003 at the back of Ex.PW-2/K had opined that the samples contained diacetylmorphine. It further recites that facsimile of the seal of the chemical examiner was affixed on the remnant samples.

68. The case property i.e. the 17 packets of the contraband, one set of duplicate samples and also remnant samples were exhibited in the testimony of PW-2. PW-2 had admitted that the test memos were prepared at the spot in duplicate; Ex.PW-2/K and Ex.PW-2/J; Ex.PW-2/K has been sent along with the samples to the CRCL and

back page of the Ex.PW-2/K contained the report of the CRCL in the handwriting of PW-8.

69. The test memos are cyclostyled documents, the details have been filled in type written form and column-5 of Ex.PW-2/J and Ex.PW-2/K recites that the samples had been drawn on 17.4.2001 and the date of dispatch has been mentioned as 18.4.2001. It is not in dispute that the proceedings have been conducted in the office of the DRI; type writer was available with the department at the time when the test memos were prepared in the department; that is why the columns were filled in typed form. PW-2 in his cross-examination has stated that he had been instructed by PW-4 that samples are to be deposited on 18.4.2001 and therefore on his instructions both the dates i.e. 17.4.2001 and 18.4.2001 find mention in column no.5. It is also not the case of the accused that the seals affixed on the paper slips were not intact when they were received in the department CRCL; PW-5 & PW-8 were the officers in the department of the CRCL at the relevant time. PW-5 has deposed that the samples packets have been received in the department along with duplicate test memo in intact condition. Every possibility of tampering stands excluded.

70. In Kulwant Singh vs. Narcotics Control Bureau, CrI. A.No.248/1997 decided on 18.1.2008, it has been held by this High Court that there is no legal requirement that the test memo has to be filled in at the spot on the same day; it can also be filled in on a subsequent day. In, Gurminder Singh v. Directorate of Revenue

Intelligence 2007(1) JCC (Narcotics) 11. It has been held that it is not incumbent upon the customs department to deposit the case property with the malkhana in the police station as such officers are fully empowered to deposit the case property in their own malkhana, which was done in this case. In Siddiqua v. Narcotics Control Bureau, 2007(1) (Narcotics) 22, it has been held that there is no provision under the NDPS Act for handing over the seal by the Investigating Officer after use to some independent witness; it is also not the case of the accused that the seals on the samples have been tampered with.

71. In State of Punjab v. Makhan Chand (2004) 3 SCC 453, the Supreme Court, on the issue of the Standing Instruction issued by the Central Government under Section 52 A of the NDPS Act requiring a particular procedure to be followed at the time of sampling had held that in view of the ratio of the judgment in the case of Khet Singh v. Union of India (2002) 4 SCC 380 these standing orders are merely intended to guide the officers to see that a fair procedure is adopted by the officer in charge of the investigation; they are not inexorable rules; even if there is some kind of a procedural irregularity if prejudice is not caused to the accused the evidence adduced would not become inadmissible.

72. In the instant case the paper slips appended on the samples were found intact; samples could not have been tampered without tampering with the paper slips; since the paper slips were intact; possibility of tampering of the samples is necessarily excluded.

73. Standard of Proof:-

The burden of proof in a criminal trial is always on the prosecution; it is for the prosecution to prove its case beyond reasonable doubt; however, this test of proof beyond reasonable doubt is a guideline; not a fetish and the guilty cannot get away with because truth suffers from some infirmity when projected through this human process. 1978 Cr. L.J. 766 Inder Singh vs. State.

74. The legislature while incorporating certain provisions in the NDPS Act did so with an intention. Section 35 of the NDPS Act is a presumption of the culpable mental state of the accused; the court shall presume the existence of such a mental state but it shall be the duty of the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that section. AIR 2001 SC 821 Abdul Rashid Ibrahim Mansuri v. State of Gujarat while expounding the provisions of Section 35 of the NDPS Act the Supreme Court had held that the burden of proof cast on the accused under Section 35 can be discharged through different modes; he can rely on materials available in the prosecution evidence; he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt; he may also adduce other evidence when he is called upon to enter on his defence. None of this has been done so in the instant case.

75. Section 54 of the NDPS Act is the presumption from possession of an illicit article. Under this provision of law it is not

required for the prosecution to prove that the possession of the contraband by the accused is illegal to raise a statutory presumption against the accused. Once the prosecution proves the possession and recovery the burden shifts on the accused. These presumptions also come to the aid of the prosecution.

76. Shift of Place and Public Witnesses not examined:-

The submission of the learned defence counsel that there is no explanation that if the accused persons have been apprehended on the National Highway i.e. Delhi-Gurgaon Road why the search of the accused persons could not be effected there; the arbitrary decision of the DRI officials to shift the place to their office is uncalled for. There was every possibility of taint in the investigation in the coercive surroundings of the DRI office.

