

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.775 of 2016

Jagat Prasad S/o Ram Jiwan Prasad, Resident of village - Govind Bazar, P.S.
Harsidhi, District East Champaran.

... .. Appellant

Versus

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

... .. Respondents

Appearance:

For the Appellant	:	Mr. Nafisuzzoha, Advocate
For the Respondent-State	:	Dr. Mayanand Jha, APP
For the Union of India	:	Mr. Manoj Kumar Singh, CGC

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date: 19-01-2022

This appeal is directed against the judgment dated 02.07.2016 and the order dated 15.07.2016 passed by the learned Additional Sessions Judge-VII, Patna in Special Case No. 09 of 2013/ N.C.B No. 53 of 2013 whereby and whereunder, the appellant has been convicted for the offence punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and



consequently sentenced to undergo rigorous imprisonment for thirteen years and to pay a fine of Rs. 1 lac and in default to undergo rigorous imprisonment for a further period of two and a half years.

2. According to the prosecution case, on 26.02.2013, one Rohit Srivastava, an Intelligence Officer of Narcotics Control Bureau (for short 'NCB'), Patna Zonal Unit, Patna seized 25.450 kilograms of dark brown coloured semi solid resinous substance believed to be *charas* from the appellant near Mithapur Bus stand. His statement was recorded under Section 67 of the NDPS Act in which he confessed his involvement in the trafficking of contraband believed to be *charas*. After that he was arrested and taken into custody at 10:50 PM on 26.02.2013. He was produced by the aforesaid Rohit Srivastava (P.W.4) before the learned Sessions Judge-cum-Special Judge, NDPS Act, Patna on 27.02.2013 with a prayer to remand him to judicial custody, as the case was under investigation and a complaint was likely to be filed. On 27.02.2013 itself, the aforesaid Rohit Srivastava filed another application before the learned Sessions Judge-cum-Special Judge, NDPS, Act, Patna seeking permission for storage of seized contraband under the custody of NCB *Malkhana*, Patna and further for permission to



forward the sample marked as S-1 to be sent to CRCL, Kolkata.

3. On receipt of the aforesaid applications, vide order dated 27.02.2013, the learned Sessions Judge-cum-Special Judge, NDPS, Act, Patna got registered Special Case No. 9 of 2013 and remanded the appellant to judicial custody. He also allowed the prayer made by Rohit Srivastava (P.W.4) and granted him permission to forward the sample to CRCL, Kolkata.

4. Subsequently, on 24.07.2013, a complaint was filed by one Sujit Kumar (P.W.7), an Intelligence Officer of NCB, Patna Zonal Unit, Patna in the Court of Sessions Judge-cum-Special Judge, NDPS Act, Patna stating therein:

(a) That, a specific intelligence was received by one Manoj Shanker, Intelligence Officer, NCB, Patna at about 10:00 AM to the effect that a person will carry commercial quantity of *Charas/Hashish* from Raxaul (Indo-Nepal Border area) to Mithapur Bus Stand, Patna for delivery in between 06:00 PM to 08:00 PM on 26.02.2013. The intelligence was recorded in writing and communicated to the Assistant Director, NCB, Patna, who consented and ordered to work out the intelligence.

(b) That, accordingly, a team consisting of Manoj Shankar (P.W.3), Gyan Prakash (P.W.1), Rohit Srivastava



(P.W.4), Subhash Chandra Sinha (P.W.2), Vijay Bahadur (P.W.5), all Intelligence Officers, NCB, Patna Zonal Unit, Patna and Ravi Ranjan Kumar (P.W.6), Surveillance Assistant, (NCB, Patna) with departmental vehicle driven by Anil Kumar Ghosh started from Patna NCB office at 04:45 PM on 26.02.2013 and reached Mithapur Bus Stand, Patna at about 05:40 PM in the evening on the same day.

(c). That, after reaching Mithapur Bus Stand, the team contacted two persons passing nearby and enquired their names and addresses. On being asked, they disclosed their names as Nagendra Kumar S/o Shri Bharat Kumar, resident of Shri Krishnavihar Colony, Beur, Patna and Harishankar, S/o Bideshwari Singh, Village-Naubatpur, Patna, respectively. Thereafter, the team disclosed their identity and the secret information they had and requested them to remain present as independent witnesses during the process of search and seizure of narcotic drug, for which they both agreed.

