

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 05.10.2020

+ **CRL.A. 1088/2017 & CRL. M. (BAIL) 7501/2020**

SANTINI SIMONE

.....Appellant

Versus

DEPARTMENT OF CUSTOMS

.....Respondent

Advocates who appeared in this case:

For the Appellant :Mr. Akshay Bhandari, Advocate.

For the Respondent :Mr. Satish Aggarwala, Senior Standing
Counsel for Department of Customs.

Mr Amit Gupta, Advocate Amicus Curiae.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning a judgment dated 14.09.2017, whereby the Special Court convicted the appellant of an offence punishable under Section 20(b)(ii)(C) of the Narcotics and Psychotropic Substances Act, 1985 (hereafter 'NDPS Act') on account of being found in possession of 4.235 kgs of *charas*. The appellant was also held guilty of committing an offence under Section 23(c) of the NDPS Act, for attempting to export the illicit substance. By an order dated 21.09.2017, which is also impugned in this appeal, the appellant was sentenced to undergo rigorous imprisonment for a period of ten years with a fine of ₹1,00,000/- and in default of the fine, to undergo simple imprisonment for a further

period of four months for committing the offence punishable under Section 20(b)(ii)(c) of the NDPS Act. He was awarded a similar sentence for committing the offence punishable under Section 23(c) of the NDPS Act. Both the sentences were directed to run concurrently. It was further directed that after completion of the aforesaid sentence, the appellant be deported to his native country.

2. It is the prosecution's case that on 27.02.2012, one Sh. Anil Kumar, who was the Security Official of DIAL (Delhi International Airport Limited), gave information to the Customs Department that something suspicious was revealed during the screening of baggage of one of the passengers. Sh. Pawan Kumar, Air Customs Officer, who was also examined as PW-4, acted on the said information. He also included two independent witnesses, namely, Sh. Vishal Chettri and Sh. Dharmender Singh in further proceedings, which were conducted in the Customs Departure Hall of Terminal-3 of Indira Gandhi International Airport, New Delhi. The baggage in question belonged to the appellant, who is an Italian citizen (holding an Italian Passport No. AA 1955522 issued at Italy). At the material time, the appellant was travelling from Delhi to Bangkok by Flight No. TG 324 and he had been issued a boarding pass for the said flight. He was also issued a boarding pass for Flight No. TG 120 from Bangkok to Chiang Mai. It is stated that while his checked-in baggage was being sent through SOOG-2 belt, the security staff of DIAL (Sh. Anil Kumar) suspected something in his baggage during its screening. He informed the Customs Officer at the Departure Hall regarding the same. The

appellant was asked certain questions by the said Customs Officer but he could not answer them. Thereafter, the said Customs Officer took him to the Customs Counter for further examination.

3. The appellant was questioned. Thereafter, Sh. Pawan Kumar (the Customs Officer) served him a notice under Section 50 of the NDPS Act and the contents of the same were also read and explained to him. In addition, a notice under Section 102 of the Customs Act, 1962 was also served on the appellant and the contents of the same were also explained to him. Thereafter, his baggage (a steel trunk) was examined and his personal search was conducted.

4. On searching the appellant, his Passport (Passport No. AA 1955522 issued at Italy), boarding pass dated 27.02.2012 for Flight No. TG 324 from Delhi to Bangkok; boarding pass dated 27.02.2012 for Flight No. TG 120 from Bangkok to Chiang Mai; Check-in Baggage Tag No. TG 707840; One Currency Encashment Certificate dated 16.02.2012 issued by M/s Baluja Forex Pvt. Ltd.; his wallet (containing ₹50,732 Indian Currency, 1567 GBP, some Guatemalan Currency and five euro cent); and one Nokia mobile (model no. 1209) were recovered.

5. The Customs Officer examined the checked-in metal trunk before the *panch* witnesses. The said trunk was opened from the keys provided by the appellant. It contained some clothes and other personal effects of the appellant. They were removed and it was found that the metal trunk had a false bottom. The false bottom and

the false side walls of the metal trunk were broken. And, “*some hardened substance in dark brown colour in small ball shape individually wrapped in transparent polythene sheets*” was found in transparent polythene bags. They were concealed between carbon papers and newspapers. The appellant informed the Customs Officers that the same was *charas*. The Customs Officers took a small amount (equivalent to the tip of a matchstick) from the recovered substance and tested the same with Smith ION Testing Machine placed in the Departure Hall of T-3, IGI Airport, New Delhi, in the presence of the *panch* witnesses and the appellant. According to the prosecution, the test yielded a positive result for heroin 3% and THC 13%. Print out of the result was taken and kept in the possession of the Customs Officer.

6. The brown substance was weighed on a small weighing machine brought to the Departure Hall of T-3, IGI Airport and it was found that it weighed 4.235 kgs. According to the prosecution, the same was valued at ₹1,48,225/-. The said substance was seized by the Customs Officer under Section 42 of the NDPS Act, on the belief that it was being taken out from India, in contravention of the provisions of the NDPS Act and the Foreign Trade Policy.

7. It is stated that the Customs Officer (Pawan Kumar) drew three representative samples of 45 grams each. The samples were placed in separate transparent plastic pouches, which were kept in envelopes marked as A-1, A-2 and A-3. All the envelopes were sealed with the Customs Seal No. 6. The *panch* witnesses, the concerned Customs

Officer (who is also the complainant) along with the accused signed the said envelope.

8. The remnant substance (4.1 kgs of *charas*) was also seized and placed in a polythene bag. Carbon papers and newspapers used by the accused to conceal the said substance were also seized along with the metal trunk used to conceal the illicit substance. 4.1 kgs of the substance (remaining substance) was repacked in a transparent polythene bag and the said polythene bag was packed in a Delhi Duty Free polythene bag which was, thereafter, wrapped with a brown adhesive tape. This was wrapped in a white cloth and stitched and sealed with Customs Seal No.06 along with a slip bearing the signature of the *panch* witnesses, the accused as well as the Customs Officer. The clothes and personal effects of the accused were separately packed in a black colour polythene bag, which was then wrapped in a white cloth, which was sealed with the Customs Seal No. 6 over a slip containing the signatures of the *panch* witnesses, the accused as well as the Customs Officer.

9. The *panchnama* was drawn on the spot. It is stated that the *panchnama* proceedings commenced at 10:00 hours and concluded at 15:35 hours on 27.02.2012. The test memo was prepared by the complainant in triplicate. The accused also signed the said *panchnama* along with the *panch* witnesses.

10. Thereafter, summons under Section 67 of the NDPS Act was issued to the appellant and he made a voluntary statement in his own handwriting, wherein he confessed that he had been taking *hashish*

since the age of 17/18 years in Italy. He stated that he came to India for the first time in 1998 and visited many places. He stated that on his present visit, he stayed for six days in a village named Kasol near Manikaran in Himachal Pradesh. He stated that on 20.02.2012, he had bought *charas* from a local person. He had paid a sum of ₹3 lacs in cash to one Deenu Ram, who had facilitated the procurement of *charas*. He stated that he had given the said substance to a local person in Bhuntar, Himachal Pradesh and after two days, he got the same packed in a steel trunk. He stated that thereafter, he took a local bus from Bhuntar to Delhi. He arrived in Delhi on 26.02.2012 and stayed the night in a hotel at Paharganj (Hotel RR). He came to IGI Airport on 27.02.2012 for boarding a flight to Bangkok for his journey to Chiang Mai. He stated that he paid a sum of ₹2800/- for excess baggage. After the trunk had been checked in, the Airline Ground Staff took the said trunk to the extreme right corner and he followed the ground staff because they were carrying his trunk. He stated that he did not disclose that he was carrying *charas*, when questioned by the Customs Officer. He admitted that the said trunk had been opened in the presence of two independent witnesses and himself and 4.235 kgs of *charas*, which was concealed in the said trunk, was recovered. He admitted that he had purchased *charas* for his personal use and for monetary gain and he was aware that the same was an offence under the NDPS Act.

11. After his statement was recorded, the appellant was formally arrested, at 08:00 pm, on 27.02.2012. The Embassy of Italy at New

Delhi and the F.R.R.O were informed of his arrest by letters dated 27.02.2012.

12. The appellant was medically examined on 28.02.2012 and thereafter, on 28.02.2012, he was produced before the Court and was remanded to judicial custody.

13. The search of the luggage room at T-302, General Market, Main Bazar, Pahar Ganj, New Delhi was conducted, however, nothing incriminating was found.

14. The summons were issued to Sh. Anil Kumar and his voluntary statement was recorded on 27.02.2012. Similarly, summons were also issued to the *panch* witness, namely, Sh. Vishal Chettri and Sh. Dharmender Singh and their statements were also recorded on the same date, that is, on 27.02.2012.

15. On 28.02.2012, the Assistant Commissioner, Customs, IGI Airport authorized Sh. Prabodh Kumar, ACO to deposit the samples with Central Revenue Control Laboratory (CRCL). On the basis of the said authorization, he received the samples marked A-1 from the IO (Pawan Kumar), who in turn had received the same from Sh. Pankaj Kumar; SDO(A) in intact condition against acknowledgement on the detention receipt.

16. Sh. Prabodh Kumar took the sample marked A-1 along with the test memo in duplicate to the Chemical Examiner, CRCL and had handed it over to Sh. Rajeev Anand.

