

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 470 of 2015

Against the judgment of conviction dated 19.05.2015 and order of sentence dated 27.05.2015 respectively passed in N.D.P.S. Case No. 89 of 2009/97 of 2010 by Sri Anand Singh, learned 1st Additional Sessions Judge, East Champaran, Motihari

Arising out of P. S. Case No. - 89 Year - 2009 Thana - GOVERNMENT OFFICIAL COMP. District - EASTCHAMPARAN (MOTIHARI)

Shiv Shankar Dixit @ Kallu @ Kalu, S/o Dinanath Dixit, Resident of Village - Basaon, P.O. - Bhopapur, P.S. - Cholapur, Bazar Palhipatti, Distt. - Varanasi, Uttar Pradesh

.... Appellant

Versus

The Union of India through the Commissioner Customs, Patna

.... Respondent

Appearance :

For the Appellant : Mr. Prakash Tewari, Advocate

For the Union of India : Mr. S.D. Sanjay, A.S.G.

Mr. Rakesh Kumar Sinha, C.G.C.

Mrs. Priya Gupta, A.C. to A.S.G.

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

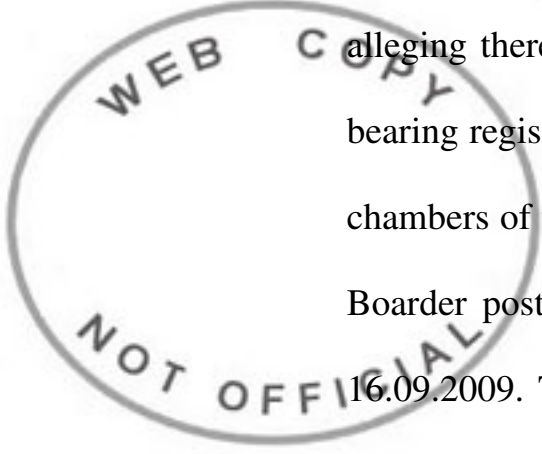
C.A.V. JUDGMENT

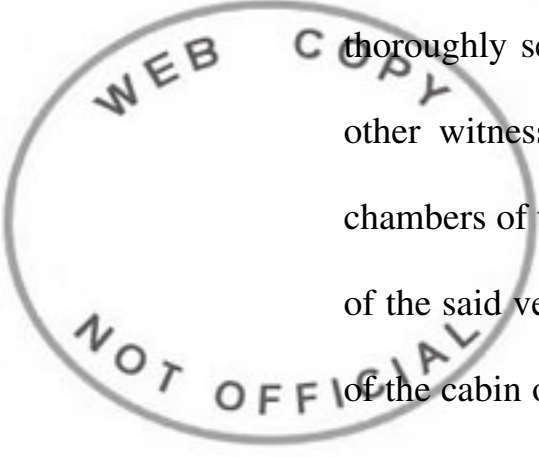
Date: 28 - 06 - 2016

The sole appellant has been convicted for the offence under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short “the Act”) and sentenced to undergo rigorous imprisonment for ten years with a fine of Rs.1,00,000/- and in default of payment of fine to undergo rigorous imprisonment for six months. He has further been convicted for the offence under Section 23(c) of the Act and sentenced to undergo rigorous imprisonment for ten years with a fine of Rs.1,00,000/- and in default of payment of fine to undergo rigorous imprisonment for six months. However, it has been ordered that both the sentences shall run concurrently.

2. The prosecution case is that the informant Arvind Kumar

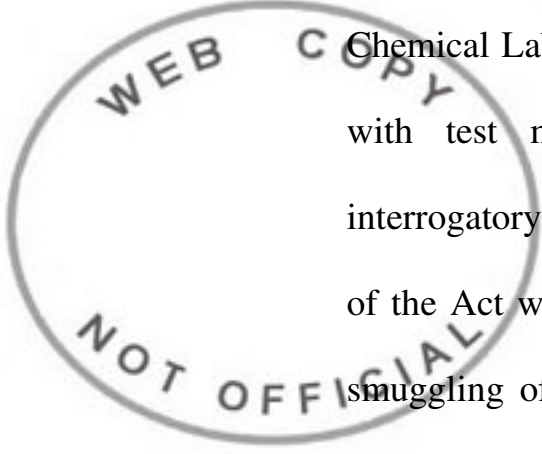
Mishra (P.W.1), who happens to be the Inspector, Land Custom Station, Raxaul, filed an official complaint under Section 36A of the Act, alleging therein that acting on an specific information, that a tank-lorry bearing registration no. WB-39/8823 concealing contraband Ganja in the chambers of the tank-lorry was expected to cross Indian Boarder through Boarder post at Raxaul from Birganj (Nepal) in the morning hours of 16.09.2009. The Custom Officers of the Land Custom Station, Raxaul, were put on alert, as a result of which, the said tank-lorry was intercepted on 16.09.2009 at about 08:00 hours while just crossing the Boarder Check-Post at Raxaul. On being signaled the said vehicle stopped and the driver of the said tank-lorry, namely, Shiv Shankar Dixit (appellant) was asked to get his vehicle searched. The driver replied that the tank-lorry is empty and showed his reluctance, which further led to suspicion. Then, the driver was asked to get off from the vehicle and also get it searched. Before commencing the search, two independent witnesses of nearby localities available there were requested to witness the search operation to which they agreed. Upon search, it was found that a large number of rectangular packets were secreted in the three out of four chambers of the said vehicle, keeping one chamber of the rear portion empty, ostensibly to dodge the Customs as well as other enforcement agencies, as revealed by the driver in his statement recorded during search and seizure. Few packets were taken out from the chambers of the tank-lorry and they were opened in presence of the two independent witnesses and the driver





of the said tank-lorry. The packets so opened appeared to have contained Ganja with characteristic pungent smell. Then the said vehicle was thoroughly searched in presence of the Superintendent (Preventive) and other witnesses and all the packets were found secreted in the three chambers of the tank-lorry which were unloaded in presence of the driver of the said vehicle and the two independent witnesses. During the search of the cabin of the said vehicle, some documents were also recovered i.e. papers relating to said tank-lorry along with the Driving Licence of the driver Shiv Shankar Dixit. Total 249 rectangular packets of different size and weight of contraband Ganja (in moist condition, wrapped with papers, plastic sheets and tied with Sutli) were recovered from the three chambers of the said tank-lorry. The same were quantified and weighed before the said driver and two independent witnesses. The gross weight of Ganja was found to be 2422 Kgs. and the net weight as 2230 Kgs. The value of Ganja was ascertained @ Rs.2000/- per Kg. as Rs.44,60,000/-, the said tank-lorry was also valued at Rs.7,50,000/-. It is further alleged that in presence of the Superintendent (Preventive) and other witnesses, the above recovered Ganja and the vehicle were seized on 16.09.2009 at 16:00 hours under the provisions of Section 43 of the Act for violation of Section 8 of the Act under reasonable belief that the same is liable to confiscation under the provisions of Section 60 of the Act after observing all the legal formalities and procedure. Five homogeneous representative samples, each weighing 25 grams, were drawn by mixing representative

