

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (SJ) No.1388 of 2017**

Arising Out of PS. Case No.-1 Year-2011 Thana- GOVERNMENT OFFICIAL COMP.  
District- Muzaffarpur

=====

Munna Kumar @ Munna Kumar Singh, Son of Sri Nand Kumar Singh,  
resident of village- Manki, P.S.- Bagengola, District- Buxer.

... .. Appellant/s

Versus

The Union of India (DRI) through Senior Intelligence Officer Director of  
Revenue Intelligence Sub Regional Unit, Muzaffarpur.

... .. Respondent/s

=====

with

**CRIMINAL APPEAL (SJ) No. 1482 of 2017**

Arising Out of PS. Case No.-1 Year-2011 Thana- GOVERNMENT OFFICIAL COMP.  
District- Muzaffarpur

=====

Bablu Kumar, Son of Late Tribhuwan Singh, Resident of Village-  
Khuchariaon, P.S. Bagen Gola, District- Buxar.

... .. Appellant/s

Versus

1. The State of Bihar
2. The Union of India

... .. Respondent/s

=====

**Appearance :**

(In CRIMINAL APPEAL (SJ) No. 1388 of 2017)

For the Appellant/s : Mr. Kumar Rajeev-Advocate

For the Respondent/s : Mr. Zeyaul Hoda-A.P.P.

(In CRIMINAL APPEAL (SJ) No. 1482 of 2017)

For the Appellant/s : Mr. Sudha Chandra-Advocate

For the Respondent/s : Mr. Bipin Kumar-A.P.P.

=====

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**  
**CAV JUDGMENT**



**14-08-2019**

Both the criminal appeals have been heard analogously and are being decided by a common judgment on account of having been preferred at the end of both the appellants namely Munna Kumar @ Munna Kumar Singh and Bablu Kumar against the common judgment of conviction dated 17.02.2017, order of sentence dated 23.02.2017 passed by the 2<sup>nd</sup> Additional Sessions Judge, Muzaffarpur in D.R.I. (N.D.P.S.) Case No.01 of 2011, leading to Complaint D.R.I. F. No.718(ii)01-Seizure/MSRU of 2011A, whereby and whereunder both the appellants have been found guilty for an offence punishable under Section 20(b)(ii)(c) of the N.D.P.S. Act and each one has been sentenced to undergo R.I. for ten years as well as to pay fine of Rs. One Lac, under Section 25 of the N.D.P.S. Act and each one has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. One Lac, under Section 29 of the N.D.P.S. Act and each one has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. One Lac and in default thereof, to undergo S.I. for two months respectively, additionally, with a further direction to run the sentences concurrently, with a further direction to have the period undergone during course of trial set off in accordance with Section 428 of the Cr.P.C.



2. On getting information from higher official regarding transportation of Ganja over a truck bearing registration No.WB-23B-1771 from Assam to Varanasi, the D.R.I. Official indulged in checking at Tajpur after constituting a raiding party and covering the distance from the office and during course thereof, a truck was seen coming from Barauni, which was signalled to stop. On query, the driver and the occupant disclosed that they are carrying turmeric. After removing tarpaulin sheet by which truck was covered and after opening some of the bags, they found that in some of the bags, there was turmeric, but in some of the bags, there was Ganja, whereupon the officials of the D.R.I. escorted the truck to D.R.I. Office, Muzaffarpur, where the truck was unloaded bags were opened, and during course of search, it has been found that out of total 254 bags, 186 bags contained one packet of Ganja concealed. After taking out of all the 186 packets, it was weighed and shown to be 10500 k.g. while the net weight of Ganja was 2930 k.g. The driver disclosed his identity as Munna Kumar @ Munna Kumar Singh and his associate as cousin brother Bablu Kumar. Then thereafter, their statement under Section 67 of the N.D.P.S. Act have been recorded wherein they made inculpatory extra-judicial confessional statement. Bablu



Kumar further divulged that one Nilu Singh, son of Shiv Kumar of village-Naragada, P.O. Balua, P.S. Saraiya, District-Bhojpur, who happens to be the owner of the truck, also happens to be the owner of the Ganja and on whose instruction, they have gone to Golaghat, Assam where the aforesaid consignment was loaded by one Pradeep Kumar Gogoi having mobile no.07896703325. Also disclosed the name of the assignee of the aforesaid consignment namely M/s Rajesh Trading Co., D/23, Visheswar Gaon, Varanasi. Accordingly, in presence of two seizure list witnesses, the Ganja were seized, samples were prepared, duly sealed, accused were apprehended, produced before the Court. On the other hand, enquiry has been taken up and after completing the same, complaint petition has been filed by the PW-4, facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

3. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, nothing has been adduced in defence.