(d) That, thereafter, the team mounted surveillance around Mithapur Bus Stand. After waiting for some time, at about 06:30 PM on 26.02.2013, the team located a person near Mithapur Bus Stand, carrying a black-colored carry bag and then on identification by the informer in presence of both the



independent witnesses that person was intercepted. On being enquired, the person identified himself as Jagat Prasad S/o Ram Jiwan Prasad, R/o Gobindapur Bazar, P.S-Harshidhi, District-East Champaran, Bihar.

(e). That, thereafter, the team disclosed their identity along with the identity of both the independent witnesses and the secret information they had with them. The said Jagat Prasad admitted of possessing *Hashish/Charas* in his black-colored carry bag. Thereafter, he was told about his legal rights under Section 50 of the NDPS Act 1985 and a notice under Section 50 of the NDPS Act 1985 was served to him. An option was provided to him that it is his legal right to be searched before any Gazetted Officer or Magistrate which he declined in writing and said that there is no need to take him before a Gazetted Officer or a Magistrate for search and that the team itself may carry his search. Thereafter, before conducting search of Jagat Prasad, the search of team members and both the independent witnesses was offered to him, which he refused. On being searched in presence of two independent witnesses, a total of 50 slabs (41 slabs wrapped in brown-colored adhesive tape and 09 slabs wrapped in yellow-colored adhesive tape) of brown colored semi solid resinous substance was recovered from the



black-colored carry bag carried by Jagat Prasad. The material so recovered was tested with the field test kit on the spot and it responded positive to the test of *Hashish/Charas* and the same was seized. In presence of both the independent witnesses, the seized material so recovered was weighed by the electronic weighing machine on the spot and the weight of the seized material was found to be 25.450 kilograms gross. From the recovered 25.450 kilograms of *Charas/Hashish*, two samples of 25-25 grams each were drawn randomly and marked as S-1 and S-2 and were kept in two separate plastic packets and were hot sealed. The same were kept in two plastic paper envelopes and were sealed with departmental seal and signed by the officer concerned, independent witnesses and the said Jagat Prasad. The rest 25.400 kilograms of *Hashish/Charas* was also sealed in the black colored carry bag recovered from Jagat Prasad and further sealed with the departmental seal on white-colored marking cloth. Further, the signature of the owner of the goods, two independent witnesses and the officer concerned were obtained on all the sealed bags.

(f). That, the test memo in triplicate and search-cum-seizure list were also prepared on the spot. The signature of owner of goods, independent witnesses, seizing officer and all



the team members were obtained on search-cum-seizure list. A facsimile of the departmental seal used during seizure was affixed at the end of search cum seizure list at the right side of the page. The search was started at 06:30 PM on 26.02.2013 and completed peacefully at 08:45 PM on 26.02.2013. A copy of search-cum-seizure list was served to Jagat Prasad, who put his signature as acknowledgment of receipt.

(g) That on reasonable belief the Seizing Officer seized *Hashish/Charas* weighing 25.400 kilograms valued at Rs. 25,00,000/- approx, (International Value) under the provision of Section 42 of NDPS Act, 1985 as the same were found to have contravened the provision of this Act.

(h) That, the notice u/s 67 of the NDPS Act was served to said Jagat Prasad whereupon his confessional voluntary statement under strength of Sec 67 of NDPS Act 1985 was recorded on 26.02.2013. He accepted his involvement in illicit trafficking of Narcotic with connivance with drug peddlers. He confessed before the team that the seized *Charas/Hashish* was supplied to him by one Raj Kumar, aged about 30 years at Manokamna Mai Ka Sthan, Laxmipur, Raxaul to carry the same to Mithapur Bus Stand. He also confessed that the seized contraband was to be received by the aforesaid Raj Kumar



himself at Mithapur Bus Stand for further delivery, but in the meantime, he was caught by the NCB Team. He told that for carrying this Charas consignment, he was promised to be paid Rs. 200/- per kilogram by Raj Kumar.

