

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.766 of 2015

Against the judgment of conviction, dated 24.09.2015, and order of sentence, dated 29.09.2015, passed by Mr. Anand Singh, Additional Sessions Judge I-cum-Special Judge, N.D.P.S. Act, East Champaran at Motihari, in N.D.P.S. Case No. 73 of 2008/Tr. No. 118 of 2010

Shiv Balak Sah @ Madan Sah, S/o Shiv Chand Sah, R/o Village- Padmol, Gamhariya, P.S Pokhariya, Dist- Parsa(Nepal) Appellant

Versus

The Union of India through Amarnath Respondent

Appearance :

For the Appellant : M/S Shri Prakash Tiwari & Mahesh Kumar, Advs.

For the Respondent : Mr. S.D. Sanjay, Addl. S.G, with
Mr. Rakesh Kumar Sinha, CGC

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 05.07.2016

Heard the learned counsel for the parties.

2. The appellant has been convicted under Section 15(c) and 23(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as, 'the Act') for having possession of 266 K.G. of dodda and sentenced to undergo rigorous imprisonment for ten years and a fine of rupees one lakh for offence under Section 15(c) of the Act and in default of payment of fine to undergo rigorous imprisonment for six months and has, further, been sentenced to undergo rigorous imprisonment for ten years and a fine of rupees one lakh for offence under Section 23(c) of the Act and in default of payment of fine to undergo rigorous imprisonment for six months.

3. The prosecution case, as alleged in the complaint filed by Amar Nath, P.W. 1, Inspector of Custom, that I.P. Singh, Superintendent, Custom, (P) Division, Motihari, received an information through the coded informer on 23.02.2008 that a large quantity of dodda is being transported through the bus bearing registration no. BR-16P-1251. On the said information a preventive

team was organized by the Superintendent, Custom, (P. Division), Motihari, which contains the complainant, Amar Nath, as well as Siman Ekka, P.W. 2 and other sepoy and havildar and B.N. Pandit, the team rushed to Chhapwa and waited at Chhapwa Terminal and after some time the said bus seen coming from the side of Raxaul, which was signaled to stop and, thereafter, the bus was stopped and on check, from the dickey of the said bus some sacked dodda recovered in gunny bag. On enquiry, one Shiv Balak Sah amongst the passengers came forward and accepted the ownership and claimed the articles belong to him. Thereafter, six big gunny bags and two small gunny bags of alleged dodda brought to the Custom Office and the articles seized was weighed and found to be 266 K.G. for which seizure list and panchnama were prepared, which were duly signed by the driver, cleaner (khalasi) and passenger of the bus and by the appellant, representative samples were also drawn and the samples were sent to the Chemical Laboratory, Custom House, Kolkata, for report. The interrogatory statement and voluntary statement of the accused were recorded in which the appellant admitted and confessed his guilt. The said confessional statement was recorded by Ajit Kumar, P.W. 6, though the interrogatory statement was asked by the Custom authorities and the answer given by the accused was recorded. The Chemical Examiner sent his report on 19.01.2009 stating therein that the sign for percentage of morphine could not be detected as the machine for testing the same is not working so ordered to send the sample to the Central Revenue Control Laboratory, Hill Side Road, Pusa Campus, P.O. I.A.R.I, New Delhi – 110 014, for checking of morphine contents therein.

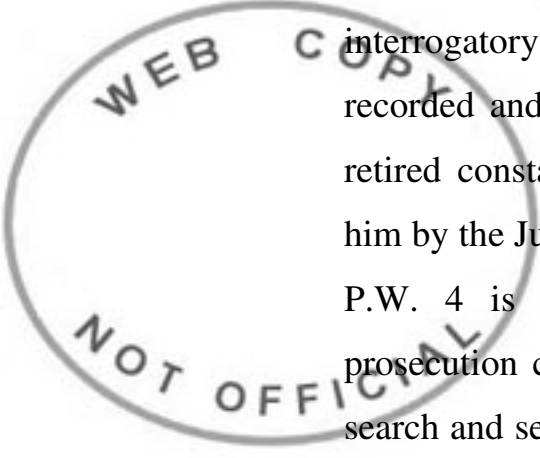
4. A petition was filed on 21.01.2009 for re-sampling and deputation of Magistrate for drawing sample to send it to Laboratory at New Delhi, on which, by Court's order, dated 17.02.2009, sample taken

before Shri Ashok Raj, Judicial Magistrate, and the re-sampling duly sealed and signed by the Judicial Magistrate sent for chemical examination and, in the meantime, the complaint filed and, thereafter, a report received that the seized articles contains 0.6 per cent morphine.