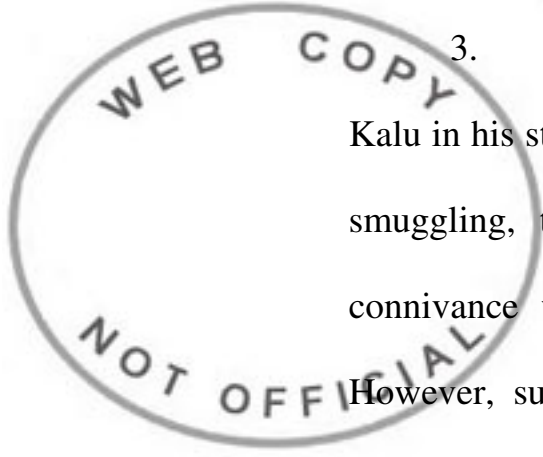
samples from different packets and were sealed before the said accused and two independent witnesses for sending it to the Joint Director, Chemical Laboratory, Customs House, 15/1 Strand Road, Kolkata along with test memo for chemical examination. The voluntary and interrogatory statements of the driver were recorded under the provisions of the Act wherein the involvement of the accused person in the act of smuggling of said recovered Ganja is established. The knowledge and guilt about smuggling/transaction of the contraband Ganja in commercial quantity are established in the voluntary statement of the accused and his interrogatory statement recorded before the Superintendent (Preventive) under the provisions of Section 67 of the Act. In his statements, the driver, Shiv Shankar Dixit @ Kallu confessed his guilt admitting that he had committed such illegal act of smuggling, transportation and concealment of contraband Ganja in connivance with Sri Devi Sau and others in the greed of money. The seizure formalities were completed under a Panchnama drawn before the independent witnesses and the accused, two Inspectors of Custom Official, namely, Sri Ashok Kumar and Sri Chandra Prakash and Sri Navin Chandra, the Superintendent of Customs and the copies of the seizure memo and other relevant documents were handed over to the apprehended accused. After the above formalities, the seized 2230 Kgs. Ganja and the seized tank-lorry were taken into custody for further action and the arrested accused Shiv Shankar Dixit @ Kallu was forwarded on 16.09.2009 in the Court of

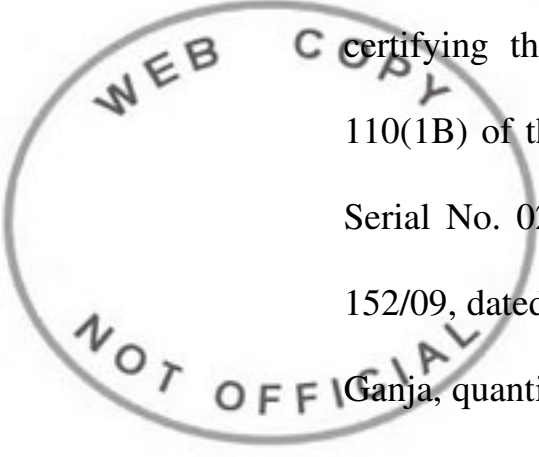


learned District and Sessions Judge, Motihari. The chemical report also shows that the said sample answers positive test for Ganja.

3. However, the appellant Shiv Shankar Dixit @ Kallu @ Kalu in his statements admitted that he had committed such illegal act of smuggling, transportation and concealment of contraband Ganja in connivance with Sri Devi Sau and others in the greed of money.

However, summons under Section 67 of the Act has been issued to Shashi Bhushan Pandey which has been marked as Ext.5 series. The case was instituted on the forwarding report along with seizure memo, panchnama, voluntary and interrogatory statements of the accused Shiv Shankar Dixit @ Kallu @ Kalu and xerox copy of arrest memo under Section 43 of the Act for violation of Section 8 of the Act on seizure of 2230 Kgs. of Ganja net weight from the tank-lorry no. WB-39/8823 on 09.12.2009. On 09.12.2009 a petition was filed on behalf of the Union of India through Special P.P. Nirmal Kumar praying therein to depute a Judicial Magistrate for certification of narcotics and vehicle kept at Raxaul Custom Godown under the provision of Sections 52A, 52(4) of the Act and accordingly Sri Rakesh Kumar Tiwary, Judicial Magistrate, Motihari was deputed for certification of narcotics and vehicle, in question. Thereafter on 10.12.2009 official complaint along with relevant papers on behalf of the Union of India was filed by the learned Special P.P. and subsequently cognizance was taken on 07.01.2010 on the basis of official complaint. Thereafter on 17.01.2010 certification was made





for the disposal of seized goods under Section 110(1A) of the Customs Act, 1962 and Section 52A of the Act (Ext.8) with regard to the certifying the correctness of inventory as per provisions of Section 110(1B) of the Customs Act, 1962 and Section 52A of the Act bearing Serial No. 02, GE No. 48/NDPS/09, dated 16.09.2009, Unit Case No. 152/09, dated 16.09.209, NDPS Case No. 89/09, description of the goods Ganja, quantity 2230 Kgs. number of packets 62 jute gunny bags, seizure value Rs.44,60,000/- and Ext.9 is regarding the certificate of the data for destruction of seized/confiscated narcotics drugs on 28.01.2010, after taking cognizance, charge was framed and trial proceeded. During trial, nine witnesses were examined by the prosecution.

4. P.W.1, Arvind Kumar Mishra, the complainant, supported the prosecution case regarding the apprehension of tank-lorry on the basis of secret information and recovery of Ganja in 249 rectangular packets and proved the interrogatory/confessional statement of the accused marked as Ext.1, panchanama regarding seizure of the article marked as Ext.2, seizure memo marked as Ext.3. He deposed that he prepared the sample, sealed and sent to Chemical Laboratory for examination and thereafter proved the report of the Chemical Laboratory marked as Ext.4. He has also proved summons issued to the accused Shashi Bhushan Pandey marked as Ext.5 series and official complaint marked as Ext.6.

5. P.W.2 Chandra Prakash supported the prosecution case

regarding apprehension of the tank-lorry and the same was opened and in the morning it was brought at yard and in presence of two independent witnesses search was made. During the course of search, it was found that out of four chambers, in three chambers plastic packets were kept. Total number of packets were found to be 209 and net weight being 2230 Kgs. of Ganja and thereafter from the said seized Ganja a sample was prepared on which two independent witnesses, Seizing Officer, Superintendent of Custom and the accused put their signatures and it was sent to Chemical Laboratory for examination.