(i) That, Jagat Prasad was produced before the doctors of New Gardiner Road Hospital, Patna on 27.02.2013. The doctors examined him and found him fit. Thereafter, he was produced before the Session Judge, Patna along with the seized material two samples S1 and S2. The presiding officer of the court had also put on his signature on the two samples and the seized material on 27.02.2013. The sample S2 and seized material were kept in the departmental *Malkhana* of NCB, Patna Zonal Unit and Sample S1 along with the test memo in duplicate was sent to the CRCL, Kolkata for chemical examination vide unit letter no. F. No. NCB/PZU/V/02/2013/217, dated 27.02.2013.

(j) That, on the basis of his confessional statement Jagat Prasad was placed under arrest on 26.02.2013 at 10:50 PM for having reason to believe that he had violated section 8 of NDPS Act, 1985 and hence committed offence punishable u/s 20(b)(ii)(C) of NDPS Act, 1985. The items recovered during Jamatalashi of Jagat Prasad were deposited in the NCB



Malkhana.

(k) That, the Chemical Examiner, CRCL, Kolkata had confirmed that the content of sample No. S1 was *Hashish/Charas* vide their test report no. 3041/SZD(N)-418 dated 08.05.2013.

(l) That, a letter NCB/PZU/V/02/2013 dated 14.03.2013 and a reminder dated 10.05.2013 were sent to the Superintendent of Police, Motihari, Bihar regarding the seizure of 25.450 kilograms and for verification of Raj Kumar R/o Raxaul, East Champaran, Bihar said to be supplier during interrogation with Jagat Prasad but still a reply was awaited.

(m) That, a letter was written to the managers, SBI, Raxaul, Bank of India, Raxaul and PNB Raxaul to which no reply has been received till date.

(n) That, on the basis of the facts and circumstances mentioned above, that it is clear that in contravention of Section 8 of NDPS Act, 1985 the accused Jagat Prasad was found in possession of the said *Hashish/Charas*. He, therefore, has committed an offence punishable u/s 20(b)(ii)(C) of N.D.P.S. Act, 1985.

5. On the basis of the aforesaid complaint dated 24.07.2013, the learned Sessions Judge-cum-Special Judge,



NDPS Act, Patna took cognizance of the offence under Section 20(b)(ii)(C) of the NDPS Act on the same day and transferred the records to the Court of Additional Sessions Judge-VII, for disposal.

6. After receipt of the records, vide order dated 17.09.2013, the learned Additional Sessions Judge-VII, Patna framed charge against the appellant under Section 20(b)(ii)(C) of the NDPS Act to which he pleaded not guilty.

7. Accordingly, the trial commenced.

8. In order to prove the charge, the prosecution examined, in all, seven witnesses. They are Gyan Prakash (P.W.1), Shubhash Chandra Sinha (P.W.2), Manoj Shankar (P.W.3), Rohit Srivastava (P.W.4), Vijay Bahadur (P.W.5), Sujit Kumar (P.W.7), all Intelligence Officers, NCB, Patna Zonal Unit and Ravi Ranjan Kumar (P.W.6), the Surveillance Assistant, NCB, Patna.

9. Apart from the oral evidence, the prosecution has proved the following documents in evidence in support of the charge:

Sl. No.	Exhibit	Description
1	1	Signature of Gyan Prakash (P.W.1) on the seizure list.
2	1/A	Signature of Shubhash Chandra Sinha (P.W.2) on the seizure list.



3	2	Statement of Nagendra Kumar under Section 67 of the NDPS Act.
4	3	Information regarding the right to get the search conducted before a Magistrate or Gazetted Officer as per Section 50 of the NDPS Act.
5	4	Search-cum-Seizure list.
6	4/1	Signature of Manoj Shankar (P.W.3) on the search-cum-seizure list.
7	5	Notice to the appellant under Section 67 of the NDPS Act to seek information.
8	6	Arrest memo of the appellant.
9	7 to 7/4	Signature of Rohit Srivastava on each page of the search-cum-seizure list.
10	8	Confessional statement of the appellant under Section 67 of the NDPS Act.
11	9	Complaint petition.
12	10	Signature of Rohit Srivastava (P.W.4) on the test memo.
13	10/A	Signature of Dr. Mrityunjay Mistri, Chemical Examiner Laboratory, Custom House, Kolkata.
14	10/B	Signature of Punam Kumari, Assistant Chemical Examiner Laboratory, Custom House, Kolkata.
15	10/C	Signature of P.W.4 Rohit Srivastava on the compliance report under Section 57 of the NDPS Act.

