

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

1. **CRA-D-375-DB-2013**

Date of Pronouncement: 2nd March, 2015

Saji Mohan Appellant

VERSUS

Narcotics Control Bureau, Chandigarh Respondent

2. **CRA-D-410-DB-2013**

Balwinder Kumar Appellant

VERSUS

Narcotics Control Bureau, Chandigarh Respondent

3. **CRA-S-1472-SB-2013**

Naveen Kumar Appellant

VERSUS

Narcotics Control Bureau, Chandigarh Respondent

4. **CRA-S-1736-SB-2013**

Naseeb Chand Appellant

VERSUS

Narcotics Control Bureau, Chandigarh Respondent

5. **CRR-2176-2013**

Virat Dutt Chaudhary Appellant

VERSUS

Narcotics Control Bureau, Chandigarh
and others Respondents

6.

CRR-2180-2013

Pushpdeep Singh

..... Appellant

VERSUS

Narcotics Control Bureau, Chandigarh
and others

..... Respondents

CORAM:HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MR. JUSTICE SURINDER GUPTAPresent:Ms.Sarabjit Kaur, Advocate,
Mr.Raj Kumar Gupta, Advocate, with
Mr.Gaurav Rana, Advocate,
for the appellants Saji Mohan and Balwinder Kumar.Mr.Sandeep Kumar, Advocate,
for the appellant-Naveen Kumar (in CRA-S-1472-SB-2013).Mr.Gaurav Singla, Advocate, and
Mr.Sandeep Kumar, Advocate,
for the appellant-Naseeb Chand (in CRA-S-1736-SB-2013)Mr.Kamal Sehgal, Advocate, for the petitioners
Virat Dutt Chaudhary and Pushpdeep Singh
(in CRR-2176-2013 and CRR-2180-2013).Mr.Sandeep Kumar Advocate,
for respondents No.3-Davinder Pal Singh,
and for respondent No.4-Naveen Kumar and
Mr.Gaurav Singla, Advocate,
for respondent No.5-Naseeb Chand
(in CRR-2176-2013 and CRR-2180-2013).

Mr.D.D.Sharma, Advocate, for respondent-NCB, Chandigarh.

RAJIVE BHALLA, J.

By way of this order, we shall decide CRA-D-375-DB-2013, filed by Saji Mohan, CRA-D-410-DB-2013, filed by Balwinder Kumar, CRA-S-1472-SB-2013, filed by Naveen Kumar, CRA-S-1736-SB-2013, filed by Naseeb Chand, CRR-2176-2013, filed by Virat Dutt Chaudhary and CRR-2180-2013, filed by Pushpdeep Singh. The appellants challenge judgment/order dated 08.03.2013 and 11.03.2013, passed by the Additional Sessions

Judge, Chandigarh, convicting and sentencing them in the following terms: -

Charge	Sentence
Under Section 21(C) of the NDPS Act, 1985	Saji Mohan and Balwinder Kumar are sentenced to undergo RI for 13 years each and to pay fine of Rs.1,50,000/- each. In default of payment of fine they shall further undergo RI for two years each.
Under Section 29 of the NDPS Act, 1985	Saji Mohan and Balwinder Kumar are sentenced to undergo RI for 13 years each and to pay fine of Rs.1,50,000/- each. In default of payment of fine they shall further undergo RI for two years each.
Under Section 32 of the NDPS Act, 1985	Naveen Kumar is sentenced to undergo RI for six months and to pay fine of Rs.10,000/-. In default of payment of fine he shall further undergo RI for one month.
Under Section 21 (C) of the NDPS Act, 1985	Naseeb Chand is sentenced to undergo RI for 10 years and to pay fine of Rs.1,50,000/-. In default of payment of fine he shall further undergo RI for two years.
Under Section 29 of the NDPS Act, 1985	Naseeb Chand is sentenced to undergo RI for 10 years and to pay fine of Rs.1,50,000/-. In default of payment of fine he shall further undergo RI for two years.

Virat Dutt Chaudhary and Pushdeep Singh, officers of the Customs and Central Excise have filed revisions to challenge order dated 11.03.2013, passed by the Additional Sessions Judge, Chandigarh, directing the filing of a complaint before the Chief Judicial Magistrate, Chandigarh for initiation of proceedings under Sections 193 and 340 of the Cr.P.C.

The appellants apart from Naseeb Chand, are officers of the Narcotics Control Bureau. Naseeb Chand was an informer working for the Central Excise and Customs Department. The revision petitioners are Virat Dutt Chaudhary, a retired Assistant Commissioner, Customs and Central Excise, Amritsar, and Pushpdeep Singh, a serving officer of the Customs and Central Excise Department.

The prosecution story, briefly put, as discernible from the complaint as well as prosecution evidence is that Saji Mohan and Balwinder Kumar, who were Zonal Director and the Superintendent, NCB, Chandigarh, respectively, conspired to and pilfered 10 Kgs. of heroin from the malkhana at NCB, Chandigarh and 30 kgs from the malkhana at Jammu by replacing heroin with slaked lime. Saji Mohan is thereafter alleged to have got in touch with Naseeb Chand, an informer of the Customs Department and handed over 10 Kgs. of heroin pilfered from the malkhana at Chandigarh to Naseeb Chand on 26.08.2008 for sale. Naseeb Chand is alleged to have transported the heroin to Amritsar where he allegedly told PWs 10 and 17 Virat Dutt Chaudhary and Pushp Deep Singh, officers of the customs department of an attempt to smuggle heroin on the intervening night of 27/28.08.2008. The customs department formed a raiding party and detected two persons riding a scooter. The persons on the scooter were asked to stop but made good their escape and in the process dropped 10 packets of heroin weighing 1 kg each. The

heroin was shown as an unclaimed seizure by the Customs Department, at Amritsar. The trial Court has concluded that this unclaimed recovery is false and was intended to cover up the pilferage of 10 kgs of heroin handed over to Naseeb Chand by Saji Mohan, from the Malkhana at Chandigarh. The trial Court has also relied upon test reports produced by the prosecution to prove variation in the chemical contents of heroin stored in the malkhana.

Before we proceed any further, it would be appropriate to point out that the trial Court has acquitted all the accused of charges of pilferage from the malkhana at Jammu.

Counsel for the appellants and revision petitioners have addressed separate arguments most of which are common and, therefore, wherever necessary, separate arguments shall be referred to.

Counsel for the appellants submit that the prosecution story regarding pilferage from the NCB malkhana at Chandigarh, is belied by the deposition of PW-2 R.C.Bodh, Superintendent, NCB, JZU, Jammu, who has admitted during his cross-examination that the board constituted by Sandeep Mittal, IPS, the Zonal Director to check and personally verify contents of the godown revealed that seals were intact and narcotics stored were in accordance with the weight recorded in the malkhana register. The prosecution has, therefore, failed to prove any pilferage from narcotics stored in the malkhana. The statements by Naseeb Chand and Naveen Kumar,

recorded under Section 67 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act'), which are the basis of the conviction, are, therefore, meaningless. The prosecution has not proffered any explanation for its failure to detect or prove any discrepancy in the weight of narcotics or that the seals were found intact and assumes significance as the prosecution alleges that when heroin was pilfered, it was replaced with slaked lime. The prosecution was required to prove that the alleged narcotics were replaced with slaked lime. A perusal of the reports received from the chemical examiner reveals that the chemical examiner was not asked to examine the new samples for presence of slaked lime but only to examine the percentage of diacetyl morphine. The absence of any evidence on record to even remotely suggest the presence of slaked lime in the contraband lying in the malkhana, disregards the very foundation of the prosecution case i.e. the appellants mixed slaked lime while pilfering heroin.