17. The Chemical Examiner, CRCL furnished a report confirming that the said sample was *charas*.

Evidence

18. To establish its case, the prosecution examined fourteen witnesses.

19. Sh. Pawan Kumar, Inspector Customs (IO) was examined as PW-4. He is also the officer who filed the complaint. He testified that on 27.02.2012, he was posted at IGI Airport as Inspector Customs. He stated that at about 09:30 am, Sh. Anil Kumar (employee of DIAL), had informed him, in the departure hall that during the x-ray of check-in baggage (one metal trunk) of a passenger, named, Santini Simone, he had observed certain suspicious articles inside the trunk. PW-4 deposed that he visited the x-ray machine situated at SOG-2, where the said trunk was lying and once again requested Sh. Anil Kumar to x-ray the same. This was done in his presence and he observed some ball shaped item kept at the bottom of the said trunk. He stated that thereafter, the passenger Santini Simone (the appellant herein) along with his trunk was taken to the Customs Office for further inquiry. He was asked about the “ball shaped item”. However, he did not reply. PW-4 stated that thereafter, two public witnesses, namely, Sh. Vishal Chatri and Sh. Dharmender were called for witnessing further inquiries. In their presence, he served a notice under Section 50 of the NDPS Act (Ex.PW4/A) to the appellant. He also served a notice under Section 102 of the Customs Act (Ex.PW4/B). He stated that he

explained the accused (appellant herein) his legal right to be searched in the presence of a Magistrate or a Gazetted Officer. However, the appellant did not want to exercise his right to be searched in the presence of a Magistrate or a Gazetted Officer and he replied to the aforesaid effect by penning down the same on the body of the notice. He stated that the trunk in question had a baggage tag, which indicated that the said trunk was booked in the name of the accused. It was established from the passport of the accused and his travel documents that the said trunk was his accompanying baggage. He stated that the trunk was locked and, on his demand, the accused produced the key to the said trunk and the same was opened in the presence of public witnesses. It contained certain clothes and personal effects, which were removed and an x-ray of the empty trunk was once again conducted at the x-ray machine near the Customs Office. The x-ray revealed “*ball shaped items*” at the bottom of the said trunk. The appellant failed to reply to the questions regarding the said items and it was decided to break open the trunk. He stated that “four plastic pouches” containing some substance were packed in the paper and carbon papers and were concealed in the bottom of the said trunk. The substance recovered from the four packets (sic pockets) was weighed and it was found to be 4.235 kgs. He testified that on being asked, the accused disclosed that the substance was *charas*. He stated that the substance recovered from each packet was tested separately and found positive for *charas* and the substance of all four packets was similar in nature, colour and texture. He stated that three samples of 45 grams each were drawn from the recovered substance and were given Mark

A-1, A-2 and A-3. Each sample was first kept in a plastic pouch and then kept in a paper envelope separately and sealed with Customs Seal No.6. The sample envelopes were duly signed by him, the accused and both the public witnesses. The remaining *charas*, packing material and personal effects of the said trunk were also sealed with the Customs Seal No.6. The trunk in question was also sealed after converting it into a cloth *pullanda*, with Customs Seal No.6 and a paper slip duly signed by the accused, public witnesses and himself was also affixed on the trunk as well as on the other sealed case property. He testified that seven detention receipts No. 66561, 66562, 66563, 66564, 66566, 66567 and 66568 were prepared by him, whereby the case property, samples, personal effects, *jamatalashi* etc. were deposited with SDO(A) in intact condition. The said detention receipts were collectively marked as Ex.PW4/C. PW-4 identified his signatures on the same. He stated that test memo in triplicate was prepared by him during *panchnama* proceedings. He also testified to the office copy of the same (Ex.PW4/D) and identified his signatures on the same. He also stated the *panchnama* (Ex.PW4/E) was prepared at the spot by him and he identified his signatures, signatures of the accused and the public witnesses on the same.

20. He stated that after completion of the *panchnama* proceedings, the case was put up before Sh. Kulwinder Singh, Superintendent and he briefed him about the case. The accused was directed by Sh. Kulwinder Singh to join further investigation and the statement of the accused (Ex.PW1/A) was recorded before Sh. Kulwinder Singh. He

stated that thereafter, the file was returned by Sh. Kulwinder Singh to him with the directions to go through the same. He stated that he had went through the same and thereafter, arrested the accused and prepared the Arrest Memo (Ex.PW4/F). He stated that information about the arrest was communicated to the family members of the accused, telephonically. The same was also informed to the Embassy of Italy, by a letter dated 27.02.2012 (Ex.PW4/H) and the F.R.R.O, by a letter dated 27.02.2012 (Ex.PW4/I). He stated that search was also conducted at Ankush Guest House, where the accused had stayed and a *panchnama* was drawn (Ex.PW4/K). In addition, he stated that the accused voluntarily surrendered his passport by a letter exhibited as Ex.PW4/L. He testified that during inquires of the present case, he received the test report issued by CRCL (Ex.PW4/N), which indicated that the sample A-1 was found positive for *charas*. He also stated that the remnant of the sample A-1 was also received along with the test report. He also testified as to the other items recovered from the search of the accused. He stated that after completion of the proceedings, he had prepared a report under Section 57 of the NDPS Act (Ex.PW1/H) and the same had been put up before Sh. Kulwinder Singh, Superintendent Customs. He also testified as to the other documents collected by him during the course of the investigation. He stated that thereafter, he filed the complaint (Ex.PW4/W).

21. Sh. Kulwendra Singh, Supdt. Customs, IGI Airport, New Delhi deposed as PW-1. He stated that he was informed about the interception of the appellant by Pawan Kumar, Customs Officer (PW-

4). He further stated that enquiries were conducted from the appellant and his voluntary statement under Section 67 of NDPS Act dated 27.02.2012 was recorded before him (Ex. PW-1/A). He stated that in the recorded statement, the appellant had disclosed the discovery of the concealed illicit substance from the false bottom of his steel trunk. He further affirmed that the statement is in the handwriting of the appellant. He stated that he had summoned Sh. Anil Kumar (PW-2) and Sh. Vishal Chettri and Sh. Dharmender Singh (PW-8) to tender their voluntary statements under Section 67 of the NDPS Act (Ex PW-1/C, PW-1/E, PW-1/G). On being cross-examined, he affirmed that the recovery of the illicit substance was not done in his presence. He stated that the ION Scan report was present in the case file, however, the same was not present in judicial record. He stated that the *panchnama* proceedings were not done in his presence. He further affirmed that no interpreter was provided to the appellant and the statement of the appellant under Section 67 of the NDPS Act is a voluntary statement.

22. Sh. Anil Kumar, DIAL Security Officer, IGI Airport deposed as PW-2. He stated that on 27.02.2012, the ground staff of Thai Airways came to him with the appellant and his baggage i.e. a steel trunk. He affirmed that the appellant identified the said trunk and the same was affixed with the baggage tag. He further stated that he conducted an x-ray of said trunk and observed that it contained some black type of substance of round shape. Thereafter, he passed the said information to the Custom Authorities and Sh. Pawan Kumar (PW-4) took the

appellant along with the steel trunk. During his examination in chief, PW-2 affirmed that he had signed his voluntary statement under Section 67 of the NDPS Act (Ex. PW-1/C) and identified the steel trunk in question. In his cross examination, he affirmed that he had disclosed his suspicion about the substance present in the baggage of the appellant to Mr. Vishal Chettri (Shift Manager) and thereafter, the appellant was taken by the custom authorities (Mr. Pawan and Mr. Kulwinder). He stated that he was not informed about the provisions of Section 67 of the NDPS Act, however, he affirmed signing the said statement. He further affirmed that the baggage was not sealed in his presence. During the x-ray, the said trunk had a baggage tag issued by the concerned airlines. He declined that the appellant did not know English and conversed with him in some other language.

23. Sh. Dharmender Singh, Coordinator, IGI Airport deposed as PW-8. He deposed that he was called by Sh. Anil Kumar (PW-2) to the said counter, wherein he stated that he saw an iron trunk. The said trunk was open and there were no articles present. Thereafter, the customs officer broke the false bottom of the said trunk and packets containing black colour substance were found. In his examination in chief, he identified the case property in question and affirmed having signed the paper slips present on the *pullandas*, sample envelopes, *panchnama*, summon and the statement under Section 67 of NDPS Act.

24. Sh. Prabodh Kumar, Inspector Customs, IGI Airport deposed as PW-3. He deposed that Sh. Pawan Kumar (PW-4) handed him one

sample marked as A1 in intact condition and sealed with the Custom's seal. He stated that he visited CRCL and deposited the sample with the test memo in duplicate and forwarding letter. On cross examination, he declined that the sample in question was tampered.

25. Sh. Rajeev Anand, Chemical Examiner, CRCL deposed as PW-14. He deposed that on 27.02.2012, he had received the sample in question along with forwarding letter and test memo by Sh. Pramod Kumar (PW-3) in intact condition. He further stated that the said sample was tested on 12.03.2012 under the supervision of Sh. Bhuwan Ram (PW-7). He further stated that before the sample in question was tested, the particulars of the sample were checked to make sure that the same is intact. He affirmed that the sample so tested was found positive for *charas*.