5. On filing the complaint, cognizance taken and the trial proceeded after framing of the charge.

6. During the trial nine witnesses were examined, who are P.W. 1 Amarnath, Inspector, Custom, who supported the prosecution case regarding the receipt of the information from the coded informer through Superintendent, I.P. Singh, and constituted a preventive team in which Siman Ekka (P.W. 2), B.N. Pandit (P.W. 3), Amarnath (P.W. 1) and sepoy and havildar were members and they went to Chhapwa Terminal and the bus was apprehended, searched and from the said bus, six big and two small gunny bags containing dodda, recovered from the dickey and the roof of the bus. The appellant, Shiv Balak Sah, claimed ownership of the said gunny bags for which seizure list and panchnama prepared and sample taken and sent to Chemical Laboratory, Kolkata, and has proved Exhibit 1 seizure memo, Exhibit 2 panchnama, Exhibit 3 formal first information report, Exhibit 4 test memo, Exhibit 5 forwarding report of the accused, Exhibit 6 petition, dated 21.01.2009, for re-sampling, Exhibit 7 is the letter, Exhibit 8 the final complaint, Exhibit 9 is the report of the Central Revenue Control Laboratory, Hill Side Road, Pusa Campus, P.O. I.A.R.I, New Delhi – 110 014, indicating that the seized article contains morphine to the tune of 0.6 per cent, Exhibit 10 is the interrogatory statement recorded under Section 67 of the Act of Shiv Balak Sah, the appellant, Exhibit 11 is the voluntary statement of the appellant under Section 67 of the Act, which was recorded by Katib (writer), Ajit Kumar and Exhibit 12 is the certification of the article, seized.

7. The next witness examined is Siman Ekka (P.W. 2). He



also supported the prosecution case, about the information, constitution of team, raid and search and seizure. It is, further, stated that interrogatory statement and voluntary statement of the appellant were recorded and ordered for re-sampling. P.W. 3 is Bishwanath Pandit, retired constable and has reported that re-sampling was made before him by the Judicial Magistrate and the envelop containing his signature. P.W. 4 is Indrajeet Prasad, sepoy, and has also supported the prosecution case being the member of the raiding party regarding the search and seizure of the article, seized. However, P.W. 5, Vijay Nath, he has proved the certification paper which is computerized. However, from his deposition, it is apparent that the articles seized on 23.07.2008, however, in his cross-examination he deposed that the seized articles were kept in godown on 22.09.2008 and the Godown Manager was Pawan Kumar has also signed on the seized article. However, he has stated that the seized article kept in godown on 22.09.2009. He has, further, stated that seized articles were weighed before him on the date of certification. However, he has stated in his cross-examination that where the seized articles were kept from 23.07.2008 to 21.09.2008 that can not be said, as he did not know. P.W. 6 is Ajay Kumar and has come to depose that interrogatory statement and the confessional statement recorded by him and bears his signature. P.W. 7 is Md. Mustafa. He has proved panchnama and has also proved the signature in seizure list in Custom office. P.W. 8 is Laldeo Ram proved his signature on the panchnama and signed on interrogatory statement as well as confessional statement and has signed by the trial Court taking into consideration the office of the witnesses.

8. The trial Court, taking into consideration the evidence of the witnesses, convicted and sentenced the appellant, as mentioned above, on the ground that the prosecution has been able to prove the possession of the article and the article, seized, was found to

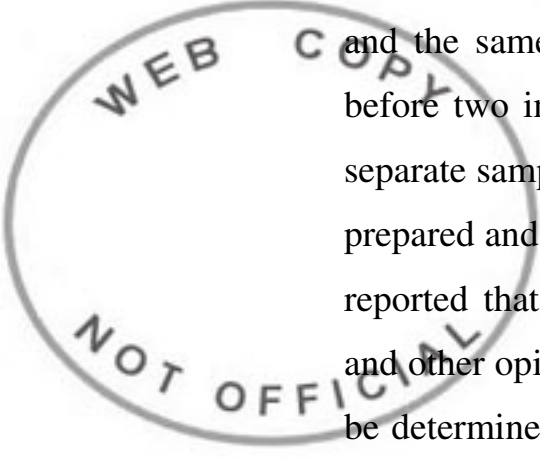
be morphine of both the two independent witnesses and Custom Officers supported the prosecution case regarding the recovery of the articles from the possession of the appellant and the Katib (writer), who recorded the interrogatory statement and voluntary statement, has proved Exhibits 10 and 11, hence, the prosecution has been able to prove the charge and so convicted and sentenced the appellant, as mentioned above.

