

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF DECEMBER, 2025

BEFORE

THE HON'BLE MR. JUSTICE G BASAVARAJA

CRIMINAL APPEAL NO.400 OF 2012

BETWEEN:

INTELLIGENCE OFFICER
NARCOTICS CONTROL BUREAU,
SOUTH ZONAL UNIT,
CHENNAI

PRESENTLY BANGALORE ZONAL UNIT
AT NO.7/1-2, PRIYANKA VILLA,
RAMANA GARDEN, KATTIGENAHALLI,
BAGLUR MAINROAD, YELAHANKA POST,
BANGALORE-63.

...APPELLANT

(BY SRI. UMESH P.B., ADV.)

AND:

- 1 . R. SUBHASH
S/O D. RANGASWAMY,
AGED ABOUT 46 YEARS,
NO.54, 2ND CROSS,
K.S. GARDEN,
LALBAGH ROAD,
BANGALORE-27
- 2 . JOHN BERKMANS @ JOHN,
S/O MARSHALLIN, D.O.B. 25-02-1964
OLD ADDRESS: WEST STREET,
ALIKAL POST,
AGASTHISVARAM TALUK,
NAGERCOIL - 629202
RAJAKAMANGALAM DIVISION,
KANYAKUMARI DISTRICT

PRESENT ADDRESS:
ASARIPALAM,
PALLAVALA,
THIRUPU, NAGERCOIL.

3 . ANTONY RAJA @ RAJA @ CHETTY
14/36 A,
RAJA BHAVAN,
KEEZH ASARIPALLEM,
NAGERCOIL

4 . P. BALAKRISHNAN @ KRISHNAN,
SRILANKAN,
S/O PERIASAMY PILLAI,
NO.30, TEMPLE STREET,
MEDAVAKKAM COLONY,
KILPAUK, CHENNAI
SRILANKA ADDRESS: NO.20,
STATION ROAD,
CRANE PASS,
COLOMBO-14

...RESPONDENTS

(BY SRI. AMAR CORREA, ADV. FOR RESPONDENTS.)

THIS CRL.A IS FILED U/S.378(4) OF CR.P.C PRAYING TO SET ASIDE THE JUDGMENT DT.14/10/2011 PASSED IN SPL. CASE NO.46/2005 BY THE PRL. SESSIONS JUDGE & SPL. JUDGE (NDPS), TUMKUR - ACQUITTING THE RESPONDENTS/ ACCUSED OF THE OFFENCE P/U/S.8(C) R/W. SEC.21, 25, 27-A AND 28 PUNISHABLE U/S.21(C), 25, 27-A AND 28 OF THE N.D.P.S. ACT, 1985.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 11.11.2025 AND COMING ON FOR "PRONOUNCEMENT OF ORDERS" THIS DAY, THE COURT, DELIVERED THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE G BASAVARAJA

CAV JUDGMENT

The appellant-Intelligence Officer, Narcotics Control, Bureau, South Zonal unit, Chennai, has preferred this appeal against the order dated 14th October, 2011 passed in Special Case No.46 of 2005 by the Principal Sessions Judge at Tumkur (for short "the trial Court").

2. For the sake of convenience, the parties herein are referred to as per their rank before the trial Court.

3. Brief facts leading to this appeal are that Caleb Arumairaj, Intelligence Officer, Narcotic Control Bureau, South Zonal Unit, Chennai, on 04th December 2004 at 5:30 pm received credible information over phone that one Balakrishnan @ Krishnan (A4) then at Central Prison, Bangalore for NDPS cases, is indulging in drug trafficking and has arranged to procure six kilograms of heroine from North India through one Shekhar (A6) who has to bring the said consignment to Bangalore. Balakrishnan has also arranged one Subhash resident of Bangalore to collect the said drug from Shekhar. The delivery spot was fixed on the road between Tumkur and Bangalore on 05th December 2004. Subhash, on receipt of the drug from Shekhar, was to handover the same to Antony Raj Alias John of Nagercoil (A3) at Bangalore on the instruction of

Balakrishnan. John, on receipt of drug from Subhash, is to smuggle the same to Sri Lanka on the instruction of Balakrishnan. Rajaratnam Alias Ravi (A5-now dead) brother of Balakrishnan, is also associated with smuggling of drugs. Subhash is going to Tumkur on 5th December 2004 in a Maruti van bearing registration number KA-01/M-6994 to collect the narcotic drug. Thereafter, PW3-Caleb Arumairaj submitted information to Gunabalan-Superintendent. The Superintendent called Arumaraj and another Intelligence Officer, Thirumalai Sridhar and discussed about the information. Then on the night of 04th December 2004, Gunabalan, along with Arumaraj and Thirumalai Sridhar, Shankar Kumar, Intelligence Officers, and Naqvi, Tax Assistant, proceeded in the department vehicle to Tumkur. On 5th December 2004 at about 2.00 pm, Thirumalai Sridhar and two witnesses at JOSS Toll Gate Plaza, Chokkanahalli said that they have agreed to be witnesses for the search proceedings under the NDPS Act. They kept waiting for the vehicle and at 4.00 pm, they noticed Maruti Omni bearing registration No.KA-01/M-6994 as mentioned in the information, and they stopped the vehicle.