Counsel for the appellants further submit that a perusal of the notice Ex.P8, served upon Naseeb Chand reveals that it was served through Zonal Director, NCB, Jammu and refers to an inquiry in connection with the arrest of Saji Mohan by Anti Terrorist Squad (hereinafter referred to as the 'ATS'), Mumbai. The notice bears the date 26.03.2009 and directs Naseeb Chand to appear before the NCB Chandigarh at 11 AM on 27.03.2009. In token of service of the notice, the left thumb impression of Naseeb Chand appears on the

notice but without any endorsement as to who effected service, at what place, on what date and at what time. It is argued that these facts assume significance as the statement of Naseeb Chand was recorded on the next very day i.e. 27.03.2009. The prosecution is required to explain as to how it could serve Naseeb Chand, within a few hours at Jammu, as to how Naseeb Chand reached Chandigarh from Jammu a total distance of more than 400 kilometers and recorded his statement on 27.03.2009. The foundation of the prosecution case, namely the statement by Naseeb Chand recorded under Section 67 of the NDPS Act is highly suspicious and must be ruled out of consideration as neither PW-2 R.C.Bodh, who recorded Naseeb Chand's statement nor H.S.Gill, Superintendent, who issued the notice, have come forward with any explanation with respect to the above facts. A perusal of the deposition by PW-2 R.C.Bodh reveals that he has stated during his cross-examination that notice under Section 67 of the NDPS Act was served upon Naseeb Chand on 26.03.2009 in the NCB office at Chandigarh, thereby admitting that Naseeb Chand was already in the custody of the NCB, Chandigarh and that notice under Section 67 of the NDPS Act was a mere charade to show that Naseeb Chand has made a statement under Section 67 of the NDPS Act, and then claim that the statement is admissible against Naseeb Chand and his co-accused. It is argued that Naseeb Chand is a resident of Jammu, the notice dated 26.03.2009 was sent for service through NCB, Jammu. The said

facts read alongwith the admission made by PW-2 R.C.Bodh that the notice was served at Chandigarh, prove that the prosecution story is false and notice under Section 67 of the NDPS Act was never served and statement recorded under Section 67 of the NDPS Act was manipulated or was made under duress and coercion.

Counsel for the appellants further submit that notice Ex.P8, refers to an inquiry under Section 53(1) of the NDPS Act. Section 53(1) of the NDPS Act refers to exercise of power under Section 42 of the NDPS Act namely the power of investigation as opposed to the power to hold an inquiry, conferred by Section 67 of the NDPS Act. The statement, therefore, cannot be said to be recorded during an inquiry under Section 67 of the NDPS Act and cannot partake the nature of an admission that can be read against an accused or his co-accused. It is further submitted that the statement made by Naseeb Chand must be ruled out of consideration as he has a shady past. Naseeb Chand who was admittedly an informer of the Customs Department and was imprisoned for spying against the country. The prosecution manipulated Naseeb Chand and put him up against the appellants so as to make a false statement against honest officers. The entire prosecution story reeks of a departmental conspiracy to falsely implicate the appellants. It is further submitted that a perusal of the evidence reveals that there is no recovery of narcotics, no search of the house(s) or office(s) of any of the appellants nor were any of the accused confronted with each other or with their

statements or the statement by Naseeb Chand and Naveen Kumar. The statements by Naseeb Chand and Naveen Kumar recorded under Section 67 of the NDPS Act have been treated as the gospel truth by the trial Court without considering these serious flaws. It is further submitted that the statement made by Naseeb Chand that Saji Mohan handed over heroin to him for sale, is belied by the fact that if Saji Mohan had entrusted pilfered heroin for sale, there was no reason for Naseeb Chand to have handed over the heroin to the Customs Department, at Amritsar where the prosecution alleges that narcotics were shown as an unclaimed recovery. The heroin was worth crores of rupees and, therefore, it is surprising that the trial Court has recorded a finding based, upon the statement made by Naseeb Chand that he handed over the heroin to the Customs Department, at Amritsar which showed a recovery of 10 Kgs. of heroin as an unclaimed seizure. It is also contended that the entire case is based upon the letter written by the ATS, Mumbai where Saji Mohan had been framed by the drug mafia in a false case. The officers at Delhi and Chandigarh could not detect any discrepancy in the heroin stored in the malkhana and, therefore, hatched a plan to frame Saji Mohan. Naseeb Chand was procured and forced to make a statement under Section 67 of the NDPS Act falsely implicating the appellants.

The statement by Naveen Kumar who has been sentenced for six months and was said to be the PSO of Saji Mohan does not contain any incriminating material with respect to Chandigarh and as

evidence regarding Jammu has been discarded, it is surprising that he has been convicted with respect to pilferage at Chandigarh. The deposition by PW-6 Vijay Kumar that he introduced Naseeb Chand to Saji Mohan, must also be rejected as it is not corroborated by any other statement.

Counsel for the appellants further submit that Naseeb Chand and Naveen Kumar filed applications for retracting their statements on 21.05.2009 and 28.03.2009, before the Special Court but no order was passed. The trial Court has construed the retraction as belated and unfairly held that the fact that no order was passed on the retractions, it is sufficient to conclude that the statements were not retracted. It is further submitted that statements made by Saji Mohan and Balwinder Kumar, as also held by the trial Court, do not contain any incriminating material but they have been convicted on the basis of statements Ex.P9 and Ex.PW18, made by Naseeb Chand and Naveen Kumar, respectively. A perusal of the statements reveals that they are not corroborated by any evidence, are clearly coerced and fabricated, were recorded on a blank paper and Naseeb Chand and Naveen Kumar were made to sign these statements. It is further submitted that retracted statements cannot be used whether as direct or corroborative evidence and may if at all be used against the person who has made the statement but cannot by resort to any provision of the Evidence Act, 1872 be used against a co-accused. Section 30 of the Evidence Act, 1872 which provides that a confession made by an

accused can be used against another accused tried together with the accused making the statement, does not apply to the present case as the statement under Section 67 of the NDPS Act was not made during investigation or before a Magistrate but is a statement made during an inquiry.

As regards the reports received from the forensic science laboratory, it is argued that second samples were not taken in the presence of any of the appellant and even otherwise, as there is no report that slaked lime was detected in the samples of heroin, the reports are meaningless. The fluctuation in the percentage of diacetyl acid with certain samples showing an increase and others showing a decrease, in the percentage originally recorded, proves that the entire process has been manipulated. If the appellants had added slaked lime, the percentage of diacetyl morphine would not have increased. It is argued that mere difference in the percentage of diacetyl morphine, cannot fasten culpability on the incharge of the malkhana namely Balwinder Kumar as the seals were found intact and the prosecution has not been able to prove its allegation namely the removing of seals, the pilferage of heroin and the mixing of slake lime.

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Counsel for the petitioners in these revisions, submits that Virat Dutt Chaudary and Pushpdeep Singh, officers of the Central

Excise and Customs have been examined as witnesses but surprisingly, the trial Court has directed initiation of criminal proceedings against them by holding that the circumstances on record reveal that they have deposed falsely as the 10 kgs of heroin delivered by Saji Mohan to Naseeb Chand on 26.08.2008, which as per Naseeb Chand, he took to Amritsar and delivered to Inspector Vajinder Singh on 27.08.2008 was falsely shown as an unclaimed seizure. The trial Court has held that it was not possible that a group of 15 persons was unable to apprehend two persons on a scooter carrying 10 kgs of heroin, thereby proving that heroin brought by Naseeb Chand from Chandigarh, on the intervening night of 27/28.08.2008, was used by the customs department to reflect an unclaimed seizure to add credit to their record. The findings recorded by the trial Court are not borne out from the evidence on record much less is any material available to suggest that recovery of unclaimed seizure of 10 kgs of heroin, was the heroin entrusted to Naseeb Chand. The inference drawn by the trial Court is not warranted from the depositions of PWs 10 and 17. The mere fact that Naseeb Chand was known to them as an informer and informed them about the possibility of heroin being smuggled on the intervening night of 26/27.08.2008, has been wrongly linked to the present case. It is prayed that as the impugned order directing proceedings against Virat Dutt Chaudhary and Pushpdeep Singh is without jurisdiction, this part of the order may be quashed.

As regards Naveen Kumar, it is argued that as no offence has been made out, his conviction under Section 32 of the NDPS Act to undergo RI for six months and to pay fine of Rs.10,000/-, is not warranted.

Counsel for the respondent submits that statements made by Naseeb Chand and Naveen Kumar are admissible as confessions made during an inquiry are not hit by Section 27 of the Evidence Act, 1872. Naseeb Chand and Naveen Kumar have not been able to prove by any prima facie evidence that the statements were made under duress or coercion. The statements prove with a degree of certainty the modus of pilferage of heroin and as it is proved that Saji Mohan pilfered narcotics with the assistance of Balwinder Kumar and then handed over 10 Kgs. to Naseeb Chand for sale, the case against Saji Mohan stands proved. The question as to what Naseeb Chand did with the narcotics, is not germane to the present controversy but is still proved by the statement by Naseeb Chand and the fact that PW-7 Pushpdeep Singh and PW-10 Virat Dutt Chaudhary used this 10 Kgs. of heroin delivered to them by Naseeb Chand, by transporting it to the border and eventually showing a recovery of unclaimed heroin by alleging that persons carrying heroin fled leaving behind 10 Kgs. of heroin. The statements made by Naseeb Chand and Naveen Kumar being relevant and capable of being read against Saji Mohan and Balwinder Kumar, the appellants have been rightly convicted and sentenced by

the trial Court. The argument relating to notice served upon Naseeb Chand, is irrelevant as Naseeb Chand did not retract his statement for more than two months and even otherwise was unable to prove coercion or duress. Even otherwise, the department had no reason to falsely implicate any of the appellants as no pressure was brought to bear by any higher authorities or was the result of departmental politics etc.