9. The learned counsel for the appellant, however, challenged the order of conviction and sentence, recorded by the trial Court on the ground that article was not produced in the Court, neither the sample was taken either at the outset in three separate envelopes has been produced nor the re-sampling done by the Magistrate was ever produced before the Court and it has been contended the best evidence for possession of the article, seized, is the production of articles, seized, but, the articles, seized, have not been produced in Court and failure to produced seized articles before the trial Court which is best evidence required to have been produced during the trial has not been produced is not merely a procedural irregularity, but, cause prejudice to the accused and mere oral evidence as to their feature production of panchnama does not discharge the heavy burden which lies on the prosecution particular when the offence is punishable with stringent sentence and has placed reliance upon a decision reported in **(2004) 10 S.C.C., 562 (Jitendra & Ors. Vrs. State of M.P.)**. It has, further, been contended that the confession made before the Customs Authorities, who have been assigned the work of investigation are like a police officer, hence, the confessional statement recorded by them is hit by Section 25 of the Indian Evidence Act, 1872, and has placed reliance upon a decision reported in **(2008) 16 S.C.C. 417 (Noor Aga Vrs. State of Punjab & Anr.)** an has placed reliance on paragraphs 75 and

76 of the decision. He has, further, placed reliance on a decision reported in **(2013) 14 S.C.C., 527 (Vijay Jain Vrs. State of M.P.)** that neither the articles, seized, has been produced nor even the sample which was taken from the article have been produced, hence, there is no evidence to connect the forensic report with the substance seized from the possession of the appellant and, further, the evidence that the certification proved as Exhibit 12 is not in consonance of Section 52A of the Act as neither the details of the articles, seized, nor the photographs of the articles seized contained in it even taken, hence, the conviction can not sustain.

10. The learned counsel for the State, however, submits that the witnesses have supported the prosecution case regarding the search and seizure of the articles and if the seizure of the articles is established by the evidence of the official and non-official witnesses and, further, the fact that the appellant has confessed his guilt in the interrogatory and voluntary statements, then, conviction can be recorded on the sole confession and has placed reliance upon decisions reported in **(2011) 11 S.C.C., 347 (Ram Singh Vrs. Central Bureau of Narcotics)** and **(2008) 4 S.C.C., 668 (Kanhaiyalal Vrs. Union of India)** and has contended that if the statement given was voluntary without any threat or compulsion and if supported by corroborative evidence then conviction can be recorded.

11. Hence, taking into consideration the respective submissions I proceed to consider the question for consideration whether the prosecution has proved the charge to record a conviction. The prosecution case, as alleged, is that the information received through the coded informer regarding the transportation of dodda in huge quantity through bus, bearing registration no. BR-16P-1251 and, accordingly, a preventive team was organized and the said bus was



apprehended and about 266 K.G. dodda was recovered in six big and two small bags, the said articles were brought in the Customs Office and the same was weighed and seizure list and panchnama prepared before two independent witnesses, Form "F" was also prepared, three separate samples were taken which were sent to Kolkata, the test memo prepared and a report of the chemical examiner was received and it was reported that the sample, sent, answers test for presence of morphine and other opium alkaloid, the percentage of morphine content could not be determined as HPLC instrument is out of order at present, hence, it is observed that the sample may be forwarded to the Central Revenue Control Laboratory, Hill Side Road, Pusa Campus, P.O. I.A.R.I, New Delhi – 110 014, for percentage of morphine content. The report of the Chemical Laboratory is dated 09.01.2009, which has been marked as Exhibit 6 and subsequently by order, dated 17.02.2009, an order passed to appoint Mr. Ashok Raj as Judicial Magistrate and, thereafter, re-sampling before the Judicial Magistrate taken and report of the Chemical Laboratory procured, marked as Exhibit 9, showing that the contents of the morphine was found to be 0.6 per cent. However, in the meantime, official complaint filed along with the report on which the cognizance taken.