4. Investigating officer-Thirumalai Sridhar, introduced himself to the occupants of the van by showing his ID and

enquired about them. The person seated on the front left seat revealed his name as Subhash. The driver of Omni said his name is Mahendra Kumar. Thirumalai Sridhar told them about the information received and informed that they have to conduct search of vehicle and he also told them that they have right to exercise that search to be conducted in the presence of a Magistrate or a Gazetted officer. Then, Thirumalai Sridhar enquired Subhash and Mahendra Kumar, whether they were in possession of any narcotic drug to which Subhash replied in the affirmative, took out the white coloured polythene sack and handed it over to Thirumalai Sridhar from the rear seat and told that it contain heroine. Thirumalai Sridhar opened the sack and found it contained 11 brown coloured packets wrapped together in an adhesive tape and upon opening the packet, found brown coloured powder in it. All the 11 packets were containing brown coloured powder and from which a small quantity was drawn for testing purpose. All the 11 packets put-together weighed 5.800 kilograms. Then Thirumalai Sridhar seized the narcotic drug under the provisions of NDPS Act and made two packets of five grams each from 11 packets. The properties were marked as Exhibits P1 to P11 and samples of two packets containing 5 grams each were marked as S1 to S22. He also seized the while coloured polythene sack used to

transport the contraband, placed it in a cover and marked as Exhibit P12. All the packets were sealed with NCB seal No.12.

5. On personal search of Subhash revealed two cell phones which were also seized and placed in a brown cover, seized, sealed and affixed with NCB seal. Indian currency of Rs.590/- was recovered and the same was placed in a brown cover, seized and sealed with NCB seal. After completing search formalities, the officers offered themselves to be search again for which Subhash and Mahendrakumar refused. The search and seizure proceedings were conducted in the same spot without any hindrance or inconvenience to others and the mahazar proceedings was completed at 6 p.m.

6. Thereafter, as per the instructions of the Superintendent Gunabalan, Caleb Arumairaj (PW3) issued summons Ex.P18 to enquire Subhash under Sec.67 of NDPS Act and asked him to appear before him in the office of Joss Toll Company, Plaza-2 at 6:30 p.m. Accordingly Subhash (A1) appeared before Caleb Arumairaj and said that he will give a written statement about his knowledge in the case. Caleb Arumairaj explained to Subhash the provisions of Sec.67 of the Act stating that the written statement can be used against him in any Court of law and hearing that, he has also mentioned it

in his statement. After completing his statement in a page, Subhash told Caleb Arumairaj that he was very tired to proceed further and requested that he may be given rest and he will continue the same on the next day.

7. On the next day on 6-12-2004 Subhash resumed his written statement about his knowledge about the seizure before him. He has signed on all the pages and Caleb Arumairaj also signed on all the pages. It is marked as Ex.P19. Thereafter, on the basis of the material evidence available and the seizure of narcotic drugs and on the statement given by A1-Subhash, Caleb Arumairaj placed Subhash under arrest at 4-30 p.m. on 6-12-2004 and served him an arrest memo as per Ex.P20. Subhash also signed after having received the arrest memo-Ex.P20.

8. As per the direction of the Superintendent S. Gunabalan, Caleb Arumairaj handed over Subhash to Thirumalai Sridhar, Intelligence Officer and Remanding Officer and also assisted him in the remand formalities. Thereafter, PW3-Caleb Arumairaj prepared the information report Ex.P21 under Sec.57 of the NDPS Act and submitted the same to the Superintendent. Later, PW16-Thirumalai Sridhar, searched Mahendrakumar. As no incriminating article was found, no

material was seized. All the mahazar proceedings, seizure, sampling, weighing and packing was done on the spot in the presence of S. Gunabalan, two independent witnesses viz., Maske and Srinivas and also two occupants of Maruti Omni van Subhash and Mahendrakumar. All of them signed on the material objects. A mahazar was drawn as per Ex.P46. The two independent witnesses, Gazetted Officer S. Gunabalan, Subhash and Mahendrakumar also signed the panchanama. Based on the arrest memo of Subhash, after completion of the remand formalities, after test memo for the material objects seized in connection with seizure effected at Tumkur for 5.800 kilograms of Herion, Thirumalai Sridhar submitted a report under Sec.57 on 7-12-2004 as per Ex.P49. After reaching Chennai he submitted all the properties with the forwarding memo and obtained go-down receipt. As per the direction of the Superintendent, he also interrogated A4-Balakarishnan in the Central Prison, Bangalore, in the presence of Chief Superintendent, Jail Authority and recorded his statement. He also arrested Balakrishnan as per the arrest memo Ex.P27.

