

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

+ CRL.A. 535/2016 & CRL. M.A.s - 3075/2017, 551/2019

SAYED AHMED Appellant

Through: Ms. Rajni Singh, Adv.

versus

DIRECTORATE OF REVENUE INTELLIGENCE (DRI)

..... Respondent

Through: Mr. Satish Aggarwala, Sr.
Standing Counsel for DRI

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

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27.12.2019

1. *Vide* the impugned judgment, dated 20th February, 2016, and order dated 23rd February, 2016, the appellant Sayed Ahmed stands convicted, under clause (c) of Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the NDPS Act”), and sentenced to rigorous imprisonment of 13 years, along with fine of ₹ 1,50,000/–, with default simple imprisonment of one year. The learned Special Judge (NDPS) has found the appellant to have been in illicit possession of 51.865 kg of diacetylmorphine (heroin). Clause (c) of Section 21 of the NDPS Act may be reproduced, for ready reference, thus:

“21. Punishment for contravention in relation to manufactured drugs and preparations. – Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,

manufacturers, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable, –

(c) where the contravention 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.”

The notified “commercial quantity” for heroin, it may be noted, is 250 grams.

2. With the above preface, it would be appropriate, at the outset, to view the impugned judgment, of the learned Special Judge, in précis.

The impugned judgment

3. According to the impugned judgment, pursuant to receipt of secret information, a team of officers of the Directorate of Revenue Intelligence (DRI, the respondent herein) comprising PW-2 J. P. Raju (the Investigating Officer, referred to, hereinafter, as “the IO”), along with PW-4 Ajay Bhasin, PW-5 Kamal Kumar and PW-15 Rajpal Singh (all of whom were Intelligence Officers in the DRI), as well as two public witnesses, namely Sharvan Shay and Shankar Kumar (neither of whom was co-opted as a prosecution witness), intercepted a Toyota Corolla car, bearing registration no. DL 8 CJ 4621, at about 3:30 AM on 16th November, 2010, at the Singhu Border, as it was entering Delhi. On being

questioned by the aforesaid raiding team of the DRI, the driver of the car introduced himself as Sayed Ahmed, i.e. the appellant before this Court, and claimed to be an Afghan national. He initially denied carrying any narcotics, though he is alleged to have subsequently capitulated. He was shown the search authorisation, issued in favour of the IO (PW-2), and was also served with a notice, under Section 50 of the NDPS Act, written in Hindi, as the appellant claimed to be unfamiliar with the English tongue. The appellant attested to an endorsement, on the body of the said notice, electing to have the search of his person and vehicle conducted before a Gazetted officer of the DRI. The appellant, alongwith his car, was escorted to the parking area of the office of the DRI, located at D-Block, I.P. Bhawan, I. P. Estate, New Delhi, where PW-9 V. S. Pandey, Senior Intelligence Officer in the DRI, who was a Gazetted officer, permitted the search of the appellant and vehicle to be conducted in his presence.

4. The factual narrative, as contained in the impugned judgment, proceeds further to note that, from the boot of the car which was being driven by the appellant, two High Density polyethylene (HDPE) bags were recovered, each of which contained 26 packets, making a total of 52 heat sealed plastic polythene packets in the two bags. The bags were marked A and B. Each of the 52 packets, recovered from the two bags, contained, in turn, a cloth bag with a rubber stamp marking. Each of the said cloth bags, on being opened, was found to contain one heat sealed transparent polythene packet, in which an off-white granular/powdery substance was visible, which was emanating of pungent smell. The 26 packets, recovered from the bag marked A were marked X-1 to X-26, and

the packets recovered from the bag marked B were marked X-27 to X-52. A pinch of the powdery substance was retrieved, from each of the 52 packets, and tested, using the Field Detection Kit, which tested positive for heroin. The total quantity of powder, on being weighed, was found to be 51.865 kg. From each of the 52 packets, two representative samples, weighing approximately 5 grams each, were taken and consigned to small Ziploc polythene packets, which were marked X-1A to X-52A, and X-1B to X-52B which were, in turn, consigned to 104 separate yellow paper envelopes, each of which was individually sealed with the seal of the DRI. The proceedings took place under *Panchnama*, on each page of which the *Panchas* (public witnesses), as well as the appellant, affixed their signatures.

5. Subsequently, as per the impugned judgment, the statement of the appellant was recorded, under Section 67 of the NDPS Act. Thereafter, at about 10 PM on 16th November, 2010, the appellant was arrested, after which he was medically examined, twice, on 16th November, 2010 and 17th November, 2010, by the Chief Medical Officer, Ram Manohar Lohia (RML) Hospital.

6. The 52 samples, in yellow envelopes were, according to the impugned judgment, sent, by the Deputy Director in the DRI K. K. Sood (PW-3), to the Chemical Examiner, CRCL, through PW-4 Ajay Bhasin. The report, dated 16th December, 2010, of the CRCL, found the 52 samples to be containing diacetylmorphine (heroin), of 15.1% to 67.6% purity.

7. The impugned judgment further recites that, in the interregnum, the ownership of the Toyota Corolla car, which was allegedly being driven by the appellant, was traced to the appellant, through the statements of Surender Kumar, Manager of M/s Pawansut Merchant Ltd., Varun Kalra, H. S. Bindra and Manzoor Ahmed, recorded under Section 67 of the NDPS Act. However, while H. S. Bindra, Varun Kalra, and Manjoor Ahmed were cited as PW-11, PW-12 and PW-13 respectively, Surender Kumar was not made a prosecution witness.

8. Consequent on the above, criminal complaint was filed, under Sections 21 and 25 of the NDPS Act, by PW-2 J. P. Raju, the IO. However, cognizance was taken, by the learned Special Judge, only under Section 21(c) of the NDPS Act, and charge was framed under the said provision, to which the appellant pleaded not guilty. He was, therefore, tried and, *vide* the impugned judgment and order, convicted and sentenced, as already noticed in para 1 hereinabove.

9. Having thus noticed the broad outline of the case, as set out in the impugned judgment, I proceed to reconnoitre the evidence in the matter, so as to facilitate a holistic view of the case.

Evidence

Witnesses to search, seizure and recovery, sampling, seizure and arrest

10. The IO, J. P. Raju, deposed, during trial, as PW-2. He set out, in detail, in his examination-in-chief, the events that had transpired, especially in the matter of interception, search, seizure and recovery of

the contraband heroin from the appellant. According to his testimony, the secret information was communicated, to him, by PW-7 Atul Handa, at 6 PM on 15th November, 2010 and, at 10 PM on the same day, he called the public witnesses Sharvan Shay and Shankar Kumar from the nearby area. Thereafter, the raiding team, which included some sepoy, apart from himself, PW-5 Kamal Kumar, PW-4 Ajay Bhasin and PW-15 Rajpal Singh, as well as the public witnesses, proceeded to the spot, near Singhu border, where they reached at 2:30 AM on 16th November, 2010. At about 3:30 AM, on 16th November, 2010, according to the examination-in-chief of PW-2, they intercepted a Toyota Corolla car, bearing registration number DL 8 CJ 4621. The driver of the car matched the description of the person, who was to arrive at the spot, carrying narcotics, as contained in the secret information. On being questioned, the driver identified himself to be Sayed Ahmed, i.e. the present appellant.

11. PW-2 deposed, further, that a notice, under Section 50 of the NDPS Act (Ex. PW-2/B), was prepared in Hindi – as the appellant claimed to be unfamiliar with any other language – and the contents, thereof, were explained to the appellant. The appellant requested that the search be conducted in the presence of a Gazetted officer of the DRI. This request was reduced to writing by PW-15 Rajpal Singh, and signed by the appellant, the public witnesses and Rajpal Singh. The said endorsement also records the request, of the appellant, that the search be conducted in the office of the DRI, as the place of interception was a public place. Purportedly in compliance with the wishes of the appellant, the appellant, as well as his car, were taken to the DRI office, where PW-9 V. S. Pandey, who was a Gazetted officer, agreed, by endorsement on the

Section 50 notice (PW-2/B) for the conducting of the search of the appellant, and his vehicle, in his presence.

12. A perusal of the notice, under Section 50 of the NDPS Act (Ex. PW-2/B) reveals that there is, indeed, on the body of the said notice, an endorsement, in writing, bearing the signature of the appellant, thereunder, requesting that the search of the appellant, as well as of his car bearing no. DL 8 CJ 4621 be carried out at the DRI office, in the presence of a Gazetted officer of the DRI.

13. Thereafter, according to PW-2, the appellant's car, which was parked in the parking lane adjacent to the building, was first searched. From the boot of the car, two large HDPE bags were recovered, which were marked 'A' and 'B'. Each bag was found to contain 26 heat sealed transparent polythene packets, which were marked X-1 to X-26, and X-27 to X-52, respectively. The bags were carried to the 7th floor of the DRI office. At the 7th floor, personal search of the appellant was carried out, which resulted in the recovery of one Afghanistan passport of the appellant, as well as \$ 3000/- cash. On being queried, the appellant stated that the said cash amount of \$ 3000 was part of the commission, received by him, for transporting the heroin from Punjab to Delhi.

14. Each of the 52 packets, recovered from the two HDPE bags, was found to contain a small white cloth packet, each of which, in turn, contained one white polythene packet. Each such polythene packet was found to contain a pungent off white powder. A pinch of the powder was recovered, from each of the said 52 packets which, when tested, using the

Field Testing Kit of the DRI, tested positive for heroin. The total net weight of the powder was found to be 51.865 kg. The search and recovery was stated to have taken place in the presence of the appellant, public witnesses and PW-9 V. S. Pandey. The bags, as well as all their contents were, therefore, seized.

15. Two representatives sealed samples, weighing approximately 5 grams each, were retrieved from each of the aforesaid 52 packets, and were, marked X-1A to X-52A and X-1B to X-52B. These 104 packets were consigned to individual, separate envelopes, and were marked in the same manner as the samples. The envelopes were sealed with the DRI seal. The samples, and the metal trunk, were also sealed with the DRI seal. Test memos were prepared in triplicate, on which the facsimiles of the DRI seals were affixed. These Test Memos were signed by the appellant, the public witnesses and PW-2. The entire proceedings were conducted under *Panchnama*, which were also signed by the public witnesses and the appellant. The proceedings concluded at about 4 PM on 16th November, 2010. All the sealed material, including the packets, the bags and the trunk, were consigned to the custody of PW-3 K. K. Sood, Deputy Director, DRI.

16. Before the learned Special Judge, a rectangular box, wrapped in white cloth, with the DRI seal (which was intact), was produced. The box was found to contain two HDPE bags, marked A and B. Each of the said bags was found to contain 52 sealed cloth packets marked X-1 to X-52. On being opened, each of the said packets X-1 to X-52 was found to contain a white cloth wrapping which, on being opened, was, in turn,

found to contain yet another white transparent packet, each of which contained off white powder.

17. A second, similar, a rectangular box was produced which, too, was wrapped in a white cloth with a DRI seal, which was intact. On being opened, the box was found to contain another, plastic, box, which, in turn, contained a yellow envelope, in which \$ 3000/-was found. Apart from this, the rectangular box contained 52 yellow sample envelopes, which were found to be marked X-1-A to X-52-A, each of which, in turn, contained a small Ziploc polythene pouch, in which an off white powdery substance could be seen. These were identified, by PW-2, as the remnants of the samples that had been drawn by him, and had been received back from the CRCL, after analysis. The trunk contained a second set of 52 yellow sample envelopes, marked X-1-B to X-52-B, the contents of which were identical to those of X-1-A to X-52-A.

18. PW-2 further deposed, during trial, that, on 16th November, 2010, he had recorded the statement of the appellant, under Section 67 of the NDPS Act (Ex. PW-2/K), which was reduced to writing by PW-8 Harish Chandra Singh Bhandari, Tax Assistant, DRI, who made an endorsement, in this regard, on the body of the statement, which was signed by the appellant, after the statement was read over to him. After the statement had been recorded, the appellant was arrested, by PW-2, *vide* Arrest Memo Ex. PW-2/L. The appellant was medically examined, twice, by the doctors at the RML Hospital, *vide* MLCs marked 'A' and 'B', on 16th November, 2010 and on 17th November, 2010, respectively. The appellant was, thereafter, produced, before the learned Duty Magistrate

on 17th November, 2010. On the same day, PW-2 prepared his report, under Section 57 of the NDPS Act (Ex. PW-2/P), and submitted the report to PW-9 V. S. Pandey.