We have heard counsel for the parties, considered the arguments and appraised the entire record.

The case, in hand, exposes the murky underbelly of government agencies set up to stamp out the menace of narcotics, where the lines between the smuggler and the law enforcer are so blurred as to make it difficult to distinguish one from the other. The shadowy world of informers, spies, drug traffickers, officers of the Customs Department, the Narcotic Bureau are so enmeshed in a web of deceit and greed, as to be indistinguishable. A sad commentary on the functioning of these agencies. The case, in hand, is a glaring example of what fortifies our opinions.

The appellant Dr.Saji Mohan, is an IPS officer, who was on deputation as Zonal Director, Chandigarh Zonal Unit, Narcotics Control Bureau with additional charge of Zonal Director, Jammu but was transferred to Enforcement Directorate, Cochin on 31.12.2008.

Dr. Saji Mohan was arrested by the ATS, Mumbai on 24.01.2009 for conscious possession of a large quantity of heroin. An FIR was registered against Saji Mohan on 24.01.2009, under Sections 8 (C), 21 and 29 of the NDPS Act. The trial is in progress at Mumbai.

Sh.K.P.Raghuvanshi, the then Additional Director General of ATS, addressed a letter dated 06.02.2009 to the Director General, NCB, New Delhi, forwarding information regarding the arrest of Dr.Saji Mohan and alleging that Saji Mohan had pilfered contraband seized from various places in Punjab and Jammu, manipulated the record and retained pure contraband for personal gain. The letter also alleges that these illegal acts were made possible with the connivance of raiding parties/subordinate staff. The letter named Balwinder Singh, Superintendent, NCB, Chandigarh, Constable Navin Kumar and Devenderpal Singh, PSOs of Saji Mohan and directed that records pertaining to seizures in Punjab, Haryana, Himachal Pradesh and Jammu be verified. It was also ordered that the chemical analyser's reports be compared with contraband in custody of the NCB so as to ascertain pilferage and adulteration. The letter Ex.PW15/A was followed by another letter Ex.PW15/B written by the same officer to the Director General of Narcotics Control Bureau, New Delhi, alleging that the interrogation of Saji Mohan has revealed certain facts which need to be verified, namely:-

- “1) Pilfering from the seizures of the unclaimed drugs started from May 2007.
- 2) Slaked lime was added to the contraband to enhance the quantity.
- 3) Sometimes part of the pure contraband was removed and the quantity of the seized contraband was managed by adding slaked lime.
- 4) The mixing of the slaked lime was done on the site of seizure if possible. In some cases the entire seized material was brought to the office of the ZD, NCB, Chandigarh where it would be packed and sealed after mixing slaked lime.
- 5) The seizures where pilferage/adulteration took place are:
 - i) Mohmediwala, Forezopar by BSF
 - ii) Rattokhe
 - iii) Jammu
- 6) The raiding party generally consisted of Supdt. Balvinder Kumar and PSOs Naveen Kumar and Devinder Pal Singh.
- 7) The sub-ordinate staff was aware of the pilferage/mixing of the seized contraband.
- 8) In some cases, the cash seized from the spot was distributed amongst raiding staff including Supdt. Balvinder Kumar and PSOs as reward.
- 9) In some cases, the samples of the seized contraband were taken after they were mixed with slaked lime to avoid detection of adulteration in future.
- 10) Not all pilfered contraband was brought to Mumbai. In all he had pilfered about 60 Kgs of Heroin, and out of that about 10 Kgs was handed over to one known drug smuggler of Jammu area namely Naseeb Chand.”

The NCB began an inquiry into the matter particularly with respect to the narcotics stored in the malkhanas at NCB Jammu and Chandigarh. Sh.Harcharan Singh Gill, the then Superintendent, NCB, Chandigarh, was directed by letter dated 08.03.2009 Ex.PW18/B, issued by Sh. Om Parkash, DDG (E), to submit a report after interrogating Balvinder Kumar, Naveen Kumar and Devinder Pal Singh.

Sh.H.S.Gill issued a notice under Section 67 of the NDPS Act, dated 06.03.2009, Ex.PW18/C to Devinder Pal Singh who made a signed statement Ex.PW18/D and was thereafter arrested, vide memo Ex.PW18/E. Devinder Pal Singh, however, was not arraigned as an accused.

Sh.H.S.Gill, thereafter served a notice, Ex.PW18/G, upon Naveen Kumar who made a signed statement Ex.PW18/H. Naveen Kumar was arrested vide memo Ex.PW18/I. Information of his arrest was forwarded vide Ex.PW18/J etc. to persons disclosed by Naveen Kumar.

Notices under Section 67 of the NDPS Act Ex.PW18/L, Ex.PW18/M and PW18/N, were served upon Balwinder Kumar, the then Superintendent, NCB, Chandigarh, who made statements in his own handwriting Ex.PW18/O, Ex.PW18/P, Ex.PW18/Q and Ex.PW18/R. Balwinder Kumar was arrested vide memo Ex.PW13/D etc. but concededly his statements do not contain any incriminating material.

Notice dated 26.03.2009, Ex.P8 was issued to Naseeb Chand by Sh.H.S.Gill through the NCB, Jammu. Naseeb Chand made a statement on 27.03.2009, Ex.P9, at NCB office, Chandigarh, which was recorded by Sh.R.C.Bodh, Intelligence Officer. Naseeb Chand appended his thumb impression on the statement which was signed by Sh.H.S.Gill and R.C.Bodh. Naseeb Chand was arrested

vide memo Ex.P10 etc. The statement Ex.P9, records that Saji Mohan handed over 10 kgs of heroin to Naseeb Chand for sale. Naseeb Chand handed over this 10 kgs of heroin to an officer of the Customs Department. The Customs Department showed a recovery of 10 kgs of heroin as an unclaimed seizure.

Saji Mohan was issued a notice under Section 67 of the NDPS Act, Ex.PW18/V, made a duly signed statement Ex.PW18/W and was arrested vide memo Ex.PW18/X. Notice Ex.PW18/AB was issued to Vijay Pal Singh who made voluntary statement Ex.P15. Similarly, notices Ex.PW18/AC, Ex.PW18/AE and Ex.PW18/AG under Section 67 of the NDPS Act were served upon Manjit Singh, Abhey Raj, Peon, NCB Jammu Zonal Unit, Jammu and N.R.Sharma, Superintendent, NCB, Headquarters, with a request to send Vijinder Singh, Inspector, who made a statement Ex.PW18/AK.

During investigation, panchnama Ex.P1 was summoned from the Jammu Zonal Unit alongwith test memo Ex.P2 and its report Ex.P3. A sample of the narcotics relating to these memos was sent for retesting. The memo is Ex.P4 and its report Ex.P5. A notice Ex.P7 was served upon M.M.S.Bhandari, Intelligence Officer, Zonal Unit, Jammu, who made a statement Ex.P6, pertaining to seizure of 60 kgs of heroin on 15.05.2008 and also stated that Balwinder Kumar was holding additional charge of Superintendent, Jammu Zonal Unit etc. Notice Ex.P13 was served upon Sepoy Kaushal Kumar, who

made his voluntary statement Ex.P14. Statement of Manjit Singh (Ex.P16) was also recorded.

Notice Ex.P20, under Section 67 of the NDPS Act was served upon Virat Dutt Chaudhary, Assistant Commissioner, Customs and Central Excise, Amritsar, who made a statement Ex.P21. Notice Ex.P19 was issued to Kartar Singh. Pushpdeep Singh, Inspector Customs and Central Excise, Amritsar, joined investigation after he was served with a notice and made statement Ex.PW17/E. A request was made to the concerned Courts and the Additional Chief Judicial Magistrate, Chandigarh, to allow re-sampling in order to check for pilferage in unclaimed seizures during the period Saji Mohan remained Zonal Director i.e. 2006-2008. Vide order dated 10.04.2009 the application was allowed. After taking out fresh samples, the samples were forwarded for chemical examination. A similar order Ex.PW18/AY was taken from the CJM, Amritsar. The details of the test memos, their sampling and the reports received thereon are available in the deposition by PW-18 Harcharan Singh Gill.

The NCB after examining the statements and the reports arrived at a prima-facie conclusion that narcotics seized and stored in the malkhana of the NCB Jammu and Chandigarh had been pilfered, filed a complaint before the Special Court, Chandigarh. The accused were separately charged but as they pleaded their innocence, the prosecution was directed to lead evidence. The prosecution, in order

to prove its case, has examined 19 witnesses, proved statements made by the accused and other witnesses under Section 67 of the NDPS Act, proved orders passed allowing retesting of the samples, test memos, panchnamas, chemical examiners' reports, letters received to initiate investigation, notices served upon the accused, their arrest memos, jamatalashis, interrogation reports, packaging details of samples, seizures reports and office noting etc.