12. The witnesses examined in the case are P.W. 1, who has supported the prosecution case regarding the information received and, accordingly, constituted a preventive team, reached at the Chhapwa More and, then, apprehended the bus by giving signal and consequently bus stopped, recovery made before the driver, cleaner (khalasi) and the passengers and the seizure list and panchnama prepared regarding the article, seized, along with accused and the witnesses brought at the Customs Office and there the articles were weighed, seizure list and panchnama prepared, sample taken out. P.W. 2 is also a member of the

preventive team, supported the prosecution case regarding the search and seizure and the sample taken out and the article, seized were sealed by the seal of the sealing officer and even the sample was also sealed the interrogatory and voluntary statements were recorded. P.W. 3 has come to support the re-sampling by him before the Judicial Magistrate. P.W. 4, Indrajit Prasad Singh, also a member of the raiding party and has supported the prosecution case. P.W. 5 is Vijay Nath Rao. He has come to prove the certification of the article, seized, and has proved Exhibit 12, which is computerized and bearing the signature of the Godown In-Charge. He has deposed that the seized articles were kept in Godown on 22.09.2009. However, he has stated that he does not know where the seized articles were kept from 23.07.2008 to 21.09.2009. P.W. 6 is Ranjit Kumar, who has come to prove that the interrogatory statement recorded and written by him and bear his signature. P.W. 7 is Md. Mustafa, the driver, who proved his signature on the seizure list and panchnama. P.W. 8 is Laldeo Ram, the cleaner (khalasi) of the said bus, who has proved his signature on panchnama and interrogatory statement as well as on the confessional statement, hence, it is apparent that the prosecution has been proved by oral evidence that they got information about the bus through coded informer and, then, team constituted, reached Chhapwa More, waited for the arrival of the said bus and when the bus arrived, the same was stopped and from the bus eight bags of dodda recovered, the appellant accepted the ownership of the bags, but, did not produce any paper and, then, articles, seized, were taken to Customs Office where articles, seized, were weighed, seizure list and panchnama prepared and even three samples were taken which were sent to Kolkata Laboratory from where the report received that the articles, seized, stood the test of morphine and other alkaloid, but, it was reported that the per cent of the morphine could not be detected so the sample be sent to New Delhi, re-

sampling was made before the Judicial Magistrate and the sample was sent to New Delhi and from there a report was received that the article contains 0.6 per cent morphine. The certification of article before Magistrate under Section 52A of the Act has been marked as Exhibit 12. However, neither the article, seized, has been produced nor the sample, taken from the article, seized, has been produced before the Court during the trial. However, though certification of a Magistrate has been marked Exhibit 12, but, destruction of the article has not been proved or brought on record. The witnesses though supported the prosecution case regarding the search and seizure and the preparation of the seizure list, which has been marked and exhibited, hence, the trial Court having convicted the appellant on the ground that since the articles, seized, were kept in sealed cover and was duly sampled, sent to Kolkata and it was found to be morphine.

13. However, it is alleged that the articles, seized, but, the said seized article has not been produced before the Court. Neither the article, seized, nor the sample of the article, seized, has been produced in the Court and proved as material exhibit and it can prejudice the accused. In the case reported in **(2004) 10 S.C.C., 562** (supra) the Hon'ble Supreme Court taken into consideration the finding of High Court and observed as follows :

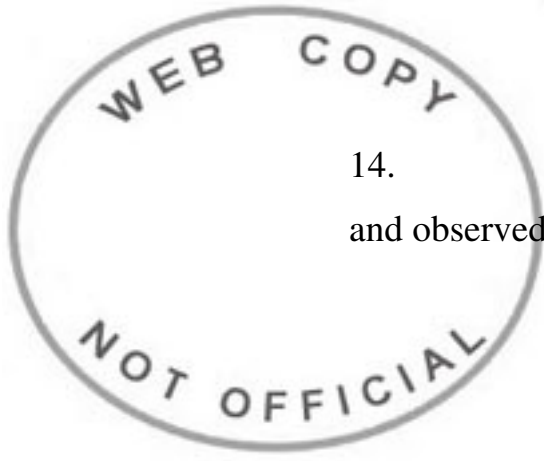
“Although the High Court noticed the fact that the charas and ganja alleged to have seized from the custody of accused had neither been produced in Court nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it has been proved and the sample were sent to Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed even production of these commodities before the Court is not fatal to the prosecution case. The defence also did not insist during

the trial that these commodities should be produced. The High Court relied on Section 465 of the Criminal Procedure Code to hold that non-production of the material object was a mere procedure irregularity and did not cast a prejudice to the accused”.

14. The Supreme Court repelled the finding of the High Court and observed as follows :

“In our view the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the allege quantities of charas and ganja were seized from the possession of the accused. The best evidence should have been the seized material which ought to have been produced during the trial and marked as material exhibit. There is no explanation for this failure to produce them. Mere oral evidence as to their feature and production and panchnama does not discharge the heavy burden which lies on the trial where the offence is punishable with a stringent sentence under the Narcotic Drugs and Psychotropic Substances Act, 1985”.