19. The two MLCs of the appellant disclosed that, in both the MLCs, his pulse rate has been recorded as 78/min, and his blood pressure is recorded, in the 1st MLC as 140/90 mm Hg, and, in the 2nd, as 130/80 mm Hg. All his vital parameters are stated to be within normal limits, and no fresh external injury is found to have existed on his person.

20. PW-2 further testified to having recorded the statements of Surender Kumar, Manager, M/s Pawansut Merchants Ltd. (Ex. PW-2/R), PW-12 Varun Kalra (Ex. PW-2/T), H. S. Bindra (Ex. PW-2/V) and Manjoor Ahmed (Ex. PW-2/Z-5) on 14th December, 2010, 23rd December, 2010, 14th January, 2011 and 25th March, 2011, respectively. Surender Kumar (who was not co-opted as a witness) deposed that he had sold the Toyota Corolla car, on 30th August, 2010, to PW-12 Varun Kalra and tendered, by way of proof thereof, the Forms 29 and 30, which were collectively marked 'C'. PW-12 Varun Kalra testified, in his Section 67 statement, to having purchased the car from M/s Pawansut Merchants Ltd., and stated that he had sold the car, on 7th September, 2010, to PW-11 H. S. Bindra. By way of evidence thereof, he produced the delivery receipt of the car, which was marked 'D'. H. S. Bindra, for his part, testified, in his Section 67 statement, that he had purchased the car from Varun Kalra, and that he had sold the car to Manzoor Ahmed (PW-13), for ₹ 3.7 lakhs, by way of proof whereof he tendered the Forms 29 and 30 as well as the delivery receipt, which were collectively marked 'B'. PW-

13 Manzoor Ahmed stated that he had allowed his name to be used in the Forms 29 and 30, by the appellant, who had actually purchased the aforesaid car from PW-11 H. S. Bindra. He identified the appellant, from the photograph shown to him, as the person, on whose behalf he purchased the car.

21. A brief reference, to the statements of Surender Kumar, Varun Kalra (PW-12), H. S. Bindra (PW-11) and Manzoor Ahmed (PW-13) would, at this stage, be apposite. Surender Kumar, in his statement (Ex. PW-2/R), deposed that the car, bearing registration no. DL 8 CJ 4621, had been purchased by M/s Pawansut Merchants in 2003, for the use of the Directors of the Company, and was sold to Varun Kalra (PW-12) on 30th August, 2010. Proof of sale of the car, in the form of the Delivery Receipt, duly signed by Varun Kalra (PW-12), photocopy of the voter ID card of Varun Kalra and Forms 29 and 30, were produced by him. He further testified that Varun Kalra was a car dealer, who sold the car, further, to H. S. Bindra (PW-11), who further sold the car to Manzoor Ahmed (PW-13). He also provided a copy of the delivery receipt, duly signed by PW-13 Manzoor Ahmed. PW-12 Varun Kalra, in his statement, under Section 67 of the NDPS Act, stated that he was a car dealer, and that he had purchased the Toyota Corolla car DL 8 CJ 4621 from Surender Kumar on 30th August, 2010, for ₹ 2.6 lakhs, and had sold the vehicle to PW-11 H. S. Bindra on 7th September, 2010, for ₹ 2.8 lakhs. He provided, by way of evidence, the delivery receipt, duly signed by him, as well as the delivery receipt signed by H. S. Bindra. H. S. Bindra (PW-11), in turn, deposed that he had purchased the aforesaid Toyota Corolla car DL 8 CJ 4621, on 7th September, 2010, from Varun Kalra, for

₹ 2.8 lakhs, and had sold the vehicle to PW-13 Manzoor Ahmed on 13th October, 2010. He further testified that, though the car had been sold, twice, after it had left the hands of Surender Kumar, ownership of the car continued to vest in M/s Pawansut Merchants. He produced the Forms 29 and 30, filled in the name of PW-13 Manzoor Ahmed, along with copies of the delivery receipt of the car, and the election card of Manzoor Ahmed.

22. Manzoor Ahmed (PW-13) in his statement, under Section 67 of the NDPS Act (PW-2/Z5), deposed that he knew the appellant for the past three years, as the appellant, during his visits to Delhi, used to purchase carpets and shawls from him. He further deposed that, on 10th October, 2010, the appellant visited his house and, expressing his desire to purchase a car, stated that, as he was a foreign national, it was not possible for him to do so in his own name; ergo, he requested PW-13 to purchase a car in his own name, for which the appellant agreed to pay him commission. Following thereupon, the appellant and PW-13 proceeded, on 13th October, 2010, to Bindra Diamond Motors, from where the appellant purchased a silver coloured Toyota Corolla car bearing registration no. DL 8 CJ 4621, in the name of Manzoor Ahmed, for ₹ 3.7 lakhs. As the car was purchased in the name of Manzoor Ahmed, he put his signature on the delivery receipt as well as on Forms 29 and 30, for which commission of ₹ 10,000/- was paid, to him, by the appellant. He further deposed that the entire payment, for the car, as also his own commission of ₹ 10,000/-, was paid by the appellant.

23. PW-2 further deposed that he had recorded the statements of the public witnesses Sharvan Shay and Shankar Kumar on 23rd November, 2010, under Section 67 of the NDPS Act (Ex. PW-2/Z-8 and Ex. PW-2/Z-7 respectively), wherein the said public witnesses acknowledged that they had joined the investigations which had led to the interception of the appellant, and the search and seizure proceedings resulting in the recovery of heroin from the boot of the car being driven by him. He also testified to having brought the test report, and the sealed *pullandas*, containing the remnant samples, from the CRCL, on 6th January, 2011, which was handed over, by him, to PW-3 K. K. Sood. Thereafter, he filed the complaint, before the learned Special Judge, on 12th May, 2011.

24. PW-2 also identified the vehicle, which was parked adjacent to the DRI office, as the vehicle which was intercepted, by the raiding team – led by himself – at the Singhu border.

25. During cross-examination, PW-2 admitted that no departure entry had been made, when the raiding team had left the DRI office on 15th November, 2010, for the Singhu border. He also admitted to not having verified the addresses of the public witnesses, or having taken their photographs or noted down their telephone numbers. He also acknowledged the fact that no site plan, of the spot of interception, had been prepared, though he had no explanation therefor. He further testified, in cross-examination, that it was the appellant himself, who had driven his car to the DRI office, from the Singhu border. He also testified that, at the time of search of the vehicle of the appellant, in the parking lot adjacent to the DRI office, there were present, apart from himself, PW-4

Ajay Bhasin, PW-9 V. S. Pandey, PW-15 Rajpal Singh, the sepoy who had accompanied the raiding team, the two public witnesses, and the appellant himself. He reiterated that he had served a single copy of the notice, under Section 50 of the NDPS Act, on the appellant, at the spot of interception, and asserted that he himself had written the said notice, by hand, on the spot. He further testified, in cross-examination, to having handed over the report, under Section 57 of the NDPS Act, to V. S. Pandey (PW-9) on 17th November, 2010. He further stated that, on the occasion of recording of the statement, of the appellant, under Section 67 of the NDPS Act (Ex. PW-2/K), H. C. S. Bhandari (PW-8) was also present. He admitted that no entry had been made in the DRI office, regarding entry and exit of the public witnesses, and also admitted that it was true that, without permission, no one could enter the DRI office. He asserted, further, that, during recovery and testing of the seized heroin, PW-4 Ajay Bhasin, PW-5 Kamal Kumar and PW-15 Rajpal Singh, were present.

26. PW-2 further admitted, on being questioned during cross-examination, that the statements of the public witnesses were recorded seven to eight days after the seizure of the heroin, but sought to explain this delay by stating that, on 16th November, 2010, the statements of the said witnesses could not be recorded owing to paucity of time, though there was nothing, in writing, establishing this fact. On being questioned regarding investigations as to the source from where the appellant had procured the heroin, PW-2 stated, in cross-examination, that some investigation had been carried out, but the source of the heroin could not be traced.

27. The testimony of PW-2, during trial, was substantially corroborated by Ajay Bhasin, deposing as PW-4. The narration of the events pertaining to the interception of the appellant, service, on him, of notice under Section 50 of the NDPS Act and his response thereto, proceeding to the office of the DRI, and involvement of PW-9 V. S. Pandey, tallied, almost entirely, with the narration, as contained in the deposition of PW-2 J. P. Raju, the IO. PW-4 further deposed that the search of the two HDPE bags, found in the vehicle driven by the appellant, was conducted in the DRI office in the presence of PW-2, V. S. Pandey (PW-9), himself, Rajpal Singh (PW-15), Kamal Kumar (PW-5), the two public witnesses and the appellant. He also confirmed the fact that, inside the cloth bags, individual packets, containing a pungent off white powder, were found. He, however, deposed that, thereafter, he left the place, to attend to his other official duties, and was not, therefore, a witness to the Field Testing of the powder, or to the preparation of the individual *pullandas*.

28. PW-4 also corroborated the testimony of PW-3 K. K. Sood, by affirming that, on 18th December, 2010, PW-3 had handed over, to him, 52 samples, along with the test memos and forwarding letter addressed to the CRCL. He deposed that he had deposited the samples, the test memos and the said letter, in the CRCL, and had delivered back, to PW-3 K. K. Sood, the acknowledgement thereof (Ex. PW-1/C), as given by PW-6 A. K. Maurya.

29. PW-4 was cross-examined. He reiterated, in cross-examination, the fact of participation, in the interception, as well as the search and seizure operations that followed, of the public witnesses. He also reiterated the fact that the raiding team had reached the Singhu border at about 2:30 AM on 16th November, 2010. He confessed not being able to remember the identity of the driver, who was driving the DRI vehicle. He accepted that no entry had been made, at the time when the raiding team returned to the DRI office, and that no site plan, of the spot of interception, had been prepared. He also reiterated the fact that the test memos, following on the Field Testing of the powder found in the packets, contained in the HDPE bags, had not been prepared in his presence, and that he had not participated in the proceedings after the packets were opened. He clarified that no entry, of arrival of public persons, was made at the DRI office, and categorically denied the suggestion that no public persons had participated in the interception, search and seizure operations in the present case.

30. Kamal Kumar, also a member of the DRI team, deposed, during trial, as PW-5. He testified, in his examination-in-chief, to being the recipient of the secret information (Ex. PW-2/A), on 15th November, 2010, to the effect that a stout person, of Afghan origin, approximately 5'10" in height, driving a silver Toyota car, bearing registration number DL 8 CJ 4621, would be entering Delhi through the Singhu border, between 3 AM and 4 AM the next day, i.e. on 16th November, 2010, and would be carrying heroin, and to reducing the said information into writing, which was submitted to PW-7 Atul Handa, his superior, at about 5:30 PM on the same day, i.e. 15th November, 2010. His deposition

corroborated, in all material particulars, the depositions of PW-2 J. P. Raju and PW-4 Ajay Bhasin, and other members of the raiding team, regarding the formation of the raiding team, the interception of the appellant at the Singhu border, the serving, on him, of notice under Section 50 of the NDPS Act and his response thereto, the conveying, of the appellant, to the DRI office and the requisitioning of the presence of PW-9 V. S. Pandey, being a Gazetted officer, as well as to the recovery of the two HDPE bags, from the boot of the Toyota Corolla car which was being driven by the appellant, and the recovery, from the said bags, of off-white, pungent powder, contained in small packets, on the 7th floor of the DRI office. He further deposed that, once the powder was recovered, he left the spot, to attend to his other duties, and that he was later informed, by PW-2 J. P. Raju, that the powder contained in the packets was, on being tested, found to be heroin.