PW-1 is M.M.S.Bhandari, Intelligence Officer, NCB, Delhi, who has deposed with respect to recovery of 60 kgs of heroin by the BSF and entrustment of heroin to officers of the NCB, Jammu. The depositions by PW-1 pertains to seizure and deposit of heroin at the malkhana in Jammu for which all the appellants have been acquitted. The NCB has not filed any appeal. It would not be necessary to recount his deposition except to the extent that Saji Mohan was Zonal Director and Balwinder Kumar was Superintendent, NCB, Chandigarh at that time, with additional charge of the Jammu Unit.

PW-2 R.C.Bodh, Superintendent, NCB, Jammu Zonal Unit, Jammu, who was on the relevant date posted at Chandigarh, has deposed that H.S.Gill issued a notice dated 26.03.2009, under Section 67 (Ex.P8) to secure the presence of Naseeb Chand who was served and came to their office on 27.03.2009. Naseeb Chand recorded his statement Ex.P9, which was taken down by this witness on the directions of H.S.Gill. After completion of the statement,

Naseeb Chand appended his thumb impression in token of its correctness. PW-2 has also deposed that Naseeb Chand was arrested, vide arrest memo Ex.P10 etc. PW-2 was cross-examined and stated that notice was served upon Naseeb Chand in the NCB office at Chandigarh but denied that he has any knowledge as to when Naseeb Chand had come to the Chandigarh office and whether he was brought by NCB officers or came on his own. The admission made by R.C.Bodh is a significant part of the arguments and, therefore, it would be appropriate to reproduce this part of his cross-examination, which reads as follows: -

“It is correct that the charge of NCB godown was handed over to me by Balwinder Kumar the then Superintendent NCB, Chandigarh on 27.1.2009. It is correct that Balwinder Kumar is an accused in the present case. It is correct that the board constituted by Zonal Director Shri Sandeep Mittal, IPS, who was the then Zonal Director to check and physically verify the articles/contraband lying in the godown. It is correct that as per the report of Board the case properties were checked physically for seal and weight as per the record of Malkhana register in the presence of independent witnesses and found to be correct as per the record.”

PW-3 is Parkash Ram, UDC, NCB, Chandigarh, who deposed that he was asked by H.S.Gill, Superintendent, to record Vijay Kumar's statement Ex.P12 and proved his signatures on the statement. PW-3 has deposed that a few lines were written by Vijay Kumar as he was finding it difficult to write and that Vijay Kumar signed the statement in his presence.

PW-4 is N.R.Sharma, Superintendent, NCB, HQ, Delhi, who at the relevant time was posted as Superintendent, Zonal Unit,

NCB, Jammu and has deposed that Saji Mohan was holding additional charge of Zonal Director, NCB, Jammu and Balwinder Kumar was holding additional charge of the godown.

PW-5 is Kaushal Kumar, Sepoy, NCB, Jammu Zonal Unit, Jammu. PW-6 is Head Constable Vijay Pal Singh, 141, BSF Battalion, Kashmir, and PW-7 is Constable Manjit Singh, J&K Police, Security Wing, Jammu. We need not narrate their depositions as their depositions pertain to narcotics allegedly pilfered from the malkhana at Jammu for which the appellants have been acquitted.

PW-8 is Vijay Kumar, Sepoy, NCB Office, Indore, who was Sepoy-cum-driver of Saji Mohan. Vijay Kumar has deposed that in 1998, the office of NCB was at Palora Camp. Naseeb Chand used to come to the BSF Camp and, therefore, he came to know that Naseeb Chand is the source of information for the BSF. Saji Mohan asked him to provide an informer. PW-8 has deposed about the contact between Naseeb Chand and Saji Mohan and, therefore, it would be necessary to reproduce a relevant extract from his deposition, which reads as follows: -

“Saji Mohan asked to me to provide some informer when he was Zonal Director of NCB Jammu. On one day, when I was in the market of Jammu, I met Nasib Chand on the way and I requested him to come to the office of NCB as the Zonal Director wants to meet him. On my asking Nasib Chand met Saji Mohan in the office. I do not know what transpired between Saji Mohan and Nasib Chand. When I was away to Sri Nagar on operation duty I came to know that there is call from NCB office, Chandigarh and I was informed regarding this by

Sepoy Tilak Raj. After 2-3 days thereafter, Nasib Chand came to the office of Jammu and I informed him that there is message for you from NCB Office Chandigarh and I requested him to go there and meet the NCB officials.”

PW-8 Vijay Kumar has also admitted that he was served with a notice Ex.P17 and recorded a statement Ex.P12 in the office of the NCB, Chandigarh. During his cross-examination, he denied that he knew any person by the name of Naseeb Chand or that he has identified Naseeb Chand in Court at the instance of the NCB.

PW-9 is Kartar Singh son of Ajit Singh, who has deposed that on 14.05.2008 he dropped Saji Mohan and Manjit Singh at Jammu. We need not refer to his deposition as his deposition pertains to narcotics allegedly pilfered from the malkhana at Jammu for which the appellants have been acquitted.

PW-10 is Virat Dutt Chaudhary, Assistant Commissioner (Retired), Customs and Central Excise, Amritsar, who has been produced by the prosecution to prove that Naseeb Chand was an informer of the Customs Department and that the department helped Naseeb Chand, financially from secret funds. It would be appropriate to reproduce a relevant part of his deposition as the trial Court has directed initiation of proceedings under Sections 193 and 340 of the Cr.P.C. against Virat Dutt Chaudhary after drawing an inference that the seizure recorded by the Customs Department on 27.08.2009 was fictitious and appears to have been used to cover up

the narcotics pilfered from the Narcotics Control Bureau from the NCB malkhana at Chandigarh:-

“I advised my staff to keep a vigilance on said Nasib Chand. For first two months he did not provide any information, in spite of the fact that I financially helped him from our secret funds. In the month of August 2008 Inspector Vajinder Singh told me that Nasib Chand had provided confirmed information that Heroin will be smuggled at the Border and he further told that he will provide the exact time and the place. He confirmed the said information on 24.8.2008 that on intervening night of 26/27.8.2008, there will be transaction of heroin and accordingly, our Department laid naka. I personally supervise the said surveillance at naka. At about 2.30/3.00 AM on 27.8.2009 we intercepted two wheeler coming from the side of BSF picket and we challenged the said persons. The said persons lost the balance on the Scooter and fell down and his belongings also fell down on the ground and therefore, those persons taking the benefit of darkness ran towards the BSF pocket and as such, we could not fire. After search the belongings were taken into custody and upon checking same was found to be 10 packets of Heroin. The weights of 10 packets were 1 Kg each and in all there were 10 packets and thus it was 10 Kg. I identify Nasib Chand, who is present in Court and he is the same person, who provided the information. Notice Ex.P20 was given to me and I appeared before the NCB official and I tendered my volunteered statement Ex.P21.”

During his cross-examination, PW-10 emphasised that 10 Kgs of heroin was an independent seizure of Department of Customs and the customs team did not visit Chandigarh before this seizure, thereby denying a link between this seizure and the narcotics allegedly entrusted by Saji Mohan to Naseeb Chand.

PW-11 is S.C.Mathur, Chemical Examiner, Grade-I, Custom House, Kolkata and PW-12 is S.K.Mittal, Chemical Examiner, Grade-II, CRCL, New Delhi, who have examined and proved various samples and forwarded the samples for chemical examination.

PW-13 is Ganesh Balooni, Superintendent, NCB, Chandigarh, who has proved the '*jamatalashi*' of the accused particularly the packaging material of the case property etc.

PW-14 is Sukhwinder Singh, DIG, ATS, Mumbai, who was produced to prove Saji Mohan's interrogation report Ex.PW14/B and his statement Mark A and Mark B as well as FIR No.1 of 2009, Ex.PW14/C, registered against Saji Mohan and also proved charge sheet Ex.PW14/D.

PW-15 is Sanjeev Krishanrao Tonapi, Police Inspector, ATS, Mumbai, who deposed with respect to the arrest of Saji Mohan while in conscious possession of 12 Kgs. of heroin vide Ex.PW14/C etc.

PW-16 is Rakesh Kumar Roshan, Inspector BSF, Jammu. We need not refer to his deposition as his deposition pertains to narcotics allegedly pilfered from the malkhana at Jammu for which the appellants have been acquitted.