6. P.W.3 Ashok Kumar, Custom Inspector, also supported the prosecution case regarding the apprehension of the tank-lorry on secret information and in presence of two independent witnesses and high Officials the tank-lorry was searched. On search, out of four chambers in three chambers Ganja was kept. Ganja was kept in plastic packets tied with Sutli. The total numbers of packets were 249 which were weighed and found 2422 Kgs. net weight being 2230 Kgs. After taking sample, the said seized Ganja was sent to Chemical Laboratory for examination, the report of the said sample received in the Court which was found Ganja

7. P.W.4, Tarun Kumar Sinha also supported the prosecution case regarding the recovery, seizure and sampling of Ganja. However, he has stated that Ganja was weighed in departmental examination yard. At the time of weighing Ganja he along with 6-7 officials was present.

There was no Ganja in the examination yard. He has not signed the seizure list and sample was not weighed in his presence.

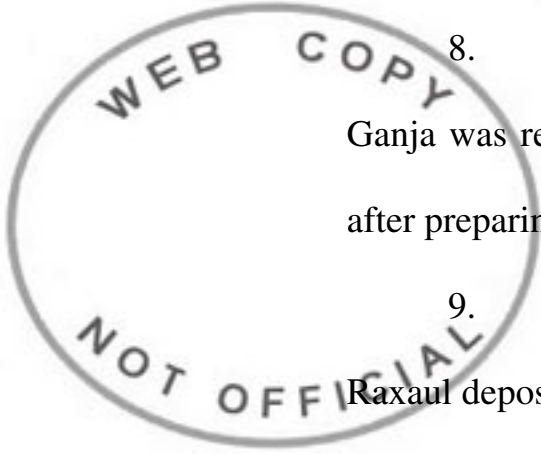
8. P.W.5 Akhilesh Kumar also deposed to the effect that Ganja was recovered from the tank-lorry and the sample was taken out after preparing Panchanama.

9. P.W.6 Prem Chand Dwar Singh, Custom Superintendent, Raxaul deposed that on secret information a team was constituted and the same was awaiting the coming of the tank-lorry at the Border. In the meantime, a tank-lorry was coming from Nepal Boarder into the Indian Territory which was apprehended and on search Ganja was recovered and on weighing total 2230 Kgs. was found kept in 249 packets and thereafter the statement of the accused was recorded.

10. P.W.7 Dilip Kumar Rajhans has also supported the prosecution case regarding the recovery of Ganja and samples were prepared in five envelopes and thereafter the statement of the accused was recorded.

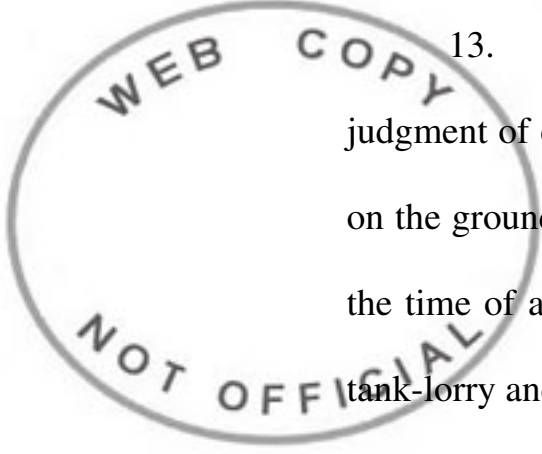
11. P.W.8 Jai Prakash Singh proved the certification chart made by Sri Rakesh Kumar Tiwary, Judicial Magistrate, Motihari and also proved the certification chart marked as Ext.8.

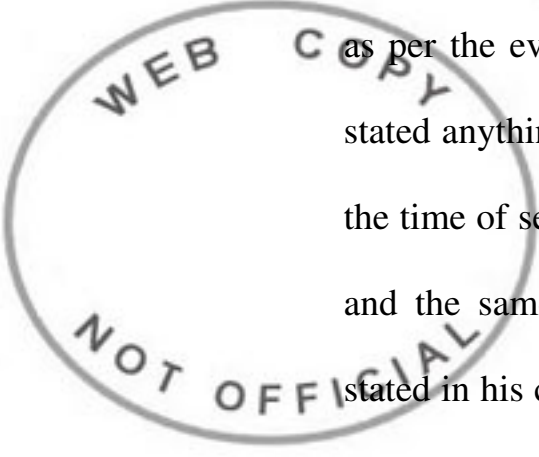
12. P.W.9 Navin Chandra also supported the prosecution case regarding the apprehension of the tank-lorry on secret information and recovery of 249 packets Ganja and the samples were taken out from each of the packets. In view of the documentary evidence adduced as



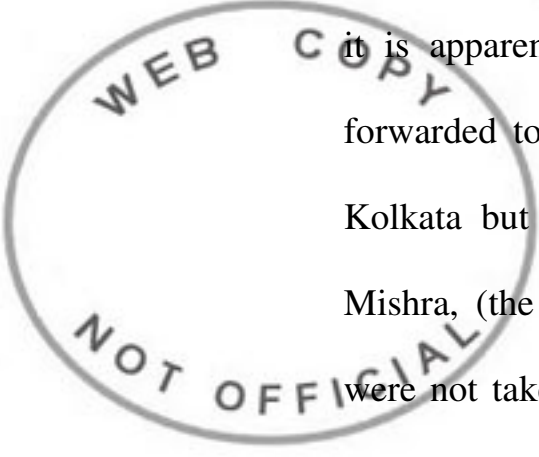
mentioned above and taking into consideration the oral and documentary evidence, the trial Court convicted and sentenced the appellant.

13. Learned counsel for the appellant has challenged the judgment of conviction and order of sentence recorded by the trial Court on the ground that the appellant, who was the driver of the tank-lorry, at the time of apprehension, had no knowledge regarding the Ganja in the tank-lorry and hence, was not in conscious possession. It has further been contended that the independent witnesses, before whom Ganja was seized, have not been examined and the Ganja has not been produced before the Court. It has further been contended that the Ganja was seized, sealed and the representative samples were prepared before the Magistrate, but neither the sealed Ganja nor the representative samples of the Ganja with the seal of the department were produced before the Court as material Exhibits, though it is alleged that five packets of representative samples were prepared with the signatures of the witnesses along with the accused. It has further been contended that though the informant/complainant in his evidence, in examination-in-chief, has stated that there were 249 seized packets and small quantity of Ganja were taken from all packets and were mixed up together and five representative samples were prepared each containing 25 grams and the samples prepared were sealed in the envelop with the signature of both the independent witnesses, Pradeep Kumar and Ram Narayan Sharma as well as Shiv Shankar Dixit @ Kallu @ Kalu and the informant (P.W.1)