15. The plea has been taken by the prosecution that prosecution has proved certification of the article, seized, hence, the certification, itself, amounts to the evidence of the possession of article, seized. The prosecution has only proved the certification of the article, but, has not produced evidence regarding the destruction of the article, seized, and the certification is not in compliance with Section 52A of the Act. The certification requires proving and bringing in evidence at least the samples taken from the article, seized, but, neither the article, seized, has been produced nor the samples of the articles have been produced before the Court. The prosecution has led evidence that three samples were taken by the informant, itself, at the time of preparation of the seizure list, just after the search and seizure and one sample was sent to Chemical Laboratory, Kolkata, in which the report received and, further, re-sampling was made of the article, seized through Judicial



Magistrate and representative samples were prepared, but, neither the sample taken at the first instance nor the sample taken at the second instance before the Judicial Magistrate has been produced nor the article, seized, has been produced. Hence, in that background it is relevant to quote paragraph 96 of the decision reported in **(2008) 16 S.C.C. 417** (supra) which is as follows :

“Para 96 : Last but not the least physical evidence relating to the 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 52A of the Act.”

16. Hence, it is apparent even if the plea taken by prosecution that it has proved the certification and bulk quantity has been destroyed, then, it is required for prosecution to produce the sample for purpose of establishing the recovery of article, seized, as envisaged in Section 52A of the Act

17. The reliance has, further, been placed on decision reported in **(2013) 14 S.C.C. 527** (supra), which has placed reliance upon paragraph 96 of the judgment of **Noor Aga’s** case, **(2008) 16 S.C.C. 417** (supra), to hold that the prosecution must in any case produce the sample even when the bulk quantity is said to have been destroyed and in the same judgment reliance has already been placed upon the decision reported in **(2004) 10 S.C.C., 562** (supra).

18. The reliance has also been placed on the decision reported in **(2011) 5 S.C.C., 123 (Ashok @ Dangra Jaiswal Vrs. State of M.P.)** where it has been held that when the article seized from the possession of the accused was not produced before the trial Court as

material exhibit and there is no explanation for non-production, then, the Court has no evidence to connect the Forensic Science Laboratory report with the substance that were seized from the possession of the others.

19. Here, under the facts and circumstances of the case, it is apparent that the prosecution has not produced the dodda before the Court nor has even produced the sample taken from the said dodda and has not given any explanation for non-production of the article seized from the appellant. Hence, there is nothing on record to connect the Forensic Science Laboratory report with the article, seized, to say that article, seized, was narcotics.

20. More over, the fact that P.W. 1, in his entire evidence, has not stated where the articles, seized, were sealed. He has not stated that whether the articles, seized, were kept and though he has stated that all the bags seized were separately weighed, but, the separate weight of each seized bags were not written in the seizure list. He has, further, stated that three samples were taken out, but, the samples were not taken in Court as there is no system for taking the sample in Court. However, P.W. 2 though has stated that seizing officer, Amar Nath, P.W. 1, has sealed the article, seized. However, he has stated that he does not know when the said gunny bags were sent to Godown and it is only the seizing officer who can when bag sent to godown. However, in the evidence of seizing officer there is no mention whether he has sealed the gunny bag in which the article seized nor he has mentioned that he had kept the article at Godown. P.W. 3 has also not stated regarding the sealing and keeping the article. However, P.W. 5, who has come to prove the certification of article, which has been marked as Exhibit 12, in his cross-examination, has stated that the seized article was kept in Godown on 22.09.2008 and the articles, seized, were

weighed before him on the date of certification, but, he has stated that he can not say where the articles, seized, were kept in between 23.07.2008 to 21.09.2008. However, the article seized on 23.07.2008 itself, hence, from the evidence it is apparent that where the articles were kept from 23.07.2008 to 21.09.2008 has not been mentioned. Though P.W. 1 stated that the article seized on 23.07.2008 and has proved the test memo which shows the date of drawing and dispatch of the sample is 23.07.2008. However, the date of receipt in the Laboratory has been shown in Exhibit 4 as 11.12.2008. However, it is apparent that when the date of withdrawal and date of dispatch of the sample is shown as 23.07.2008, but, the date of receipt of sample in the Laboratory is 11.12.2008 and there is no explanation where the sample remained for about more than 4 to 5 months in transit, i.e., reaching the sample from Motihari to Kolkata and, hence, it casts a doubt.