4. In order to substantiate its case, prosecution has examined altogether eight PWs, who are PW-1, Anil Kumar Sharma, PW-2, Krishna Nandan Prasad, PW-3, Ram Karan Safi,



PW-4, Shivendra Satyarthi, PW-5, Babu Lal Paswan, PW-6, Surendra Kumar, PW-7, Karan Mahto and PW-8, Raghu Nandan Kumar as well as has also exhibited following documents as Exhibit-1, statement of accused Munna Kumar, Exhibit-1/1 Statement of accused Babloo Kumar, Exhibit-2, Panchnama of seized articles, Exhibit-3, memo of seizure dt. 27.02.2011, Exhibit-4, document dated 28.02.2011 in two sheets, Exhibit-5 to 5/4, five test memo of seized articles (ganja), Exhibit-6, Statement of accused Nilu Singh u/s 67 of N.D.P.S. Act, Exhibit-7, Report regarding truck issued by S.D.O. Barrackpore 24 Paragana, Exhibit-8, Letter dated 26.07.11 issued by Saikat Sah, Exhibit-9, a carbon copy of report of Sub-postmaster, Baadon Street, Kolkata, Exhibit-10, Report of D.R.I. Varanasi, Exhibit-11, statement of Sunil Kumar, Exhibit-12, list of document, Exhibit-13, investigation report of accused Nilu Singh, Exhibit-14, forwarding memo, Exhibit-15, complaint petition, Exhibit-16, signature of Karan Mahto on seizure Memo dt. 27.02.2011, Exhibit-16/1, signature of Karan Mahto on Panchnama page-1, Exhibit-16/2, signature of Karan Mahto on Panchnama, Page-2, Exhibit-16/3, signature of Karan Mahto on panchnama on page no.3, Exhibit-16/4, signature of Karan Mahto on panchnama over page no.4, Exhibit-16/5, signature of



Karan Mahto on panchnama on page-5, Initial in SI. No.7 of Page no.5 of entry register of the Year 2010-2011 (Custom) is Exhibit-17, signature of R.P. Singh on original certificate of seized goods is Exhibit-18, signature of Deepak Kumar Chaudhary on original certificate of seized goods as Exhibit-18/1, signature of P. K. Shrivastava on original paper of destruction on 3 pages as Exhibit-19 to 19/2 respectively, signature of Kishori Lal on back page of paper of destruction is Exhibit-20, signature of K. R. Murti on back page of paper of inspection is Exhibit-20/1, signature of Akhilesh Kumar on back page of paper of destruction is Exhibit-20/2 and signature of P. K. Shrivastava on back page of paper of destruction is Exhibit-20/3. Sample of seized ganja in five sealed packet have been numbered as 01/2, W 1/2, W 2/2, W 3/2 and G 1/2 and these numbered samples were marked as Exhibit-1 to 1/IV. As stated above, nothing has been adduced on behalf of defence.

5. At the present moment, it is pertinent to mention that PW-7, Karan Mahto had not turn up for cross-examination after charge and that being so, his testimony certainly goes out of consideration.

6. While assailing the judgment of conviction and sentence, it has been argued at the end of the learned



counsel for the appellants that the finding so recorded by the learned lower Court is non-sustainable, because of the fact that neither it carries proper appreciation, scrutiny, reasoning, legal issues in appropriate manner so is fit to be set aside. In order to buttress such plea, it has been submitted that the prosecution case suffers from so many if and but, such as irrespective of having confidential information that too, with proper specification of the truck in question bearing registration no.WB-23B-1771 and the jurisdiction of Muzaffarpur D.R.I. was much beyond the place where truck was signaled to halt, then in that circumstance, the high up official should have been properly informed. Although, an attempt has been at the end of the prosecution, but the same is not going to satisfy the mandate, as provided under Section 42(2) of the N.D.P.S. Act.