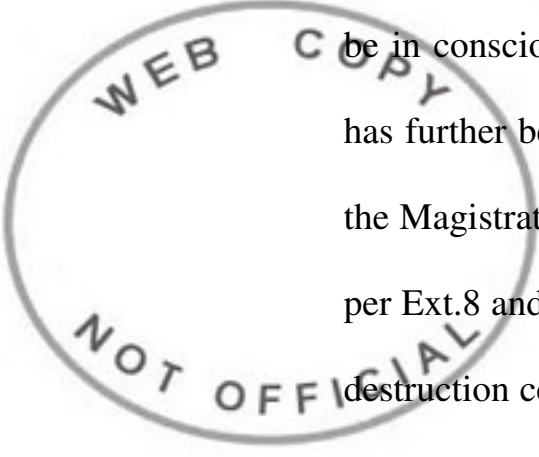


himself and were sent it to the Chemical Laboratory, Custom House, Kolkata for examination and after its examination, report was prepared as per the evidence in para 9. P.Ws.2 and 3 in their evidence have not stated anything regarding the seal of the sample. P.W.4 has stated that at the time of seizure five samples were prepared each containing 25 grams and the same was sealed before the witnesses. However, it has been stated in his cross-examination that the samples were not weighed before him. P.Ws.5, 6 and 7 have also not stated regarding seal of the sample. P.W.8 has formally proved the certification and destruction list of Ganja and certification or destruction was not made before him hence, contended that the evidence of P.W.1 stands contradicted in his cross-examination and the other witnesses have not stated about the sealing and his evidence is that the sample was not weighed. The independent witnesses, before whom the sample was prepared, have not been examined and hence, sealing of the sample has not been proved by cogent, reliable and unimpeachable evidence. It has further been contended that neither the sample taken from the seized articles with the seal and signature of the witnesses have been produced in Court nor the contraband Ganja seized has been produced in Court which casts a serious doubt regarding the recovery of the contraband Ganja from the possession of the appellant. It has further been contended that the articles were seized on 16.09.2009, date of drawal and dispatch of sample were made on 16.09.2009; 17.09.2009 as apparent from the test memo which



was sent to the Chemical Laboratory, the date of receipt of sample is 23.09.2009 and the report proved as Ext.4 is dated 29.10.2009 and hence, it is apparent that the sample was sent on 17.09.2009 with a copy forwarded to the Joint Director, Chemical Laboratory, Custom House, Kolkata but the test memo has only been signed by Arvind Kumar Mishra, (the informant P.W.1) which itself indicates that the samples were not taken before the learned Magistrate as the certification of the Magistrate is dated 17.01.2010 much after the sample sent and hence, there is non-compliance of the provisions of Section 52A of the Act and Section 110(1A) of the Customs Act, 1962 and hence, the representative samples have not been drawn before the Magistrate. It has further been contended that the certification of the articles is neither in detail nor the photographs of the articles taken and though it is alleged from the seizure memo that there were recovery of 249 packets of different size and weight wrapped with paper and plastic sheet and tied with Sutli but the certification indicates 62 jute gunny bags which does not mention the description of 249 packets nor mention regarding their origin of the place from where it was sent and made and hence, it is substantial compliance of Section 52A of the Act and Section 110(1A) of the Customs Act and hence, contended that the prosecution has not been able to prove the charges levelled against the appellant beyond shadow of all reasonable doubts.

14. Learned counsel for the Union of India, however, contended

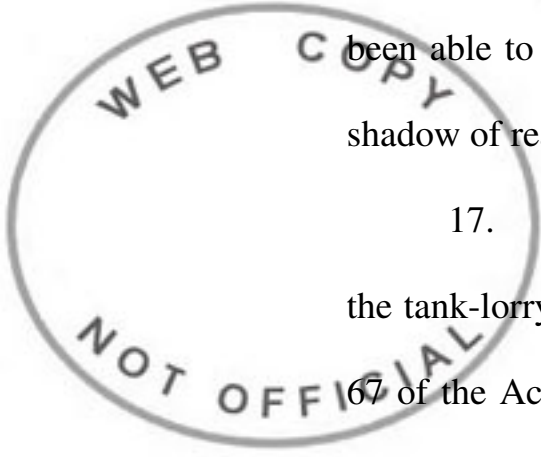


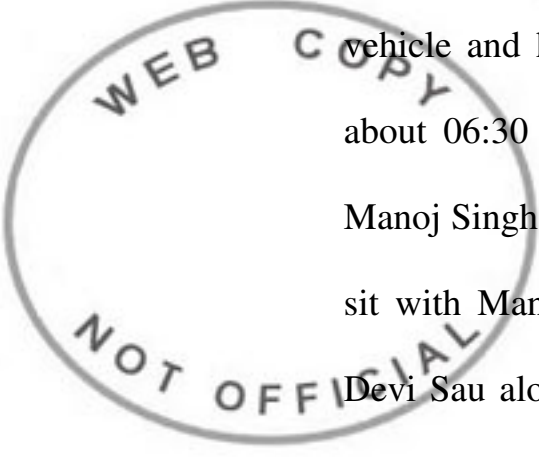
that once the contraband Ganja has been recovered from the tank-lorry which was driven by the appellant then the appellant shall be deemed to be in conscious possession and the onus is shifted to the prosecution. It has further been contended that the articles seized were produced before the Magistrate for certification and the Magistrate certified the articles as per Ext.8 and however, the articles seized were destructed on the basis of destruction certificate Ext.9 and hence, there is compliance of Section 52 and 52(4) of the Act as well as Section 110(1A) of the Customs Act, the possession having been established. The sample prepared on the spot was sent to the Chemical Laboratory and the Chemical Laboratory sent the report stating that the articles seized were Ganja in huge quantity. The compliance of Section 52A of the Act has not prejudiced the accused as the compliance of Section 52A of the Act is directory and not mandatory. It has further been contended that the appellant has confessed before the Custom Authority, Superintendent Custom and Ext.1 is voluntary statement of the appellant and Ext.10 is interrogatory statement of the appellant in which he has accepted the recovery of Ganja. It has further been contended that the Ganja has been found in possession of the appellant and he has admitted the possession of Ganja and hence, the conviction recorded by the trial Court is sustainable in the eye of law.

15. The learned counsel for the appellant submits that the confession made before the authority of the customs is not the confession as the confession is self exculpatory.

16. Hence, on the respective submissions of the parties, the question that arises for consideration is as to whether the prosecution has been able to prove the charges levelled against the appellant beyond all shadow of reasonable doubts.