26. Sh. Bhuwan Ram, Chemical Examiner, Gr-1, CRCL deposed as PW-7. He deposed that he tested the said sample qualitatively on 12.03.2012 and the same was found positive for *charas*. In his cross examination, he stated that he could not tell the condition of the samples received by CRCL on 27.02.2012, as he was on leave. He further denied the possibility of tampering of the said samples.

27. The appellant in his statement under Section 313 of the CrPC stated that he had been falsely implicated in the present case and no contraband was recovered from him and the case property was planted on him. He stated that he was not proficient in the English language. He was provided with a typed English copy and made to write the

same in his own handwriting under duress. He stated that nobody was called as a *panch* witness before him. He further stated that police officials obtained his signatures on some blank papers. He further stated that he was not apprised of his legal rights and no notice was served upon him. He stated that the metal trunk having baggage tag no. TG 70 7840 did not belong to him and the same was not opened in his presence.

Submissions

28. Mr. Bhandari, learned counsel appearing for the appellant assailed the impugned judgment on, essentially, three fronts. First, he submitted that the provisions of Section 42 of the NDPS Act were not complied with. He contended that there was no material on record to establish that either Sh. Pawan Kumar (who had conducted the search and was examined as PW-4) had taken down any information on the basis of which he had conducted the search or that had he forwarded the same in writing to his superiors. He contended that the proceedings had taken place in Customs Hall of IGI Airport, which is not accessible to public and therefore, provisions of Section 42 of the NDPS Act were applicable. He further submitted that there could be no dispute regarding the same, as the *panchnama* (Ex.PW4/E) also recorded that PW-4 was acting under Section 42 of the NDPS Act. He referred to the decision of a Coordinate Bench of this Court in ***R. Ravi Chandran v. Djibrilla Diallo: CRL.A.268/1997, decided on 27.02.2008.*** He pointed out that in this case, the search had taken place at the Luggage Hold Area of the Customs Authorities and the

Court had held that the said place could not be described as a public place and therefore, the provisions of Section 42 of the NDPS Act was applicable. He also referred to the decision of the Supreme Court in ***State of Punjab v. Balbir Singh: (1994)3 SCC 299*** and ***Abdul Rashid Ibrahim Mansuri v. State of Gujarat: CRL.A. 78/1992, decided on 01.02.2000***, in support of his contention that provisions of Section 42 of the NDPS Act were mandatory.

29. Second, he contended that the procedure adopted by the concerned officials for drawing the samples was improper and the samples drawn could not be stated to be representative of the substance allegedly found in possession of the appellant. He pointed out that PW-4 (Sh. Pawan Kumar) had admitted in his cross-examination that he had mixed the contents of all the four packets allegedly recovered before drawing any samples. Mr. Bhandari submitted that the said procedure was improper. He submitted that if the contents of all the packets are mixed and a sample is drawn, it would give a positive result for a contraband, even if only one packet contained the same. He submitted that this would not correctly represent the quantity of contraband recovered. He referred to the decisions of a Coordinate Bench of this Court in ***Amani Fidel Chris v. Narcotics Control Bureau: CRL.A. 1027/2015, decided on 13.03.2020***; ***Charlse Howell @ Abel Kom v. NCB: CRL.A. 755/2016, decided on 13.08.2018***; ***Edward Khimani Kamau v. The Narcotics Control Bureau: CRL.A. 1113/2011, decided on 28.05.2015*** and ***Basant Rai v. State: CRL.A. 909/2005, decided on 02.07.2012***.

30. Third, he contended that the prosecution had failed to establish that the case properties and samples were properly stored and were not tampered with. He submitted that PW-4 had admitted that he had not put any seal on the test memo. PW-10 had testified that PW-4 had returned the seal to him to deposit it in the *malkhana*, at the time of depositing the samples and case property, which was on the night of 27.02.2012. He submitted that this would establish that the seals had been put on the samples subsequently. He submitted there is also no evidence that the FSL Form was filled in at the spot and there is no material to prove that it was deposited along with the samples in the *malkhana*. He submitted that although PW-10 had deposed that the samples had been deposited in the *malkhana*, there is no evidence on record to show that the samples had thereafter, been withdrawn from the *malkhana* and by whom. None of the witnesses for the prosecution have deposed regarding the withdrawal of any sample from the *malkhana* for being sent to CFL. However, Sh. Pramod Kumar Inspector Customs, SIIB (who deposed as PW-3) had stated that he was instructed to deposit the samples with CRCL and on 28.02.2012, he was handed over one sample marked A-1, in intact condition, by Sh. Pawan Kumar, Inspector Customs (PW-4). Mr. Bhandari contended that PW-4 had not testified to the aforesaid effect and further, none of the witnesses had testified that he had withdrawn the sample from the *malkhana*. No such entry in the *malkhana* was shown to the Trial Court or brought in evidence. He also submitted that the seal appearing on the test memo was not legible and therefore, the testimony that the seals on the sample were tallied with the

specimen seal is of no relevance. He submitted that the seal could be tallied with the sample seal only if the seals were legible. He further submitted that the samples were stated to be of chocolate brown colour. However, the colour of the sample mentioned by the CFL were dark greenish brown coloured and when the case property was produced in Court by PW4, it was blackish brown. He further submitted that according to the prosecution, the substance was tested on a testing kit (ION Testing Machine) and the results were printed by the said machine. However, no such print out has been produced in evidence.

31. Next, he submitted that as per the *panchnama*, the case property – 4.1 kgs of *charas* – was wrapped in two polythene bags: one plastic polythene, which was then put into a polythene bag of Delhi Duty Free. This was also mentioned on the detention receipt, pertaining to the said substance. However, when the *pullanda* containing the said case property was produced in Court, it was wrapped in only one polythene and there was no second polythene bag marked as Delhi Duty Free. He submitted that this clearly established that the case property had been tampered with. In addition, the seals on sample A-2 and A-3, when produced in Court, were broken. He further stated that all samples A-1, A-2 and A-3, when produced in Court were in zip pouch polythenes. However, it was not the case of the prosecution that they had been placed in any zip pouchs when the same were seized.

32. Mr. Satish Aggarwala, learned counsel appearing for the Department of Customs (the prosecution) countered the submissions

made by Mr. Bhandari. He submitted that Section 42 of the NDPS Act would not be applicable to search conducted in public places. He referred to the decisions in *Narayanaswamy Ravishankar v. Asstt. Director, Directorate of Revenue Intelligence: 2003 Criminal LJ 27*; *Ganga Bahadur Thapa v. State of Goa: (2000) 10 SCC 312*; *Utpal Mishra Air Customs Officer, I.G.I. v. Mr. Nicelai Christensen: 1997 Cri LJ 4475* and *Joseph Henry and Ors. v. The Intelligence Officer, NCB Chennai: CRL.A. 590/1998 decided on 30.01.2002*, in support of his contention.

33. He contested the contention that there was an infirmity in the procedure for drawing the samples. He referred to the testimony of PW-4, wherein he had stated that the substances recovered from each packet were tested separately and found positive for *charas*. And, the substances of all the four packets were similar in nature, color and texture. He submitted that he was not cross-examined on the aforesaid aspect. Further, he contended that the appellant had signed the *panchnama* (Ex.PW4/E), wherein it was mentioned that *charas* was recovered. He stated that the same constituted an admission on the part of the appellant that the substance recovered was *charas* and therefore, there was no requirement for the prosecution to establish the same. He referred to Section 58 of the Indian Evidence Act, 1872 and submitted that since the appellant's signature appeared on the *panchnama*, there was no requirement for the prosecution to prove that the substance recovered was *charas*. He relied on the decision of the Supreme Court in *Kalema Tumba v. State of Maharashtra and*

Anr.: 1999 SC (Cri.) 1422. He also referred to the decision of a Coordinate Bench of this Court in **Chand Singh v. The Narcotics Control Bureau: CRL.A. 1370/2010, decided on 30.11.2015.**

34. He submitted that even if it is assumed, for the sake of argument, that the procedure for drawing the samples was incorrect, nonetheless, the appellant was liable to be convicted for non-commercial quantity, that is, upto 1 kg, since it was established that at least one of the packets contained *charas*.

35. Lastly, he submitted that there was no ground to suspect that any of the case properties were tampered with. He submitted that PW-4 had testified that the case property and samples were sealed and he had prepared the test memos during *panchnama* proceedings. PW-2 had identified the case properties that were seized and when the said property was produced in Court, the seals were intact. He also referred to the testimony of PW-3 (Sh. Pramod Kumar), who had testified that Sh. Pawan Kumar had handed over the samples sealed with the Customs Seal in intact condition along with the test memo in duplicate to him and he also denied the suggestion that the samples were tampered with. He referred to the decision of the Supreme Court in **Hardip Singh v. State of Punjab: (2008) 8 SCC 557** and **State of Rajasthan v. Sahi Ram: (2019) 10 SCC 649** and contended that the prosecution was required to establish that the samples of the recovered substance had been sealed at the spot and were in intact condition, when they reached the laboratory. He submitted that in the present case, there could be no doubt that the sample was properly sealed and

had been received at CRCL with the seal intact. He also referred to certain other decisions which had followed the decision of the Supreme Court in **Hardip Singh** (*supra*).

36. Next, he submitted that there was no difference in the color of the material seized; the color of the samples; and the color of the material as produced in Court. The testimonies of witnesses indicating different shades of the same were not significant and could be explained on account of difference in their perception. He referred to the decision of this Court in **Siddiqua v. NCB: (2007) 1 JCC (Narcotics) 22** in support of his contention.