7. It has further been submitted that according to the prosecution version itself, the vehicle was intercepted at Tajpur Chowk, then in that circumstance, there should have been proper inspection of the truck in presence of local witness which the prosecution party intentionally avoided and the same creates serious doubt over the authenticity of the prosecution case.

8. Then, it has been submitted that going to



Tajpur after covering such distance and then, carrying the vehicle for more than 50 kilometers at the D.R.I./ Custom Office, Muzaffarpur is a circumstance, which could be seen in the background of presence of fix seizure list witness along with non-production of the so alleged seized materials during course of trial.

9. Furthermore, it has also been submitted that when the evidence of respective witness is gone through, it is apparent that there happens to be no consistency over preparation of sample, sealing thereof, and transmitting the same to the F.S.L. in sealed cover as the specimen of the seal is not at all been an exhibit of the record and so, could not be relied upon. In the background of aforesaid deficiency the so alleged statement of both the appellants purported to be under Section 67 of the N.D.P.S. Act could not be relied upon. Also submitted that on account of violation of order No.1/88 as well as 1/89, the whole prosecution case is found completely drenched with falsehood and that being so, fit to be rejected.

10. On the other hand, the counsel representing the D.R.I. as well as learned Additional Public Prosecutor vehemently challenged the submission made on behalf of learned counsel for the appellants and urged that after going



though the evidences coupled with the exhibits, the prosecution case is found duly substantiated. Also submitted that search and seizure happens to be in accordance with law. Side by side, preparation of sample, sealing of sample in tune with Order No.1/88, 1/89. Furthermore, it has also been submitted that by examining PW-8, the prosecution has brought up the destruction report. Side by side, also exhibited the sample so prepared in accordance with Section 52A of the Act, which is to be treated as primary evidence. In the aforesaid background, when the oral as well as documentary evidences are gone through, it is evident that prosecution has been able to substantiate its case, whereupon these appeals are fit to be dismissed.

11. Before coming to ocular evidence, relevant facts are to be taken note of:-

- 1) The concerned officials got confidential information regarding carriage of Ganja over a truck bearing Registration No.WB-23B-1771 from Northern-Eastern State on the basis thereof, there was constitution of raiding party, who cordoned at Tajpur Chowk where the vehicle was intercepted.*
- 2) At Tajpur Chowk itself after removing the Tarpaulin sheet, same bags were opened for*



*verification and apart from having presence of turmeric, Ganja was also found. It was not possible for the officials to unload all the bags from the truck and then, taken out Ganja from the respective bag, whereupon the truck along with driver and co-occupant were taken to D.R.I. Office, Muzaffarpur where it was unloaded, bags were opened and Ganja as well as turmeric were separated. The Ganja after weighing was found 2930 k.g. while the turmeric was 10,500 k.g. for which, seizure list was prepared.*

*3) Then thereafter, sampling was done and transmitted to F.S.L. for chemical examination after obtaining an order from the Sessions Judge.*

12. In the aforesaid facts and circumstances of the case, it is crystal clear that truck was intercepted at public place and so, Section 43 will be applicable. The Hon'ble Apex Court in ***Sk Raju alias Abdul Haque alias Jagga vs. State of West Bengal reported in 2019 CRI.L.J. 407***, has observed:-

*“6. We are unable to accept the submission made by the learned counsel for the appellant that [Section 42](#) is attracted to the facts of the present case. In State*



*of Punjab v Baldev Singh ("Baldev Singh"), (1999) 6 SCC 172 Chief Justice Dr A S Anand speaking for a Constitution Bench of this Court, held:*

*"The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any Narcotic Drug or Psychotropic Substances in a public place where such possession appears to him to be unlawful."*