10. **Gyan Prakash (P.W.1)** stated in his testimony that on 26.02.2013, he was posted as an Intelligence Officer in the



NCB, Patna. On the basis of a confidential information, under the direction of the superior officer, a team of NCB Officers was constituted. In the said team, apart from him, Manoj Shankar, Rohit Srivastava, Vijay Bahadur, Shubhash Chandra Sinha, all Intelligence Officers and Ravi Ranjan Kumar, Surveillance Assistant were members. The team started at 04:45 PM on 26.02.2013 from the NCB, Patna office and reached Mithapur Bus stand at 05:40 PM on the same day. The team requested two persons, namely, Nagendra Kumar and Hari Shankar to be independent witnesses to which they agreed. At about 06:30 PM on 26.02.2013, the team intercepted a person carrying a black-colored bag while he was coming out of the Mithapur Bus stand. He was told about his legal right to be searched before any Gazetted Officer or Magistrate, but he declined in writing and offered himself to be searched by the members of the team. On being searched, a total of 50 slabs, out of which, 41 slabs were wrapped in brown-colored adhesive tape and 9 slabs were wrapped in yellow coloured adhesive tape of brown-colored semi solid resinous substance was recovered from black coloured carry bag carried by the appellant. The substance was tested on the spot and was found *charas/hashish*. The weight of the seized material was found to be 25.450 kilograms gross. The



sample was taken on the spot. The remaining substance was put in the same carry bag and was sealed over which the signature of the members of the team, the person carrying the bag and the independent witnesses were obtained. The search-cum-seizure list and test memo were also prepared and a copy of the search memo was handed over to the appellant. The entire process of search and seizure commenced at 06:30 PM and concluded at 08:45 PM. He identified his signature on the search-cum-seizure list, which was marked as Exhibit-1. He stated that he had recorded the statement of the independent witnesses.

11. In cross-examination, he stated that though the appellant was given notice under Section 50 of the NDPS Act, However, he declined in writing and, therefore, he was not taken to the Magistrate. He stated that the notice regarding constitution of the team was given to him in writing. He admitted that the letter constituting the team is not in his possession. He stated that the team consisted of seven members and it had gone to Mithapur Bus stand in Government vehicle bearing no. BR0-1 PC7206. He stated that he cannot say from which bus the appellant had come. He added by saying that the appellant was intercepted when he was coming out of gate no. 2 of the bus stand. His identity was provided by the informer of



the enforcement agency. The informer of the agency was present with the team. He admitted that the team did not enquire from the appellant or anyone else about the bus in which he had come or the place from where he was coming. He stated, in this regard the Investigating Officer may throw some light. He stated that he cannot say the size of the black-colored carry bag, which was being carried by the appellant at the relevant time. According to him, the weight of the bag was taken by a weighing machine of Phoenix Company, which may be operated by anyone. He stated that the substance was tested by P.W.4 Rohit Srivastava. He admitted that his statement was not recorded by the Investigating Officer. He denied the defence suggestion that the appellant was wrongly apprehended and he is supporting the case merely because he belongs to the enforcement agency.

12. **Shubhash Chandra Sinha (P.W.2)** reiterated what was stated by Gyan Prakash (P.W.1) in his examination-in-chief. He identified his signature on the search-cum-seizure list, which was marked as Exhibit-1/A.

13. In cross-examination, he admitted that he has no proof to show that he was also a member of the raiding team. He admitted that he did not see the appellant alighting from bus. He admitted that he does not know whether or not the requirements



of Section 50 were complied with. He further stated that at the pointing out of the informer, the appellant was intercepted. He could not give details of the informer. He could not explain the boundary of the place of occurrence. He stated that the appellant was intercepted near gate no. 2 of the bus stand. According to him, the substance seized from the appellant was tested at the place of occurrence by Rohit Srivastava (P.W.4) and Manoj Shankar (P.W.3) in the presence of two independent witnesses, whose names he did not remember. The substance so recovered was tested with the field test kit. He stated that the statement of the appellant was recorded under Section 67 of the NDPS Act. He denied the defence suggestion that nothing incriminating was recovered from the appellant and he has been falsely implicated in the case.