PW-17 is Pushp Deep Singh, Inspector, Customs and Central Excise, Amritsar, who was produced to prove seizure of 10.030 Kgs. by the Custom Department on 27.08.2008. As the trial Court has directed initiation of proceedings under Sections 193 and 340 of the Cr.P.C against him, it would be appropriate to reproduce a relevant extract from his deposition: -

“I was directed to report in the office on the same day in the evening. I went to the office of Custom Preventing Station, Atari along with other staff officers, where after briefing the staff was dividing into two teams to hold naka near BOP, Ramkot. I was attached with Team B. Both the parties were headed by senior officers. In the early morning of 27.8.2008, 10 packets of Heroin were recovered contained in plastic bag and the same was brought to the office of custom office. The weight of the said contraband comes to be 10.030 Kilograms. It was an unclaimed seizure. We prepared documents regarding seizure of the contraband. I have brought the original file with me today. The said recovery was sealed after taking out the samples from each packet and sent for testing before CRCL New Delhi and we received the report from CRCL and the same is Ex.PW17/A. Copy of Form F is Ex.PW17/B. Panchnama is Ex.D5 and the weight of each packet as specified in Annexure A to Panchnama Ex.D5 is Ex.PW17/C. A letter written in this regard to Superintendent, NCB, Chandigarh is Ex.PW17/D. I was summoned by the NCB office in this regard and my statement was recorded which is Ex.PW17/E. The notice under Section 67 is Ex.PW17/F. The statement Ex.PW17/E is in my handwriting.”

PW-18 is Harcharan Singh Gill, Assistant Commandant, CISF, CISF Unit, BTPP, Bongaigaon, Assam, who was posted as Superintendent in February, 2009 and received letters Ex.PW18/A, Ex.PW15/A and Ex.PW15/B and commenced inquiry. PW-18 has proved service of notices upon the appellants as well as statements recorded under Section 67 of the NDPS Act and other material evidence relating to the investigation which we have already detailed in the opening part of this judgment.

PW-19 is K.Natarajan, Under Secretary to the Government of India, Ministry of Home Affairs, North Block, New Delhi, who proved the sanction etc.

Upon completion of prosecution evidence, the incriminating circumstances were put to the accused while recording

their statements under Section 313 of the Cr.P.C., who denied these circumstances, pleaded innocence and false implication.

Saji Mohan stated that: -

“I am innocent, have been involved in this false case by NCB to strengthen a false case which was planted upon me by the ATS Mumbai by showing huge recovery. The ATS Mumbai has started a malafide move under which the NCB Chandigarh was directed and guided to register this false case with a view to establish the source and origin of false recovery in which I was allegedly involved by ATS Mumbai and for that reason the evidence and the statements have been fabricated by NCB, Chandigarh to cover upon the false investigation carried out by the ATS Mumbai and for that reason a team of my co-accused has also been projected alongwith me to show the false pilferage of heroin. I have not committed any such offence as projected rather I am a victim of false accusation and tainted investigation in the hands of both ATS Mumbai and NCB Chandigarh.”

Naseeb Chand stated that: -

“I am innocent, have been involved in this false case by NCB in league with ATS Mumbai as ATS Mumbai was seeking information from various agencies regarding their informers and accordingly, my name was supplied with a view to strengthen a false case by making me scape-goat in the present case. I have nothing to do with the present case. I have no connection with any of co-accused facing trial.”

Naveen Kumar stated that: -

“I am innocent and have been implicated in this false case by the NCB to create the alleged source of heroin allegedly recovered from Dr.Saji Mohan. I was also summoned by ATS Mumbai in that regard and was thoroughly interrogated thereat. When nothing incriminating was found against me, a clean chit was given to me. Later on to establish the alleged source of the recovery of contraband, the ATS Mumbai in league of high ups of NCB started a malafide move which resulted into the registration of this false case. To show a false pilferage of heroin I have been added as co-conspirator in the episode to strengthen a false case by making me scapegoat.”

Balwinder Kumar stated that: -

“I am innocent, have been involved in this false case by NCB in league with ATS Mumbai to strengthen a false case in which Dr.Saji Mohan was arrested by ATS, Mumbai. Since ATS Mumbai was unable to unearth the source of alleged recovery at Mumbai as such with clever move, the ATS Mumbai joined hands with NCB officials/officers and after fabricating various memos, statements under Section 67 of the NDPS Act, had projected the present case of pilferage of heroin from different unclaimed recoveries including the Malkhana of NCB by involving me in this false case, as I was over all incharge of NCB Godown/Malkhana. My false involvement was also required by the NCB as well as ATS Mumbai with a view to project false pilferage of heroin on account of the reason that I was incharge and supervisory authority of NCB, Godown/Malkhana and for that reason I have been involved as an accomplice in the said episode. This all drama was staged by the NCB to strengthen a case registered against Dr.Saji Mohan at Mumbai in consultation with ATS, to show the source of alleged recovery of heroin at Mumbai.”

The accused produced the following witnesses in defence: -

DW-1 Anand Chetia, Constable, BSF, to prove unclaimed seizure of 16 Kg of heroin on 19.07.2007 which was handed over to the NCB Zonal Unit, Chandigarh. DW-2 HC Dondia, Intelligence Officer, NCB, Headquarters Delhi, who deposed with respect to seizures at Jammu but we need not refer to his deposition as his deposition pertains to narcotics allegedly pilfered from the malkhana at Jammu for which the appellants have been acquitted.

DW-3 Sanjiv Chandel, Sub Area Organiser, SSB, Training Centre, Ghitorni, New Delhi, proved another unclaimed seizure.

DW-4/5 Partap Singh Yadav, Intelligence Officer, NCB, Chandigarh, proved another unclaimed seizure, letter Ex.DW5/A written by the then Superintendent Balwinder Kumar (one of the appellants) and identified signatures Balwinder Kumar on various official letters Ex.DW5/B, Ex.DW5/C, Ex.DW5/D, Ex.DW5/E, Ex.DW5/F, Ex.DW5/G, Ex.DW5/H and Ex.DW5/I.

The trial Court dealt with the case by dividing it into two separate parts i.e. NCB, Jammu and Chandigarh and with respect to the pilferage at Jammu, acquitted all the accused by holding as follows: -

“56. Presence of accused Balwinder Kumar, Davinder Pal Singh and Naveen Kumar in NCB, JZU on 15.5.2008 not having been established, the panchnama Ex.P-1 relied upon by the prosecution, proved to be a false document, statements of prosecution witnesses regarding the meeting convened by accused Saji Mohan not being reliable, it is held that prosecution has failed to prove that on 15.5.2008 in the area of NCB, JZU, accused Balwinder Kumar, Saji Mohan and Davinder Pal Singh, in conspiracy and in connivance with each other, pilfered 30 kg. Heroin from the unclaimed seizure of 60 kg and mixed slacked lime. The point is answered against the prosecution.”

As regards the alleged pilferage at Chandigarh, the trial Court has held that though statements Ex.PW18/W and PW18/O made by Saji Mohan and Balwinder Kumar, under Section 67 of the NDPS Act, do not contain any incriminating material and the statement by Davinder Pal Singh Ex.PW18/D does not prove pilferage of heroin in the unclaimed seizures lying in the malkhana of NCB, Chandigarh but the statements by Naseeb Chand Ex.P9, and

Ex.PW18/H by Naveen Kumar prove that on 26.08.2008 Saji Mohan and Balwinder Kumar pilfered 10 kgs of heroin from the malkhana at Chandigarh and handed it over to Naseeb Chand. The Trial Court thereafter went on to doubt the depositions by PWs 10 and 17 about recovery of 10 kgs of heroin at Amritsar by holding that the heroin entrusted by Saji Mohan to Naseeb Chand was shown in connivance with PWs 10 and 17 as an unclaimed recovery, thereby proving that heroin was pilfered from the Malkhana at Chandigarh and handed over by Saji Mohan to Naseeb Chand. As regards the retraction of the statements by Naseeb Chand and Naveen Kumar, the trial Court has held that the retractions are belated and even if it is held that these statements were retracted, the statements can be relied as there is corroborative evidence relating to pilferage of the case property lying in the malkhana.