21. Hence, having regard to the fact that the article seized on 23.07.2008 which was received in the Laboratory on 11.12.2008 and where these article remained travelling in between 23.07.2008 to 11.12.2008 has not been explained and, further, as per the evidence of P.W. 5 that the article seized on 23.07.2008 were kept in malkhana on 22.09.2008, after two months, and, further, the fact that neither the article, seized, has been produced in Court nor the sample taken from the article, seized was produced as evidence in Court though certification has been proved, but, not by Magistrate, hence, there is no material or even no evidence to connect the forensic report with substance that was seized from the possession of the appellant or the accused and non-production of such material evidence was not a mere procedural matter and has caused prejudice to the accused. However, the contention that the certification of the article, seized, as apparent from Exhibit 12, but, it does not contend the destruction of the article,

seized. However, the said certification also is not in consonance with and it is relevant to quote paragraph 6 of the decision reported in (2013)

14 S.C.C. 527 (supra), which is as follows :

“6 : Mr. Jain submitted that the prosecution had also taken a stand in the alternative before the trial court that the contraband goods were destroyed and, produced before the trial court only the samples of the contraband goods. He referred to the provisions of Section 52-A of the NDPS Act to submit that in a case of destruction of contraband goods the procedure as laid down in sub-section (2) of Section 52-A of the Act has to be followed and in case of destruction, the inventory prepared at the time before destruction and the photographs of the narcotic drugs and psychotropic substances and the list of samples drawn under sub-section (2) of Section 52-A of the Act as certified by the Magistrate are treated as primary evidence in respect of the offence. He vehemently argued that since no such procedure has been followed, the alternative plea taken by the prosecution that the contraband goods have been destroyed and could not be produced before the court cannot be accepted.”

22. Further, the observation made in paragraph 96 of **Noor Aga** case is relevant, where it has been held that the physical evidence regarding three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake argument that the bulk quantity was destroyed the sample was essential to be produced to prove as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52A of the Act. Section 52A of the Act suggests that every Court shall draw the inventory, the photographs of the narcotic drugs and psychotropic substances and list of samples drawn under sub section (2) and certified by the Magistrate as primary evidence in respect of such offence and in decision reported in (2013) **14 S.C.C. 527** (supra) it has been held that the prosecution must in any case produce the sample even when bulk of quantity is said to have been destroyed. More over, the fact that though the seizure list

witnesses are the driver and cleaner (khalasi), who have been examined as P.Ws. 7 and 8 respectively, they have proved their signatures on the seizure list and panchnama and on each pages of the confessional statement and the interrogatory statement have stated that the bags were loaded after booking, but, the booking was not made before him, but, was said booking was from the counter and it is stated that during the period the bus was in Customs Office, in the meantime, he remained in the bus or just has got down from the bus and the Customs Authorities after unloaded the bags took it in Customs Office.

23. Hence, it is apparent that neither the article, seized, nor the sample has been produced in Court. The certification proved as Exhibit 12, but, the destruction of the article, seized, has not been proved and nor the photograph or the detail of description of article, seized, proved, hence, the certification is not proved in compliance of Section 52A of the Act and in view of decision reported in **(2004) 10 S.C.C., 562** (supra), **(2013) 14 S.C.C., 527** (supra), **(2013) 14 S.C.C., 527** (supra), **(2008) 16 S.C.C. 417** (supra) and **(2011) 5 S.C.C., 123** (supra).

24. The possession of the article, seized, has not been established and when the article, seized, has not been produced as material exhibit nor even sample taken proved as material exhibit, hence, the Court has no evidence to connect the Forensic Science Laboratory report with substance, which has been seized.

25. The learned counsel for the State has, further, placed reliance on decisions reported in **(2008) 4 S.C.C., 668** (supra) and **(1990) 2 S.C.C., 409 (Raj Kumar Karwal Vrs. Union of India & Ors.)**, **(2011) 11 S.C.C., 347** (supra) and **(1999) 6 S.C.C., 1 (Pon Adithan Vrs. Deputy Director, Narcotics Control Bureau, Madras)** conviction can be recorded on the confession of the appellant as appellant has confessed before the Superintendent of Customs is

admissible in evidence under Section 67 of the Act.

26. Hence, the question under the facts and circumstances of the case is that whether the conviction can be recorded on the sole retracted confession of the accused or not.