37. He submitted that it is not necessary that the samples drawn and the test memo should be sent to the Chemical Examiner immediately or on the same day. He referred to the decision of this Court in **Kulwant Singh v. NCB: CRL. A. 248/1997, decided on 18.01.2008** and **Ambrose Ihecherobi Okeke v. D.P. Saxena, Intelligence Officer & Anr.: CRL.A. 1110/2010, decided on 05.08.2013**. On the strength of the aforesaid decisions, he contended that there was also no requirement of handing over the seals to an independent person.

38. He also submitted that it was not essential that the entire seized material be produced. He relied upon the decision of the Supreme Court in **State of Rajasthan v. Sahi Ram** (*supra*). He further contended that the appellant could not be acquitted on the grounds of any procedural irregularity.

39. Lastly, he contended that the appellant had confessed to the offence in his statement under Section 67 of the NDPS Act and the same was admissible in evidence. He relied upon the decision of the Supreme Court in ***Kanhaiyalal v. Union of India: 2008 (1) JCC (Narcotics) 23***, in support of the said contention.

Reasons and Conclusion

40. The first and foremost question to be addressed is whether the provisions of Section 42 of the NDPS Act have been violated. Undisputedly, the provisions of Section 42 of the NDPS Act are mandatory. It is also not disputed that none of the Customs Officers had recorded any reasons for believing that an offence punishable under Chapter IV of the NDPS Act has been committed or that a search warrant or authorization cannot be obtained without affording an opportunity for concealment of the evidence or facility for the escape of an offender. It is also relevant to note that the complaint filed by the respondent also expressly indicates that proceedings were undertaken under Section 42 of the NDPS Act. It is also mentioned in the *panchnama* (Ex.PW4/E) that the substance was recovered and seized under Section 42 of the NDPS Act.

41. Indisputably, if the provisions of Section 42 of the NDPS Act are applicable then it is apparent that the same have not been complied with. As stated above, the provisions of Section 42 of the NDPS Act are mandatory and therefore, non-compliance of the same would

vitiating the proceedings. However, the key question to be addressed is whether the provisions of Section 42 are applicable in the given facts.

42. It was contended on behalf of the appellant that since the complainant has expressly stated in the complaint as well as in the *panchnama* that the proceedings were conducted under Section 42 of the NDPS Act, it is not open for the prosecution now to contend the contrary. However, the said contention is unpersuasive. It is well settled that merely mentioning a provision or a certain section of an enactment in the pleadings or in documents, would not necessarily preclude any party from raising any question of law in that regard. The question whether Section 42 of the NDPS Act is applicable or not is a question of law and this question can be raised at any stage.

43. The appellant's contention that Section 42 of the NDPS Act is applicable is premised on the assumption that the search had not taken place in a public place. According to the appellant, the baggage hold area of T-3 was not a public place, as it was accessible to any member of the public. It was contended that the entry to the said area is restricted and cannot be accessed without authorisation/permission. The Customs Office located near the Departure Hall is also not accessible to the general public. In **R. Ravichandran** (*supra*), a Coordinate Bench of this Court has reasoned that since the accused therein was intercepted at the Departure Hall of IGI Airport and it was brought in evidence that the same was not accessible to public without prior permission, the said Departure Hall could not be held to be a

public place and therefore, the provisions of Section 42 of the NDPS Act were applicable.

44. In **R. Ravichandran** (*supra*), the Trial Court had acquitted the accused on the ground that provisions of Section 42 of the NDPS Act were not complied with. And, the said decision was upheld. This Court found that there was no perversity in the conclusion of the learned Trial Court. This Court followed an earlier decision of a learned single judge of this Court in **Richard Thomas Wrigley v. Customs and Anr.: 1997 CriLJ 2741**, wherein it was held that since the Customs Counter at the airport is located after the immigration check and is not accessible to the public, it is not a public place. It is material to note that in **R. Ravichandran** (*supra*), this Court had adjudicated the appeal without any representation from either side and thus without any assistance from counsel. Rather than dismissing the appeal for non-prosecution, this Court had examined the decision of the Trial Court and having found that it was not perverse, dismissed the appeal on merits.

45. The learned Single judge failed to consider an earlier decision of the Division Bench of this Court in **Utpal Mishra Air Customs Officer, I.G.I.** (*supra*). In that case, the Division Bench had expressly held that it was unable to subscribe to the view as expressed in **Richard Thomas Wrigley** (*supra*). It also noticed that the said judgment had been stayed by the Supreme Court. Thus, the decision in **Richard Thomas Wrigley** (*supra*) stood overruled and the decision in

R Ravichandran (*supra*), which was rendered overlooking the same, is *per incuriam*.

46. The definition of the expression ‘public place’ is set out in Explanation to Section 43 of the NDPS Act. The said definition reads as under:

“Explanation. For the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”

47. As is apparent, the expression ‘public place’ is defined in wide terms. In **Utpal Mishra Air Customs Officer, I.G.I** (*supra*), the Court had noted the above and held as under:

“5. A reading of the aforesaid provisions, *inter alia*, shows that for seizure of any narcotic drug or psychotropic substance in any public place and for detention and search of any person whom the officer has reason to believe to have committed an offence punishable under Chapter IV and for his arrest, it is not necessary to take down the information in writing or to send a copy thereof to his immediate official superior. The restrictions of Section 42 about the search, seizure, detention or arrest between sunrise and sunset is also not applicable where search, seizure, detention and arrest in relation to offence punishable under Chapter IV is committed at a public place. The explanation to Section 43 sets out inclusive definition of the expression “public place” to include any public conveyance, hotel, shop or other place intended for use by, or accessible to the public. The definition of the expression “public place” is very wide. For deciding whether a particular area/place is or is not a “public place” the determining factor is whether the

same is accessible to or intended to be used by public or not. The accessibility of the public to such a place can be restricted or unrestricted. A restricted accessibility could be where a fee may have to be paid for entry to such a place or a permission is required for entry or alike. Even with these restrictions the place would remain a “public place”. These restrictions by itself would not change the character of a “public place” and will not result in public place losing its character a such. That place would be a “public place” to which public have or permitted to have access on payment or otherwise.

6. The Airport or Customs area at the Airport or Custom counter or Luggage hold area or Immigration area or alike at the Airport would thus be a public place. These areas are accessible to the public, may be with certain restriction or requirement of a permission for entry these areas.

7. It could not have been the intention of the Legislature that at the aforesaid areas at the Airport, search, seizure, detention and arrest for commission of an offence under Chapter IV of the Act shall not take place between sunset and sunrise. It is also not practical. It will almost make impossible the detention of offences under the Act which may be committed at the Airport. It is well known that many International flights depart from India and also reach India between sunset and sunrise. It could not have been intended that the persons in respect of whom there may be reasonable apprehension of commission of offence under Chapter IV of the Act at the Airport, they should not be subjected to investigation between sunset and sunrise.”

48. The contention that certain areas in the airport cannot be described as a public place merely because the entry is restricted, was expressly rejected.

49. In *Narayanaswamy Ravishankar* (*supra*), the Supreme Court had authoritatively held that an airport is a public place and therefore, the provisions of Section 42 of the NDPS Act would not be applicable. Paragraph no. 5 of the said judgment is relevant and is set out below:

“5. 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. Furthermore, in the mahazar which was prepared, it is clearly stated that the seizure was made by PW 1. The mahazar was no doubt drawn by one S. Jayanth. But, the contention of the learned Senior Counsel that the prosecution version is vulnerable, because Jayanth has not been examined, is of no consequence because it is PW 1 who has conducted the seizure. With regard to the alleged non-compliance of Section 57 of the NDPS Act, the High Court has rightly noted that PW 3 has stated that the arrest of the accused was revealed to his immediate superior officer, namely, the Deputy Director.”

50. In *Joseph Henry, Rukmani* (*supra*), the Madras High Court after referring to the decision of the Division Bench of this Court in

Utpal Mishra (*supra*) held that an airport could not be considered as a public place, as referred to under Section 42 of the NDPS Act.

51. Admittedly, there is a material difference in Section 42 and 43 of the NDPS Act. Whereas Section 42 of the NDPS Act requires recording of reasons for the belief and for taking down the information received in writing, in regard to commission of an offence; section 43 of the NDPS Act does not require recording of any such belief or reason. In **Karnail Singh v. State of Haryana: (2009) 8 SCC 439**, the Supreme Court had held as under: -

“26. The material difference between the provisions of Sections 42 and 43 of the NDPS Act is that 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 substance in a public place where such possession appears to him to be unlawful.”

52. A similar view was also expressed by the Constitution Bench of the Supreme Court in **State of Punjab v. Baldev Singh: (1999) 6 SCC 172**, in the following words:-

“10.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 substance in a public place where such possession appears to him to be unlawful.”

53. Notwithstanding the averment made in the complaint that the recovery and seizure was done under Section 42 of the NDPS Act, the same is clearly not applicable since the recovery and seizure was done in a public place. Considering the above, the contention that the provisions of Section 42 of the NDPS Act was not complied with, is irrelevant.