The prosecution story as discernible from the complaint as well as the evidence is that Saji Mohan and Balwinder Kumar, who were Zonal Director and Superintendent, NCB, Chandigarh, respectively, pilfered 10 Kgs. of heroin from the malkhana at NCB, Chandigarh by replacing the heroin, lying in the malkhana with slaked lime. Saji Mohan thereafter got in touch with Naseeb Chand, an informer of the Customs Department and handed over 10 Kgs. of heroin to Naseeb Chand 26.08.2008 for sale. Naseeb Chand is alleged to have transported the heroin to Amritsar where he informed officers of the Customs Department that on the intervening night of

27/28.08.2008 an attempt would be made to smuggle heroin. The customs department formed a raiding party and detected two persons riding a scooter. The persons on the scooter were asked to stop, but made good their escape and in the process dropped 10 packets of heroin weighing 1 kg each. The heroin was shown as an unclaimed seizure by the Customs Department at Amritsar. The trial Court has concluded that this unclaimed recovery is false and was intended to cover up the pilferage by Saji Mohan and Balvinder Singh from Malkhana at Chandigarh. The prosecution also relies upon test reports to prove variation in diacetyl morphine in the contents of heroin stored in the malkhana and bases its case upon test reports after heroin stored in the malkhana was retested.

A perusal of the evidence on record reveals that the prosecution in order to prove its charge of pilferage of narcotics, primarily relies upon the statement Ex.P9 made by Naseeb Chand on 27.03.2009, recorded by PW-2 R.C.Bodh, Superintendent, NCB, on the directions of PW-18 H.S.Gill, the statement Ex.PW18/H made by Naveen Kumar, statement of PW-3 Parkash Ram, UDS, statement of PW-8 Vijay Kumar, Sepoy and statement of PW-18 H.S.Gill. PW 10 Virat Dutt Chaudhary, Assistant Commissioner (Retired), Customs and Central Excise, Amritsar and PW 17 Pushp Deep Singh, Inspector, Customs and Central Excise, Amritsar have been produced to prove recovery of 10 kgs of heroin on 27.08.2008 as unclaimed seizure. The pilferage from the malkhana is sought to be proved by

the depositions of PW-11 S.C.Mathur, Chemical Examiner, Grade-I, Customs House, Kolkata and PW-12 S.K.Mittal, Chemical Examiner, Grade-II, CRCL, New Delhi, who examined the contents of narcotics and forwarded their reports.

At this stage, it would be necessary to record that the prosecution admits that statements made by Saji Mohan and Balwinder Kumar under Section 67 of the NDPS Act, do not contain any incriminating material.

The prosecution having primarily relied upon statement Ex.P9 made by Naseeb Chand, the statement is a significant piece of evidence and would, therefore, require reproduction. The statement reads as follows: -.

“..... I worked as Informer of BSF, Central Custom & Central Excise etc., government agencies and got money for the information supplied. I remained in jail in Pakistan on four occasions and in Jammu for fourteen month for illegally crossing the border. In May, 2008, C. Vijay Kumar introduced me to Saji Mohan, who was the then Zonal Director of NCB, JZU. Saji Mohan asked me to meet him in Chandigarh where he had been transferred and gave me Rs.500/-. After some time, C. Vijay of Jammu NCB told me to meet Saji Mohan in kothi no.80, Sector 2, Chandigarh. In June, 2008, I reached house no.80 to meet Saji Mohan and I was taken to him by a Sikh Sepoy. I spoke to Saji Mohan for about half an hour and Saji Mohan told me that he would pay him Rs.50,000/- if I sold Heroin for him. I told him that the work was dangerous upon which Saji Mohan said that his name should not crop up, but if I was caught, he would manage my release. I told him that I would search for a customer, but would require some money on which he paid me Rs.1000/- which I spent. After 15-20 days, I again went to Meet Saji Mohan in Chandigarh and told him that I could not find a buyer. Saji Mohan paid me Rs.500/- and asked me to search for a buyer and that Heroin to the extent of 10 to 20 kg would be supplied. Then, I went to Amritsar and met Inspector Baljinder Singh of Custom Department in his office. I told him that an official of Narcotics Department,

Chandigarh trusted me and was ready to deliver Heroin for sale and if he wanted, I could give drug to him. Thereupon, Inspector Baljinder Singh spoke to his senior officer Sh. Chaudhary, A.C. Customs & Central Excise and told me to bring sample of Heroin. Again in August 2008, I met Saji Mohan and asked him for a sample. Saji Mohan gave me sample in two small packets and told me that he would pay me Rs.50,000/- per kg and the amount beyond Rs.5 lacs, if it was sold at that rate. I took the sample to Amritsar and showed it to Baljinder Singh who said that the quality of Heroin was very good and that I should bring the contraband. I told him that I would not go alone to Chandigarh. So, on 26.08.2008, I accompanied by Baljinder Singh, a driver and armed Constable came to Chandigarh from Amritsar in a vehicle and reached Chandigarh at about 1300 hrs. Inspector Baljinder Singh dropped me near NCB office and I met Saji Mohan who sent me to his residence and lateron, himself reached. I was given meals and ten packets of Heroin from a white box. After 10-15 minutes, I reached Sector 43, Chandigarh in an auto where I met Inspector Baljinder Singh and we started for Amritsar in the vehicle. At about 12/1 a.m., they reached the house of Baljinder Singh where I slept and stayed till 27.8.2008. On 28.8.2008, I came to know that Baljinder Singh had shown 10 kg Heroin a unclaimed seizure on 27.8.2008. For 2-3 days, I remained there and I was paid Rs.50,000/- by Baljinder Singh which I spent. Thereafter, I never met Saji Mohan.....”

A perusal of the statement Ex.P9, reveals that Naseeb Chand has admitted that he was an informer of the BSF, the Customs Department and the other government agencies, remained in jail in Pakistan and Jammu and that he was introduced to Saji Mohan by Vijay Kumar, appellant. After some time, he was asked by Vijay Kumar to meet Saji Mohan at House No.80, Sector 2, Chandigarh. He reached the aforesaid house in June, 2008, met Saji Mohan for half an hour. Naseeb Chand stated that Saji Mohan told that he would pay him Rs.50,000/- if he sold heroin for him. Saji Mohan paid him Rs.1000/- at that time. After 15-20 days, he met Saji Mohan in Chandigarh and told him that he could not find a buyer.

Saji Mohan paid him Rs.500/- and asked him to search for a buyer and told him that 10-20 kgs of heroin would be supplied. Naseeb Chand thereafter stated that he went to the Customs Department, Amritsar, met Inspector Baljinder Singh and told him that an official of the Narcotics Department was ready to deliver heroin for sale. Inspector Baljinder Singh spoke to his senior officer Sh.Chaudhary and then told Naseeb Chand to bring a sample of heroin. In August, 2008, he met Saji Mohan and asked for a sample. Naseeb Chand took the sample from Saji Mohan and took it to Amritsar and showed it to Baljinder Singh who stated that the quality of the heroin is very good. Naseeb Chand thereafter goes on to state that he was accompanied to Chandigarh by Baljinder Singh, a driver and an armed Constable. They reached Chandigarh in a vehicle at 13:00 hours. He was dropped near NCB office where he met Saji Mohan who sent him to the latter's residence. After some time, Saji Mohan arrived at his residence removed 10 packets of heroin from a white packet and handed them over to Naseeb Chand after which he and Inspector Baljinder Singh returned to Amritsar. He came to know on 29.08.2008 that Baljinder Singh had shown 10 kgs of heroin as an unclaimed seizure on 27.08.2008. He was paid Rs.50,000/- by Baljinder Singh. The statement which is self-inculpatory admits that 10 kgs of heroin was handed over by Saji Mohan to Naseeb Chand for sale but Naseeb Chand handed it over to Baljinder Singh an

official of the Customs Department, Amritsar who showed it as an unclaimed seizure on 27.08.2008.

The next piece of evidence is the statement Ex.PW18/H, by Naveen Kumar, which reads as follows: -

“..... I have been informed that this statement u/s 67 of the Act can be used against me in the court..... One evening, in Nov., 2008, Saji Mohan told me to pick him up from the office. At about 7.30/8 p.m., Saji Mohan Sahib reached the office where Superintendent Balwinder Kumar was present. They had taken out several lots. In the presence of Saji Mohan Ji, on his direction, I and Balwinder Kumar mixed lime in the lots and made another big lot and that packet was given to Saji Mohan Sahib. I asked Saji Mohan and Balwinder Sahib what they would do with the packet upon which they told me that some big seizure would be shown in Chandigarh. This incident occurred on two occasions, but I can not correctly remember the date. Many a times, whatever money was recovered in the raids, was given to Saji Mohan through Balwinder Kumar Superintendent.....”

A perusal of the statement Ex.PW18/H made by Naveen Kumar reveals that the statement was recorded to prove the modus of pilferage from the malkhana at Chandigarh. Naveen Kumar states that he and Balwinder Kumar mixed lime in the narcotics and made a big lot of narcotics which was handed over to Saji Mohan.