9. In the course of the disclosure made by A1-Subhash and A4-Balakrishnan, it was revealed that the other accused i.e. A2, A3, A5 and A6 were also involved in the

conspiracy. Therefore, the investigating agency came to the conclusion that all the accused had conspired to commit various offences with which they are charged. Accordingly, the accused committed the offences punishable under section 8(c) and sections 21, 23, 27A, 28 and 29 of NDPS act 1985, as amended in 2001.

10. Having heard on charges, the trial court framed charges against accused 1 and 2 for the offences punishable under section 8(c) read with section 21 of NDPS Act; against accused No.3, for offence punishable under Section 8(c) read with sections 21 and 28; against accused No.4 for offences punishable and section 8(c) read with sections 27A and 28 of NDPS Act. The charges were read over and explained to the accused in the language known to them. Having understood the same, accused pleaded not guilty and claimed to be tried. To prove the guilt of the accused, in all 16 witnesses were examined as PWs 1 to 16, 79 documents were marked as Exhibits P1 to 79 and 16 material objects were marked as MOs 1 to 16. On closure of prosecution side evidence, statement of the accused under section 313 of Code of Criminal Procedure was recorded. Accused have totally denied the prosecution witnesses. However, they did not choose to lead any defence

evidence on their behalf. During the course of cross-examination of prosecution witnesses, Exhibits D1 to D3 were marked.

11. Having heard the arguments on both sides, the trial court acquitted the accused 1 to 4 of alleged offences. Accused 1 to 4 were in judicial custody till the disposal of the case. Being aggrieved by the judgment of acquittal, the appellant-State has preferred this appeal.

12. Sri Umesh P.B., learned Counsel appearing for the appellant would submit that the trial court has failed to appreciate that the prosecution has examined by official witnesses and one independent witness and produced Exhibits P1 to P79 and material objects as MOs.1 to 16 to establish the charges against the accused. The trial court has erred in holding that there is violation of mandatory provisions of section 42 of NDPS Act. As regards to the information received on 4th December 2004, he would submit that the trial court has erred in not appreciating the fact that the search operation was done at a public place involving the vehicle and the accused, and the proceedings clearly fell under the provision of section 43 of NDPS Act which does not even provide for recording the information or sending it to the immediate superior officer

within 72 hours, in contrast to provisions of section 42 of the NDPS act. He would further submit that the difference between section 42 and section 43 of the said Act is clearly dealt with by the Hon'ble Apex Court in the case of STATE OF PUNJAB v. BALBIR SINGH, wherein it is observed that the empowered officer, while acting under section 43 of the NDPS Act, need not record any reasons for his belief. This section also does not mention anything about the empowered officer having prior information given by any person or about recording the same as compared to section 42 of the NDPS Act, as such, the trial court, without any reason, disregarded the proven compliance by the prosecution and also failed to appreciate that the complaint was not even necessary as the search and recovery was at the public place covered by section 43 of the NDPS Act. The trial Court has also erred in holding that the statement contained technical words like "Provisions of section 67 of NDPS Act, 1985", "Court of Law", "powder believed heroin", "Narcotic Control Bureau", "provisions of section 50 of the NDPS Act", "NCB Seal No.12" etc. The trial Court has failed to appreciate the evidence on record in accordance with law and facts. On all these grounds, it is sought for allowing the appeal.

13. As against this, Sri Amar Correa, learned Counsel appearing for the respondents would submit that the trial Court has properly appreciated evidence record in accordance with law and facts. He would submit that the NCB officials took accused No.1 in the Maruti van and confined him in a room overnight, which shows that he was under an atmosphere of threat and restraint. The statement of accused No.1 indicates that it was written under dictation and was not voluntary. Therefore, the same is hit by section 36 of Indian Evidence Act. The voluntary statement of accused No.1 has no evidentiary value because it was compelled against his own free will and it was not recorded by the authorised officer. Nothing was recovered from the driver and the NCB officers released him. He was not cited as a witness nor examined by the prosecution to establish that accused No.1 had used his car and that the heroin was recovered from the possession of accused No.1 in the presence of driver. The investigating officer has not complied with the mandatory provisions of sections 45, 52 to 55 of NDPS Act. The prosecution has failed to prove the exclusive possession of 5.800 kgs of heroin from accused No.1. The learned counsel would further submit that the prosecution has failed to prove that statement was given voluntarily by accused No.1. The prosecution wants to connect the accused 2