14. **Manoj Shankar (P.W.3)** stated in his examination-in-chief that he received an information at about 10:00 AM to the effect that a person will reach Mithapur Bus stand with huge quantity of *charas* between 06:00 PM to 08:00 PM on 26.02.2013. He recorded the said information in writing and communicated the same to the Assistant Director, Narcotics Control Bureau, Patna and, under his direction, a team was constituted to work out the information. Apart from what was



stated by P. Ws-1 and 2 in their testimonies, he stated that two samples of 25 grams each were drawn and marked as S-1 and S-2 and were kept in two separate plastic packets and were sealed. Thereafter, they were kept in paper envelop and sealed and signed by the members of the raiding team, independent witnesses and the appellant. The rest *charas* was also sealed in the black-colored carry bag and further sealed in white-coloured markin cloth. The signature of the appellant, two independent witnesses and the concerned officer were obtained. The search-cum-seizure list and test memo were also prepared on which the signature of the person from whom the recovery was made, the independent witnesses, the seizing officer and all the team members were obtained. He proved his signature, which was marked as Exhibit-3.

15. In cross-examination, he admitted that apart from the team members, others were also present at the place of search and seizure. He stated that the informer of the agency identified the appellant first. The informer was accompanying a senior officer of the NCB. He was at a distance of 10-15 pace from where he was standing. He stated that the carry bag of the appellant was opened in the presence of the witnesses. He expressed his ignorance as to whether the two independent



witnesses of the case were also witness in any other case. He admitted that he has no document to support that the drug testing kit used for testing the substance gives correct result. He further admitted that he does not have any proof, on the basis of which, it can be said that the appellant was coming from Raxaul. He denied the defence suggestion that nothing incriminating was recovered from the possession of the appellant and he was unnecessarily arrested by the members of the team.

16. **Rohit Srivastava (P.W.4)** stated in his testimony that on 26.02.2013, he was posted as an Intelligence Officer in the NCB Patna. On that day, a confidential information was received by Manoj Shankar (P.W.3) that a person will reach Mithapur Bus stand with huge quantity of *charas* between 06:00 PM to 08:00 PM from Raxaul. Thereafter, a team was constituted. The team started from Patna NCB office at 05:30 PM and reached Mithapur Bus stand. After reaching Mithapur Bus stand, the team contacted Nagendra Kumar and Hari Shankar and requested them to remain present as independent witness. On the pointing of the informer of the NCB, a person was intercepted at 06:30 PM, who disclosed his name as Jagat Prasad. On enquiry, he confessed that he was carrying *charas*.



He was told about his legal rights under Section 50 of the NDPS Act. However, he gave in writing that he may be searched by the NCB team. He proved his signature on the notice, which was marked as Exhibit-3. He conducted the search of the carry bag being carried by the appellant and recovered 50 slabs. The substance found in those 50 slabs was tested and was found *charas*. The substance was seized. The weight of the seized substance was found to be 25.450 kilograms. The sample was drawn in accordance with law and the remaining substance was put in carry bag and was sealed over which signature of the members of the team, the person carrying the bag and the independent person were obtained. He stated that he prepared the search-cum-seizure list and test memo. He identified his signature on the search-cum-seizure list, which was marked as Exhibit-4. He stated that he gave notice to the appellant under Section 67 of the NDPS Act, whereafter his statement was recorded by Ravi Ranjan Kumar (P.W.6). He proved his signature and writing on the notice under Section 67 of the NDPS Act, which was marked as Exhibit-5. He stated that the appellant confessed that the seized contraband was *charas*. In his statement under Section 67 of the NDPS Act, he further confessed that the substance was supplied to him by one Raj



Kumar. Thereafter, the appellant was arrested and an arrest memo was prepared by him, which also bears his signature. He proved his signature on the arrest memo, which was marked as Exhibit-6. He remanded the appellant to judicial custody and the sample was sent for test to Kolkata. He complied with the provisions prescribed under Section 57 of the NDPS Act and put his signature on the compliance report. He identified his signature on the compliance report, which was marked as Exhibit-7. He stated that the investigation of the case was handed over to one Abhijit Prakash.