*[Emphasis supplied]*

*In Narayanaswamy Ravishankar v Assistant Director, Directorate of Revenue Intelligence, (2002) 8 SCC 7, a three judge Bench of this Court considered whether the empowered officer was bound to comply with the mandatory provisions of Section 42 before recovering heroin from the suitcase of the appellant at the airport and subsequently arresting him. Answering the above*



*question in the negative, the Court held:*

*“In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the airport which is a public place. This being so, it is the provisions of [Section 43](#) of the NDPS Act which would be applicable. Further, as [Section 42](#) of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of [Section 42](#) of the NDPS Act is wholly irrelevant.”*

*In Krishna Kanwar (Smt) Alias Thakuraeen v State of Rajasthan, (2004) 2 SCC 608, a two judge Bench of this Court considered whether a police officer who had prior information was required to comply with the provisions of [Section 42](#) before seizing contraband and arresting the appellant who was travelling on a motorcycle on the highway. Answering the above question in the negative, the Court held:*

*“Section 42 comprises of two components. One relates to the basis of information i.e.: (i) from personal knowledge, and (ii) information given by person and taken down in writing. The second is*



*that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub-section (2) mandates, as was noted in Baldev Singh case that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc. are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document etc. must be in any building, conveyance or enclosed place.”*

*[Emphasis supplied]*

*7. An empowered officer under [Section 42\(1\)](#) is obligated to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a*



*document or an article is concealed in a building, conveyance or an enclosed place. Compliance with [Section 42](#), including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act was not committed in a building, conveyance or an enclosed place. [Section 43](#) is attracted in situations where the seizure and arrest are conducted in a public place, which includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”*

13. In ***Fulia vs. State reported in A.I.R. 2007 SCW 6864***, it has been held:-

*“Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with ... It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior*



*information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefore coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or housekeeping of the room, the guest is entitled to maintain his privacy.”*

14. Over admissibility of statement of an accused under Section 67 of the Act has been taken into consideration by the Apex Court in ***Surinder Kumar Khanna v. Intelligence Officer Directorate of Revenue Intelligence reported in A.I.R. 2018 (SC) 3574***, it has been held:-

*“7. For the present purposes, we will proceed on the footing that the statements of co-accused were recorded under and in terms of Section 67 of the NDPS Act. As regards such statements, a bench of two Judges of this Court after referring to and relying upon the earlier Judgments, observed in*



*Kanhaiyalal v. Union of India*<sup>1</sup>, (2008) 4 SCC 668  
as under:

“45. Considering the provisions of Section 67 of the NDPS Act and the views expressed by this Court in *Raj Kumar Karwal* case (1990) 2 SCC 409 with which we agree, that an officer vested with the powers of an officer in charge of a police station under Section 53 of the above Act is not a “police officer” within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the NDPS Act to be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act.”

8. Later, another bench of two Judges of this Court in *Tofan Singh v. State of Tamil Nadu*<sup>3</sup> was of the view that the matter required reconsideration and therefore, directed that the matter be placed before a larger bench. It was observed in *Tofan Singh* (supra) as under:

“40. In our view the aforesaid discussion necessitates a re-look into the ratio of *Kanhaiyalal*



*case (AIR 2008 SC 1044). It is more so when this Court has already doubted the dicta in Kanhaiyalal in Nirmal Singh Pehlwan (2011) 12 SCC 298 wherein after noticing both Kanhaiyalal as well as Noor Aga, (2008) 16 SCC 417 this Court observed thus: (Nirmal Singh Pehlwan case, SCC p. 302, para 15)(at P.5700, para 9 of AIR).*

*“15. We also see that the Division Bench in Kanhaiyalal case (AIR 2008 SC 1044) 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 (AIR 1991 SC 45). 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.*

*42. In this context, the other related issue viz. whether the statement recorded by the investigating officer under Section 67 of the Act can be treated as confessional statement or not, even if the officer is not treated as police officer also needs to be referred to the larger Bench, inasmuch as it is intermixed with a facet of the 1st issue as to whether such a statement is to be treated as statement under Section 161 of the Code or it partakes the character of statement under Section 164 of the Code.*