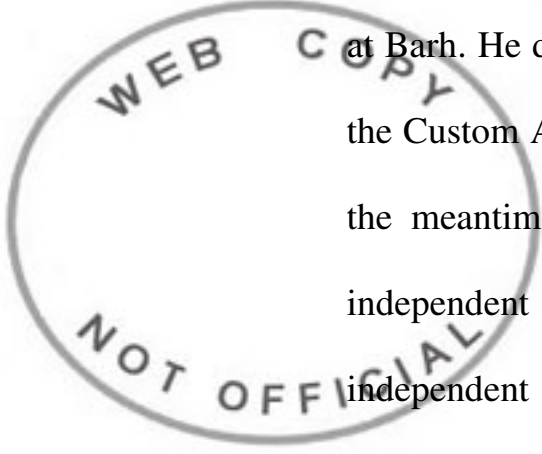
17. However, the appellant has been apprehended along with the tank-lorry while driving the same and in his statement under Section 67 of the Act he has stated that Sri Devi Sau is the actual driver of the said vehicle to whom he knows for the last two-three years. The appellant was driving the tank-lorry of Bunni Sah about one and half months prior to the occurrence and he left driving of the said tank-lorry about one and half months before and was sitting idle. In the meantime, he met with Sri Devi Sau driver of the tank-lorry bearing no. WB-39/8823 then Devi Sau asked to follow him to Nepal and Devi Sau told regarding employment of this appellant so the appellant proceeded on the tank-lorry with Devi Sau from Kolkata on 11.09.2009 and reached Nepal Shiv Shakti Oil Mill, Birganj (Nepal) on 14.09.2009 at 09:00 p.m. where unloaded the Mitha Tel (palm oil) on 15.09.2009 at 03:30 p.m. Thereafter, he met P.N. Singh at the first time on 13.09.2009 at private parking of Raxaul and this P.N. Singh discussed something with the driver of the appellant Devi Sau. The said P.N. Singh told Devi Sau about Manoj Singh of Birganj and said that they should meet him at Birganj. The appellant met Manoj Singh first time at Nepal Bhansar. He was talking something with Devi Sau at some distance. After unloading





the oil from the tank-lorry at about 3.30 p.m. they parked the tank-lorry outside the said mill and then Devi Sau asked the appellant to sit in the vehicle and he would be coming. He used to sit in the vehicle and at about 06:30 a.m. Devi Sau came along with a man and behind them Manoj Singh also came with a motorcycle. Devi Sau told the appellant to sit with Manoj Singh on his motorcycle near the closed petrol pump. Devi Sau along with the person accompanying him proceeded with the tank-lorry and asked to sit at the petrol pump and he would come after some time after doing some repair work in the vehicle. The appellant went to the petrol pump along with Manoj Singh and Manoj Singh also went from there. He used to sit at the petrol pump. At about 01:00 a.m. Devi Sau came with the tank-lorry on the said petrol pump and brought him to another petrol pump which was closed and there they took rest for 3-4 hours. They at about 7.00 a.m. proceeded towards India. He has further stated in his statement under Section 67 of the Act that when the appellant and Devi Sau reached Nepal Bhanshar in the morning of 16.09.2009, there was a road jam there. Devi Sau handed over steering of the said vehicle telling him that he is going to assess the jam. He drove the vehicle slowly and reached Raxaul, Custom Office where he was intercepted by the Custom Officers. Then he looked for Devi Sau, but could not find him anywhere around. When the appellant and Devi Sau proceeded with the tank-lorry on 16.09.2009 at about 6.00 a.m. after some distance on the way at the right side of the road there was a temple.

Devi Sau told me that he visited this factory in the night and Manoj Singh has loaded bearing. This bearing is to be handed over to one Khan at Barh. He did not know that there was Ganja in the vehicle. Thereafter the Custom Authority asked him to take the tank-lorry in the yard and in the meantime, the Custom Authorities asked two persons to become independent witnesses and both ready and in presence of two independent witnesses the chamber of the tank-lorry was searched after opening the lid from three chamber out of four, Ganja was found wrapped in plastic with Sutli in rectangular form and then the Ganja was recovered in 249 packets which were measured as 2422 Kgs. and net weight being 2230 Kgs. and the said Ganja was seized before the two independent witnesses. However, the appellant has further stated that he does not have knowledge regarding this fact and Devi Sau has disclosed him that only bearing was loaded in the tank-lorry which he has to carry to Barh (Bihar) and he had no knowledge at all that the tank-lorry does not contain bearing but Ganja and the Panchnama was also prepared regarding the search and seizure. The representative samples, prepared from the seized articles, were sent to Chemical Laboratory along with the test memo prepared and the report was received showing the articles seized to be Ganja and further the authority concerned sent for verification of the address of the appellant, Sri Devi Sau and Shashi Bhushan Prasad. In the meantime, the statement of Sahshi Bhushan Prasad was recorded stating therein that he did not know Shiv Shankar



Dixit @ Kallu and further stated that Devi Sau is the permanent driver of the tank-lorry WB39-8823, who left Budge-Budge to Nepal on 09.09.2009 driving the said vehicle loaded with crude palm oil and also gave an application dated 21.09.2009 for provisional release of the said tank-lorry stating therein to the Police Station that the vehicle was missing whereas Shashi Bhushan Pandey was constantly in touch with the events leading to search, seizure and arrest of the driver and thereafter on 09.12.2009 a petition was filed on behalf of the Union of India through Special P.P. to depute a Judicial Magistrate for certification of narcotics and vehicle kept in Raxaul, Custom Godown under the provision of Section 52A and Section 52(4) of the Act and accordingly, Sri Rakesh Kumar Tiwary, Judicial Magistrate, Motihari was deputed and subsequently on 10.12.2009 official complaint along with the relevant papers was filed on which cognizance was taken on 07.01.2010.

18. During trial, nine witnesses were examined by the prosecution. The witnesses examined are P.W.1 Arvind Kumar Mishra, P.W.2 Chandra Prakash, P.W.3 Ashok Kumar, P.W.4 Tarun Kumar Sinha, P.W.5 Akhilesh Kumar, P.W.6 Prem Chand Dwar Singh, P.W.7 Dilip Kumar Rajhans, P.W.8 Jai Prakash Sihgh and P.W.9 Navin Chandra. The documentary evidences adduced are Ext.1 voluntary statement of Sheo Shankar Dixit, Ext.2 Panchnama, Ext.3 seizure memo, Ext.4 chemical examination report, Ext.5, 5/1 and 5/2 signature of Navin

Chandra, Superintendent, on carbon copy of summon, Ext.6 official complaint, Ext.7 signature of Sone Toppo, Superintendent, Custom, Raxaul on address verification report, Ext.8 certification chart, Ext.9 destruction list and Ext.10 interrogatory statement of Sheo Shankar Dixit.

19. The trial Court taking into consideration the evidence of the witnesses, convicted and sentenced the appellant as mentioned above.