to 4 to the alleged offence based on Exhibit P17-information and Exhibit P1-the statement. He would submit that no satisfactory evidence is there to prove the role of accused 2 to 4, either in the conspiracy or in the direct participation to procure, possess, transport and attempt interstate trafficking of heroin. The accused No.4 has been arraigned as accused on 29th April 2005, after five months of voluntary statement of accused No.1 which was recorded on 5th December 2004. The learned counsel would submit that viewed from any angle, there is no sufficient and substantiate evidence to prove the guilt of the accused, and on all these grounds, he sought for dismissal of the appeal.

14. Having heard the arguments on both sides, and perusal of materials, the following points would arise for my consideration:

"Whether the trial Court is justified in acquitting the accused for the offence punishable under section 8(c) read with sections 21, 25, 27A, and 28 of NDPS Act?"

15. I have examined the materials placed before me. Before appreciation of evidence and record, it is necessary to

refer to the recent judgment of the Apex Court in the Case of CONSTABLE 907 SURENDRA SINGH AND ANOTHER v. STATE OF UTTARAKHAND passed in Criminal Appeal No.355 of 2013 connected with Criminal Appeal No.788 of 2013 decided on 28th January, 2025, as also, the judgments in the case of BABU SAHEBGOUDA RUDRAGOUDAR AND OTHERS v. STATE OF KARNATAKA reported in (2024)8 SCC 149; in the case of CHANDRAPPA v. STATE OF KARNATAKA reported in (2007)4 SCC 415; and in the case of H.D. SUNDARA v. STATE OF KARNATAKA reported in (2023)9 SCC 581. In the case of H D SUNDARA (supra), the Apex Court has summarized the principles governing exercise of appellate jurisdiction while dealing with an appeal against judgment of acquittal under section 378 of Code of Criminal Procedure as under:

"8. ...8.1. The acquittal of the accused further strengthens the presumption of innocence;

8.2. The appellate court, while hearing an appeal against acquittal, is entitled to re-appreciate the oral and documentary evidence;

8.3. The appellate court, while deciding an appeal against acquittal, after re-appreciating the evidence, is required to consider whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;

8.4. If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and

8.5. The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible."

16. Further, it is observed that it is beyond the pale of doubt that the scope of interference by an appellate court for reversing the judgment of acquittal recorded by the trial court in favour of the accused has to be exercised within the four corners of the following principles:

41.1. That the judgment of acquittal suffers from patent perversity;

41.2. That the same is based on a misreading/omission to consider material evidence on record; and

41.3. That no two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record."

17. In the case on hand, the trial Court, at paragraphs 16 to 37 of its judgment, has observed as under:

"16. These six points could be taken up for discussion together as they are interrelated and as the

team of officers of N.C.B. have conducted search and seizure at Joss Toll Road Plaza 2, N.H. 4, Chokkanahalli, Tumkur at a time from the possession of A.1. Point No. 1 deals with regard to the possession of 5.800 Kgs. of Heroin from A.1 Subash. Points No.2 to 6 deals with regard to A.1 to A.4 attempted to illegally indulge in illicit drug trafficking of 5.800 Kgs. of Heroin.

17. To prove search and seizure and recovery of contraband property from the possession of A.1 at Joss Toll Road Plaza 2, N.H.4, Chokkanahalli, Tumkur, the prosecution in all examined 16 witnesses and has placed documentary evidence as per Exts.P.1 to P.79. P.Ws.3, 5, 6, 8 and 16 are the N.C.B. Officers who have conducted the search and seizure. P.W.14 Narayana Rao Maske and P.W. 15 Srinivas, who are the independent panch witnesses, have not supported the prosecution case and turned hostile. The N.C.B. Officers P.Ws.3, 5, 6 and 16 have performed different duties and carried out the activities of search and seizure as per the direction of the Superintendent of N.C.B. - P.W.8 Gunabalan. All these officers have collectively discharged their function for search and seizure of 5.800 Kgs. of Heroin at Joss Toll Road Plaza 2, N.H. 4, Chokkanahalli, Tumkur, from the possession of A.1. For search and seizure, the main evidence placed on record by the investigating agency is of P.W. 16 Thirumalai Sridhar and P.Ws.3, 5 and 6 have assisted P.W.16 in respect of search and seizure of 5.800 Kgs. of Heroin from the possession of A.1. P.W.8 Gunabalan is the Superintendent, who also accompanied the team of Officers. i.e., PWs.3, 5, 6 and 16 and he was also present at the time of search and seizure. In respect of the said search and seizure, the N.C.B. officers i.e.,

P.Ws.3, 5, 6, 8 and 16 have narrated the prosecution case to the fullest extent in their examination-in-chief.