*”9. Thus the issue whether statement recorded under Section 67 of the NDPS Act can be construed as a confessional statement even if the officer who recorded such statement was not to be treated as a police officer; has now been referred to a larger Bench.”*

15. So far process of search and seizure of sampling under N.D.P.S. Act is concerned, it is needless to say that two circulars have been issued by the Central Government bearing Order No.1/88 and 1/89 relating thereto and the same has been taken into consideration by the Apex Court in ***Union of India v. Mohanlal and another reported (2016) 3 SCC 379***, it has been held:-

*“12. Section 52-A(1) of the NDPS Act, 1985*



*empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:*

*“2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.”*

*13. Most of the States, however, claim that no*



*samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.*

14. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

**“Section 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) When 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, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”*



15. It is manifest from [Section 52A](#) (2)(c) (*supra*) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under [Section 53](#) who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing



*of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.*

*17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to [Section 52-A\(4\)](#) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of [Section 52-A](#) above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”*

**16. In Sajan Abraham vs. State of Kerala reported in (2001) 6 SCC 692, it has been held:-**

*“12. The last submission for the appellant is, there is non-compliance of [Section 57](#) of the Act. He submits under it, an obligation is cast on the prosecution while making an arrest or seizure, the officer should make full report of all particulars of such arrest or seizure and send it to his immediate superior officer within 48 hours of such arrest or*



*seizure. The submission is, this has not been done. Hence the entire case vitiates. It is true that the communication to the immediate superior has not been made in the form of a report, but we find, which is also recorded by the High Court that PW5 has sent copies of FIR and other documents to his superior officer which is not in dispute. Ex.P9 shows that the copies of the FIR along with other records regarding the arrest of appellant and seizure of the contraband articles were sent by PW5 to his superior officer immediately after registering the said case. So, all the necessary information to be submitted in a report was sent. This constitutes substantial compliance and mere absence of any such report cannot be said it has prejudiced the accused. This section is not mandatory in nature. When substantial compliance has been made, as in the present case it would not vitiate the prosecution case. In the present case, we find PW5 has sent all the relevant material to his superior officer immediately. Thus we do not find any violation of [Section 57](#) of the Act.*

13. [In State of Punjab vs. Balbir Singh](#) (1994) 3 SCC 299, this Court held:

*"The provisions of [Sections 52](#) and [57](#) which deal with the steps to be taken by the officers after*



*making arrest or seizure under [Sections 41](#) to [44](#) are by themselves not mandatory."*

17. In the aforesaid background, now evidences are to be seen. **PW-1** has stated that as per direction, he came to his office on 26.02.2011 at about 9.00 A.M. An information was given to him, whereupon a team was constituted comprising Shivendra Satyarthi, Babu, he himself, Ram Karan Sahu. Then they gone to Tajpur Chowk where at about 4.00 A.M., they have seen truck bearing Registration No.WB-23B-1771 coming from Barauni Side. They signalled to stop the truck. They found two persons in the cabin. The driver has disclosed his identity as Munna Kumar Singh and the second one Bablu Kumar. On query, they have given their introduction and asked for about the materials being carried in truck. They both disclosed that turmeric is being carried. Then thereafter, they searched out and during course thereof, they have opened one bag and found Ganja kept therein in presence of two persons of the locality. Then, they carried the truck along with the aforesaid persons to D.R.I. Office, Muzaffarpur where they unloaded the truck and during course thereof, they have found turmeric in 68 bags while in 186 bags, Ganja was kept. Ganja was weighed carrying 2930 k.g. for which, seizure list was prepared. Seeing bulk quantity of the Ganja, one log was constituted comprising 44



packets and another that of 23 packets. Sample was taken out, Ganja was seized, sealed. Accused failed to produce document. So, they were taken into custody. Turmeric was seized. The statement of both the accused were taken. Then, they were sent to judicial custody. During cross-examination, he had stated that the distance in between the place where truck was signaled to stop and the D.R.I. Office happens to be substantial one. Packets of the seized Ganja were kept in locks. Accused was not provided an option to be searched in presence of the Magistrate. Then had denied the suggestion that nothing was seized from the truck.