54. The next aspect to be examined relates to the testing conducted on the spot and drawing of samples from the *charas* allegedly recovered from the appellant’s trunk. The question to be addressed is whether the samples drawn were representative of the substance recovered from the appellant’s baggage. The controversy to be addressed is, essentially, three-fold. The first relates to whether the procedure for drawing samples allegedly followed by the complainant is permissible. Second, whether the substance in all the four pouches was tested prior to it being kept together. Third, whether the contents of the four packets were properly mixed to form a homogeneous mixture and the samples were drawn from the same.

55. Before proceeding further, it would be relevant to refer to certain decisions, where the courts have examined the procedure for drawing samples.

56. In *Gaunter Edwin Kircher v. State of Goa: Secretariat Panaji, Goa: (1993) 3 SCC 145*, two cylindrical pieces of *charas* weighing 7 grams and 5 grams each were allegedly recovered by the concerned enforcement agency. One piece weighing 5 grams was sent for chemical analysis. The Supreme Court did not sustain the appellant's conviction for possessing 12 grams of *charas* and held that he could be convicted only for possessing 5 grams of *charas* which was sent for chemical analysis. The relevant extract of the said judgment is set out below:

“5. The next and most important submission of Shri Lalit Chari, the learned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gms of Charas. According to the learned counsel, only a small quantity i.e. less than 5 gms has been sent for analysis and the evidence of PW 1, the Junior Scientific Officer would at the most establish that only that much of quantity which was less than 5 gms of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis cannot be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other intoxicating type which are not covered by the Act. Therefore the submission of the learned counsel is that the quantity proved to have been in the possession of the accused would be small quantity as provided under Section 27 of the Act and the accused should have been given the benefit of that section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms also was recovered from the possession of the accused and there was no need to send the entire quantity for

chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas, the necessary inference would be that the other piece also contained Charas and that at any rate since the accused has totally denied, he cannot get the benefit of Section 27 as he has not discharged the necessary burden as required under the said section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms and 5 gms respectively. As already mentioned only one piece was sent for chemical analysis and PW 1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms of Charas were recovered from the accused. In view of the evidence of PW 1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.”

57. In ***Sumit Tomar v. State of Punjab: (2013) 1 SCC 395***, the Court was examining the case where according to the prosecution, two plastic bags containing ‘*bhooki*’ opium powder were recovered from the dickey of the car. The contents of both the bags were mixed and two samples of 250 grams each were taken out. The remaining contraband weighing 69.5 kgs were sealed in two bags and the samples were sent to Forensic Science Laboratory for examination. It was contended on behalf of the appellant that the procedure followed by the concerned seizing officials was irregular and the alleged contraband could not be mixed and the samples taken thereafter. It was contended that since the punishment is based on the quantity of contraband recovered, mixing of substances from two bags was unacceptable. The said contention was rejected. The Court held that merely because different punishments have been prescribed depending on quantity of the contraband, the same has not caused any prejudice to the appellant. The Court reasoned that even after taking two samples of 250 grams each, 69.5 kgs of contraband was still available.

58. In ***Amani Fidel Chris (supra)***, four brown colour packets were allegedly recovered. The said packets contained powdery substances, which on being tested, yielded a positive result for heroin. The substances were then mixed properly and weighed with the help of an electronic machine and it was found that the same weighed 1.5 kgs. Thereafter, two samples of 5 grams each were drawn from the recovered substance and put into zip lock pouches. It was contended that the procedure adopted was not permissible. The procedure of

transferring the contents of all four packets into one and then drawing a sample from the mixture had caused a serious prejudice, as it could not be ascertained whether the four packets contained the alleged narcotic. The Court found that the procedure adopted fell foul of the Standing Order No.1/88 dated 15.03.1988 issued by the Narcotics Control Bureau (which was *pari materia* to Standing Order 1/1989 dated 13.06.1989, issued by Department of Revenue, Ministry of Finance, Government of India). The Court held that where more than one container/package is found, it is necessary that samples be drawn from each separate container/package and be tested with a field-testing kit. If the container/packages are identical in shape, size and weight then lots of 10 or 40 container/packages may be prepared. Thereafter, representative samples from each container/package be drawn.

59. In **Basant Rai** (*supra*), a Coordinate Bench of this Court considered a case where the accused was allegedly found carrying a polythene bag, containing eight smaller polythene bags, containing a brown colour substance, which was alleged to be *charas*. The Investigating Officer had taken small pieces from each packet and mixed the same and thereafter, drawn two samples which were sent to FSL for analysis. The Court found fault with the said procedure and allowed the appeal. The Court held as under:

“25. After hearing both the learned counsel for parties and going through the Trial Court Record, I find force in the submission of learned counsel for appellant. Admittedly, the samples were drawn after breaking small pieces from 08 of the polythene bags which were allegedly kept in a green coloured bag by the

appellant in his right hand. The IO prepared two samples of 25 grams each after taking a small quantity from each of the slabs.

26. Though the settled law is that if it is not practicable to send the entire quantity then sufficient quantity by way of samples from each of the packets of pieces recovered should be sent for chemical examination. Otherwise, result thereon, may be doubted.

27. For example, if the 08 packets were allegedly recovered from the appellant and only two packets were having contraband substance and rest 6 packets did not have any contraband; though all maybe of the same colour, when we mix the substances of all 8 packets into one or two; then definitely, the result would be of the total quantity and not of the two pieces. Therefore, the process adopted by the prosecution creates suspicion. In such a situation, as per settled law, the benefit thereof should go in favour of the accused. It does not matter the quantity. Proper procedure has to be followed, without that the results would be negative.”

60. In **Edward Khimani Kamau** (*supra*), a Coordinate Bench of this Court rejected the procedure where the substance found in nine packets was transferred into one packet and two samples were drawn from the same. The Court held that it could not be ascertained that all nine packets contained heroin.

61. In **Charlse Howell @ Abel Kom** (*supra*), the NCB had allegedly recovered 330 grams of heroin. The powder recovered was packed in 166 polythene strips, which were concealed in the laces/hem of two *lehengas*. The concealed powder from the 166 strips was collected in a

transparent polythene and on weighing, it was found to be 330 grams. Two samples of five grams were drawn and put separately in zip lock polythene pouches. A Coordinate Bench of this Court following the decision of the Supreme Court in ***Union of India v. Bal Mukund: (2009) 12 SCC 161***, held that the procedure adopted was not in conformity with the Standing Order 1/88 dated 15.03.1988, issued by the Narcotics Control Bureau.

62. At this stage, it is also relevant to refer to Standing Order 1/1989 dated 13.06.1989, issued by the Department of Revenue, Ministry of Finance, Government of India. The relevant extract of the said Standing Order, which pertains to the procedure to be adopted for drawing samples is set out below:

“Section (II) provides for a general procedure for sampling, storage and reads as under:-

“SECTION (II) – GENERAL PROCEDURE FOR SAMPLING, STORAGE, ETC.

2.1 All drugs shall be properly classified, carefully, weighed and sampled on the spot of seizure.

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 witness (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.

2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in cases of opium, ganja and charas (hasish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages /containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4 In the case of Seizure of a single package/container, one sample (in duplicate) shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5 However, when the packages/containers seized together are of identical size and weight, bearing identical markings and the content of each package given identical results on color test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of 10 packages/ containers/ except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6 Whereafter making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching will be necessary and no sample need to be drawn.

2.7 If such remainders are more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate)

may be drawn for such a reminder package /container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample are in equal quantity is taken from a package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9 The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should bear the S.No. of the package(s)/ containers from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope which should also be sealed and marked 'secret-drug sample/ Test memo' is to be sent to the chemical laboratory concerned.”

63. Concededly, in the present case the instructions contained in Standing Order No. 1/89, was not followed.

64. In ***Khet Singh v. Union of India: (2002) 4 SCC 380***, the Supreme Court had, in the context of similar instructions issued (Standing Order 1/88) by the NCB, New Delhi, held that the same were to be followed by the Officer-in-charge of the investigation of crimes falling within the purview of the NDPS Act. The Court held that even though the said instructions did not have the force of law, they were intended to guide the officers to ensure that a fair procedure is adopted in the investigation.

65. In a subsequent decision, in the case of ***State of Punjab v. Makhan Chand: (2004) 3 SCC 453***, the Supreme Court held that Section 52A(1) of the NDPS Act did not empower the Central Government to lay down the procedure for search of an accused. But, a subsequent decision rendered by the Supreme Court on 31.03.2009, in ***Union of India v. Bal Mukund*** (*supra*), the Supreme Court observed that Standing Instructions No. 1/88, which required samples of adequate quantity be drawn, had not been followed and the same was referred to as “a requirement in law”.

66. The decision in the case of ***Bal Mukund*** (*supra*) which was rendered by a Bench of three Judges, is binding. It also cannot be disputed that even if the said instructions are not considered as binding, they lay down a procedure which the Investigation Officers are required to follow in the interest of ensuring that the samples drawn truly represent the composition of the substance recovered.

67. The entire purpose of drawing a sample and testing the same is to establish the composition of the substance from which the sample is drawn. Keeping this object in view, it must be ensured that the sample is a true representative of the substance recovered, before it can be assumed that the composition of the sample is the same as that of the recovered substances.