31. During cross-examination, PW-5 acknowledged that he was not present at the time of recording of the statements of the public witnesses, that no site plan was prepared in his presence, and that he had not signed any document, prepared on the spot. He went on to depose, in cross-examination, that there was no documentary evidence, regarding his participation in the investigative process, or even regarding the investigation conducted by the DRI officials in the office of the DRI. I may note, even at this juncture, that such a statement, even if made, is of little, if any, evidentiary value, as the existence, or otherwise, of documentary evidence, is a matter of record.

32. The testimony of PW-5 Kamal Kumar was corroborated by PW-7 Atul Handa, who, at the relevant time, was posted as Deputy Director in the DRI Headquarters. PW-7 confirmed that, on 15th November, 2010, he had received the secret information (Ex. PW-2/A), which had been put up, before him, by PW-5 Kamal Kumar. He also referred to the specifics of the information, in which respect his testimony was the same as that of PW-5. He also confirmed having conveyed the information to PW-2 J. P. Raju, the IO, at 6 PM on the same day, i.e. 15th November, 2010. PW-7 was cross-examined, but nothing substantial emerged therefrom.

33. H. C. S. Bhandari, Tax Assistant in the DRI, deposing as PW-8, affirmed, in his examination-in-chief, that, on 16th November, 2010, he had reduced the statement of the appellant, recorded under Section 67 of the NDPS Act (Ex. PW-2/K), to writing, as dictated by the appellant and that, on the said occasion, PW-2 J. P. Raju, the IO, was present. (In cross-examination, he confirmed that no other officer, of the DRI, was present on the occasion.) He confirmed that the statement of the appellant had been recorded, in writing, on his dictation, as the appellant claimed to be unable to read and write any language, though he could understand and speak Hindi. The appellant signed the statement, after it was read over to him. In cross-examination, PW-8 confirmed that he did not participate, in the investigative process, in any other manner, except as the scribe of the statement, under Section 67 of the NDPS Act, of the appellant, for which he was he was called, by the IO, to be present at 4:15 PM on 16th November, 2010. He also confirmed, in cross-examination, that PW-2 was putting questions to the appellant, while recording of his statement. He further testified that the appellant had been arrested at about 10 PM on

16th November, 2010, and that the Arrest Memo (Ex. PW-2/L) was prepared by the IO in advance.

34. V. S. Pandey, then IO in the DRI, as the Gazetted officer, before whom the search of the appellant, as well as of the vehicle in which he was travelling, was conducted, deposed, during trial, as PW-9. He confirmed, in his examination-in-chief, having issued the DRI seal to PW-2 J. P. Raju, the IO, on 15th-16th November, 2010, after making the requisite entry in the Seal Movement Register (Ex. PW-9/A), which was signed by PW-2 as well as by him. He also confirmed that, after it was used, the seal was returned to him, and that he had signed on Ex. PW-9/A by way of receipt thereof. He also confirmed having issued the search authorisation (Ex. PW-2/Z-16), authorising the IO PW-2 J. P. Raju, to search the Toyota Corolla car, in which the appellant was travelling. Insofar as his participation in the investigative process was concerned, PW-9 deposed that, on 16th November, 2010, he had been called to the parking area outside the office of the DRI, where the raiding team, along with the two public witnesses, was present. He was shown the notice, under Section 50 of the NDPS Act (Ex. PW-2/B), issued to the appellant, as well as the response of the appellant, as recorded thereon, and he, by way of a separate endorsement on the body of the said notice, permitted conducting of the search of the appellant, and of his car, in his presence. Pursuant thereto, the IO J. P. Raju (PW-2) searched the vehicle of the appellant, in the presence of PW-9, wherefrom two HDPE bags, each of which contained 26 packets, were recovered. The search was conducted in the presence of the appellant, the two public witnesses and PW-9.

35. PW-9 further deposed that the packets, along with the documents recovered from the two HDPE bags, were carried to the 7th floor of the DRI office, where personal search of the appellant was conducted, resulting in the recovery of \$ 3000, an Afghanistan passport and a temporary residential permit. He further testified that a pinch of the powder, found in each of the 52 packets, contained in the two HDPE bags, was tested, and found to test positive for heroin. The proceedings, he deposed, were conducted under *Panchnama*, which, along with all annexures thereto, were signed by the IO J. P. Raju (PW-2), the public witnesses, and PW-9. In cross-examination, PW-9 confirmed that he had not seen the public witnesses in the DRI office on 15th November, 2010, and saw them, for the first time, at 5-5:30 AM on 16th November, 2010. He also confirmed having asked the public witnesses, whether they had ever been associated, earlier, with DRI raids, to which they answered in the negative. He described one of the public witnesses as being between 18 and 19 years of age, and the other as being between 32 and 35 years of age. He also admitted that he had never seen the secret information, on the basis of which the investigative process had commenced, at any time during the proceedings in the investigation. He further testified, in cross-examination, that the public witnesses had left the office after the *Panchnama* proceedings had been concluded, and that the *Panchnama*, though drawn his presence, was not signed by him.

36. Having thus testified regarding his participation in the proceedings on 16th November, 2010, PW-9 went on to depose that, on the next day, i.e. 17th November, 2010, he received the report, drawn under Section 57 of the NDPS Act (Ex. PW-2/P) from the IO J. P. Raju (PW-2).

37. Two boxes were produced in the court, each of which was sealed with a DRI seal, which had to be broken before the boxes could be opened. One of the said boxes contained another box, in which an unsealed yellow envelopes, containing \$ 3000, was found. The second box contained two bags, in which 52 packets, bearing the seals of the court (which were intact), marked X-1 to X-52, were found. These bags were identified by PW-9 as being the bags recovered from the boot of the Toyota Corolla car, in the parking lot outside the DRI office. Each packet was found, in turn, to contain a cloth wrapping, in which there was yet another packet, containing an off white powdery substance, which was identified by PW-9 as the contraband seized in his presence by the IO J. P. Raju (PW-2). PW-9 also correctly identified the appellant, in court.

38. PW-9 further testified, in cross-examination, that officers, using official vehicles, were required to countersign the entry in the logbook of the vehicle, which was maintained by the driver. He further stated that the notice, under section 50 of the NDPS Act, was already bearing the signatures of the public witnesses, at the time when it was first seen by him. He further confirmed that he had ascertained, from the appellant, that the noting, entered on the body of the notice under Section 50 (Ex. PW-2/B), requesting for conducting of the search in the office of the DRI in the presence of a Gazetted officer of the DRI, was voluntary. He also confirmed that, at the time when he had been shown the said noting, in the parking area, the IO J. P. Raju (PW-2), as also PW-15 Rajpal Singh, were part of the raiding team present on the spot. He further confirmed

that the appellant had professed that he was unable to write in any language, but was able to understand Hindi.

39. PW-9 further explain, in cross-examination, that the paper slips were prepared one by one and, after the signatures of the public witnesses, the appellant and the IO J. P. Raju (PW-2) had been obtained thereon, the slips were affixed on the *pullandas*, which were subsequently sealed with the DRI seal. He also acknowledged that, though the appellant, as well as the public witnesses, were not conversant with English, the *Panchnama* was prepared in the said language. PW-9 further testified, in cross-examination, that the appellant was arrested during the night of 16th November, 2010 and that, before the said arrest, he was not under the custody of the DRI. On being further queried, PW-9 affirmed that no register was maintained, at the reception of the DRI, on the 7th floor of the building, regarding entry and exit of visitors to the office. PW-9 also confirmed that he was not present when the statement of the appellant, under section 67 of the NDPS Act, was being recorded, and that the said statement had not been shown to him by the IO. He reaffirmed that, though the English tongue was unfamiliar to the public witnesses, as well as the appellant, the entire paperwork, in the case, was done in English.

40. The above testimonies, of PW-2, PW-4 and PW-5 were corroborated by Rajpal Singh, Intelligence Officer in the DRI, testifying as PW-15. PW-15 affirmed, in his examination-in-chief, that he had been called to the DRI office, by PW-2 J. P. Raju, the IO, at around 12 midnight between 15th and 16th November, 2010, where he was

introduced to the public witnesses “Shanker and Sharvan”. He confirmed (i) the departure of the raiding team, comprising J. P. Raju (PW-2), Ajay Bhasin (PW-4), Kamal Kumar (PW-5), two subordinate staff, the two public witnesses and himself, at around 1:30 AM, (ii) the interception, by the said raiding team, of the Toyota Corolla car bearing registration no. DL 3 CJ 4621, at around 3:30 AM on 16th November, 2010, (iii) the disclosure, by the appellant, of being the driver of the said car, (iv) the service of notice, under Section 50 of the NDPS Act (Ex. PW-2/B), on the appellant, (v) the response of the appellant, to the effect that the search of the car, and of his person, could be conducted before a Gazetted officer of the DRI, in the DRI office, (vi) the proceeding, by the raiding team, with the appellant, to the DRI office, (vii) the inclusion of V. S. Pandey (PW-9), as the Gazetted officer, in the proceedings, (viii) the search of the car, resulting in the discovery of two HDPE bags, containing 52 packets of powder which tested positive for heroin, (ix) the weighment of the heroin, as 51.865 kg, (x) the withdrawing, from each of the 52 packets, of two representative samples, of approximately 5 grams each and their labelling as X-1-A to X-52-A and X-1-B to X-52-B, (xi) the recovery of \$ 3000 and an Afghanistan passport from the personal search of the appellant, (xii) the preparation of test memos in respect of the samples to be sent to the CRCL, and (xiii) the drawing up of *Panchnama*, recording the entire proceedings, which were concluded at around 4 PM on 16th November, 2010.

41. In cross-examination, PW-13 acknowledged that, in his presence, no documents had been signed by the public witnesses. He also confirmed having left the office after conclusion of the *Panchnama*

proceedings (which he did not sign) though, till then, he remained with PW-2 J. P. Raju, the IO. He acknowledged that he was not present during the recording of the statement of the appellant. He, however, affirmed, once again, that notice, under Section 50 of the NDPS Act had, in fact, been issued to the appellant, and denied the suggestion that the notice had been prepared in the office of the DRI.

Witnesses to the transmission of the samples, from the time of their seizure and inventorization, to the CRCL

42. K. K. Sood, Deputy Director, DRI, deposing as PW-3, testified, during the trial, that, on 16th November, 2010, PW-2 J. P. Raju (the IO) had handed over, to him, “the sealed *pullandas* of the case property (consisting of two packages, 52 sealed sample packets in duplicate (in total 104 samples in number) and test memos in duplicate”. He deposed that he preserved the case property, samples and test memos in his room, under lock and key, and that, in his absence, the key of the room remained with him. He further testified that, on 18th November, 2010, he directed PW-4 Ajay Bhasin to carry one set of the sample packets, consisting of 52 samples, along with test memos in duplicate, to CRCL, for chemical analysis. He also provided PW-4 Ajay Bhasin with an introductory letter, for the said purpose (Ex. PW-3/A). He further confirmed that, later on the same day, the IO J. P. Raju (PW-2) showed him the acknowledgement, received from the CRCL (Ex. PW-1/C), evidencing deposit of the aforesaid packets in the CRCL. He further confirmed having written, on 22nd November, 2010 (Ex. PW-3/E) to the Regional Transport Office (RTO), Wazirpur, Delhi, for being provided

ownership details of the vehicle bearing registration no. DL 8 CJ 4621. PW-3 also confirmed having authorised the IO J. P. Raju (PW-2), on 6th January, 2011, *vide* authority letter Ex. PW-3/F, for collecting of the remnant samples along with the analysis report from the CRCL, and that, on the basis thereof, the IO had collected the remnant sample and report. In cross-examination, PW-3 confirmed, however, that the handing over, of the sealed sample *pullandas* and test memos, by him, to the IO J. P. Raju (PW-2) on 16th November, 2010, was not documented. He went on to depose, voluntarily, that the letters, whereunder the samples had been sent to the CRCL, were sent through the DRI officer.