18. **PW-2**, during his examination-in-chief, has reiterated the same version and further, disclosed that during course of inspection of the truck bearing Registration No.WB-23B-1771 at D.R.I. Office, Muzaffarpur after carrying it from Tajpur, 254 bags were found, out of which, 186 bags was carrying Ganja while 68 turmeric. After weighing, it was 2930 k.g. while the turmeric 10500 kilograms. Seizure list was prepared and a copy thereof, was also handed to the accused persons in token thereof, they put their signature. The accused persons also made their statement, identified the accused. During cross-examination at Para-5, he has stated that they had



proceeded from the Office at about 9.15 A.M. and returned at 5.30 P.M. In Para-6, he has stated that when bags were opened at the place of occurrence, the packets of Ganja was found as kept beneath the turmeric. At Para-7, he has stated that he is not remembering the weighing kiosk where it was weighed. In Para-8, he has stated that sample was prepared from all the packets. In Para-9, he has stated that Tajpur lies at a distance of 40-45 k.m. from the office.

19. **PW-3**, during course of examination-in-chief, has reiterated the earlier version and during course thereof, has stated that when they intercepted the truck at Tajpur bearing Registration No.WB-23B-1771, the bags were checked and found presence of Ganja over which, they had taken the truck to the Office where it was unloaded and during course thereof, out of 254 bags, in 186 bags, Ganja was kept along with turmeric while remaining bags were carrying only turmeric. On weighed, Ganja was 2930 k.g. while turmeric was 10500 k.g. Accordingly, seizure list was prepared and a copy thereof, was handed over to the accused, who put their signature. Sample was prepared, sealed at the spot itself. Statement of both the accused persons were recorded under Section 67 of the N.D.P.S. Act (exhibited). Then disclosed with regard to contents of the



confessional statement. Identified the accused. During cross-examination at Para-11, he has stated that he had not noted down the confidential information. In Para-12, he has stated that seizure list was not prepared at a place where truck was intercepted. In Para-17, he has stated that they have not tried to escort the seized articles to the police station. It has further been narrated that conscious possession of the accused with regard to recovered articles is found substantiated from the statement of the accused. At Para-19, he has stated that sample was taken out after getting the lots prepared in consonance with the recovery of the packet of the Ganja. He is unable to say how much quantity was taken out from each lot, but sampling was made in his presence. In Para-20, he has stated that the event of sampling was not photographed. In Para-21, he has stated that he has got no identity relating to seizure list witness. Then has stated that seized articles is not seized in his presence.

20. **PW-4** is the complainant. He has deposed that on 26.02.2011 while he was posted at D.R.I. Office, Muzaffarpur, he received confidential information at about 9.00 A.M. on the basis of which, he constituted a team comprising Ram Karan Safi, Anil Kumar Sharma, Krishna Nandan, Babu Lal Paswan including he himself and gone to Tajpur Chowk



after hiring Ambassador Car. They reached at 11.30 A.M. At about 4.00 P.M., they have seen a truck bearing Registration No.WB-23B-1771, whereupon they signaled to stop. They have found one person in the cabin along with driver. On query, driver had disclosed his name as Munna Kumar while his companion as Bablu Kumar. On query, they disclosed that turmeric is loaded in the truck. Then in presence of two witnesses, they have inspected the bags wherefrom smell of Ganja was coming out. Because of the fact that whole procedure could not have been completed at that very place on account thereof, they took the truck to their office and during midst thereof, they got the weight of the truck at weighing machine, Dighra. After coming to office, they have unloaded the truck in presence of accused, witnesses and then, on proper vigil, they found total 254 bags out of which, they have found 186 packets of Ganja kept in 186 bags along with turmeric while only remaining 68 bags were full of turmeric. Then thereafter, weight were taken, Ganja was weighed, it was 2930 k.g. while turmeric was 10500 k.g. Seizure list was prepared copy of which, was handed over to the accused, arrest memo was prepared, statement of accused was recorded under Section 67 of the N.D.P.S. Act wherein accused have confessed their guilt. Also