18. The first and foremost contention put forward by the learned counsel for the accused No.1 to 4 is that there is a violation of mandatory provisions of Sec.42 of the N.D.P.S. Act and therefore, the entire proceedings is vitiated. This contention goes to the root of the matter in as much as if the prosecution has violated the mandatory provisions of Sec.42 of the N.D.P.S. Act, the consequent result will be the vitiation of the entire proceedings because the illegal search and seizure cannot stand the test of law. They have further submitted that the evidence of P.Ws.3, 5, 6, 8 and 16 is not at all corroborated by the independent panch witnesses i.e., P.W.14 Narayana Rao Maske and P.W. 15 N. Srinivas, but on the other hand it is contradictory as they have specifically stated that in their presence nothing was seized from the possession of A.1. Their signatures were taken by P.Ws.3, 5, 6, 8 and 16 N.C.B. Officers. Further, these P.Ws.3, 5, 6, 8 and 16, in order to escape the liability of Mahendrakumar - driver, after leaving him they have falsely included A.1 in this case and further, the prosecution has not examined Mahendrakumar-driver and not cited as a witness in this case, in order to prove the prosecution case. Further, the prosecution has also not examined C.W.3.S.D.V. Murali Seshu, who after entire search and seizure operation and upon investigation, laid the complaint, though sufficient opportunity was given to the prosecution. As per the prayer of the prosecution, summons and bailable warrants were issued to C.W.3, but they returned unexecuted. As the accused in this case are in custody

since more than six years, the Hon'ble High Court had given a direction to complete the trial from 18-2-2011 on day to day basis within three months. Even the extension time granted by the Hon'ble High Court up to 30-7-2011 has also come to an end and hence, on that day i.e., on 30-7-2011, as the prosecution has failed to keep C.W.3 present, as per their request, it is taken as the prosecution case closed. Hence, adverse inference has to be drawn against the prosecution on the non-examination of C.W.3, who is the complainant in this case and who laid the complaint after the entire conclusion of the investigation in this case. As there are number of discrepancies and flaws in the entire search and seizure operation, the examination of the complainant C.W.3 is necessary. As the prosecution has failed to examine C.W.3 the complainant, adverse inference has to be drawn against the prosecution case.

19. The counter argument in this regard by the learned Special Public Prosecutor Sri. K.N. Mohan is that P.Ws.3, 5, 6, 8 and 16, particularly P.W.16 has complied with the mandatory provisions of Sec.42 of the N.D.P.S. Act in respect of search and seizure of 5.800 Kgs. of Heroin from the possession of A.1. Further, all the other N.C.B. Officers i.e., P.Ws.3, 5, 6 and 8 have also complied with the provisions of Secs.42 and 43 of the N.D.P.S. Act. This question, therefore, requires careful examination of the relevant provisions viz., Secs.42 and 43 of the N.D.P.S. Act.

20. Section 42 of the N.D.P.S. Act reads as under:

"42. Power of entry, search, seizure and arrest without warrant or authorisation - (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including paramilitary forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset, -

- a) enter into and search any such building, conveyance or place;*
- b) in case of resistance, break open any door and remove any obstacle to such entry;*
- c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for*

seizure or freezing or forfeiture under Chapter V-A of this Act; and

d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

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

21. Section 43 of the N.D.P.S. Act reads as under:

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

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

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

22. As far as the interpretation concerning the applicability of Secs.42 and 43 of the Act is concerned, the learned Special Public Prosecutor has relied on the decision of the Hon'ble Apex Court reported in A.I.R. 1994 S.C. 1872 in the case of STATE OF PUNJAB V. BALBIR SINGH. Our Hon'ble High Court in the decision reported in I.L.R. 2008 KAR 4166 in the case of R. MAYILVAHANAM AND ANOTHER V. INTELLIGENCE OFFICER, has referred the above decision of the Hon'ble Apex Court. In view of the principles laid down in the decision of the Hon'ble Apex Court and our Hon'ble High Court as stated above, the evidence placed on record by the prosecuting agency i.e., evidence of P.Ws.3, 5, 6, 8 and 16 particularly P.W. 16 who is the seizing officer and who has also received information as per Ex.P.17 has to be discussed. Before going to discuss the evidence of P.W. 16, the relevant observations of the Honble Apex Court in the case of STATE OF PUNJAB V. BALBIR SINGH (A.I.R. 1994 S.C. 1872) are as under:

"The Magistrate or Officers especially empowered under the Act can, proceed under Ss.41 and 42 on the prior information and/or having reason to believe thereupon that an offence under the Act has been committed. We may mention here that S. 43 which deals with the power of seizure, and arrest in public place is slightly different from S.42 in certain

respects. Under this provision any empowered officer under S.42 has the power to seize detain, search or arrest in public place or in transit if he has reason to believe that an offence punishable under Chapter IV relating to such drug or substance has been committed and seize any document or other article which may furnish evidence of the commission of such offence and can seize any animal or conveyance or article liable to confiscation and can detain and search any person similarly. The empowered officer while acting under S.43 need not record any reasons of his belief. This Section also does not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to S.42".

23. It is therefore clear from the above position in law as laid down by the Apex Court that while effecting search or seizure or arrest in any public place under Section 43, there is no need to record any reasons for his belief and it also does not make it obligatory on the part of the empowering officer to put the information in writing, whereas it is not so in the case of Section 42 of the Act.

24. The learned Special Public Prosecutor has vehemently argued and submitted that the oral and documentary evidence adduced before the Court clearly go to show that the Officers of N.C.B. have complied with the provisions of Secs.42, 52, 55 and 57 of the N.D.P.S. Act. The reports submitted by P.Ws.3, 5, 6 and 16 go to prove the compliance of Sec.57 of the N.D.P.S. Act. The evidence given by these witnesses clearly indicate that they have performed their duty as prescribed under Secs.52, 55 and 57 of the N.D.P.S. Act. In support of his contention, he has relied on the decisions of the Hon'ble

Apex Court, our Hon'ble High Court and other Hon'ble High Courts as mentioned in para 11 supra.

25. In support of search and seizure of 5.800 Kgs. of Heroin effected at Joss Toll Road Plaza 2, N.H. 4, Chokkanahalli, Tumkur, from the possession of A.1, the prosecution has mainly relied on the evidence of P.W. 16 Thirumalai Sridhar, who is the seizing officer. Though P.W.16 has narrated the prosecution story in his examination-in-chief to the fullest extent, but in the cross-examination he admits that A.1 Subash was in their custody on the night of 5-12-2004. Neither of the officers allowed either occupants of the said Maruti van to get down from the vehicle and himself and other officers did not allow the occupants of the vehicle to move about freely. At the time of writing the mahazar, they directed them not to leave the place and both A.1 Subash and the driver Mahendrakumar were kept in one of the rooms allotted to them by Joss Toll Company. Himself and other officers came along with him for the seizure, stayed back on the said night at Joss Toll Office. This clearly goes to show that there was a restriction of movement of A.1 from the Maruti Van itself and he was being taken to Joss Toll Office by about eight officers and confined in a room overnight and for a period of 24 hours along with the officers armed with revolvers This clearly goes to show that A.1 Subhash was under an atmosphere of threat and restraint.

26. Further, bare reading of Ex.P.19 voluntary statement of A.2 would indicate that such a statement can be written only upon being dictated and not voluntarily. The technical words used in Ex.P.19 clearly

goes to show that the said words are used by an officer well versed with the investigation of offences under the N.D.P.S. Act. For example, the use of words i.e., "provisions of Section 67 of the N.D.P.S. Act, 185", "Court of law", "powder believed to be heroin", "Narcotic Control Bureau", "Provision of Sec.50 of N.D.P.S. Act", "NCB seal No.12" can only be used by a person who is well acquainted with the N.D.P.S. Act. Ex.P.1 statement do not have English grammatical errors. Even P.W.3 in his cross-examination admits that himself and other officers have restricted the movement of A.1 Subash during the search and seizure, and A.1 did not ask that he had go to out of the room from 6:30 p.m. on 5-12-2004 till the production of A.1 Subash before the Magistrate on 6-12-2004 at about 8-15 pm and all the officers and A.1 spent the night at Joss Toll Plaza Office. Even P.W.8 in his cross-examination admits that except the mahazar witnesses, the entire team took A.1 Subash and Mahendrakumar to Joss Toll Office. Hence, the statement of A.1 at Ex.P.19 is not voluntary and it is hit by Sec.36 of the Indian Evidence Act. From the cross-examination of P.Ws. 3, 5, 8 and 16 it is evident that A.1 was all through in an atmosphere of restraint, threat, compulsion and coercion.