27. The learned counsel for the appellant, however, placed reliance on the decision reported in **(2008) 16 S.C.C. 417** (supra) that the officer empowered under Section 53 of the Act and has been vested with power of a police officer deemed to be police officer and Section 25 of the Indian Evidence Act, 1872, is applicable, reference has been made of paragraphs 75, 76, 78, 81 and 82 of the decision reported in **(2008) 16 S.C.C. 417** (supra) :

“75 : The Act is complete code by itself. The Customs Officers have been clothed with the powers of police officers under the Act. It does not, therefore, deal only with a matter of imposition of penalty or an order of confiscation of the properties under the Act, but also with the offences having serious consequences.”

“76 : Section 53 of the Act empowers the Customs Officers with the powers of the Station House Officers. An officer invested with the power of a police officer by reason of a special statute in terms of sub-section (2) of Section 53 would, thus, be deemed to be police officer and for the said purposes of Section 25 of the Act shall be applicable.”

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“78 : Section 53-A of the Act makes such a statement relevant for the purposes of the said Act. The observations of the High Court, thus, that confession can be the sole basis of conviction in view of Section 108 of the Customs Act, thus, appear to be incorrect.”

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“81 : This Court in *Alok Nath Dutta v. State of W.B.* stated : (SCC p. 274, para 125)



“125. We are not suggesting that the confession was not proved, but the question is what would be the effect of a retracted confession. It is now a well-settled principle of law that a retracted confession is a weak evidence. The court while relying on such retracted confession must satisfy itself that the same is truthful and trustworthy. Evidence brought on record by way of judicial confession which stood retracted should be substantially corroborated by other independent and cogent evidence, which would lend adequate assurance to the court that it may seek to rely thereupon.”

“82 : In *Pon Adithan v. Narcotics Control Bureau* whereupon reliance has been placed by the High Court, this Court had used retracted confession as a corroborative piece of evidence and not as the evidence on the basis whereof alone, a judgment of conviction could be recorded.”

28. However, in **(2011) 11 S.C.C., 347** (supra) it has been held that if confession made under Section 67 of the Act “when accused is made aware of confession made by him and he does not make complaint within a reasonable time, the same shall be relevant factor to adjudicate as to whether the confession was voluntary or not and taking into consideration the fact that the appellant was produced before the Court on several dates and at no stage did he complain to Special Judge of any torture or harassment in recording the confession it is only when his statement was recorded under Section 313 of the Criminal Procedure Code that he retracted and denied making such confession and went to the extent of saying that his signature was obtained on blank paper and in the facts and circumstances confessional statement made, the appellant was held not voluntary in nature and to form the purpose of conviction. The reliance has also been placed in decision reported in **(2008) 4 S.C.C., 668** (supra), **(1990) 2 S.C.C., 409** (Raj

Kumar Karnwal Vrs. Union of India & Ors.) where it has been recorded that the conviction can be recorded.

29. In decision reported in **(1999) 6 S.C.C., 1** (supra) where the fact that the appellant was in possession of 150 gm heroin and the argument raised that the mandatory requirement of informing the appellant of his right under Section 50(1) of the Act has not been complied, hence, it can not be held that the heroin was found from the possession of the appellant. However, the attention was also drawn to the evidence made by P.W. 1 that he informed the appellant of his right and his evidence found to be reliable and trustworthy and there is no reason to doubt his version that he had informed the appellant of his right. It is, further, held that the conviction can be recorded on the confessional statement, if confessional statement voluntarily made. Further, confessional statement of the appellant corroborates evidence of P.W. 1 and the criticism to reject the confessional statement on ground of retraction rejected on plea that said retraction in statement under Section 313 of the Criminal Procedure Code is at belated stage and no complaint made at the time of recording evidence when produced before Magistrate and so held that if trial Court held that confessional statement was voluntarily made and though it is safe to rely upon the same it can not be held that it committed any wrong. However, confessional statement has only been taken as corroborative evidence.

30. However, in this background it is relevant to quote paragraph 95 of decision reported in **(2008) 16 S.C.C. 417** (supra) :

“95 : The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the

credibility of the prosecution. Even for the said purpose the retracted confession on the part of the accused could not have been taken recourse to.”