made reference with regard to loading, transportation at the end of owner of the truck namely Sono Singh, copy of the seizure list was handed over to the accused, who put their signature in token thereof. Then thereafter, the aforesaid 186 packet was bifurcated in lots and then, 15 samples were prepared (each containing 25 gm) and were sealed in presence of accused, seizure list witnesses and he himself bearing signature. Then the accused was forwarded to the judicial custody. Sample was produced before the Court and after obtaining the order, the same was transmitted to laboratory for chemical examination, received inquiry report (exhibited relevant documents) and then, submitted complaint petition (exhibited), identified the accused. He has further exhibited the documents relating to compliance of Section 57A of the N.D.P.S. Act. Also exhibited the samples (material exhibit), the chemical examination report, statement of co-accused Nilu Singh, procured identity of the truck from D.T.O. Office, North-East-24 Pargana, West Bengal belonging to Nilam Singh. Also got the identity ascertained relating to the consignment to its destination at Varanasi. Also traced out the holder of the seized turmeric from the accused. During course of cross-examination at Para-34, he has stated that there happens to be specific disclosure in the complaint petition with regard to



informing the superior officials regarding the recovery. In Para-35, he has stated that after informing the accused persons with regard to their entitlement to have their physical search in presence of Gazetted Officer, on their inclination, physical search was made in presence of Ram Karan Safi, Senior Intelligence Officer, but the same has not been incorporated in the complaint petition. In Para-37, he has stated that all the 186 packets of Ganja was not separately weighed. Furthermore, sample was taken out from all the packets, but he is unable to disclose the quantity having taken out from each packet. At Para-38, he has stated that they have not put specific mark/ seal over the seized Ganja at the P.O. It has further been disclosed at Para-41 that Tajpur, where the truck was intercepted, lies under Samastipur District while the Office happens to be within Muzaffarpur District. In Para-43, he has stated that they have not tried to store the Ganja at any police station. In Para-44, he has stated that sampling was not done in presence of any Magistrate. He has further stated that he is unable to say whether the seizure list witnesses of this case also happens to be the seizure list witness of other case or not, but he had met with them at an earlier occasion also. He denied the suggestion that seizure list witness is pocket witness. He has further admitted



that all the packets of Ganja is not present before the Court. The rest of Ganja after examination has also not been produced in Court. In Para-46, he has stated that information to Senior Officials were given on 28.02.2011. At Para-47, there happens to be cross-examination relating to Pradeep Gagoi. In Para-48, he has stated that on account of disclosure having at the end of accused persons during course of statement under Section 67 of the N.D.P.S. Act, the mental culpability of the accused persons is found duly exposed. There happens to be no evidence with regard to loading of packet by the accused persons. The accused persons have got no criminal antecedent. Then, there happens to be suggestion that they got implicated the accused falsely.

21. **PW-5**, during course of his examination-in-chief, has reiterated the version. During cross-examination at Para-11 has stated that they have not seen Ganja at Tajpur Chowk after tearing the bags rather they have interrogated the accused. At Para-12, he has stated that no paper work was conducted at Tajpur Chowk. They have taken statement of the accused at office. They have not sealed the seized articles during midst of way. They have not deposited the seized articles at any police station. In Para-14, he has stated that sample was taken out in his presence, but he is unable to say how much quantity



of Ganja was taken out. All the Ganja appeared carrying same physical character. He is unable to say what was weight of each packet. Then he denied the suggestion that he has deposed as per instruction of his superior officials.

22. **PW-6**, is the witness of seizure, who during course of examination-in-chief, has stated that as he had accompanied the D.R.I. Officials to Tajpur on the basis thereof, he has narrated the whole incident, exercise having been taken at the end of the D.R.I. Officials at their office, his presence as a witness of seizure as well as over other respective documents including over the sample along with accused after having been sealed, statement of the accused (exhibited the same), identified the accused. During cross-examination at Para-8, he has stated that as informed by the complainant Satyarthi, he had gone to D.R.I. Office. He has further stated that at earlier occasion also, he was called upon by the aforesaid Satyarthi at so many occasions. At Para-11, he has stated that when truck was intercepted at Tajpur Chowk, so many persons have assembled. At that very place, some bags were opened wherein Ganja was found. In Para-12, he has stated that the said Ganja, which was seen at Tajpur, neither sealed nor special mark was put over the same. No weight was taken at that very place rather they have



proceeded there from. In Para-15, he has stated that he is unable to say the size of packets independently. In Para-17, he has stated that no special mark was given over the packet in his presence.