68. Bearing the aforesaid in mind, this Court may proceed to examine the evidence obtaining in this case.

69. At the outset, it is necessary to observe that there is little clarity as to the manner in which the samples were drawn. Pawan Kumar – who was examined as PW-4 and is also the Investing Officer as well as the complainant before the Trial Court – had testified that while the trunk in question was being scanned under the X-ray machine, he had observed “*similar type of ball shaped items in the bottom of the trunk*”. The trunk was broken and from the lower outer portion, four plastic pouches containing “some substance” were concealed in the bottom of the said trunk. He had testified that the substance recovered from the four packets was weighed and it was found to be 4.235 kgs. He further testified that “*the substance recovered from each packet was tested separately and found positive for charas. The substance of all four packets was similar in nature, colour and texture. Three samples of 45 grams each were drawn from the recovered substance and were given mark- A1, A2 and A3*”. It is relevant to note that he did not disclose the size of each of the packets. He also did not testify that all the four packets were identical in their shape. It is also important to note that he did not state the texture of the substance – whether the substance recovered was in the form of a single solid piece or in the form of powder. More importantly, PW-4 did not testify that he had mixed the said substance. He did not specify as to whether he had drawn samples from the substance recovered from separate packets. He did not testify as to how the substance was tested – whether it was done on a field-testing kit or otherwise.

70. PW-4 was cross-examined with regard to the recovery and sampling. In his cross-examination, he stated that the representative samples were drawn from the substance recovered from the four pouches after homogeneously mixing the same. He was pointedly asked as to what he meant by homogeneous mixture. He responded by stating that *“All the substance (ball shaped) of all the four packets were collected in one place and thereafter samples were drawn from the said”*. He further stated that he did not count the recovered ball shaped substance, but they were weighed by him. He conceded that he did not check all the ball shaped substance except one or two. He also stated that he did not take any extract to test the substance. Although, he was extensively questioned regarding the sampling of the substance, he merely deposed that the substance was ball shaped. There is no clarity whether each pouch had a single sphere of the substance or each pouch comprised of multiple spheres of the substance. However, it is apparent that he did not draw samples from each of the packets or tested the contents of each of the packets. According to him, he only checked *“one or two ball shaped substance”*.

71. Although in his examination-in-chief, PW 4 had testified that he had tested the contents of each packet separately, the same cannot be believed for several reasons. First of all, for the reason that it is not consistent with his statements made in the cross-examination, where he had stated that he had only checked one or two ball shaped substances. If his testimony is accepted, then either all the four

pouches contained substance in the form of a single spheres each or each packet contained the substance in the form of several spheres. In either case, he had only checked one or two of them. Secondly, this is also not consistent with the *panchnama* (Ex.PW4/E). The *panchnama* states that “*On breaking open the false bottom and side wall of the Metal trunk, some hardened substance in dark brown colour in small ball shape individually wrapped in transparent polythene sheet was found in transparent polythene bag and then concealed between Carbon papers and Newspapers*”. This indicates that the substance recovered was a “hardened substance” and was in a spherical shape. This was packed in a transparent polythene sheet, which was found in a polythene bag. There is no other evidence that the substance was in spherical form and wrapped in polythene sheets, which were then packed in a transparent polythene packet. On the contrary, the evidence led is that the substance was found to be contained in four polythene pouches. Therefore, the packaging does not consist of a polythene packet containing multiple spheres individually wrapped in polythene. It does appear (although it cannot be ascertained with any certainty) that the substance was in the form of four spherical shaped balls, separately wrapped in polythene which were then packed in polythene pouches.

72. Thirdly, the *panchnama* further records that the Custom Officer took “*a very small amount (equivalent to a tip of a match stick) from the recovered substance and tested the same with the Smith ION testing machine placed in the Departure Hall of T-3, IGI Airport, New*

Delhi". This does not indicate that the contents of each packet were tested separately but only a small amount equivalent to a tip of a match stick was tested. It is obvious that a small amount of the substance purportedly taken out for testing would be from the contents of only one of the four packets that were recovered and not from all of them. Fourthly, the *panchnama* indicates that only one such test had been conducted. It is recorded in the *panchnama* that "*the Smith ION testing machine gave the positive result for Heroin 3% and THC 13% for the sample testing. Print for the said result was taken by the Customs Officer in his possession*".

73. Although the *panchnama* refers to a Customs Officer, it is obvious that the Customs Officer in question is Pawan Kumar (PW-4). The print out of the test result would indicate the number of tests conducted. If the contents of each of the packet was tested separately, there would be four such print-outs or one print-out recording the result of four such tests. However, the print out in question has not been brought in evidence, even though it is stated that it was in the possession of PW-4. It is also material to note that it is not the prosecution's case that any heroin was recovered from the appellant. The CRCL test result also does not disclose any presence of heroin in the sample sent for analysis. But the alleged test had also returned a positive result for heroin.

74. In view of the above, this Court is unable to accept that the prosecution has established that the contents of each of the four

packets that were allegedly recovered, were tested and found to be *charas* prior to the contents of the said packets being placed together.

75. Although PW-4 had stated in his cross-examination that the representative samples were drawn from the recovered substance after homogeneously mixing the same, it is obvious that no such homogeneous mixture was made. The substance in each of the four packets was allegedly a “hardened substance”. It also appears that the same was in the form of a spherical balls. There is no evidence to indicate that the said hardened substance from each of the four packets was crushed and then mixed together.

76. As observed earlier, it is difficult to accept that each packet contained multiple spheres individually packed in polythene, as this is not the testimony of any of the witnesses. However, the *panchnama* indicates that each ball shaped substance was separately wrapped in a polythene and was contained in a packet. Therefore, it is apparent that there were four separate spheres. PW-4 had deposed that all the substance (ball shaped) were collected at one place. This would obviously mean that all four spheres were collected at one place. Considering that the substance was a hardened substance, there could be no question of mixing them to obtain a homogeneous mixture; placing four balls (or for that matter a number of spheres) together does not amount to creating a homogeneous mixture.

77. The complaint filed by PW-4 is verbatim of the *panchnama*, insofar as the recovery of the substance, drawing of the samples and

testing is concerned. Thus, even according to the complaint filed by PW-4, only a small amount equivalent to the tip of a match stick from the recovered substance was tested. The complaint also does not mention that the contents of each of the four packets allegedly recovered were tested separately. The contention that the contents of each of the packets were tested separately is advanced only on the strength of the testimony of PW-4, which is inconsistent with the complaint, the *panchnama* drawn by him, and his deposition on being cross-examined. Thus, it cannot be accepted.

78. The prosecution's case that on testing a small quantity of the substance, it was revealed that it was *charas* is premised on an alleged test conducted on an ION Scan machine, in the presence of *panch* witnesses, as recorded in the *panchnama*.

79. Out of the two *panch* witnesses who had witnessed the *panchnama*, only one was examined – Sh. Dharmender Singh, Coordinator, DIAL. He was examined as PW-8. His examination-in-chief spans almost a year. His examination began on 20.11.2014. In his brief testimony recorded on that date, he stated that he was called by Sh. Anil Kumar at about 09:45 am and he went to the counter. He stated that Sh. Anil Kumar was present there and one iron trunk of the accused was found opened at the said counter. The trunk did not have any articles but a false bottom was found in the said trunk. He stated that thereafter the Customs Officer and Sh. Vishal Chettri, Manager were also called there. The Customs Officer broke open the bottom of the trunk and it was found containing some black coloured substance,

which he claimed weighed more than 5 kgs. His further examination-in-chief was deferred and it was resumed on 03.12.2014. On this day, he stated that he was called by Sh. Pawan Kumar, Customs Inspector through Sh. Anil Kumar at about 10.00 am and he reached the SOG-2 Counter/Customs Office in the Departure Area. He testified that three samples were drawn from the recovered substance and were kept separately in polythene pouches and further kept in an envelope. His examination-in-chief remained incomplete and it was resumed on 27.08.2015. On this date, he commenced his examination by affirming that the weight of the substance recovered was 4.235 kgs. During the course of his examination-in-chief, he affirmed that he had signed the *panchnama* after reading it. He also affirmed that he had recorded his statement under Section 67 of the NDPS Act. A plain reading of the said statement under section 67 of the NDPS Act indicates that it merely incorporates the contents of the *panchnama*. His examination-in-chief was finally completed on 03.10.2015.

80. In his cross-examination, he stated that Mr. Vishal Chettri had also accompanied him to SOOG-2. He had proceeded to the said counter where he had met the appellant, Mr. Anil Kumar and Mr. Pawan Kumar (PW-4). He stated that the first document that was prepared on the spot was a note/document, in respect of the search of the baggage of the accused. However, he did not remember whether it was a single page document or was in duplicate. He also did not remember the contents of the same. He stated that he had tendered his statement before Sh. Kulwinder Singh, the Customs Officer, on that

date. He affirmed that in his statement (Ex PW1/E), he had mentioned about the drawing of samples, manner of their sealing and affixing of paper slips, however, on being confronted with the said statement, it was noted that it did not mention any such facts. He was also cross-examined regarding the procedure for withdrawal of the samples and he stated that he was not aware about the procedure for withdrawal of the samples. However, he stated that he was aware of the ION Testing Machine. He did not know the meaning of THC. He did not remember as to when the recovered substance was tested by the IO. However, he affirmed that a test was conducted near SOOG-2. He stated that he was not informed by the Customs Officer about the procedure for withdrawal of samples or testing of the recovered substance. He also did not remember the name or designation of the Customs Officer, who had informed him about the test result of the recovered substance obtained from IONSCAN machine.