CRCL witnesses

43. Deposing as PW-1, V. B. Chaurasia, Chemical Examiner in the CRCL testified, in his examination-in-chief, that, on 18th November, 2010, 52 sample packets had been received, in the CRCL, by R. P. Singh (who has not been co-opted as a witness), against which receipt was issued by PW-6 A. K. Maurya. Thereafter, the samples were kept in the strong room of the CRCL. They were taken out on 8th December, 2010, in the presence of PW-1, by PW-6 A. K. Maurya. On checking, the seals, on the samples, were found to be intact, and matching with the facsimile provided by the DRI. PW-1 further deposed that analysis, of the samples, was conducted, in his presence, by PW-6 A. K. Maurya, from 8th to 16th December, 2010 and that, on the basis of chemical and chromatographic examination, the substance was found to be diacetylmorphine (heroin). A report, to the said effect (Ex. PW-1/A) was, therefore, issued, under his

signature. The signature of PW-6 A. K. Maurya figured in Section II of the Test Report, which contained the Analysis Report of the substance.

44. In cross-examination, PW-1 admitted that, on the date of receipt of the samples, he was not posted in the CRCL and that he could not say, with certainty, that, at the time of the receipt, the samples were sealed, and that the seals on the samples tallied with the facsimile provided by the DRI. He, however, went on to clarify that, when the samples were taken out on 8th December, 2010, they were, in fact, properly sealed, and the seals were found to tally with the test memos. He also admitted that, between 8th and 16th December, 2010, the samples were kept in the strong room in an unsealed condition, but denied the suggestion that there was any possibility of tampering therewith.

45. The CRCL report, dated 16th December, 2010 (Ex. PW-1/A) opined that, on the basis of chemical and chromatographic examination, it was concluded “that each of the 52 samples under reference answer positive test for Diacetylmorphine (Heroin)”. The report also contains a tabular statement, setting out the percentage of heroin in each of the 52 samples. The percentage ranged from 15.1% to 67.6%. Worked out on the basis of the said purity percentages, the total quantity of heroin works out to 24.41 kg, which is much in excess of the notified commercial quantity of heroin, which is only 250 grams.

46. A. K. Maurya, who was Assistant Chemical Examiner in the CRCL during the relevant time, testified as PW-6. In his examination-in-chief, PW-6 confirmed having received, on 18th November, 2010, 52 sample

packets, bearing intact seals of the DRI, along with the forwarding letter and test memos in duplicate. He further confirmed that, before receiving the packets, he checked the condition of the seals and found them to be intact. The samples, according to him, were diarised *vide* Diary No. 231, dated 18th November, 2010, whereafter acknowledgement, of receipt of the samples (Ex. PW-1/C), was given, by him, to the officer of the DRI, who had brought the samples. The samples were allotted, to him, by Rajpal Singh, the Chemical Examination-in-Charge of the Narcotics Section of the CRCL.

47. PW-6 further deposed that, after receipt, the samples were kept in the strong room of the CRCL. They were retrieved, from the strong room, twice, on 8th December, 2010, and on 9th December, 2010. On both the occasions, the retrieval of the samples, as well as the subsequent examination, took place in the presence of PW-1 V. B. Chaurasia. After the samples were taken out, the markings, on the samples marked X-1-A to X-52-A were verified and checked, with respect to the Test Memo. The seals on the samples were found to be intact, and tallying with the facsimile provided by the DRI.

48. PW-6 further testified that, on 8th December, 2010, the samples were subjected to chemical and chromatographic analysis, in the presence of PW-1 V. B. Chaurasia, and were found to test positive for diacetylmorphine (heroin). Thereafter, the samples were re-consigned to the strong room, wherefrom they were again taken out the next day, i.e. on 9th December, 2010. From 9th to 16th December, 2010, the samples were subjected to quantitative analysis and determination of the

percentage of heroin therein. The analysis was completed on 16th December, 2010. The final Analysis Report (Ex. PW-1/A) was signed by PW-1 V. B. Chaurasia, whereas he, i.e. PW-6, signed the Short Analysis Report, in Section II of the Test Memo (Ex. PW-1/B). PW-6 further stated that he identified the signatures of PW-1 V. B. Chaurasia. After completion of quantitative analysis, the remnant samples were sealed with the seal of the CRCL, a facsimile of which was appended thereto.

49. PW-6 was cross-examined. In cross-examination, he reiterated having received the sample packets on 18th November, 2010, though he accepted that the diarisation, thereof, was not in his handwriting. He maintained that, in Ex. PW-1/A, the impression of the seal of the CRCL was readable.

50. PW-6 admitted, in cross-examination, that, on Ex. PW-1/A, the date had been wrongly entered as 18th December, 2010. This, he submitted, was a *bona fide* clerical error, as was reflected by the fact that, in Section II of the Test Report, the date of receipt was correctly mentioned as 18th November, 2010. PW-6 also admitted that the description of the drugs, in Ex. PW-1/A, was entered as “off-white coarse powder”, whereas, in Ex. PW-1/B, it was reflected as “coloured powdery/granular substance”. PW-6, on being further queried, clarified that he had not analysed the samples for extraneous substances, and that the heroin percentage had been derived by gas chromatography. In analysing the samples, he stated that the United Nations Manual, regarding testing of heroin, had been referred to. He also confirmed that

the key of the strong room remained with the In-Charge of the Narcotics Section.

Witnesses to the sale and purchase of Toyota Corolla Car No. DL 8CJ 4621

51. Varun Kalra deposed as PW-12, during the trial. He confirmed, in his deposition, having purchased the Toyota Corolla car, bearing registration no. DL 8 CJ 4621 from M/s Pawansut Merchants on 30th August, 2010, for ₹ 2.6 lakhs, and having sold the car, to H. S. Bindra (PW-13) ₹ for 2.75 lakhs. He further deposed that he had taken delivery of the car, from M/s Pawansut Merchants, against a delivery receipt, and was given blank Forms 29 and 30 (which were collectively marked 'C'), and that he had, in turn, tendered the said blank Forms 29 and 30 to H. S. Bindra (PW-13), from whom he had received a delivery receipt (marked 'D'). He also confirmed the recording of his statement, by the IO J. P. Raju (PW-2) on 23rd December, 2010 (Ex. PW-2/T). In cross-examination, PW-12, even while acknowledging that the signature, contained on the copy of the delivery receipt, was not there in the original, refuted the allegation that the documents had been manipulated at the instance of the DRI.

52. H. S. Bindra, deposing as PW-11, confirmed having purchased the aforesaid Toyota Corolla car, from Varun Kalra (PW-12) on 7th September, 2010, for ₹ 2.5 lakhs, and having sold the car, to Manzoor Ahmed (PW-13) for ₹ 3.7 lakhs, which was received, by him, in cash. He also confirmed that he had given a delivery note to Varun Kalra, and had received, from him, Forms 29 and 30. Similarly, he confirmed having

provided Forms 29 and 30 to Manzoor Ahmed, and having received, from him, a Delivery Note. These documents were, collectively, marked 'D'. He also confirmed having stated the above facts, in his statement to the DRI (Ex. PW-2/V), and that the said statement had been tendered, by him, without coercion or force, though, prior to the recording thereof, Section 67 of the NDPS Act was not explained to him. In cross-examination, PW-11 admitted that he had not shown the sale or purchase of the car in his sale and purchase account.

53. Manzoor Ahmed deposed as PW-13. He confirmed having tendered his voluntary statement, under Section 67 of the NDPS Act (Ex. PW-2/Z-5), to J. P. Raju (PW-2), which was reduced, to writing, by his son and signed, at the foot of the statement, by his son and by himself. He testified that the aforesaid Toyota Corolla car was purchased by the appellant, in the name of himself (PW-13), using his, i.e. PW-13's, Election ID Card, as the appellant, being a foreign national, did not have documents of identity. He identified the appellant correctly in court. He further testified that the car was purchased from a Sikh gentleman, though he did not remember his name, for ₹ 3.6 lakhs, as far as he could recollect. He also confirmed that he did not take any consideration from the appellant, for allowing the appellant to purchase the car in his name, as the appellant was known to him, but that he had received commission of ₹ 10,000/- from the dealer of the car. He also confirmed that he had not signed any transfer documents. Nothing substantial was elicited from him, in cross-examination.

Hospital witnesses

54. Dr. Rajnish Kaushik, Medical Officer in the RML Hospital, deposing during trial as PW-14, proved the MLC of the appellant (Ex. PW-14/A), and confirmed that the report had been prepared in his handwriting and bore the signatures. He affirmed, in oral evidence, that he found the appellant conscious and oriented and with stable vitals. Nothing substantial was elicited, from him, in cross-examination.

55. The testimony of PW-14 was supported by PW-16, Dr. Deepa Sharma, during trial. PW-16 also confirmed having been posted as Medical Officer in the RML Hospital on 17th November, 2010, where the appellant was brought by the IO J. P. Raju (PW-2), and having examined the appellant *vide* MLC No. E/204858/10 (Ex. PW-16/A), which was entered in her handwriting and bore her signatures. She confirmed that there were no fresh external injuries on the person of the appellant. In cross-examination, however, she agreed that, if a person was given blows at certain strategic points like his back, feet, etc., an orthopaedic expert alone would be able to depose as to whether there would, or would not, be external injury marks. She, however, affirmed that the appellant had not pointed out, to her, the mark of any external injury suffered by him.

56. Reference, to the contents of the MLC of the appellant (Ex. PW-14/A) has already been made, in greater detail, hereinbefore.

Statement of appellant under Section 67, NDPS Act (Ex. PW-2/K) and retraction thereof

57. A reading of the statement of the appellant, recorded by PW-2 J. P. Raju, the IO, on 16th November, 2010, reveals that the appellant has stated/disclosed, therein, that

(i) as the appellant was illiterate, and could only speak and understand Hindi, the statement was, as per his dictates, being transcribed, in Hindi, by H. C. S. Bhandari (PW-8),

(ii) the appellant was informed, by his friend Azim Mohammed, that, if he would transport narcotics, from his associates, located in Punjab, to Delhi, he would be paid at the rate of ₹ 10,000/- per kg,

(iii) in his greed for wealth, he acquiesced to the scheme,

(iv) Azim Mohammed paid him \$ 9000/-, to enable him to purchase a car, on reaching Delhi,

(v) he reached Delhi on 20th September, 2010, and began residing with his friend Ahmed Sadiq,

(vi) he purchased an old Toyota Corolla car, bearing registration no. DL 8 CJ 4621, using the money given to him by Azim Mohammed,

(vii) Azim Mohammed asked him to meet two of his friends, between 2:30 and 3 PM on 15th November, 2010, near the Reliance petrol pump located in Sursingh village,

(viii) he was told, further, that the said two persons would hand over, to him, 52 to 53 kg of heroin, which he was required to

transport to Majnu Ka Tila, Delhi, and supply to a Nigerian national who would meet him there at about 5 AM on 16th November, 2010,

(ix) as directed by Azim Mohammed, he left Delhi, for Sursingh village, Punjab, at midnight on 14th November, 2010,

(x) two persons met him, outside the Reliance petrol pump, at the said village, at 2:30 PM on 15th November, 2010, and, after borrowing his car for about half an hour, returned with about 52 kg of heroin, which they claimed to have concealed in the boot of the car,

(xi) one of the said two persons paid him \$ 3000/-, as advance payment,

(xii) he did not know the names, or the phone numbers, of the said two persons, who had met him in Sursingh village, and

(xiii) he was also unaware of the address of Azim Mohammed, though he knew two of the mobile numbers of Azim Mohammed, registered in Pakistan.

The appellant also acknowledged, in his statement under Section 67 of the NDPS Act, to having been intercepted, by the raiding team of the DRI, at about 3:30 AM on 16th November, 2010, at the Singhu border, as well as to having been served with a notice, under Section 50 of the NDPS Act. He further acknowledged the fact of search, of his person and of the car, at the DRI office, and of the recovery of 51.865 kg heroin,

\$ 3000/-, and various documents, from the car, under *Panchnama*. He also acknowledged the fact that representative samples had been extracted, from the seized heroin.