20. Learned counsel for the appellant, however, challenged the judgment of conviction and order of sentence recorded by the trial Court on the ground that the appellant had no knowledge about the Ganja in the tank-lorry and he was under impression that the vehicle contained bearing in the chamber and so he was not in conscious possession. It has been contended that the witnesses are at variance on the sealing the sample of the Ganja with the seal of the department and further the fact that the independent witnesses have not been produced as witnesses nor the seized articles or even representative samples have been produced in Court and the certification proved as Ext.8 is not in compliance of Section 52A of the Act, Ext.9, relating to the destruction of contrabands, is not in compliance of the procedure laid down in sub-section 2 of Section 52A of the Act and hence, the certification and the destruction are not acceptable and the conviction cannot be sustained on these grounds and has placed reliance upon the decisions in the case of **Jitendra and Another Versus State of M.P.** reported in (2004)10 SCC

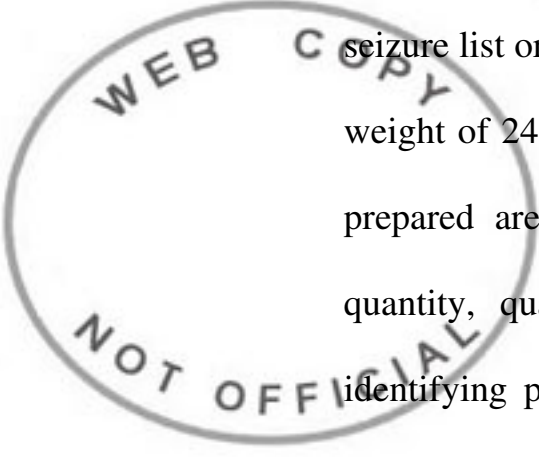
562 as well as in the case of **Vijay Jain Versus State of Madhya Pradesh With Nilesh Suryakant Shah Versus State of Madhya Pradesh** reported in **(2013)14 SCC 527**. It has further been contended that so far as the confession of the appellant is concerned, the same is not absolute confession as the confession is exculpatory and further for recording conviction on confession rule of prudence requires corroboration.

21. Learned counsel for the Union of India, however, contended that the prosecution has been able to prove the charges levelled against the appellant as the recovery of Ganja has been established and the appellant was apprehended along with the tank-lorry containing contraband Ganja and the appellant has been arrested along with the tank-lorry while driving the vehicle and once the possession is established, it shall deem that appellant is in conscious possession as per Section 54 of the Act. It has further been contended that when the prosecution has proved the recovery and the Ganja seized was produced before the Magistrate and the Magistrate has certified the said Ganja which has been marked as Ext. 8 and the destruction of the Ganja has also been proved which has been marked as Ext.9 and once the certification of the Magistrate has been proved as a primary evidence of the offence then onus shifts on accused to prove his innocence and on this point placed reliance in the case of **Kulwinder Singh and ANOTHER Versus State of Punjab** reported in **(2015)6 SCC 674**. It

has further been contended that the conviction can also be based on the confession of the accused and if the confession is voluntary, then, the confession can itself be the sole basis for recording conviction and in the voluntary statement as well as interrogatory statement of appellant, he has specifically admitted the possession of Ganja and once he has admitted the possession of Ganja, he would be deemed to be in conscious possession and hence, conviction can be recorded on confession of the appellant itself.

22. However, taking into consideration the respective submissions of the parties, I proceed to consider the evidence of the witnesses in the light of submissions made by them.

23. The prosecution case at the out set is that on secret information raid was conducted and the appellant was apprehended along with the tank-lorry and on search 249 Kg. rectangular packets of different size and weight of Ganja were recovered on 16.09.2009 and thereafter the said Ganja was seized and from each packet small quantity of Ganja was taken out which was mixed together, then five representative samples were prepared, each containing 25 grams of Ganja and the sample was sent with the test memo to the Chemical Laboratory on 17.09.2009 which was received in the Laboratory on 23.09.2009 as per evidence and the report of the same was received on 29.10.2009 which is apparent from Ext.4. For the Ganja seized, a seizure memo was prepared, which shows that 249 rectangular packets of Ganja



of different size and weight were recovered. However, the weight of the Ganja of the different packets was not mentioned separately either in seizure list or in the inventory, but the weight has been given as the gross weight of 2422 Kg. and net weight 2230 Kg. However, the seizure lists prepared are not in detail regarding the details of their description, quantity, quality, mode of packing, mark, numbers or such other identifying particulars of narcotics drugs or psychotropic substance or the packing in which they were packed, neither country of origin nor other particulars nor the photographs of such drugs or substance nor certifying such photograph as number have been mentioned. The witnesses examined as P.W.1 to 9 are the official witnesses or the witness certifying the chart of the Magistrate marked as Exts.8 and 9 but the two independent witnesses Pradeep Kumar and Ram Narayan Sharma before whom seizure was prepared were not examined nor their absence for non-examination has been explained. However, with regard to the seizure, sampling and sealing of the representative samples are concerned, the witnesses are at variance. P.W.1 though has stated in his evidence that the sample was taken, sealed and sent for chemical examination, however, in his cross-examination in paragraph 9 he has stated that he did not seal and sign on any of the representative samples and hence, his evidence in his examination-in-chief and cross-examination regarding the sealing of the sample stands contradicted. P.Ws.2 and 3 have not stated about the sealing of the sample. P.W.4

though stated that at the time of seizure five representative samples were prepared each containing 25 grams and it was sealed. However, in his cross-examination, he has stated that the samples were not weighed before him and further P.Ws.5, 6 and 7 have not stated regarding the seal of the sample and P.W.8 has only formally proved the certification and destruction chart of the Magistrate and has stated that no certification or destruction was made before him. P.W.9 though has deposed about the sample having been taken out, seized and sealed but neither the sample was produced before the Court as a material exhibit nor the articles seized were produced before the Court as material object. However, the seizure was made on 16.09.2009 and the sample was sent on 17.09.2009 which was received in the Chemical Laboratory on 23.09.2009 as apparent from Ext.4. However, a petition for certification of the article was made on 09.12.2009 and the certification of the Magistrate Ext.8 shows that the certification was made on 17.01.2010. Hence, it is apparent that though sample was taken on 17.09.2009 but certification was made on 17.01.2010 much after sending of the sample but no sample was produced before the Magistrate.

24. However, it is relevant to quote the certification made:-

2	48/NDPS/ 09 dt. 16.09.09	152/09 dt 16.09.09	89/09	GANJA	2230	62 jute gunny bags	4460000
---	-----------------------------	-----------------------	-------	-------	------	--------------------------	---------

Hence, from the certification as mentioned above, it is apparent that the prosecution case as alleged in the complaint petition is

to the effect that seizure was with regard to 249 packets of different size of Ganja whereas certification shows 62 jute gunny bags. There is no description of 249 packets seized and there is no mention as to what was contained in 62 jute gunny bags. There is neither any certification about what is contained in 62 jute gunny bags.