27. Further, as nothing was recovered from the driver Mahendrakumar, the NCB officers left him out and even he was not cited as a witness or not examined by the prosecution to show that A.1 Subash brought his car and in his presence NCB officers P.Ws.3, 5, 6, 8 and 16 have recovered 5.800 Kgs. of Heroin from the possession of A.1. The evidence of P.W.16 Seizing Officer is not corroborated by the evidence of independent panchas

P.W.14 Narayana Rao Maske and P.W.15 N. Srinivas. On the other hand, it is contradictory. P.W. 16 let off Mahendrakumar driver of Maruti Omni, though it is the prosecution case that A.1 Subash hired his taxi and when it was stopped at Joss Toll Gate, A.1 Subash was found in possession of 5.800 Kgs. of Heroin. It gives rise to a doubt whether A.1 Subash was in possession of 5.800 Kgs. of Heroin and A.1 Subash brought Mahendrakumar's Maruti Omni from Bangalore to Tumkur. The prosecution has failed to produce any Joss Toll receipt to show that during that time and on that day that Maruti Omni was proceeded from Bangalore and passed through the earlier Joss Toll Gate at Nelamangala.

28. Further, P.W.16 has not recorded the voluntary statement of A.1. On the other hand, the voluntary statement of A.1 is recorded by P.W.3 Caleb Arumairaj. Though P.W.3 has narrated the prosecution story in his examination-in-chief, he admits in his cross-examination that on 5-12-2004 A.1 Subash after completing the statement in a page told before him that he was very tired to proceed further and requested that he may be given rest and he will continue the same on the next day. On the next day, his statement was recorded. Thereafter, after completion of the statement, P.W.3 arrested A.1 Subash on 6-12-2004 at about 4-30 p.m. Further, P.W.3 is the Officer who received the information report as per Ex.P. 17 over phone and he admits in his cross-examination at para 32 that the mahazar does not indicate that A. 1 was given the liberty of calling his family, friends or relatives and he also admits that the mahazar does not indicate that A. 1 was told of his right to keep his lawyer at the time of

interrogation. They were six officers including the driver of the vehicle at the time of interception and seizure. He admits at para 40 that on 5-12-2004 A. 1 commenced his statement at around 9.p.m. and A.1 finished his voluntary statement on 6-12-2004 at around 14-00 hours and he also admits that the time taken to conclude Ex.P.19 voluntary statement of A. 1 was about 17 hours including rest and other time given to him.

29. In his 313 Cr.P.C. statement A.1 has stated that on 5-12-2004 in the evening at about 5 p.m. when he was at his house, he got a call from Mahendra Kumar, who is his relative, and he said that he was in Tumkur near Joss Toll Gate and he wanted some urgent help. As he asked him to come immediately, he left Bangalore and reached Joss Toll Gate at about 6:30 p.m. When he reached Joss Toll Gate, he met Mahendrakumar and also there were four persons around him. Suddenly all the four persons held him and forcibly took him to the office of Joss Toll Gate and the officers compelled him and threatened him to sign on few blank and also written sheets. When he refused, he was beaten up and he was made to strip to his undergarment and he was kept overnight in the same place.

30. Further, as per the admissions in the cross-examination of P.Ws.3, 5, 6, 8 and 16, A.1 was not taken to the nearest police officer in-charge of the police station i.e., Kyathasandra Police Station, which is one or two kilometers away from the delivery spot. Looking to the evidence of P.Ws.3, 5, 6, 8 and 16, there has been no compliance of Secs.42 and 52 to 55 of the N.D.P.S. Act and also as it is clearly admitted in the cross-

examination of the main witness ie., P.W. 16 seizing officer, wherein he has admitted that the NCB seal No. 12 was not given to the hands of the panch witnesses, but they remained

31. In view of the prosecution, evidence placed on record, there are serious infirmities noted above, as A.1 was compelled to give statement against his own free will and as there is no evidentiary value in regard to the voluntary statement of A.1 recorded by P.W.3 Caleb Arumairaj, as. P.W. 16 the seizing officer has not recorded the same. As the prosecuting agency let off Mahendrakumar, who all along was in the company of A.1 Subash from Bangalore to Joss Toll Gate in a Maruti Omni van and he has not been examined by the prosecution and not cited as a witness in this case. The prosecution has failed to prove that they have complied the mandatory provisions of Secs.42, 50, 52, 57 and 67 of the NDPS Act. The prosecution has further failed to prove the exclusive possession of 5.800 Kgs. of Heroin from A.1. As already discussed above, non-examination of C.W.3. S.D.V. Murali Seshu, who is the complainant, give rise to adverse inference and I hold that the prosecution has failed to prove the exclusive possession of 5.800 Kgs. of Heroin from A.1.