58. The appellant retracted the aforesaid statement, tendered by him on 16th November, 2010, in writing, on 1st December, 2010. The retraction is in English, and commences with the recital that, as the appellant was unable to write in any language, he had “begged somebody to write” for him on his dictation. Neither the name, nor the signature, of the purported scribe of the retraction, however, is to be found in the body thereof. The retraction states that the statement, of the appellant, was “non-voluntary”, and that the appellant had been “forced and tortured by the DRI officers to sign any paper that was put before” him. Accordingly, the retraction prays “that the Hon’ble court may ignore any statement or any documents that bears (his) signature because all were obtained under threat and duress and coercion (*sic* coercion).”

Statement of appellant under Section 313, Code of Criminal Procedure, 1973

59. In his statement under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.), the appellant, while professing ignorance in response to most of the queries posed to him, denied (i) having driven the vehicle bearing registration no. DL 8 CJ 4621, which was stopped as it entered Delhi after having crossed the Singhu border, (ii) all the proceedings which allegedly took place at the said spot, and the proceedings, therefrom, to the DRI office, (iii) the recovery of narcotics

from the boot of the said car, as well as the entire proceedings that allegedly took place in the DRI office, including recovery of the heroin, and (iv) his having admitted, in his statement before the DRI officers, having been in possession of heroin, or having anything to do with the Toyota Corolla car DL 8 CJ 4621. He insisted that the witnesses, on whose depositions DRI was relying, were planted witnesses, and that his signatures had been obtained, by the DRI officers, on certain blank papers. He denied the existence of any public witnesses, and asserted that the complaint, lodged against him, was false. He maintained that the witnesses, who had deposed against him, had done so under pressure of DRI. He insisted that he had been falsely implicated, and had no relation with the recovery of heroin. He also expressed his desire to lead defence evidence.

Defence Evidence

60. In his defence, the appellant led the evidence only of SI Sanjay Kumar, who deposed as DW-1, and who, on being summoned, produced the Register relating to FIR Nos. 251 to 300/2011. Inasmuch as the contents of these FIRs – including FIR No. 258/11 (Ex. DW-1/A), registered on 10th August, 2011 under Section 14 of the Foreigners Act, 1946, do not impact the outcome of the present case to any discernible extent, this judgment need not be burdened with any further reference thereto.

The impugned judgment

61. Paras 1 to 7.0 of the impugned judgment of the learned Special Judge set out the case of the prosecution, as well as the rival submissions,

advanced before him by both sides. It is not very clear, from the impugned judgment, as to whether the observations that follow, in the passages commencing from para 8.0 onwards, constitute the submissions of the rival parties before the learned Special Judge, or his findings. It appears, however, that the learned Special Judge has proceeded on the following basis:

(i) On the events, relating to constitution of the raiding team, interception of the appellant, and seizure and recovery of heroin, from the boot of the car being driven by him, there was, largely, congruence, in the statements of PW-2 J. P. Raju, the IO, PW-5 Kamal Kumar, PW-4 Ajay Bhasin and PW-15 Rajpal Singh. There was no inherent contradiction in their statements, as could affect the case of the prosecution. The statements of these witnesses, therefore, proved the factum of seizure and recovery.

(ii) Though the public witnesses could not be examined, as it was not possible to serve summons on them, there was nothing to show that they were fictitious, or that they were deliberately withheld by the prosecution. The inability to examine the public witnesses, therefore, could not result in any inference adverse to the case of the prosecution.

(iii) The law did not postulate that, in the absence of the public witnesses, the statement of official witnesses could not be believed. The DRI/complainant had not deliberately withheld the witnesses from the Court. In order to cast doubt on the statement of

appreciable/departmental witnesses, it was essential for the defence to establish that the department had deliberately kept witnesses away from the Court. The inability of the prosecution, to produce public witnesses, was only because, though summons were issued to them, for one reason or the other, they could not be served. Reliance was placed, for this purpose, on *State of Haryana v. Mai Ram*¹.

(iv) Ultimately, the question to be asked was whether the evidence of the official witnesses suffered from any infirmity. If the answer was in the negative, and the official witnesses corroborated the proceedings, the case of the prosecution could not be disbelieved. Reliance was placed, for the purpose, on the decision in *Ajmer Singh v. State of Haryana*².

(v) There was no allegation of any enmity or prejudice, of the prosecution witnesses, to falsely implicate the appellant. In the circumstances, there was no reason to disbelieve the statement of the official recovery witnesses, with regard to recovery of heroin from the car which was being driven by the appellant. Besides, the said statements were corroborated by the *Panchnama* (Ex. PW-2/C), which also bore the signature of the two public witnesses, as well as that of the appellant.

¹ (2008) 8 SCC 292

² (2010) 2 SCC 746

(vi) Besides, the three receipts recovered from the car of the appellant were also signed by the public witnesses, the appellant and the IO J. P. Raju (PW-2).

(vii) Contemporaneous documents, therefore, provided adequate support and co-operation to the oral testimony of the prosecution witnesses.

(viii) Besides, the appellant had, in his statement under Section 67 of the NDPS Act (Ex. PW-2/K) explained, in detail, how he came into contact with Azim Mohammed, as well as the circumstances in which he transported the heroin from Punjab to Delhi, in the boot of the car being driven by him, for which he was paid \$ 3000 as advance. The statement, recorded under Section 67 of the NDPS Act, was admissible, provided it was voluntary and truthful. In the absence of any material to indicate that the statement had been extracted by force, or that it had been retracted at the first available opportunity, the statement was admissible. In the present case, the evidence of PW-14 Dr. Rajnish Kaushik and PW-16 Dr. Deepa Sharma, and the MLCs prepared by them (Ex. PW-14/A and PW-16/A) clearly showed that there was no external injury on the person of the appellant. Besides, the deposition, of the appellant, to the effect that he had been paid \$ 3000, as advance for transporting the heroin, was corroborated by the recovery of precisely \$ 3000 from him.

(ix) Though a retracted statement, ordinarily, could not be the sole basis for convicting an accused, in the absence of independent

corroboration, it could certainly be relied upon, if made voluntarily. There was nothing to indicate that Ex. PW-2/K was not a voluntary statement. The statement corroborated the evidence of the official witnesses. Even if, therefore, the statement of the appellant, under Section 67 of the NDPS Act, was to be eschewed from consideration, the recovery of the heroin, nevertheless, stood proved by the statements of the recovery witnesses.

(x) Once the recovery of heroin stood proved, the onus was on the appellant to explain his possession, or to disprove the presumption of conscious possession thereof. No such explanation was forthcoming.

(xi) The evidence of K. K. Sood (PW-3), Ajay Bhasin (PW-4), A. K. Maurya (PW-6) and V. B. Chaurasia (PW-1), seen in the light of the forwarding letter, whereunder the samples and test memos were sent to the CRCL for chemical analysis (Ex. PW-3/A), the acknowledgement of receipt of the samples in the CRCL (Ex. PW-1/C), as provided by A. K. Maurya, and the test report of the samples (Ex. PW-1/A), clearly established that the samples had remained intact, till their testing by the CRCL and even thereafter. The possibility of tampering with the samples, as noted by the appellant during arguments was, therefore, without substance.

(xii) Though the appellant may not have been the registered owner of the Toyota Corolla car, it stood established that he had purchased the vehicle through Manzoor Ahmed (PW-13).

(xiii) The submission, of the appellant, that there was no justification for effecting the search of the appellant, and of his vehicle, at the DRI office, whereas interception had taken place at the Singhu border, was found to be without substance. The learned Special Judge notes, in this regard, that the endorsement, by the appellant, on the notice, under Section 50 of the NDPS Act (Ex. PW-2/B), opting for his personal search, and the search of his car to be effected in the presence of a Gazetted officer of the DRI in the office of the DRI, stood proved by J. P. Raju, the IO (PW-2). Even otherwise, there was no inherent illegality in effecting of the search at the DRI office, and the appellant could not be said to have been prejudiced, in any manner, thereby.

(xiv) Section 50 of the NDPS Act was not applicable, in the absence of any inextricable connection between the search of the appellant and the search of his vehicle. Reliance was placed, for this purpose, on the judgment of the Supreme Court in *Yasihey Yobin v. Department of Customs, Shillong*³.

(xv) Compliance, with Section 42 of the NDPS Act was also found to have been duly effected, by reduction of the secret information into writing and obtaining of a search authorisation, to search the vehicle in which the appellant was travelling.

(xvi) Non-production of the logbook of the car, used by the DRI, was insufficient as a ground to dent the effect of the statements of the prosecution witnesses.

³(2014) 13 SCC 344

62. In view of the above, the learned Special Judge held that the possession, and importing into Delhi, by the petitioner, of 51.865 kg heroin, stood proved, thereby making out a case of commission, by him, of the offence punishable under Section 21(c) of the NDPS Act. The learned Special Judge, accordingly, proceeded to convict the appellant for commission of the said offence. *Vide* subsequent order, dated 23rd February, 2016, as already noted hereinabove, the appellant was sentenced to suffer rigorous imprisonment for 13 years (of which he has already suffered about ten).

Rival submissions

63. Detailed submissions, spanning several hearings, were advanced by Ms. Rajni Singh, learned counsel designated by the Delhi High Court Legal Services Committee to represent the appellant, and Mr. Satish Aggarwala, learned Senior Standing Counsel on behalf of the DRI. Written submissions, setting out their respective contentions, have also been placed, on record, by learned Counsel.

64. The submissions of Ms. Rajni Singh may be enumerated, thus:

- (i) On the factum of arrest, of the appellant, H. C. S. Bhandari (PW-8) deposed that the appellant had been arrested at about 10 PM on 16th November, 2010, and that the Arrest Memo (Ex. PW-2/L) was already in the possession of the IO PW-2, and was not prepared in his presence. PW-9 V. S. Pandey deposed, on this

aspect, that, prior to the arrest of the appellant, on the night of 16th November, 2010, he was not under the custody of the DRI, and that the appellant had not been arrested in his presence.

(ii) Apropos the statement, of the appellant, under Section 67 of the NDPS Act, H. C. S. Bhandari (PW-8) deposed that he had not explained anything, to the appellant, regarding Section 67. Rajpal Singh (PW-15) and V. S. Pandey (PW-9) testified, during trial, that they were not present during the recording of the statement of the appellant.

(iii) Regarding the details of the substance recovered, and sent for testing, PW-15 Rajpal Singh deposed that he had checked “small quantity” of the substance in each of the 52 packets, whereas V. S. Pandey (PW-9) deposed that a “pinch” of the powder, contained in the 52 packets, was tested with the help of the Field Testing Kit, which tested positive for heroin. The words “small quantity” and “pinch” were vague. PW-2, J. P. Raju, the IO, too, in his the deposition, use the expression “small quantity”.

(iv) The powder was described, in Ex. PW-1/B, as “coloured/powdery/granular substance”, whereas, in Ex. PW-1/A, it was referred to as an “off white coarse powder”.

(v) PW-6 A. K. Maurya, the Chemical Examiner who had received the samples in the CRCL, did not state the quantity of sample received by him.

(vi) J. P. Raju (PW-2), Ajay Bhasin (PW-4), Kamal Kumar (PW-5) and V. S. Pandey (PW-9) were *ad idem* that the public witnesses were present, from the time of interception, till the time of preparation of *Panchnama*. The DRI had, thereafter, “made them disappear”, without producing them in the witness box. This eroded the credibility of the case of the respondent.

(vii) Apropos the testing of the samples in the CRCL,

(a) PW-1 A. K. Maurya had deposed, in cross-examination, that, when the test memos were first taken out from the strong room in the CRCL, they were not in a sealed condition,

(b) the receipt of the CRCL,(Ex. PW-1/C), issued at the time of tendering of the samples by Ajay Bhasin (PW-4), was not in the handwriting of A. K. Maurya (PW-6), though he had signed at the foot thereof,

(c) the main Test Report of the CRCL (Ex. PW-1/A) did not bear the signature of A. K. Maurya (PW-6), and contained the signature only of PW-1 V. B. Chaurasia,

(d) the samples remained, in the store room, in a sealed condition, from 8th December, 2010 to 16th December, 2010,

(e) no register, or record, was maintained in the CRCL, regarding opening and closing of the strong room, or the depositing therein, or withdrawal therefrom, of samples,

(f) the dispatch number of the CRCL was not available on the official file, which had been produced by A. K. Maurya (PW-6) before the learned Special Judge, and

(g) there was stark contradiction in the testimonies, during trial, of PW-1 V.B. Chaurasia and PW-6 A. K. Maurya.