25. However, it is relevant to quote Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985:-

“52A. Disposal of seized narcotic drugs and psychotropic substances.-----

- (1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.
- (2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any

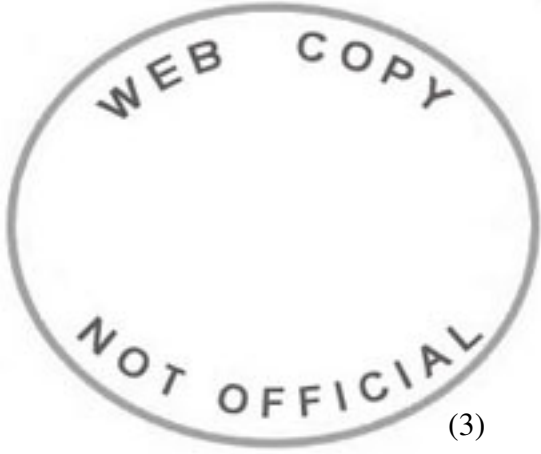
Magistrate for the purpose of---

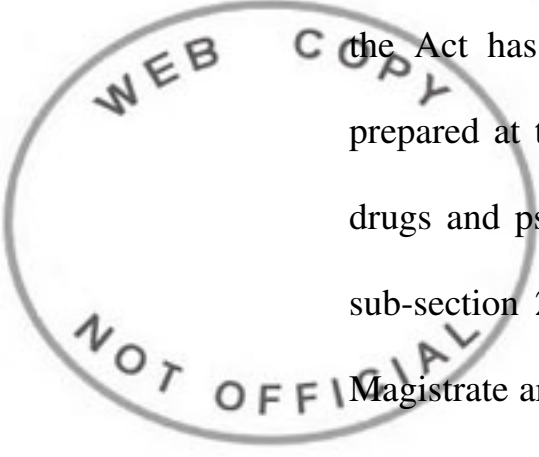
- (a) certifying the correctness of the inventory so prepared; or
- (b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

- (3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.
- (4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence].”

26. However, having regard to the fact that articles were seized on 16.09.2009 and sample taken was sent on 17.09.2009, but the articles were placed before the Magistrate for certification on 09.12.2009 after three months of the occurrence. The seizure shows 249 packets but certificate shows 62 jute gunny bags and there is no mention as to what was contained in 62 jute gunny bags and there is no separate disclosure of 249 bags of Ganja seized at the time of seizure or inventory so prepared.

27. The stand is taken that the articles seized have the certification and the destruction report marked as Exts.8 and 9. However,





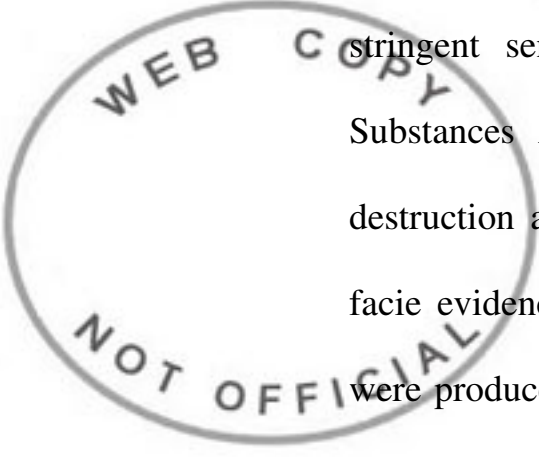
in the case of certification of the articles or goods or destruction of the contrabands, the procedure laid down in sub-section 2 of Section 52A of the Act has to be followed and the Act provides for the inventory prepared at the time of certification or the photographs of the narcotic drugs and psychotropic substances and the list of sample drawn under sub-section 2 of Section 52A of the Act as certifications done by the Magistrate are treated as primary evidence. However, the certification of the Magistrate does not contain the description of the articles seized, but the seizure list contains such details relating to their description, quantity, quality, mode of packing, mark, numbers or such other identifying particulars of narcotics drugs or psychotropic substance or the packing in which they are packed, country of origin and other particulars nor the photographs of such drugs or substances and certifying such photograph as number have been mentioned as to identity of the narcotic or psychotropic substance seized certifying the correctness of the inventory so prepared packing in presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true and allowing to draw representative sample in presence of such Magistrate and certifying the correctness of the list of the sample so drawn and hence, certification Ext.8 cannot be said to be the sufficient compliance of Section 52A of the Act as neither the photographs nor the detail of description of the articles seized has been mentioned in Exts.8 and Ext.9. Moreover, even the representative

samples of the articles seized have not been produced on record though it is stated that five packets of representative samples were prepared out of which one was sent to the Chemical Laboratory, but there is no mention as to what happened to the four representative samples so prepared.

28. However, a reliance has been placed upon the decision in the case of **Jitendra** (supra) where it has been held that in the trial it was necessary for the prosecution to establish its case by cogent evidence that the alleged quantity of Ganja was seized from the possession of the accused and to prove possession the best evidence is to produce the article seized in Court. It is relevant to quote:-

“The best evidence would have been the seized materials which ought to have been produced during the trial and marked as materials objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act.”

29. Here under the facts and circumstances of the case, the two independent witnesses having turned hostile and the materials alleged to have been seized from the possession of the appellant were not produced before the Court so as to connect him with the sample so sent to the Chemical Laboratory, it has to be held that the best evidence should have been seized articles which ought to have been produced during the trial and marked material objects and mere oral evidence as to their feature,



production, panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with stringent sentence as under the Narcotic Drugs and Psychotropic Substances Act, 1985 Act. The explanation that Exts.8 and 9 the destruction and certification of the articles by the Magistrate is prima facie evidence of possession. The fact remains that the articles seized were produced before the Magistrate much after the sample drawn was sent for chemical analysis. Neither the articles seized was produced immediately before the Magistrate nor the sample was taken before the Magistrate rather the articles seized were produced after three months on 16.12.2009 and there is no evidence as to where the articles were kept and there is variation in the evidence of the witnesses. However, it has been found that before the Magistrate neither the facsimile representative sample has been produced in Court nor the articles seized have been produced and the certification proved is with regard to 62 jute gunny bags, whereas articles seized are 249 packets of Ganja of different size and shape. There is no mention as to what 62 jute gunny bags of Ganja contained and further from the stand taken that regarding the certification and destruction of the Ganja Exts.8 and 9, it is apparent that it is not in consonance with Section 52A of the Act and further neither the articles seized have been produced nor the representative sample even has been produced to show as to what were the articles seized. A reliance has been placed in the case of **Vijay Jain** (supra) and it is

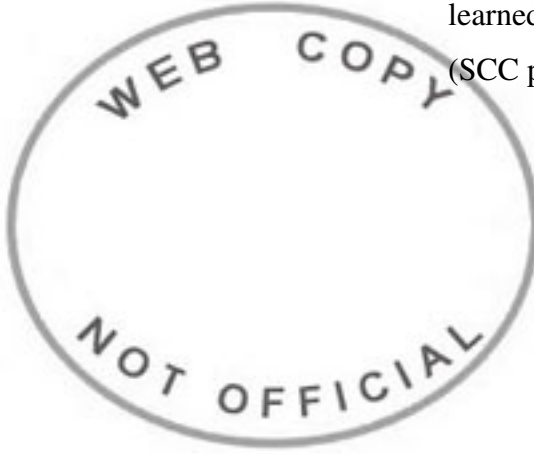
relevant to Quote paragraph 9 of the said judgment.