81. It is apparent from his testimony that he had not personally seen the print-out of the test result from the IONSCAN machine but was informed about the same by a Customs Officer, whose name or designation he did not recollect. Although he denied the suggestion that no test was conducted in his presence and he was deposing falsely, however, he reiterated that he remained at the spot throughout the proceedings and he also affirmed that the proceedings were conducted in the Customs room situated near the SOOG-2. He stated that apart from leaving to attend nature's call once, he had not left the spot. There is an inconsistency in his testimony, inasmuch as, the

Smith IONSCAN machine was not located in the Customs room but at another spot near SOOG-2 and therefore, if he had not left the spot where the proceedings were conducted, he could not have been present to witness the test. It does appear that he was informed by a Customs Officer about the result and did not have personal knowledge of the amount of the substance withdrawn for conducting the said test and the result of the said test.

82. Given the testimony of PW-8, little reliance can be placed on the *panchnama*. His testimony (examination-in-chief) is also inconsistent with the facts, as recorded in the *panchnama*. Whereas, it is recorded in the *panchnama* that the appellant's trunk was opened in his presence with the keys handed over by the appellant; he had testified that when he arrived at the spot, the trunk was already opened and was empty. Thus, he could have no knowledge of whether the trunk was opened from the keys provided by the appellant or the contents that were recovered from the trunk before it was broken. The testimony of PW 8 raises a doubt, as to the manner, in which the *panchnama* was recorded. PW 8 also did not appear to have any idea, as to the manner, in which the samples were tested.

83. In view of the above analysis of the evidence obtaining in this case, it is concluded that the prosecution has failed to establish that (a) the contents of each of the packets were separately tested (probably a small quantity equivalent to the head of a match stick of the said substance was tested); (b) that the said test indicated that the substance contained 3% Heroin and 13% THC and; (c) that the contents of all

four packets were mixed to form a homogenous mixture and three samples of 45 grams were drawn from it (the said samples may have been drawn from the contents of one or more packets).

84. It is at once clear that the samples cannot be considered as a representative of the contents of all the four packets.

85. Mr. Aggarwala had also contended that since the appellant has signed the *panchnama* and has also made a statement under Section 67 of the NDPS Act, the recovery of *charas* from the bag must be considered to be admitted and therefore, it would not be necessary for the prosecution to establish the said admitted fact. The said contention is unpersuasive. Although the appellant may have signed the *panchnama* but it is his case that he had not understood the documents that he was made to sign, as he is not proficient in English. According to the appellant, the *panchnama* was a false document and suggestions to this effect had also been put to the concerned witnesses. They were also cross-examined to establish the same. Insofar as the statement recorded under Section 67 of the NDPS Act is concerned, the same was retracted by the appellant (Ex. DX-1). The said document is in Italian. However, it is not disputed that the appellant had contested that his statement under Section 67 of the NDPS Act was recorded voluntarily. Mr Aggarwala also did not dispute that the appellant had retracted the same; however, he did not contend that the retraction should not be accepted.

86. The question whether a confessional statement recorded under Section 67 of the NDPS Act is admissible as evidence has been referred to a Larger Bench of the Supreme Court in ***Tofan Singh v. State of Tamil Nadu: (2013) 16 SCC 31.***

87. It is also well settled that a confessional statement is a very weak evidence and can only be used to corroborate other evidence. (***Kashmira Singh v. State of Madhya Pradesh: AIR 1952 SC 159; Hari Charan Kurmi v. State of Bihar: (1964) 6 SCR 623; Mohammed Fasrin v. State: (2019) 8 SCC 811*** and ***Surinder Kumar Khanna v. Intelligence Officer, Director of Revenue Intelligence: (2018) 8 SCC 271.***)

88. In ***Kalema Tumba v. State of Maharashtra and Anr*** (*supra*), the Supreme Court had in the given facts of that case, not accepted that the statement given was not voluntary and also found that the defense indicated in Section 313 CrPC was in variance with the reasons for retraction. The facts in this case are materially different.

89. In view of the above, this Court is unable to accept that the prosecution was not required to lead any evidence to establish that the substance recovered from the appellant was *charas*.

90. Mr. Aggarwala had further contended that even if the sample drawn cannot be considered as a representative of the entire substance, it should be considered as a representative of at least one packet of the substance recovered, which would amount to 1 kg and therefore, the appellant ought to be convicted for possessing an intermediate

quantity of *charas*. Although this contention appears to be attractive at the first blush, the same is also unmerited. This is because there is no evidence as to whether the four packets allegedly recovered from the trunk of the appellant contained an identical quantity of substance. Therefore, the very assumption that one packet contained one kg of the illicit substance cannot be accepted.

91. Since the prosecution has failed to establish that the sample drawn by PW-4, which was sent for chemical examination, is a true representative of the entire substance recovered, it has failed to establish that the substance allegedly recovered was *charas*. The appellant is, therefore, liable to be acquitted for the offence for which he was charged and convicted by the Trial Court.

92. The next question to be examined is whether the prosecution has failed to establish that the sample sent to CRCL and/or the remnant substance recovered from the appellant's trunk, was not tampered with. The contention that the prosecution has failed to establish that the sample (marked as 'A-1') sent to CRCL was not tampered with, is premised on the ground that it has failed to establish the chain of custody of that sample. PW-4 had testified that the case property including the samples in question had been deposited with the SDO(A) on 27.02.2012. However, the said sample was allegedly dispatched by PW-4 (Sh. Pawan Kumar) on 28.02.2012 to CRCL through Sh. Prabodh Kumar. It is contended that there is no evidence on record as to how PW-4 came in possession of the said sample on 28.02.2012.

93. The contention that the remnant substance allegedly recovered from the appellant was also tampered with, is founded on the ground that the same had been packed in a polythene bag which was then put in a plastic bag of Delhi Duty Free but the material subsequently produced in Court was packed in a polythene bag only. The Delhi Duty Free bag, in which the polythene bag was packed, was not found. It was contended that this clearly established that the substance had been removed/tampered and thereafter, re-sealed. It was contended that none of the witnesses had tested to opening of the seal and then resealing the same and, therefore, it was obvious that the case material has been tampered with.

94. There is merit in the contention that the chain of custody has not been clearly established by the prosecution. It is the prosecution's case, as stated in the complaint, that by a letter dated 28.02.2012 issued by Ms. Deep Shikha Arora, Assistant Commissioner, Customs, IGI Airport, Sh. Prabodh Kumar, ACO was authorized to deposit the samples with CRCL. On the basis of the said letter, Sh. Prabodh Kumar had received the sample marked A-1 from the complainant who had in turn received the same from Sh. Pankaj Kumar, SDO(A) in intact condition against acknowledgement on the Detention Receipt No. 66564. The said letter dated 28.02.2012 has been placed on record. However, the same was not exhibited. Neither the Assistant Commissioner who had issued the letter nor the addressee of the said letter (The Chemical Examiner, CRCL, Pusa, New Delhi) testified to the issue or receipt of the said letter. PW-4, the Investigating Officer,

had testified that he had prepared seven detention receipts, whereby the case property, samples, personal effects, *jamatalashi* etc. were deposited with SDO(A) in intact condition. The said detention receipts were also placed on record as Ex.PW4/C. One of the seven detention receipts bearing No. 66564 pertains to three representative samples of *charas* marked as A-1, A-2 and A-3. The goods detained under the said detention receipt are described as: *“three representative sample of charas marked as A-1, A-2 & A-3 placed in transparent polybags then in white envelope sealed with Custom Seal No. 6”*. Inspector Pankaj Kumar (who was examined as PW-10), testified that on 27.02.2012, he was posted at IGI Airport as SDO in Night Shift and had joined the duty at about 09:00 pm. He testified that on that date, he had received the sealed goods in an intact condition, as mentioned in Entry No. 2863 of the SDO(A) register from Sh. Pawan Kumar. He had testified that after receiving the goods in question, the same were kept in safe custody. He had produced the relevant register and a copy of the page containing the relevant entry (Ex PW10/A) was placed on record. Thus, it is established that the samples had been deposited in safe custody with PW-10.

95. However, the said register contains no entry regarding removal of the sample in question from the possession of SDO. There is no evidence on record which indicates that PW-10 (who was the SDO in charge) had handed over the sample to PW-4. It is the prosecution's case that PW-3 (Sh. Prabodh Kumar) was authorized to deposit the sample with CRCL. It would necessarily follow that he would have

the authority to withdraw the same from safe custody of the concerned officer/Malkhana. However, he did not withdraw the sample from the Malkhana. PW-3 testified that he had been handed over the sample marked 'A-1' by Sh. Pawan Kumar. There is no evidence as to how Sh. Pawan Kumar (PW-4) came into possession of the sample on 28.02.2012, after having deposited the same in safe custody on 27.02.2012.

96. As noticed above, it is the prosecution's case in the complaint that he had withdrawn the same by acknowledging its receipt on the detention receipt bearing No. 66564. However, the detention receipt bearing that number (that is, 66564) which has been exhibited as Ex.PW4/C does not mention any such acknowledgment. There is yet another copy of the said receipt, which records the noting that "*AI sample was received from SDO(A) and handed over to Sh. Prabodh Kumar, Inspector Customs*" however, that document has not been exhibited. Further, there is no explanation as to how two detention receipts bearing the same number have been placed on record. It is material to note that since the receipt bearing the said acknowledgement has not been exhibited, it is not in evidence. This Court had asked Mr. Aggarwala whether there is any evidence on record to show that PW-4 had withdrawn the said sample from SDO(A)/malkhana on 27.02.2012 or 28.02.2012, after having deposited the same in his safe custody. He had fairly answered in the negative. Thus, neither PW-4 has testified to withdrawing the said sample from the same custody nor does the relevant register record the

withdrawal of the said sample from SDO(A). PW-3 testified that he had been handed over the said samples by PW-4 and he had then deposited the said sample with CRCL.