23. **PW-7** is the another seizure list witness, whose statement was recorded on the first day and then was deferred, but did not turn up for cross-examination and so, his evidence is not at all legally entertainable, as there happens to be no material to substantiate ingredient of Section 33 of the Evidence Act.

24. **PW-8** is the Custom Inspector, who happens to be the Godown Incharge. He, as directed, has produced the entry register of 2010-11 and produced all the relevant documents including the original paper of destruction of seized Ganja having entry at serial no.7 of page-53 of the register dated 14.03.2011. Then has exhibited the signature of Deepak Kumar Chaudhary, the then Godown Incharge, the Superintendent, Custom, R. P. Singh, Sandeep Agnihotri, Judicial Magistrate, 1<sup>st</sup> Class (exhibited the documents in original as well as signature of respective members). During cross-examination, he has stated that as he took charge on 14.05.2014, on account thereof, all the entries were not made in his presence. The case property



was not stored at the godown. Certification of seized Ganja was done by Sandeep Agnihotri, Judicial Magistrate, 1<sup>st</sup> Class, Muzaffarpur. Destruction was not done in his presence. None of the member of destruction committee was a Judicial Officer. Then has denied the suggestion.

25. Thus, from the evidence as discussed herein above, it is crystal clear that during destruction of the property, representative sample were prepared, which has been produced in Court along with all the relevant papers on that score, validating the same, hence is to be treated as primary evidence as prescribed under Section 52A of the Act and the aforesaid eventualities has not been properly challenged at the end of the appellants. Furthermore, it is also evident that the manner of seizure has not been controverted, seizing of truck is also out of question. That means to say during course of trial, transportation of turmeric wherein the Ganja in such huge quantity being concealed, also is found out of controversy and the same is found duly substantiated with the destruction report. In likewise manner, the manner of preparation of sample, sealing thereof, and the transmitting the same to the Forensic Laboratory, as is evident from order sheet of the lower Court in consonance with the evidence of the complainant (PW-4) corroborated by other



witnesses, has substantiated the adoption of procedure so prescribed under Circular No.1/88, 1/89.

26. Apart from this, it is also evident that being public carrier, the activity so performed at the end of the prosecution party during course of interception of the truck bearing No.WB-23B-1771, inspection thereof, and tracing out the Ganja having been concealed in the bag containing turmeric at the public place that means to say at Tajpur, found to be in accordance with Section 43 of the N.D.P.S. Act, whereupon the mandate, the obligation to be performed in accordance with Section 42(2) of the Act is not at all found attracted.

27. Now, the question rest over application of Section 57 of the Act. From the evidence, it is evident that matter has already been communicated to the Superior Officials. On that very score, no cross-examination has been made.

28. It is to be noted that statement of an accused recorded under Section 67 of the Act, could not be the sole ground to convict an accused, more particularly, when the matter is referred to Larger Bench in *Toofan Singh vs. State of Tamil Nadu, reported in 2013 CRI.L.J. 4290*, for the purpose of proper identification of the officials in consonance with the police, so used under the Evidence Act, making the confession



inadmissible under Section 25 of the Evidence Act, is not at all found hazardous to the prosecution, as other evidence duly substantiate the same.

29. In the aforesaid facts and circumstances of the case as well as considering the material available on the record minutely, carefully, analytically, it is apparent that the prosecution has succeeded in substantiating its case, whereupon both the appeals lack merit, and are dismissed. Appellants are under custody, which they will remain till saturation of the period of sentence.

**(Aditya Kumar Trivedi, J)**

Vikash/-

|                   |            |
|-------------------|------------|
| AFR/NAFR          | A.F.R.     |
| CAV DATE          | N.A.       |
| Uploading Date    | 14.08.2019 |
| Transmission Date | 14.08.2019 |