77. This submission is not borne out from the record. PW-2 in his examination-in-chief has categorically stated that the place of interception was not a proper place for conducting the search and as such both the cars along with their occupants were escorted to the DRI office. PW-3 has also deposed that the place of interception was not conducive for the search of the vehicle; both the cars were escorted to the office of DRI. PW-4 also in his version on oath explained that after the apprehension of the accused persons they were taken to the DRI Quarter as it was not safe and secure to seize and conduct other formalities at the spot. This answers the first part of the argument of the learned defence counsel.

78. The statement of the panch witnesses was recorded by PW-1; summons issued to Rajesh Kumar are Ex.PW-1/C and his statement tendered in three pages is Ex.PW-1/D. Summons sent to second panch witness Ashok Kumar are Ex.PW-1/E and his statement running into three pages is Ex.PW-1/F. Both these panch witnesses were cited as witnesses of the prosecution. Both the witnesses were residents of D-2/12, Lalita Park, Laxmi Nagar, Delhi; their statements in the course of the investigation was recorded on 17.4.2001; thereafter inspite of repeated summons having been sent by the Court to secure their presence they could not be traced; this is reflected in the order sheets dated 7.3.2003, 13.3.2003 and 19.8.2003. In these circumstances the question of an adverse inference to be drawn against the prosecution under Section 114(g) of the Indian Evidence Act does not arise; it is not as if the prosecution was deliberately withholding this evidence.

79. In M. Prabhu Lal v. The Assistant Director, Directorate of Revenue Intelligence JT 2003 (Suppl.2) SC 459, the seizure was effected 20 k.m. away from the place where the search was conducted; panch witnesses were not examined; Supreme Court had held that no prejudice has been caused to the accused.

80. Conspiracy of A-1 and A-2 for the possession and transportation of this narcotic drug is prima facie evident. A-1 and A-2 in their statements under Section 67 of the NDPS Act have detailed private informations about one another; it has been corroborated that at the asking of A-1, A-2 had paid a sum of

Rs.1,02,2000/- to a contact of A-1 outside Ravi Dhaba, Manesar Haryana to collect a bag of narcotic drug; accused persons in their statements under Section 313 of the Cr.P.C. have made a vague denial that they both are not known to one another; such a defence had not been adopted at the time of cross-examination of the prosecution witnesses; eye-witness accounts of the recovery witnesses coupled with the documentary evidence proved by them as also the presumptions of law as contained in Section 35 and 54 of the Act; the complicity of A-1 and A-2 is borne out.

81. There is no infirmity in the order of the trial Court. The conviction of the accused persons calls for no interference. However, on the point of sentence this Court feels that the interest of justice demands that a modification is called for.

82. Offence relates to April, 2001 i.e. eight and half years from today. There is no dispute that the recovery in the instant case is a commercial quantity. The sentence prescribed for the contravention of any provisions of this Act involving a commercial quantity is rigorous imprisonment for a term not less than 10 years but which may extend to 20 years and also a fine which shall not be less than Rs.1 lac but which may extend to Rs.2 lacs.

83. Proportion between the crime and punishment is a goal respected in principle, and in spite of an errant notion, it remains a strong influence in the determination of sentence. The Supreme Court in Dhananjoy Chatterjee v. State of West Bengal (1994) 2SCC 220 observed that the imposition of an appropriate

punishment is the manner in which the court should respond to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victims of the crime and the society at large while considering the imposition of an appropriate punishment.

84. The minimum punishment prescribed for the offence of this nature is rigorous imprisonment for ten years. Petitioner Vimal Kumar Bahl had been convicted on two counts i.e. under Section 21 & 29 of the NDPS Act and sentenced to undergo rigorous imprisonment for 16 years besides fine. Petitioner Surinder Raj Singh had been convicted under Section 29 of the Act and had been sentenced to undergo rigorous imprisonment for 11 years besides fine.

85. The word 'may' used in Section 20 gives a discretion to the court which has been ascribed by the Legislature as regard the awarding of sentence. This discretion which has been vested with the Court, has to be exercised legally, properly and reasonably and not arbitrarily or disproportionately.

86. In the instant case the sentence of rigorous imprisonment for 16 years to A-1 appears to be excessive and on the higher side. This Court is of the view that ends of justice would be well met if the sentence of RI for 16 years is reduced to RI for 13 years. No modification is made in the fine imposed. Similarly, while

maintaining the conviction of A-2 his sentence of RI for 11 years is reduced to the minimum i.e. RI for 10 years. No modification is made in the fine imposed.

87. With these directions, appeals are disposed of.

(INDERMEET KAUR)
JUDGE

5th November, 2009
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