97. It is apparent from the above that the prosecution has failed to establish the chain of custody of the samples in question.

98. Although PW-4 had testified that he had prepared the test memos at the relevant time and a copy of the same (Ex.PW4/D) has also been brought in evidence. However, Ex.PW4/D does not contain any impression of seal and the entry regarding facsimile of the seal is blank. However, copy of the said test memo, which has been brought in evidence by PW-7 (Sh. Bhuwan Kumar, Chemical Examiner) bears an impression of a seal. PW-7 had also testified that Sh. Prabodh Kumar, ACOP had brought the sample to CRCL along with the test memo (Ex.PW7/A). He also testified that after receiving the sample, a receipt was issued to Sh. Prabodh Kumar and the sample was kept in the store room. He stated that the sample was sealed with seven seals and all of them were intact. This raises a question as to who had put the seal on the test memo that had been forwarded to CRCL. According to PW-10, PW-4 had handed over the seal in question (Custom Seal No. 6) to him on 27.02.2012. But, the test memo claimed to have been prepared does not bear the said seal. It is, thus, apparent that the seal on the test memo had been put at a later time/date.

99. PW-10 had testified that he joined duty at about 9:00 pm on 27.02.2012 and he had received the case property and had kept the same in safe custody. He does not indicate the time when he received the case property. He also stated that he received the Custom seal No.6 from Inspector Pawan Kumar. There is no evidence as to when Inspector Pawan Kumar had withdrawn the seal from the Officer in charge of keeping the same in safe custody. Curiously, in the complaint filed by PW-4 it is averred that Custom Seal No.6, which was used to seal the case property, had been handed over by Pankaj Kumar to the complainant on 27.02.2012 at 9:00 pm and after conducting the seizure proceedings he had returned the seal to Pankaj Kumar, custodian of the seal, on 27.12.2012 at 11:00 pm. The relevant extract of the complaint (PW-4/W) is set out below:

“ee) The customs seal No. 6 which was used for sealing the case property etc. was hand over by Shri Pankaj Kumar to the complainant on 27.02.2012 at 9.00 p.m. and after concluding the seizure proceedings, the said seal was returned to Shri Pankaj Kumar, custodian of the seal on 27.02.2012 at 11.00 p.m.”

The above raises considerable doubts as to the case regarding the seizure proceedings. According to the *punchnama* (Ex.PW4/E), the proceedings had commenced at 10:00 hours and had concluded at 15:35 hours, that is much prior to PW-4 allegedly acquiring the seal from PW-10. However, the *punchnama* records that the case property had been seized and sealed with Custom Seal No.6, thus, according to

the *punchnama*, PW-4 was in possession of the seal during the said period (that is, prior to 15:35 Hours).

100. The remaining substance (after removal of the samples) allegedly recovered from the trunk of the appellant had been put in a polybag, which was then put in another bag of Delhi Duty Free and thereafter, sealed in a cloth *pullanda*. The paper slip bearing the signatures of the PW-4 as well as the two *panch* witnesses was also affixed with the seal. The said *pullanda* was opened in Court. The Court had noted that the cloth *pullanda* sealed with Customs Seal No.6 over a paper slip, produced by the case property in charge was in intact condition. The *pullanda* could not be opened without disturbing the seals. The paper slip was directed to be removed. It mentioned the particulars of DR No.66563. The said paper slip was exhibited as Ex.PW4/X1. Thereafter, the cloth *pullanda* was opened and it was found to contain one polythene wrapped with adhesive tape. The polythene was opened and it was found to contain blackish brown substance.

101. It is noteworthy that the substance wrapped in polythene with an adhesive tape had been produced. However, the polythene was not kept in a Delhi Duty Free bag. The said Duty Free bag was absent. The detention slip bearing No.66563 which pertain to the said substance described the goods as under:-

“Chocolate brown substance said to be CHARAS placed in transparent polybag then in duty free poly

bag then covered with white cloth and sealed with seal no.6.”

102. It is also relevant to note that the *panchnama* (Ex.PW4/E) also records that: *“the remnant substance weighing 4.1 kgs was repacked in transparent polythene bag and this polythene bag was packed in Delhi Duty Free polythene bag and this Delhi Duty Free Polythene bag was then wrapped with brown adhesive tape and was then wrapped with white cloth and stitched and sealed with Custom Seal No. 06 over a slip containing dated signatures of ours alongwith the dated signature of the pax and the Custom Officer.”*

103. The fact that the polythene bag containing the substance was not packed in a Delhi Duty Free polythene when the *pullanda* was opened raises considerable doubt whether the substance had been tampered with. Mr. Aggarwala sought to explain this by stating that the case property had been opened while examining PW-2 and the testimony of PW-2 also indicates that a Delhi Duty Free bag was found in the trunk. He submitted that, therefore, it is possible that the Delhi Duty Free bag could have been taken out at that stage. This contention is unpersuasive. During the course of examination-in-chief of PW-2, one *pullanda* mentioning DR No. 66562 was opened. On opening the said *pullanda*, it was found to contain one steel trunk. The steel trunk was in a torn condition and wrapped in an adhesive tape. On opening the steel trunk, it was found to contain one polythene bag of Delhi Duty Free containing certain articles. These articles were not shown to the witness (PW-2), as he could not testify to the same. PW-

2 merely identified that trunk. An examination of the *panchnama* (Ex.PW4/E) indicates that carbon papers and newspapers allegedly used to conceal the substance were packed in a separate Delhi Duty Free polythene bag, which was put in the metal trunk from which the substance was allegedly recovered. That metal trunk was wrapped in a brown colour adhesive tape and then sealed in a white cloth *pullanda*. Thus, the Duty Free bag that had come out of the trunk is the Duty Free bag that should contain the carbon papers and newspapers that were used to conceal the substance recovered from the trunk. The said Duty Free bag is not the bag in which the recovered substance had been sealed. Admittedly, the substance was sealed in a separate cloth *pullandas* and had not been placed in the *pullandas* in which the trunk was placed. The fact that the *pullanda* containing the alleged recovered substance was found in a sealed condition, does not explain the absence of the Delhi Duty Free bag. The only explanations are that the *panchnama* and the detention receipts incorrectly record as to how the case property was packed or that the *pullanda* had been opened and resealed. Since the seal as well as the recovered contraband continued to be in possession with the Custom Officers, the possibility of the same being opened and re-sealed cannot be ruled out. It is also apparent that the record maintained regarding the movement of case property is not accurate. In this case PW-4 seems to have access to the articles kept in safe custody and could remove them without making any entry in the SDO(A) Register. This is clearly evident as there was no entry made in the Register for removal of the

sample A-1. Thus, the contention that there are doubts that the substance recovered could have been tampered, is merited.

104. The decision of the Supreme Court in ***Hardip Singh v. State of Punjab*** (*supra*) is of little assistance to the respondent. In that case, it had been brought in evidence that the case property had been kept by Inspector Baldev Singh till it was deposited in the office of the Chemical Examiner and the fact that the seals put in the parcels were intact, established that there was no tampering with the aforesaid seals at any stage and the sample was received by the Analyst contained the same opium that was recovered. In the present case, the sample marked A- 1 was not in the possession of PW-4. According to him, he deposited the same in the safe custody. As stated above, the aspect as to how he came to be in possession of the same without making any entry in the Register, is not explained. Even though, PW-10 had testified that PW-4 had handed over the seal to him on 27.02.2012, there is doubt as to the same because (a) there does not appear to be any record of the custody or the movement of the seal. None of the witnesses have placed on record any register or any document which indicates the same; (b) that although it is averred by PW-4 in the complaint that he had received the seal from PW-10 at 9:00 pm and had returned at 11:00 pm there is no evidence led to the aforesaid effect. PW-10 merely stated that he received the seal on 27.02.2012; and (c) the test memo sent to CRCL on 28.02.2012 bears the imprint of custom seal. However, there is no such imprint on the test memo produced by PW-4. Thus, merely because the sample had been

received by the Chemical Examiner bearing the seals of Customs No. 6 and the remaining substance was produced in court in a sealed *pullanda* bearing the seal of Customs No. 6 does not necessarily mean that the said sample or the case property could not have been tampered with.

105. There are minor inconsistencies in the testimonies of the witnesses including the colour of the substance recovered; however, the same are not material.

106. Before concluding, this Court acknowledges with gratitude the efforts made by Mr. Amit Gupta, learned Amicus Curiae to render assistance to this Court in this case.

107. In view of the above, the appeal is allowed and the appellant is acquitted of the offences punishable under Sections 20(b)(ii)(C) and 23(c) of the NDPS Act. The appellant has been in custody for over eight years and six months. He shall be released immediately if not wanted any other case.

108. The pending applications are also disposed of.

VIBHU BAKHRU, J

**OCTOBER 05, 2020
RK**