The trial Court has placed reliance upon statements Ex.P9 and Ex.PW18/H and held that though the statements were retracted but as there was a delay in retracting the statements and as there is no credible evidence of coercion or force, the statements have to be read against Naseeb Chand, Saji Mohan and Balwinder Kumar as evidence of their culpability. The trial Court has also held after

referring to various judicial precedents that even a retracted statement can be relied provided it is corroborated. The trial Court has also held that the retraction alleging force and coercion is baseless as if the department had used force and coercion they would have recorded self-inculpatory statements by Saji Mohan and Balwinder Kumar also.

Counsel for the appellants, apart from doubting the legality of a statement, under Section 67 of the NDPS Act, have criticised the statements by alleging that the notice served upon Naseeb Chand does not contain his address or the name of the officer who effected service and it has not been explained as to how notice dated 26.03.2009, issued from Chandigarh was served upon Naseeb Chand at Jammu and he appeared before NCB Chandigarh on 27.03.2009 after travelling a distance of more than 400 kms. Apart from this argument, counsel for the appellants have also submitted that as the statements stood retracted they could not form the basis of an opinion of culpability vis-a-vis any of the appellants. The statement by Naveen Kumar has drawn similar criticism and in addition it is urged that as Naveen Kumar has alleged to have stated that in November, 2008 Saji Mohan and Balwinder Kumar had in his presence taken out several lots of heroin and on the directions of Saji Mohan he and Balwinder Kumar mixed slaked lime in the lots and made another big lot which was handed over to Saji Mohan for showing a big seizure at Chandigarh but a perusal of the chemical

analysis reports reveals that the samples were not analysed for presence of slaked lime, thereby in essence, nullifying the statement Ex.PW1/H made by Naveen Kumar under Section 67 of the NDPS Act.

Admittedly, at the time of the alleged pilferage, handing over of narcotics to Naseeb Chand, the recovery of 10 kgs of narcotics of unclaimed seizure at Amritsar by officers of the Customs Department, Saji Mohan was the Zonal Director, NCB Chandigarh and Balwinder Kumar was Superintendent, NCB Chandigarh. The charge of the malkhana was with Balwinder Kumar. The overall control and supervision was with Saji Mohan.

After receipt of information regarding the arrest of Saji Mohan at Mumbai, while in possession of a large quantity of narcotics and pursuant to letters received from the Director General of NCB, New Delhi etc. investigation commenced into narcotics stored by particular reference to the malkhana at Chandigarh and Jammu.

PW-18 Harcharan Singh Gill, who was posted as Superintendent at the relevant time, issued notice dated 26.03.2009, Ex.P8 to Naseeb Chand, who appeared at NCB, Chandigarh on 27.03.2009 and made a statement Ex.P9, which we have already reproduced. A perusal of notice Ex.P8, reveals that it does not contain Naseeb Chand's address, does not contain the name of the

officer who served the notice but these facts, in our considered opinion, are not sufficient to discard the statement as it has come in evidence as well as in the statement made by Naseeb Chand himself that he was known to various under cover agencies including the Customs Department and BSF and, therefore, his address and location was obviously known to officers of the NCB, Jammu who would have served this notice upon him and asked him to reach Chandigarh on 26.03.2009. Furthermore, Naseeb Chand does not deny that his statement was recorded on 27.03.2009 as while retracting his statement, admitted that a statement dated 27.03.2009 was recorded at NCB Chandigarh though by alleging threat and coercion, thereby admitting that he was present in NCB, Chandigarh on 27.03.2009 and recorded the aforesaid statement Ex.P9. We are, therefore, not inclined to discard this statement on account of discrepancies regarding service upon Naseeb Chand of the notice Ex.P8.

Another argument that the statement Ex.P9, made by Naseeb Chand, who is an informer and had been punished for treason, was manipulated on account of departmental politics, is not borne out from any evidence or any fact that may have been placed on record in defence or may have come forth during cross-examination of prosecution witnesses. The argument that there was no reason for Saji Mohan to have handed over 10 kgs of heroin to Naseeb Chand, a casual acquaintance, falls within the realm of

speculation as what actually transpired between Naseeb Chand and Saji Mohan is within their special knowledge. We are, therefore, not inclined to discard the statement made by Naseeb Chand whether on account of ambiguities in the notice or on the basis of the other arguments advanced by counsel for the appellants.

An argument that the statement under Section 67 of the NDPS Act cannot be read against Naseeb Chand, as it was not recorded during an inquiry based upon use of the words “an inquiry under Section 53(1) of the NDPS” in the notice Ex.P8, must also fail. The notice Ex.P8 refers to Section 53(1) of the NDPS Act but as is apparent from the facts, no investigation was pending on the date of service of the notice on 26.03.2009 or recording of the statement on 27.03.2009. All that was pending was an inquiry during which statements as provided under Section 67 of the NDPS Act were recorded. The statement recorded under Section 67 of the NDPS Act, therefore, cannot be said to be a statement recorded before a police officer during investigation, so as to be ruled out of consideration.

The next question is whether the statement Ex.P9 made by Naseeb Chand can be relied for convicting Naseeb Chand. A statement made under Section 67 of the NDPS Act, if it records an inculpatory admission can be read against an accused making such a statement as an admission as to the contours of a factual situation within his special knowledge and is, therefore, an admission as set

out in Section 17 of the Evidence Act, 1872 and may be read against an accused under Section 21 of the Evidence Act without inviting the prohibition enacted by Section 27 of the Evidence Act provided it is not recorded before or by a police officer during an investigation. The statement, in our considered opinion, having been recorded under Section 67 of the NDPS Act during an inquiry has to be read alongwith Section 35A of the NDPS Act as sufficient to enable the prosecution to prove Naseeb Chand's culpability without having to prove *mens rea*, which is even otherwise writ large on the statement recorded under Section 67 of the NDPS Act. We, therefore, have no hesitation in holding that statement Ex.P9 made by Naseeb Chand has to be read in evidence as an admission by Naseeb Chand of the commission of the offences for which he has been charged, convicted and sentenced subject, however, to our accepting the opinion recorded by the trial Court on the question of retraction, and the reading of the statement and the other evidence against Saji Mohan and Balwinder Kumar and other corroborative evidence.

A perusal of the record reveals that at the time when Naseeb Chand was produced before the Magistrate, he did not record a retraction of his statement. Naseeb Chand retracted his statement, two months later by merely stating that the statement was obtained by coercion and force. A perusal of the application for retraction reveals that Naseeb Chand has not set out the particulars of the acts of force and coercion. An inculpatory statement, which is in the

nature of an admission, can be legitimately retracted but such a retraction can only be accepted if it is made expeditiously namely at the time when the accused is produced before the Magistrate or soon thereafter and then also by putting forth credible facts that would indicate, but would not prove force/coercion. The ultimate principle that governs acceptance of a retraction and a consequent discarding of such a statement, is the facts disclosed in a retraction to prima-facie suggest coercion, force or manipulation as opposed to absolute proof of such facts. The facts regarding coercion, force and manipulation must be specific and must broadly, if not specifically set out the acts that constitute coercion and force for otherwise it would be near impossible for a prosecution in such cases to succeed and render meaningless provisions in various statutes relating to economic crimes and smuggling of drugs. We shall not be misunderstood to have held that in each and every case, a self-inculpatory statement recorded under Section 67 of the NDPS Act has to be accepted or that retractions cannot be accepted. All that we propose to hold is that the final arbiter is the evidence on record i.e. the contents of the statement, the timing of the retraction, the particulars of the allegations of force and coercion and then depending on the fact and circumstances of a case, the judicial perception of a Court while accepting or rejecting the retraction. The facts of the present case do not enable us to accept the retraction as not only was it not proffered when Naseeb Chand was produced

before the Magistrate for the first time but the application for retraction is devoid of even rudimentary particulars of any acts that may constitute force or coercion. The mere fact that Naseeb Chand was in the NCB office, is irrelevant as Naseeb Chand is not an ordinary individual. Naseeb Chand is an informer and has been in jail before and, therefore, would not capitulate easily. We, therefore, affirm the opinion recorded by the trial Court that the retraction by Naseeb Chand does not detract from the admission made in his statement recorded under Section 67 of the NDPS Act. At this stage, it would be appropriate to point out that even a retracted statement may, circumstances so permitting, form the basis of a conviction. The trial Court has duly considered various judgments of the Hon'ble Supreme Court on the point of retraction and the consideration of a retracted statement and only thereafter proceeded to rely upon the statement made by Naseeb Chand. We find no reason to differ with the opinion recorded by the trial Court that statement made by Naseeb Chand is sufficient to prove his culpability.