These factors completely vitiated the alleged Test Report of the CRCL and, in fact, cast serious doubt on the very factum of submission of the samples to the CRCL, and testing thereof.

(viii) With respect to the public witnesses, PW-2 J. P. Raju, the IO, had testified, in his examination-in-chief, that he had called the public witnesses at 10 PM on 15th November, 2010, from the area near the office of the DRI, and that the said public witnesses had accompanied him to the DRI office. As against this, in his cross-examination, PW-2 stated that the public witnesses had been called through certain sepoy in the DRI office, whose names he did not collect. He also testified that he could not verify the addresses of the public witnesses, who served with the respective summons immediately on completion of the *Panchnama* proceedings, at the time of the departure from the DRI office. He further testified, in the said cross-examination, that no entry was made, in the DRI office, regarding arrival of the said public witnesses. The testimony of PW-2, regarding the public witnesses was, therefore, inherently contradictory, which indicated that the case against the appellant was false, and that the actual culprits had been allowed to escape. It

could not be believed that, if the public witnesses were actually associated with the investigation, PW-2, the IO, would have made no efforts to ascertain their addresses or telephone numbers. (In this context, it merits mention that the public witnesses were summoned, by the learned Special Judge, but were found not to be residing at the addresses provided by the DRI, whereupon the DRI gave up the said witnesses.)

(ix) Though, according to the deposition of PW-2 J. P. Raju, during trial, personal search of the appellant had resulted in the recovery of one Afghanistan passport, no such passport was forthcoming on the judicial record.

(x) The deposition of PW-2 J. P. Raju, the IO, during trial, was contrary to the depositions of PW-8 H. C. S. Bhandari, PW-15 Rajpal Singh and PW-9 V. S. Pandey.

(xi) There was no explanation for a single copy having been made, of the notice under Section 50 of the NDPS Act.

(xii) K. K. Sood (PW-3) had deposed, during trial, that the samples had been sent to the CRCL, not by the usual method of dispatch, but by hand through the officer of the DRI. He also confirmed that the *pullandas* had not been sealed in his presence.

(xiii) The manner in which Field Testing, using the Drug Detection Kit/Field Detection Kit, was carried out, was not forthcoming. Ms. Singh set out, in her written submissions, the

appropriate methodology, required to be followed in this regard, emphasising that there was nothing to indicate that Field Testing had been carried out, using the said methodology.

(xiv) There was no reasonable explanation for not conducting the search of the vehicle, being driven by the appellant, at the spot of interception. In this context, reliance was placed on the testimony, during trial, of PW-5 Kamal Kumar.

(xv) The testimony of the official witnesses was unworthy of reliance, additionally for the reason that none of the witnesses knew the names of the sepoy's who accompanied the search team, or of the drivers of the vehicles in which the search team proceeded.

(xvi) Ownership, by the appellant, of the Toyota Corolla car, which was alleged being driven by him, was also not conclusively established.

65. The written submissions of the appellant also seek, rather inexplicably, to criticise, severely, the manner in which the copying agency in the court was functioning, and the difficulties that had been faced by learned Counsel for the appellant in obtaining certified copies, etc. In my view, these allegations have no bearing, whatsoever, on the merits of the case of the appellant, and reference, thereto, is, accordingly, being entirely eschewed. Such submissions, in my view, ought to find no place, whatsoever, in written submissions, which are intended to facilitate

the court in having, before it, in a nutshell as it were, the rival contentions of the parties.

66. The respondent-DRI has, *per contra*, contended thus:

(i) The receipt of the samples in the CRCL, their storage in the premises thereof, and their testing, could not be doubted or questioned. PW-1 V. B. Chaurasia had clearly stated that the samples were received by PW-6 A. K. Maurya, on the directions of R. P. Singh, and had been kept in the strong room of the CRCL, along with the test memos. Thereafter, on 8th December, 2010, the samples were taken out in the presence of PW-1 V. B. Chaurasia. The seals on the samples were found to be intact. Receipt of the sample had also been accepted, by A. K. Maurya only after ascertaining that the seals, thereon, were in order. The receipt of the samples was also diarised. In this view of the matter, the absence of any dispatch number on the forwarding letter, whereunder the samples were forwarded by the DRI to the CRCL, and the Test Memos, made no difference to the case. The forwarding letter stood exhibited as Ex. PW-3/A. Analysis of the samples took place as per the prescribed procedure, and the testimony, of the CRCL witnesses, in this regard, was not subjected to any cross examination by the appellant. In these circumstances, the fact that the receipt, whereunder the samples were received in the CRCL, was not filled in, by hand, by PW-6 A. K. Maurya, was immaterial.

(ii) It was not possible to verify the addresses of the public witnesses, at the time when the raid was being organised.

(iii) Conviction, under the NDPS Act, could justifiably be based even solely on the deposition of official witnesses. There was nothing to indicate that the official witnesses, in the present case, were tutored, inimically disposed towards the appellant, or interested for any other reason.

(iv) Contradictions inter se, amongst the testimonies, during trial, of the various witnesses, if any, were minor.

(v) Conducting of the search, in the office of the DRI, was unexceptionable, in view of the law laid down in *M. Prabhulal v. Assistant Director, DRI*⁴.

(vi) Though in view of the seizure having been effected from the vehicle being driven by the appellant, rather than from his person, Section 50 of the NDPS Act had no application, there was, nevertheless, due compliance with the said provision.

(vii) There was no legal requirement that the test memos, at the time of their being handed over to the CRCL, were required to be sealed.

⁴ (2003) 8 SCC 449

(viii) The retraction, by the appellant, of the statement under Section 67 of the NDPS Act, was 14 days after he had been produced in the Court and, being highly belated, was unworthy of acceptance. It was obviously a result of legal advice, and could not be regarded as spontaneous.

(ix) The entirety of circumstances, regarding the ownership and possession of the Toyota Corolla car, being driven by the appellant, stood established by the evidence on record.

(x) Non-appearance of the public witnesses could not dent the case of the prosecution. Reliance has been placed, for this proposition, on *M. Prabhula*⁴. It was well settled that there was no requirement of involvement, in investigative proceedings under the NDPS Act, of any public witnesses at all⁵.

(xi) The evidence on record indicated that no coercive methods had been employed, while recording the statement of the appellant under Section 67 of the NDPS Act. In view thereof, the said statement was admissible in evidence, and bound the appellant. Reliance has been placed, for this proposition, on various decisions of this Court; inasmuch as, however, the law stands settled, on these aspects, by decisions of the Supreme Court, the reference to the decisions, cited by the DRI, is, for the present, being eschewed.

⁵ *P. P. Beeran v. State of Kerala*, (2001) 9 SCC 571

Analysis

67. Before proceeding to the facts of the present case, it would be appropriate to analyse, in brief, the legal position.

68. Adjudication, of the criminal *lis* is an intricate affair, in which the court is required to walk a tightrope. The approach of the Court can neither be “acquittal-oriented”, nor can it be “conviction-oriented”. A court, which, before it comes to grips with the facts and the law applicable to the case, proceeds with a preconceived agenda, even if invisible, is not competent to adjudicate the *lis*.

69. In all criminal cases, without exception, the court is concerned, fundamentally, with the question of whether the offence, with which the accused has been charged, has, or has not, been committed by him. For this, the court must be aware of the ingredients of the offence, as prescribed in the law, statutory or otherwise. Having made itself aware of the ingredients of the offence, the court has to examine the facts, to arrive at a conclusion as to whether the offence can, on facts, be brought home to the accused, or not. It is absolutely essential for the court to bear, in mind, its duty in this regard. It is not the attempt, of a court, to search for lacunae in the procedure followed by the investigation. It must be remembered that every criminal investigation involves a variety of factors. The position of the criminal investigator is, oftentimes, unenviable. Any want of precision and thoroughness, on the part of the investigating authority, in the investigative process, renders the investigation fraught with the possibility of being discarded as “shoddy”

or haphazard, and acquittal follows. The greater the degree of thoroughness, with which the investigation proceeds, however, proportionately greater would be the chance of procedural slips taking place. The Court, adjudicating the offence, has to keep this factor in mind. Every procedural infraction, during a criminal investigation, does not, inexorably result, of necessity, in acquittal. The court has to sift the facts, to arrive at an informed decision as to whether the infraction is such as would vitiate, in its entirety, the case of the prosecution. There are, indisputably, procedural imperatives, which cannot be compromised, even to the slightest degree. Any shortcoming, in adhering to a procedural imperative, would necessarily result in guillotining of the investigative process *in toto*, and, with it, the outcome that the prosecution desires, so assiduously, to achieve.

70. The court is also required to be alive to the fact that, oftentimes, in criminal cases, there is that one decisive definitive piece of evidence, which consigns to the shadows, as it were, all other pieces of evidence. Expressed more precisely, if the court comes across any piece, all pieces, of evidence, which are incompatible with the innocence of the accused, and clinchingly points towards guilt, conviction must follow, irrespective of other lacunae which may exist in the investigative process. Equally, if the evidence, or any part thereof, is incompatible with any conclusion other than innocence of the accused, acquittal has necessarily result, irrespective of the doubts which other aspects of the evidence may invite.

71. Unnecessary stress is often placed, by pleaders, pleading the cause of accused, on what they perceived to be “inconsistencies” or

“contradictions” in evidence, especially in oral testimonies. It is necessary to bear in mind, in this context, contradictions which may be fatal, vis-à-vis those which may not. It is only those contradictions, which throw into doubt the issue of whether a particular event did, or did not, take place, which are really significant, and not those contradictions, or inconsistencies, which relate merely to the *manner* in which they were occurred. By way of an example, one witness may say that A met B at place X whereas another may insist that they met at place Y. Undoubtedly, there is a contradiction between the two statements. This contradiction does not, however, result in the *fact of A having met B* being rendered doubtful. It is only *the venue of the meeting, i.e. place X, or place Y, which is rendered indeterminate*, owing to the contradiction between the two testimonies. This is yet another aspect, of which the court, assessing the evidence in criminal cases, is required to be conscious.

Laws relating to cases under NDPS Act

72. In the context of the NDPS Act, and offences allegedly committed thereunder, certain distinct principles have emerged, from various decisions of the Supreme Court. These may be enumerated, for convenience, as under:

- (i) While holding that the principle, enunciated earlier in *Mohan Lal v. State of Punjab*⁶, that, if the informant, on the basis of whose information the investigation had commenced, was also

⁶ AIR 2018 SC 3853

the complainant before the learned Trial Court, the proceedings under the NDPS Act should vitiated, would apply only prospectively, the Supreme Court enunciated the principles and philosophy behind the NDPS Act thus, in *Varinder Kumar v. State of Himachal Pradesh*⁷:

“12. Individual rights of the Accused are undoubtedly important. But equally important is the societal interest for bringing the offender to book and for the system to send the right message to all in the society --be it the law-abiding citizen or the potential offender. 'Human rights' are not only of the Accused but, extent apart, also of the victim, the symbolic member of the society as the potential victim and the society as a whole.

13. Law has to cater to wide variety of situations as appear in society. Law being dynamic, the certainty of the legislation appears rigid at times whenever a circumstance (set of facts) appears which is not catered for explicitly. Expediency then dictates that the higher judiciary, while interpreting the law, considers such exception(s) as are called for without disturbing the pith and substance and the original intention of the legislature. This is required primarily for the reason to help strike a balance between competing forces - justice being the end - and also because the process of fresh legislation could take a long time, which would mean failure of justice, and with it erosion of public confidence and trust in the justice delivery system.

14. The principle of fair trial now informs and energizes many areas of the law. It is a constant, ongoing, evolutionary process continually adapting itself to changing circumstances, and endeavouring to meet the exigencies of the situation - peculiar at times - and related to the nature of crime, persons involved, directly or operating from behind, and so many other powerful factors which may come in the way of administration of criminal justice, wherefore the endeavour of the higher

⁷ 2019 SCC OnLine SC 170

courts, while interpreting the law, is to strike the right balance.