32. Further, the prosecution has also failed to prove that Ex.P.19 statement is a voluntary statement given by A.1. Only on Ex.P.17 information report and Ex.P.19 voluntary statement, the prosecution want to connect A.2 to A.4 with the alleged offences. Hence, I hold that there is no satisfactory evidence against A.1 to A.4 to connect them with the offence of indulging in illicit

drug trafficking of 5.800 Kgs. of Heroin. Hence, points No.1 to 6 are answered in the negative.

Point No.7:

33. Firstly there is no satisfactory evidence to prove the role of A.2 to A.4 either in the conspiracy or the direct participation to procure, possess, transport and attempt inter-State, of Heroin. The evidence on record placed by the prosecution in respect of A.2 to A.4 do not inspire confidence to believe the prosecution case in respect of conspiracy or attempt made by A.2. to A.4. to export Heroin. Absolutely there is no specific role attributed to them in the case from the stage of inception to the stage of conclusion of the evidence. It is the prosecution case that A.2, who used to receive Heroin from A.1 and hand over to A.3, is not sufficient to connect the guilt with A.2 to A.4. The entire case against A.2 and A.3 is based on the information report Ex.P.17 and the mahazar Ex.P.46.

34. Further, A.2 was arrested on 5-1-2005, A.3 was arrested on 6-1-2005, though A.1 was arrested on 6-12-2004. But A.4 is an under-trial prisoner in Central Prison, Bangalore. He was arrayed as accused No.4 in this case on 29-4-2005 nearly after five months after the alleged seizure on the voluntary statement of A.1 on 5-12-2004.

35. The learned counsel for A.1 to A.4 submit that as Ex.P.17 the information report is not a genuine document and the conspiracy has not been proved by the prosecution, and further the statement of co-accused A.1 i.e., Ex.P.19 is inadmissible under Sec.30 of the

Evidence Act, absolutely there is no evidence against A.2 to A.4 to connect them with the alleged offences. Further, there is no seizure of cell phone or Sim card or any other incriminating material from A.4. The prosecution has failed to prove that the numbers, which alleged to have been used by A.4 stands in his or anyone's name. A.4 was in Central Prison, Bangalore since 1999 as an under-trial prisoner in C.C.248/02 which ended in acquittal in 2008. In this case, the prosecution has failed to examine the complainant C.W.3 S.D.V. Murali Seshu. As the confession of A.1 Subhash has been retracted, there is no value on the retracted confession. Hence, I hold that the prosecution has failed to connect the guilt with A.2 to A.4 in this case only on the basis of the voluntary statement of A.1 i.e., Ex.P.19 and Ex.P.46 mahazar. They are not proved by the prosecution. Hence, I answer point No.7 in the negative.

Point No.8:

36. In view of my findings on points 1 to 7 in the negative and as per the admissions made by the prosecution witnesses i.e., NCB Officers in their cross-examination, they have not complied with the provisions of Sec.42 of the NDPS Act. After a careful examination of the entire evidence on record and in the light of the principles laid down in the decisions cited by both sides, I come to the conclusion that there has been violation on the part of the prosecuting agency to comply with the mandatory provisions of Sec.42 of the Act, thereby vitiating the entire proceedings.

37. On a careful consideration of the entire evidence and documents placed on record, I am of the view that the evidence placed on record is not trustworthy and not reliable to support the prosecution case. In the instant case, the search and seizure and recovery of contraband article i.e., 5.800 Kgs. of Heroin is not proved and also the possession of the same by A.1 is not proved. Hence, there is no presumption arise under Sec.35 of the NDPS Act regarding the existence of culpable mental state of the accused and also under Sec.66 of the NDPS Act regarding the presumption of genuineness of the documents produced by the prosecuting agency. Hence, I hold that the prosecution has failed to prove that A.1 was found in possession of 5.800 Kgs. of Heroin and also failed to prove that A.1 to A.4 in pursuance of the criminal conspiracy to purchase, possess, conceal, transport and sale 5.800 Kgs. of Heroin, committed the offences under Secs.8(c) read with Secs.21, 25, 27-A and 28 punishable under Secs.21(c), 25, 27A and 28 of the N.D.P.S. Act, 1985."

18. A careful examination of the observation made by the trial court makes it crystal clear that the trial court has assigned proper reasons while arriving at a conclusion that the prosecution has failed to prove the guilt of the accused beyond all reasonable doubt. I do not find any cogent, convincing, corroborative or legal evidence before this Court to reverse the judgment of acquittal. I also do not find any legal or factual error in the judgment of acquittal by the trial court. Hence,

considering the facts of the case and also keeping in mind the aforestated decisions of the Hon'ble Supreme Court, I answer the point that arose for consideration in the affirmative.

Accordingly, I proceed to pass the following:

ORDER

Appeal is dismissed.

**Sd/-
(G BASAVARAJA)
JUDGE**

Inn