31. However, in decision reported in **(2013) 16 S.C.C. 31 (Toofan Singh Vrs. State of T.N.)** the proposition imposed in the question raised that there was no evidence except purported confessional statement of the appellant recorded under Section 67 of the Act and there is no power under Section 67 of the Act to either record confessional statement to record conviction and considering the decision reported in **(2008) 4 S.C.C. 668** (supra) and **(1990) 2 S.C.C. 409** (supra) as binding precedence having been considered in decision reported in **(2008) 16 S.C.C. 417** (supra)

32. It has been observed that officer under Section 53 of the Customs Act is a police officer and, therefore, attract the provision of Section 25 of the Indian Evidence Act, 1872, and finally taking into consideration that the Hon’ble Supreme Court has already doubted the dicta in **(2008) 4 S.C.C., 668** (supra) and **(2011)12 S.C.C. 298 (Nirmal Singh Pehlwan Vrs. Inspector, Customs)**. It is relevant to quote paragraphs 40 and 41 of decision reported in **(2013) 16 S.C.C. 31** (supra) :

“40 : In our view the aforesaid discussion necessitates a re-look into the ratio of *Kanhaiyalal case*. It is more so when this Court has already doubted the dicta of *Kanhaiyalal* in *Nirmal Singh Pehalwan* wherein after noticing both *Kanhaiyalal* as well as *Noor Aga*, this Court observed thus : (*Nirmal Singh Pehlwan case*, SCC p. 302, para 15) :

“15. We also see that the Division Bench in *Kanhaiyalal case* had not examined the principles and the concepts underlying Section 25 of the Evidence Act, 1872 vis-à-vis Section 108 of the Customs Act and the powers of a Customs Officer who could investigate and bring for trial an accused in a narcotic



matter. The said case relied exclusively on the judgment in *Raj Kumar case*. The latest judgment in point of time is *Noor Aga case* which has dealt very elaborately with this matter. We thus feel it would be proper for us to follow the ratio of the judgment in *Noor Aga case* particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with.”

“41 : For the aforesaid reasons, we are of the view that the matter needs to be referred to a larger Bench for reconsideration of the issue as to whether the officer investigating the matter under the NDPS Act would qualify as police officer or not.”

33. The ratio decided in **(2008) 4 S.C.C., 668** (supra) has been doubted and referred the case to the Constitution Bench for reconsideration.

34. However, it is true that the physical evidence of possession has not been proved by producing the article, seized, but, the prosecution witnesses supported the prosecution case and even the independent witnesses have supported the seizure and proved his signature on seizure list, however, the appellant has confessed and the confessional statement and the interrogatory has been marked as Exhibits 10 and 11. P.W. 2 has specifically stated that the appellant has confessed, the appellant has not reported about any threat and coercion or that the statement has not been voluntarily made at the initial stage, this only is a denial of having not made such statement in statement under Section 313 of the Criminal Procedure Code at a very late stage and the witnesses has supported the prosecution case and there is nothing in their evidences to disbelieve except the physical evidence has not been produced. However, the fact contain in **Noor Aga** case retracted up in the fact that the accused in **Noor Aga** case where the confession recorded by an officer of Custom Department rightly and latter the same was written by him under threat, duress and gun point.

However, the confession made has been retracted, but, in the facts and circumstances of the case, at hand, the witnesses supported the prosecution case and the confession made by appellant not controverted till the simple denial in statement under Section 313 of the Criminal Procedure Code. Hence, on these facts, it can well be presumed that confession was free from threat, coercion and was voluntarily made.

35. Taking into consideration that the appellant has confessed the guilt in his confessional statement, Exhibit 10, and interrogatories, Exhibit 11, that he was carrying six big and two small bags of dodda and he has not complained that he has not made any such statement, voluntary, and has not reported of having made the statement in voluntary or under threat. Except, in the statement under Section 313 of the Criminal Procedure Code at a belated stage where he has merely made simple denial that he has not made such statement, but, has not given any reason, hence, there is no reason to hold that the confession was not voluntary for non-production of physical evidence, like the seized article and the sample, however, the witnesses supported the prosecution case, the witness, P.W. 2 has also supported prosecution case. It is true that before acting solely on confession as a rule of prudence the Court requires some corroboration, but, it can not be said that conviction can not be recorded on sole confession, if the confession has voluntarily been made. However, decisions reported in **(2008) 4 S.C.C., 668** (supra), **(2011) 11 S.C.C., 347** (supra) and **(1990) 2 S.C.C., 409** (supra) having regard to the fact that the appellant has made confessional statement and, more over, independent witness deposed that recovery has been made and, further, the official as well as the independent witnesses supported the prosecution case regarding the search, seizure and recovery and his conviction can sustain on the said confessional statement, I find and hold that the prosecution has been

able to prove the charge beyond all reasonable doubts.

36. I do not find any merit in this appeal, hence, it is, accordingly, **dismissed**.

(Gopal Prasad, J)

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