The next question that requires an answer, is whether the statement Ex.P9 made by Naseeb Chand can be read against Saji Mohan and Balwinder Kumar. As referred to above, the statement made by Naseeb Chand implicates Saji Mohan as the person who entrusted 10 kgs of heroin to him for sale. As a normal rule, the statement of a co-accused, cannot be read against the other but an

exception to this rule is set out in Section 30 of the Evidence Act, 1872, which reads as follows: -

“30.Consideration of proved confession affecting person making it and others jointly under trial for some offence: -

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession, as against such other person as well as against the person who makes such confession.

Illustration:- *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said-“*B* and I murdered *C*”. The Court may consider the effect of this confession as against *B*.”

Section 30 of the Evidence Act postulates that where more persons than one are tried jointly for the same offence and one such person makes a confession affecting himself and the other accused, a Court may take into consideration such a confession not only against the person making the confession but also against others who have been implicated. The illustration appended below Section 30 of the Evidence Act, makes it amply clear that an admission made by a co-accused being jointly tried against another may be taken into consideration not only against the person making such a confession but also against the other accused being tried with such person. As we have accepted the truth and the evidentiary value of the statement made by Naseeb Chand, have no hesitation in holding that the admission made by Naseeb Chand can and may be read against Saji Mohan to raise an inference of culpability. A perusal of the statement Ex.P9, made by Naseeb Chand reveals that it contains a

categoric admission that 10 kgs of narcotics were handed over by Saji Mohan to Naseeb Chand for sale. As we have already held that the admission made by Naseeb Chand can be read against Naseeb Chand, we are inclined to invoke Section 30 of the Evidence Act to hold that as Saji Mohan who was tried alongwith Naseeb Chand, the statement Ex.P9 made by Naseeb Chand has to be read against Saji Mohan to infer the commission of offences under the NDPS Act.

Considering for a moment that the statement made by Naseeb Chand requires corroboration, we need not travel too far to seek corroboration. Naseeb Chand in his statement Ex.P9 stated that after receiving 10 kgs of heroin from Saji Mohan he reached Amritsar where he handed it over to Inspector Baljinder Singh of the Customs Department and he came to know that Baljinder Singh had showed recovery of 10 kgs of heroin on 27/28.08.2008 as an undisclosed seizure. The fact that an undisclosed seizure of 10 kgs of heroin was made at the international border in Amritsar on 27/28.08.2008 soon after Naseeb Chand handed over 10 kgs of heroin to Balwinder Singh, is duly admitted and proved from the depositions of PW-10 Virat Dutt Chaudhary, Assistant Commissioner (Retd.) Customs, Amritsar who has admitted that Naseeb Chand was an informer of the Customs Department and was helped by the department with secret funds. To similar effect is the statement made by PW-17 Pushpdeep Singh, Inspector Customs, Amritsar. The trial Court has in view of the admitted link between

Naseeb Chand and these officers of the Customs Department sought to corroborate the statement made by Naseeb Chand of unclaimed seizure of 10 kgs of heroin at Amritsar by linking it to the heroin handed over by Saji Mohan to Naseeb Chand. We find no reason whether in fact or in law to cast any doubt on the inference drawn by the trial Court as the chain of the circumstances that commenced with a meeting between Naseeb Chand and Saji Mohan followed by delivery of 10 kgs of heroin by Saji Mohan to Naseeb Chand, passing on this 10 kgs of heroin to an officer of the Customs Department, Amritsar and the sudden unclaimed seizure of 10 kgs of heroin near the Amritsar border completes a chain of facts implicating Saji Mohan and Naseeb Chand and two officers of the Customs Department who for reasons best known to the prosecution were not cited as accused but were cited as witnesses. We desist from recording any adverse comment on the conduct of the prosecuting agency except to the extent that after Naseeb Chand recorded his statement that he had handed over 10 kgs of heroin to an officer of the Customs Department, the role of the Customs Department should have been investigated but as the trial Court has ordered prosecution of these witnesses, we do not record any further opinion, lest it prejudice their rights.

The next part of the case pertains to the culpability of Balwinder Kumar. Balwinder Kumar was Superintendent of the NCB, is not named in the statement Ex.P9 made by Naseeb Chand

but is named in the statement Ex.PW18/H made by Naveen Kumar which we would like to once again reproduce and reads as follows: -

“..... I have been informed that this statement u/s 67 of the Act can be used against me in the court..... One evening, in Nov., 2008, Saji Mohan told me to pick him up from the office. At about 7.30/8 p.m., Saji Mohan Sahib reached the office where Superintendent Balwinder Kumar was present. They had taken out several lots. In the presence of Saji Mohan Ji, on his direction, I and Balwinder Kumar mixed lime in the lots and made another big lot and that packet was given to Saji Mohan Sahib. I asked Saji Mohan and Balwinder Sahib what they would do with the packet upon which they told me that some big seizure would be shown in Chandigarh. This incident occurred on two occasions, but I can not correctly remember the date. Many a times, whatever money was recovered in the raids, was given to Saji Mohan through Balwinder Kumar Superintendent.....”

Naveen Kumar has clearly stated while making a statement under Section 67 of the NDPS Act that under instructions of Saji Mohan he and Balwinder Kumar took out heroin from various lots and then handed it over a packet to Saji Mohan. Balwinder Kumar was incharge of the malkhana i.e. all narcotics seized under the jurisdiction of the Narcotics Control Bureau, Chandigarh were in his direct control. The statement made by Naveen Kumar was retracted at a later stage and as we have already held in the case of Naseeb Chand, the retraction is not valid, apply the same process of reasoning and by referring to Section 30 of the Evidence Act, hold that the prosecution has succeeded in proving the culpability of Balwinder Kumar.

The question that remains is whether the prosecution has been able to prove any pilferage in the malkhana at Chandigarh. As

is apparent from the evidence on record, the narcotics lying in the NCB, Chandigarh as well as certain samples at Amritsar were retested after taking permission from the concerned Magistrate. The result is as follows: -

CASES OF CHANDIGARH ZONAL UNIT, NCB, CHANDIGARH

Sr. No.	Crime No./Date	Drug Seized	Qty. of Drug (in KG)	% of DAM in initial Testing	% of DAM after Resampling	Variation in % of DAM
1	1/2007 dt. 27.3.07	Heroin	05	56.00	13.3	-42.7
2	2/2007 dt. 25.4.07	Heroin	.690	38.58	1.7	-36.88
3	3/2007 dt. 3.5.07	Heroin	08	A-1 40.9 B-1 55.5	C-1 79.8 C-2 26.1	+38.9 -29.4
4	5/2007 dt. 19.7.07	Heroin	16	Negative Twice	C-I 2.8 C-II 31.7	+2.8 +31.7
5	6/2007 dt. 15.8.07	Heroin	02	77.9	53.0	-24.9
6	7/2007 dt. 18.9.07	Heroin	15	A-1 15.4 B-1 36.9	C-1 30.7 C-2 18.8	+15.3 -18.1
7	3/2008 dt. 16.2.08	Heroin	03	60.3	21.5	-38.8
8	13/2008 dt. 8.10.08	Heroin	09	84.3	16.3	-68.0
9	16/2008 dt. 30.12.08	Heroin	06	78.11	41.9	-36.21

CASES OF CHANDIGARH ZONAL UNIT, NCB, JAMMU

10	3/2008 dt. 15.05.08	Heroin	60	A-1 44.8 B-1 42.8 C-1 56.9	A-3 55.5 B-3 40.1 C-3 63.4	+ 10.7 -2.7 +6.5
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A perusal of the aforesaid table reveals a marked difference between the contents of the samples as originally tested and during the process of retesting. The fact that in certain cases the contents of diacetyl morphine has increased rather than decreased

can be attributed to failure to make a homogeneous mixture but the overall facts that emerge from retesting definitely points to a fact that there was large scale pilferage of narcotics stored in the NCB, Chandigarh. The aforesaid evidence, in our considered opinion, when read alongwith the statements made by the experts who conducted the test further corroborate the statements Ex.P9 and Ex.PW18/H made by Naseeb Chand and Naveen Kumar respectively, and conclusively establishes the guilt of the appellants.

As regards Criminal Revisions filed by Virat Dutt Chaudahry and Pushpdeep Singh, we have perused the impugned order as well as submissions made by counsel for the petitioners and as we have already held that a prima-facie perusal of their statements reveals that they may have deposed falsely with respect to the nature of the unclaimed seizure on the intervening night of 27/28.08.2008 and have also made an observation that the facts actually warranted their prosecution as accused alongwith the appellants, find no merit in the revisions and dismiss the same accordingly.

In view of what has been recorded hereinabove, the appeals and the revisions are dismissed.

[RAJIVE BHALLA]

JUDGE

2nd March, 2015

Shamsher S. Sabharwal

[SURINDER GUPTA]

JUDGE