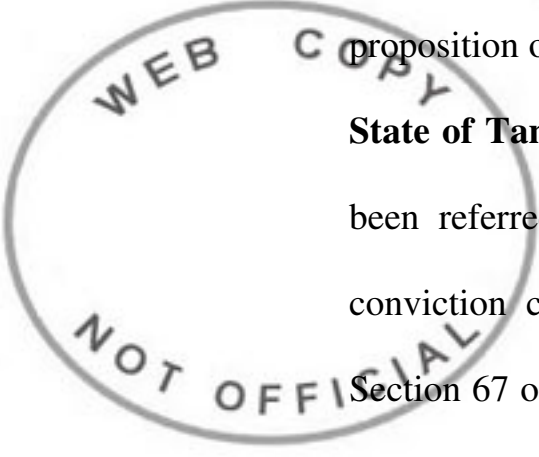
“9. Para 96 of the judgment of this Court in Noor Aga case on which the learned counsel for the State very strongly relies is quoted hereinbelow: (SCC p. 464)

“96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.”

30. Hence, it is apparent that there is no compliance of Section 52A of the Act and hence, neither the seized articles produced nor the facsimile of the representative sample was produced and hence, the production of Punchnama and other papers do not discharge the heavy burden which lies on the prosecution particularly when the offence is punishable with stringent sentence and hence, there is no cogent evidence that alleged quantity of Ganja was seized from the conscious possession of the appellant.

31. Learned counsel for the appellant, however, contended that if the conviction can be recorded on the confession of the appellant and he has confessed in his statement under Section 67 of the Act. A reliance has been placed in the case of **Ram Singh Versus Central Bureau of Narcotics** reported in (2011)11 SCC 347 where it has been held that the conviction can be solely based on the confession if the confession is voluntary. Any corroboration is only a rule of prudence but not a rule of





law. It cannot be said that the conviction cannot be maintained solely on the basis of confession made under Section 67 of the Act. However, this proposition of law has again been doubted in the case of **Tofan Singh V. State of Tamil Nadu** reported in (2013)16 SCC 31 where a matter has been referred to the Constitution Bench on the point as to whether conviction can be recorded solely on the basis of confession under Section 67 of the Act and as to whether the confession can be treated as a substantive piece of evidence to record conviction, particularly, when the confession has been retracted. However, the position of law is settled in the case of **Ram Singh** (supra) held that the conviction can be recorded on the confession if the confession made is voluntary.

32. However, taking into consideration the facts and circumstances of the case and statement recorded under Section 67 of the Act where it was stated that the appellant in his confession has stated that he had no knowledge about the narcotics in the tank-lorry and it was only the driver Devi Sau who had taken the tank-lorry and was instrumental in getting the narcotics and as it was disclosed to the appellant that the tank-lorry contains bearing to be delivered to someone and the appellant was asked to drive the tank-lorry in the jam and Devi Sau the actual driver proceeded on the pretext that he is going to see and clear the road jam and appellant proceeded with the tank-lorry when he was apprehended on Raxaul Boarder, hence, his confession is only to the extent that he has no knowledge of the Ganja in the tank-lorry and it was

Devi Sau who was instrumental and hence, his confession is exculpatory in nature that it was not he but the driver Devi Sau who was instrumental in carrying the Ganja.

33. It is proper to refer the decision in the case of **Pakala Narayan Swami Vs. Emperor** reported in **A.I.R. 1939 Previ Council 47 at p. 52 paragraph (11)**

“.... no statement that contains self exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession, e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession.”

34. These observations have been approved in the case of **Palvinder Kaur v. The State of Punjab** reported in **[1953] S.C.R. 94 = AIR 1952 SC 354**. In the case of **State of U.P. v. Deoman Upadhyaya** reported in **[1961]1 S.C.R. 14 = AIR 1960 SC 1125**. The decision rendered in the case of **Aghnoo Nagesia v. State of Bihar** reported in **AIR 1966 SC 119** at para 12 runs thus:

“..... A statement which contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. If an admission of an accused is to be used against him, the whole of it should be tendered in evidence, and if part of the admission is

exculpatory and part inculpatory, the prosecution is not at liberty to use in evidence the inculpatory part only.”

It has further been observed that accused is entitled to consideration of his defence with the entire admission including the exculpatory part”

35. Hence, having regard to the fact that confession made by the appellant is exculpatory and the fact that the confession made by the appellant apparently is exculpatory a conviction cannot be recorded on the basis of exculpatory statement of the accused when the appellant has stated that it was not he who has done the crime and his confession indicates that it was Devi Sau who has done the occurrence. The statement of the appellant as apparent is not inculpatory as he has not stated the fact that he along with Devi Sau has done the crimes rather his statement recorded under Section 67 of the Act is to the effect that he has excluded himself from the crime alleging that he had not done the crime and had no knowledge thereof and hence, the confession is not voluntary. Hence, unless the confession is in specific term that the appellant has committed the occurrence with the knowledge of doing the crime a conviction cannot be recorded on the basis of such exculpatory statement and when the statement contains self-exculpatory matter it cannot amount to confession and hence, the appellant cannot be held guilty on the basis of the said confession made by him, moreover, the fact that the appellant was subjected to personal search and there is no

evidence regarding appellant before the personal search entered into was made aware of his right of being searched by a Gazetted Officer or Magistrate and the conviction cannot be sustained on these grounds and hence, I find and hold that the prosecution has not been able to prove the charges levelled against the appellant beyond all reasonable doubts and the judgment of conviction dated 19.05.2015 and order of sentence dated 27.05.2015 passed in N.D.P.S. Case No. 89 of 2009/97 of 2010 by Sri Anand Singh, learned 1st Additional Sessions Judge, East Champaran, Motihari are hereby set aside and the appeal is allowed.

(Gopal Prasad, J)

Kundan Sharma

AFR/NAFR	NAFR
CAV DATE	28.04.2016
Uploading Date	29.06.2016
Transmission Date	29.06.2016