15. Societal interest therefore mandates that the law laid down in *Mohan Lal (supra)* cannot be allowed to become a spring board by an Accused for being catapulted to acquittal, irrespective of all other considerations pursuant to an investigation and prosecution when the law in that regard was nebulous. Criminal jurisprudence mandates balancing the rights of the Accused and the prosecution.”

(ii) Though Section 35 and 54 of the NDPS Act placed a “reverse burden of proof” on the accused, the initial burden of proof still remain on the prosecution and, unless the said burden was discharged, Sections 35 and 54 of the NDPS Act would not come into play⁸. In fact, precisely for the reason that a reverse burden of proof was cast by the NDPS Act, the weight of the initial burden, on the prosecution, was heavier than in other cases⁹.

(iii) Section 50 of the NDPS Act is applicable only in the case of recovery from the person of the accused. Where the recovery is effected from the bag, or the vehicle of the accused, therefore, Section 50 does not apply. While reiterating this position, the Supreme Court, in its recent decision in *State of Punjab v. Baljinder Singh*¹⁰ has also overruled the earlier decision in *Dilip v. State of M. P.*¹¹, which sought to uphold the applicability of Section 50, in cases where the search of the person, and the bag/vehicle, were simultaneously conducted, and recovery was

⁸Noor Aga v. State of Punjab, (2008) 16 SCC 417; Hanif Khan v. Central Bureau of Narcotics, 2019 (4) RCR (Criminal) 250; MANU/SC/1498/2019

⁹ Mohan Lal (supra) : Makhan Singh v. State of Haryana, 2015 (4) JT 222

¹⁰ (2019) 10 SCC 473

¹¹ (2007) 1 SCC 450

effected from the bag/vehicle. It stands definitively concluded, therefore, that, in the case of recovery of contraband from the bag, or the vehicle, of the accused, Section 50 would not apply¹².

(iv) The turning of seizure witnesses hostile is a relatively common phenomenon in NDPS cases, and is not of particular significance¹³.

(v) Where the lone independent witness was not co-opted as a witness for the prosecution, it was held, in ***Kamaljit Singh v. State of Punjab***¹⁴, that the accused was entitled to acquittal, of the charges under the NDPS act, on that sole ground. Prior thereto, however, the law, as repeatedly enunciated by the Supreme Court, has been that the decision, of the prosecution, not to co-opt the independent witnesses as its witnesses before the learned Trial Court, would not inevitably vitiate the case of the prosecution, provided the evidence of the other witnesses – which would include the official witnesses – was trustworthy¹⁵. In ***Nnadi K. Iheanyi v. Narcotisc Control Bureau***¹⁶, a learned Single Judge of this Court held that failure, on the part of the prosecution, to produce, in the witness box, the “public witnesses”, having chosen to rely on their evidence, cast serious cloud on the case of the prosecution, and entitled the accused to the benefit of doubt. In ***Mahiman Singh v.***

¹² Varinder Kumar (supra)

¹³ Dangra Jaiswal v. State of M.P., (2011) 5 SCC 123

¹⁴ 2019 (4) SCALE 18

¹⁵ State of H.P. v. Pradeep Kumar, AIR 2018 SC 1345; Kulwinder Singh v. State of Punjab, (2015) 6 SCC 674

¹⁶ (2014) 145 DRJ 267

*State of Uttarakhand*¹⁷, it was held, by the Supreme Court, that, where the search was effected by a Gazetted officer, after service, on the accused, of the requisite notice under Section 50 of the NDPS Act, and the accused led no evidence, except for his statement under Section 313 of the Cr.P.C., and the seizure of narcotic was in commercial quantity, withholding, by the prosecution, of public witnesses, was not fatal to its case.

(vi) If the fact of seizure of the contraband is not in doubt, all that is required to be proved, to sustain a conviction, is that the samples, taken from the contraband were not tampered with, the seals thereon remained intact when they were submitted for forensic examination, and the report of the forensic examination confirmed the potency, nature and quality of the contraband samples¹⁸.

(vii) Once the factum of possession of the contraband narcotic was established, the burden shifted to the accused to prove that the possession was not conscious. The manner in which this burden could be discharged by the accused has been explained thus, in *Baldev Singh v. State of Punjab*¹⁹:

“Burden of proof cast on the accused under Section 35 of the NDPS Act can be discharged through different modes. One of such modes is that the accused can rely on the materials available in the prosecution case raising doubts about the prosecution case. The accused may also adduce other evidence when he is called upon to enter on his defence. If the circumstances appearing in the prosecution

¹⁷ AIR 2016 SC 3775

¹⁸ *State of Rajasthan v. Sahi Ram*, 2019 SCC OnLine SC 1267

¹⁹ 2015 (12) SCALE 308

case give reasonable assurance to the Court that the accused could not have had the knowledge of the required intention, the burden cast on him Under Section 35 of the NDPS Act would stand discharged even if the accused had not adduced any other evidence of his own when he is called upon to enter on his defence”

(viii) On the aspect of “conscious possession”, the Supreme Court held, in a case in which the accused was shown to be in sole possession of the house, from which the narcotic had been recovered, that the fact that the house did not belong to the accused, but to his father, was irrelevant, and that “conscious possession” of the narcotic was rightly attributable to the accused²⁰. In *Kulwinder Singh (supra)*, it was held that “conscious possession” of 110 bags of poppy, weighing over 4 metric tons, contained in a truck in which the accused were sitting by the side of the driver, was attributable to the accused, where the accused was not seeking to set up a case of having taken a lift in the truck, and the burden, consequently, shifted to the accused to prove that the possession of the narcotic was not “conscious”.

(ix) The best evidence, to correlate the sample seized, with the sample tested, was production of the seized material before the Court²¹.

(x) The statement, recorded under Section 67 of the NDPS Act, if unretracted, has been held to be sufficient to base a finding of conviction²².

²⁰ *Arutla Shankaraiah v. State of Andhra Pradesh*, 2015 (9) SCALE 223

²¹ *Vijay Pandey v. State of U.P.*, AIR 2019 SC 3569; *Vijay Jain v. State of M.P.*, (2013) 14 SCC 527

²² *Ghulam Mohd Malik v. State of Gujarat*, (2018) 14 SCC 473

(xi) In *Dilbagh Singh v. State of Punjab*²³, it was held that, where there was a positive FSL report, as well as proof of conscious possession of narcotic, conviction was rightly upheld. Significantly, in the said case, the Supreme Court held that the quantity of poppy husk seized was so large (34 kg) that the possibility of the narcotic having been planted, by the prosecution, stood negated.

(xii) Where the seal, on the narcotic samples, had remained intact, the delay in sending the sample for testing was held, in *Mohan Lal v. State of Rajasthan*²⁴, not to be fatal to the case of the prosecution. Similarly, the suggestion, mooted on behalf of the accused, regarding the possibility of the samples having been tampered with, was found to lack force, where there was no positive evidence of such tampering, and no suggestion had been advanced, during cross examination of any of the prosecution witnesses, to the said effect²⁵.

(xiii) The guiding philosophy, in all such cases was, perhaps, most tellingly elucidated, thus, in *Gorakh Nath Prasad v. State of Bihar*²⁶:

“The NDPS Act provides for a reverse burden of proof upon the accused, contrary to the normal Rule of criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. The

²³ 2016 (11) JT 336

²⁴ (2015) 6 SCC 222

²⁵ *Gulsher Mohd v. State of H.P.*, 2015 (12) SCALE 1

²⁶ (2018) 2 SCC 305

mere registration of a case under the Act will not ipso facto shift the burden on to the Accused from the very inception. *Compliance with statutory requirements and procedures shall have to be strict and the scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused.*”

(Italics and underscoring supplied)

73. Though there are judgments, galore, dealing with various aspects of prosecutions under the NDPS Act, I have chosen, hereinabove, only to highlight decisions which, to one extent or the other, may be of assistance in dealing with the contentions advanced, on behalf of either side, in the present case. Once the writing on the *tabula rasa* is, thus, clear, resolution of the controversy is greatly facilitated.

74. In all cases arising under the NDPS Act, especially in the context of Section 21 thereof, the only issue to be determined is whether the accused was, or was not, in conscious possession of narcotic. If conscious possession of narcotic is admitted by the accused, or if there is clinching evidence, beyond the slightest shadow of doubt, establishing conscious possession, by the accused, of narcotic, the inquisitorial exercise – whether executive or judicial – must end there. It is rarely, if ever, however, that such a case presents itself. In practically every case, therefore, the court is required to sift through the evidence, to discern the picture that emerges therefrom. While doing so, the principles, enumerated hereinabove and culled from authoritative pronouncements of the Supreme Court, have necessarily to be borne in mind. Ultimately, the quest narrows down to two aspects, viz. the aspect of recovery, and the aspect of the identity of the substance recovered. The prosecution has

to establish, in order to sustain a conviction under the NDPS Act, that there had been recovery, from the accused, of substance of which he was in conscious possession, and that the substance or recovered was a “narcotic”.

75. It would be advantageous to proceed, chronologically, once more, through the sequence of events in the present case, to examine whether a clear case of “conscious possession” of heroin, by the appellant, could be said to have been made out. While doing so, this Court is required, ever, to be aware of the high degree of proof that is required to sustain a conviction under the NDPS Act and, in fact, is required to be discharged, by the prosecution, even before the burden shifts, to the accused, to disprove the presumption of “conscious possession”, as well as the fundamental principle that, even if there is an iota of doubt, the benefit thereof has necessarily to enure in favour of the accused – i.e., in the present case, the appellant.

76. One of the planks, on which learned Counsel for the appellant sought to rest her case, was, predictably, the failure, on the part of the DRI, to produce the two “public witnesses”, in the witness box. She contends that this failure, seen in juxtaposition with the fact that attempts, by the learned Special Judge, to issue summons to the public witnesses to secure their appearance, proved futile, resulting in the DRI giving up the said witnesses, was fatal to the case of the DRI.

77. I regret my inability to subscribe to this somewhat extreme view, canvassed by learned Counsel for the appellant. True, there are instances

– to which reference has already been invited hereinabove – in which the failure, on the part of the prosecution, to make the public witnesses available for examination during trial, or to lead their evidence in the witness box, have been held to cast serious doubts on the case of the prosecution, and have, in more cases than one, resulted in acquittal. Acquittal, however, in my respectful view, cannot be the inevitable sequitur, in every case in which the prosecution is unable to secure the appearance of the “public witnesses”, who were allegedly co-opted in the investigative, or inquisitorial, exercise. In the present case, significantly, there is nothing, whatsoever, to indicate that the DRI was withholding, deliberately, the aforesaid public witnesses. The involvement, of the public witnesses, in the investigative process, stands vouchsafed by several PW-2 J. P. Raju, the IO, PW-4 Ajay Bhasin, PW-5 Kamal Kumar, PW-9 V. S. Pandey, and PW-15 Rajpal Singh. In the circumstances, if the mass of evidence, otherwise available, is sufficient to overwhelmingly establish the factum of conscious possession, by the accused, of the narcotic, in my view, it would be a disservice to the law, to acquit the accused, or even extend, to the accused, the benefit of doubt, merely because of the failure, conscious or otherwise, on the part of the DRI, to secure the appearance of the public witnesses. While bearing in mind the “serious doubt” that the failure, on the part of the DRI, to produce the two “public witnesses” in the witness box, in the present case, has necessarily to entail, it is equally necessary to examine whether, on the remaining facts, the charge of conscious possession of heroin, by the appellant, is overwhelmingly made out, or not.

78. The answer to this query has, in my view, in the facts of the present case, necessarily to be in the affirmative.

79. There were as many as five witnesses, i.e. PW-2 J. P. Raju, the IO, PW-4 Ajay Bhasin, PW-5 Kamal Kumar, PW-9 V. S. Pandey and PW-15 Rajpal Singh, whose testimonies, to one extent or the other, establish, beyond doubt, the interception, of by the appellant, at the Singhu border, while he was driving across the border in a Toyota Corolla car, the acknowledgement and acceptance, by the appellant, of his identity, the proceedings, by the raiding team, with the accused, to the DRI office, and the recovery, from the boot of the car, of 52 packets, containing a pungent off white powdery substance. The cumulative effect of the depositions of PW-2, PW-4, PW-5, PW-9 and PW-15, establish these facts beyond a scintilla of doubt. I am also entirely in agreement with the finding, of the learned Special Judge – which echoes the opinion expressed by the Supreme Court in several decisions – that, in the absence of any material to indicate that the official witnesses bore any enmity towards the appellant, or were otherwise ill disposed towards him, there is no reason, whatsoever, to disregard their testimonies, far less the cumulative effect thereof. I may also draw sustenance, in this regard, from the view, expressed in *Dilbagh Singh*²³, and observed that, given the huge quantity of heroin seized (53 kg), the possibility of the heroin having been planted in the car of the appellant may safely be discountenanced.

80. The fact of recovery, from the HDPE bags contained in the boot of the car being driven by the appellant, of heroin, also stands corroborated

by the discovery, in one of the bags, when opened in court before the learned Special Judge, of \$ 3000, which was the exact amount stated, by the appellant in his statement under Section 67 of the NDPS Act, to have been paid to him, as part payment for carrying the heroin across the Punjab-Delhi border.

81. The attempt of Ms. Singh, arguing on behalf of the appellant, to question the propriety of the decision to conduct the search of the car at the DRI office, rather than at the point of interception near the Singhu border, though valiant, cannot really be of serious assistance to the case of her client. There was a specific endorsement, on the body of the notice, under Section 50 of the NDPS Act, as served on the appellant (Ex. PW-2/B), whereby the appellant desired that the search be conducted by a Gazetted Officer of the DRI, in the DRI office. The requirement of the search being conducted by a Gazetted officer, obviously, is of no significance, as the recovery of the heroin was from the boot of the car being driven by the appellant, and Section 50 of the NDPS Act, therefore, had no application, in view of the law enunciated in the decisions cited hereinabove. What is significant, however, is that the endorsement specifically expresses the desire, of the appellant, to have the search conducted in the DRI office. Though an attempt was made, by the appellant, *inter alia* in his statement under section 313 of the Cr.P.C., to completely disown all documentary evidence against him, and to contend that his signatures had been obtained on blank papers, there is precious little to support this allegation which must, therefore, be regarded as having been advanced *in terrorem*. In any event, the appellant has not, specifically, denied his signature, as it figures below the endorsement, on

the aforesaid notice, under Section 50 of the NDPS Act. In view thereof, I am of the opinion that there is substance, in the contention of the prosecution, that the search had been conducted, in the DRI office – rather, at the parking lot outside the DRI office – on the specific request of the appellant.

82. In any event, this aspect is also not of much significance, in view of the fact that, as is held hereinafter, the recovery of heroin, from the boot of the car which was being driven by the appellant, is proved beyond any shadow of doubt. Once that is proved, the question of whether the search was conducted at the Singhu border, or at the DRI office, ceases to matter.

83. Though PW-4 Ajay Bhasin, and PW-5 Kamal Kumar, averred that they had left the 7th floor of the DRI office, once the packets, containing the off white powder were retrieved from the HDPE bags found in the boot of the car being driven by the appellant, they were witnesses, nevertheless, to the said recovery. Even after they had left, further proceedings, regarding Field Testing of the powder, preparation of individual *pullandas* for submission to the CRCL, and inventorization thereof, took place in the presence of the IO J. P. Raju (PW-2), V. S. Pandey (PW-9), K. K. Sood (PW-3) and Rajpal Singh (PW-15). K. K. Sood, thereafter, dispatched the *pullandas* to the CRCL, by hand, through Ajay Bhasin (PW-4). In his deposition during trial, K. K. Sood specifically testified that, during the time they remained in his possession, the *pullandas* remained inviolate. No attempt, to cross-examine K. K. Sood on this statement, was made by the appellant. The

pullandas were received, in the CRCL, with intact DRI seals, by PW-1 V. B. Chaurasia, and receipt, thereof, was signed and issued by PW-6 A. K. Maurya. The *pullandas* were kept in the strong room and, when they were taken out on 8th December, 2010, for qualitative analysis and, later, on 9th December, 2010, for quantitative analysis, the DRI seals were found intact. After an analysis was completed, the remnant samples were sealed, using the CRCL seals, and returned to the DRI. The samples were, later, produced in Court, and identified by PW-2, PW-9. The court seals, on the remnant samples, and the DRI seals, were found intact, and there is a specific finding, by the learned Special Judge, to the effect that the samples could be accessed only after the seals were broken. The recording, in this regard, as entered in the proceedings before the learned Special Judge on 21st March, 2013, during the recording of the testimony of PW-2 J. P. Raju, merits reproduction, *in extenso*, thus:

“At this stage, 52 sealed yellow colour sample enveloped packets are produced in the court. The sample packets are found sealed with the seals of Central Revenue Control Laboratory Govt. of India 2. The seals are in intact condition and the content of the envelope packets cannot be taken out without breaking open the seal. The seals of the above impression are found affixed on the folded portion of the envelope packets. On each of the envelope packets there is writing to the effect of X1A to X52A and further having writing CLD no. 326 (N) to 377 (N) dated 18.11.10.

The sample packets are opened after removing the intact seals of the above impression and on opening the same one small zip locked polythene pouch is taken out from each of the envelope packets having same corresponding marking as given to the respective envelope from which the same are taken out. The polythene pouches taken out from each of the envelope packets are found to contain some off white coloured granular/powdery substance and *the same has been identified by the witness as the sample drawn by him from the seized case property and received back from the CRCL after its chemical analysis.* The zip locked

polythene pouches containing the remnant samples are exhibited as Ex. P 161/1-52.”

(Italics and underscoring supplied)

In view thereof, it stands conclusively established, by an unbroken chain of circumstances, that the *pullandas* which were prepared on the 7th floor of the DRI office were, in fact, tested by the CRCL, and found to contain heroin.

84. There has been no serious challenge, to the manner in which testing of the samples took place, in the CRCL. Each individual sample was tested, and its purity determined, over a period of ten days. Each of the samples weighed 5 grams, and samples were taken from each of the 52 packets found in the two HDPE bags concealed in the boot of the car being driven by the appellant. The samples were, therefore, representative in nature, and the result of the testing, statistically, represented the nature of the powder concealed in the two HDPE bags. The powder was found, in the case of each and every sample, to be heroin and, even going by the purity percentages, as determined by the CRCL in its report, the actual quantity of heroin, in the two HDPE bags, works out to 24.41 kg, which is far in excess of the notified commercial quantity thereof.

85. Objection had been taken, by Ms Singh, appearing for the appellant, to the use of the words “pinch” and “small quantity”, while referring to the quantity of powder, retrieved from the 52 packets, for Field testing. In my opinion, this cannot seriously impact the case of the prosecution, inasmuch as the quantity, which was actually extracted from

each of the 52 packets and sent for testing, to the CRCL, has specifically been noted as 5 grams. Any inaccuracy, in the description of the quantities taken for Field testing, therefore, loses significance.

86. In my opinion, therefore, the conscious possession, by the appellant, of 51.865 kg of heroin, which was being carried, by him, across the Singhu Border from Punjab to Delhi, in Toyota Corolla car No. DL 8 CJ 4621, stands conclusively established. The appellant has not been able to explain, satisfactorily, the conscious possession, by him, of the aforesaid heroin.

87. Rather, the statement of the appellant, under Section 67 of the NDPS Act, also conclusively establishes the charge, against him, of carrying heroin, consciously, across the border from Punjab to Delhi. It is a settled position, in law, that the statement, under Section 67, unless retracted in accordance with law, may even, in an appropriate case, legitimately form the sole basis for convicting the accused. In the present case, though the appellant claims to have retracted the statement, recorded from him under Section 67 of the NDPS Act, there is substance in the submission, of the DRI, that the retraction, having been preferred 14 days after the appellant had been produced in Court, loses much of its relevance. It is well settled that the retraction, in order for it to be of any substantial evidentiary value, has to be tendered at the first available opportunity. There is no explanation, from the appellant, for the inexplicable delay in tendering his retraction and, consequently, the submission, of the DRI, that the retraction was in the nature of an afterthought, based on legal advice, cannot be said to be without merit.

Besides, the evidence of PW-14 Dr. Rajnish Kaushik and PW-16 Dr. Deepa Sharma, which was never doubted in cross examination, clearly indicated that there was no evidence of the appellant having been subjected to force or coercion, during the recording of his statement.

88. Reliance may usefully be placed, in this context, on the following passages, from *Kanhaiyalal v. U.O.I.*²⁷:

“45. Considering the provisions of Section 67 of the NDPS Act and the views expressed by this Court in *Raj Kumar Karwal case, (2003) 8 SCC 449 : 2003 SCC (Cri) 2024* with which we agree, that an officer vested with the powers of an officer in charge of a police station under Section 53 of the above Act is not a “police officer” within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the NDPS Act to be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act.

46. There is nothing on record to suggest that the appellant was compelled under threat to make the statement after he had been placed under arrest which renders such statement inadmissible and not capable of being relied upon in order to convict him. On the other hand, there is the evidence of PW 9 upon which the High Court has relied in convicting the appellant. It may once again be mentioned that no question in cross-examination had been put to PW 9 in this regard and the version of the said witness must be accepted as corroborative of the statement made by the accused.

47. It may also be recalled that though an application was made for retracting the confession made by the appellant, neither was any order passed on the said application nor was the same proved during the trial so as to water down the evidentiary value of the said statement. On the other hand, in the absence of such

²⁷ (2008) 4 SCC 668

evidence on record, the High Court had no option but to proceed on the basis of the confession as made by the appellant under Section 67 of the NDPS Act. Since it has been held by this Court that an officer for the purposes of Section 67 of the NDPS Act read with Section 42 thereof, is not a police officer, the bar under Sections 24 and 27 of the Evidence Act cannot be attracted and the statement made by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. Since a conviction can be maintained solely on the basis of a confession made under Section 67 of the NDPS Act, we see no reason to interfere with the conclusion of the High Court convicting the appellant.”

89. In any event, even *de hors* his statement, under Section 67 of the NDPS Act, the available evidence is, in my opinion, more than sufficient to bring home, to the appellant, the charge of having committed the offence contemplated by clause (c) of Section 21 of the NDPS Act.

90. The cumulative appreciation of the facts, in the background of the law that has developed over the years, to which reference has been made hereinabove, leaves me with no option but to affirm the findings of the learned Special Judge, and uphold the conviction, of the appellant, under Section 21 (c) of the NDPS Act. It is, no doubt, true that, even if there is an iota of doubt regarding the guilt, or complicity, of the accused, in a case under the NDPS Act, the accused is entitled to the benefit thereof. Every chance circumstance, or procedural infraction cannot, however, create a doubt.

91. “Doubt”, in legal parlance, refers to a real, and not a fanciful, doubt, justified on the admitted, or established, facts. “Doubt”, to be

reasonable, has to be free from abstract speculation. (**State of U.P. vs. Krishna Gopal**²⁸)

92. In the facts of the present case, on the cumulative assessment of the evidence, I am convinced that there is no iota of doubt, regarding the conscious possession and transportation, by the appellant, of commercial quantity of heroin, which was intercepted and seized on 16th November, 2010.

93. Given the quantity of heroin which was being transported by the appellant, I am of the view that no case, for interference with the quantum of punishment awarded by the learned Special Judge, which is much less than the maximum punishment that could be awarded for the offence, can be said to have been made out.

Conclusion

94. Resultantly, the impugned judgment, dated 20th February, 2016, and order dated 23rd February, 2016, are upheld.

95. The appeal of the appellant is, consequently, dismissed.

96. Trial Court record be returned forthwith.

²⁸ (1988) 4 SCC 302: AIR 1988 SCC 2154

Crl. M.A. 3075/2017 and Crl. M.A. 551/2019

97. The Directorate of Revenue Intelligence is at liberty to deal with/dispose the case property in accordance with law. Applications stand disposed of accordingly.

C.HARI SHANKAR, J.

DECEMBER 27, 2019/HJ