17. In cross-examination, he admitted that all the team members were employees of NCB. He admitted that the driver of the vehicle in which the team went to Mithapur Bus Stand was also an employee of the NCB. He admitted the presence of large number of persons at the bus stand at the time of search and seizure. He admitted that at the time of arrest, the appellant was not in possession of bus ticket. He further admitted that no enquiry was made from him regarding the place from where he was coming. He further admitted that he does not have any proof to present before the court that the appellant was coming from Raxaul. He admitted that the forms of notice under Sections 50 and 67 of the NDPS Act were printed in English. He



clarified that the contents of the notice were explained to the appellant in Hindi. He admitted that it was not asked from the appellant as to whether he would like to write his confessional statement under Section 67 of the NDPS Act himself. However, his true and correct statement was reduced into writing by Ravi Ranjan Kumar (P.W.6). He admitted that though large number of persons were present at the place of search and seizure, no statement of any person was recorded by the team. He denied the defence suggestion that the documents prepared by the NCB team were fabricated. He also denied the defence suggestion that no incriminating substance was recovered from the bag being carried by the appellant and he has been falsely implicated in the case.

18. **Vijay Bahadur (P.W.5)** another Intelligence Officer of the NCB, Patna stated in examination-in-chief on the same line as stated by Gyan Prakash (P.W.1). He proved his signature on the search-cum-seizure list, which was marked as Exhibit-4/1.

19. In cross-examination, he admitted that the appellant did not know English. He further admitted that whatever was written in the notice under Section 50 of the NDPS Act was not explained to the appellant. He stated that the team was



constituted by the Zonal Director of Narcotics Control Bureau. However, he admitted that he is not in possession of the letter by which the team was constituted.

20. **Ravi Ranjan Kumar (P.W.6)** also reiterated the same story as narrated by Gyan Prakash (P.W.1) in his examination-in-chief. He proved his signature on each page of the search-cum-seizure list, which was marked as Exhibit-7 to 7/4. He stated that he had recorded the statement of the appellant under Section 67 of the NDPS Act and proved his writing, which was marked as Exhibit-8.

21. In cross-examination, he admitted that he had not received the confidential information. He was told at about 12:00 noon to be ready orally. At about 04:45 PM, he started from the NCB office in the official vehicle and reached Mithapur Bus stand. He stated that he was not told about the accused from before. He admitted that he did not make any recovery from the appellant. He admitted that he was not authorized by the department to record the statement under the NDPS Act. He admitted that the electronic machine on which the seized substance was weighed was not checked before him to ensure whether it was giving correct reading or not. He further admitted that at the place of occurrence, several persons



were present, but no one except the two independent witnesses of seizure was made a witness to the present case. He also denied the defence suggestion that the appellant has been falsely implicated in the case.

22. **Sujit Kumar (P.W.7)** stated in his examination-in-chief that on 26.02.2013, he was posted as an Intelligence Officer in the NCB, Patna. He was appointed as the Investigating Officer of the instant case on 11.06.2013 by Sri Narendra Kumar Sinha, the Assistant Director of the NCB. Prior to him, Abhijit Prakash was the enquiry officer. After taking over the charge of the investigation, he perused the records of this case and after discussing with the Senior Officers and Special Public Prosecutor, he filed the complaint in the Court of Sessions Judge, Patna. He proved the signature of P.W.4 Rohit Srivastava on the test memo, which was marked as Exhibit-10. He stated that on the back page of the test memo, chemical report is written on which signature of Dr. Mritunjay Mistri and Punam Kumari can be found. He identified their signatures, which were marked as Exhibit-10/A and 10/B. He also identified the signature of P.W.4 on the compliance report under Section 57 of the NDPS Act, which was marked as Exhibit-10/C.



23. In cross-examination, he admitted that the previous Investigating Officer, Abhijit Prakash did not investigate the case in his presence. He admitted that when Abhijit Prakash was investigating the case, he was not in the team. He further admitted that Abhijit Prakash has not been made a witness to the present case. He admitted that neither *charas* was recovered in his presence nor the appellant Jagat Prasad was arrested in his presence. He further admitted that he did not record the statement of any witness. He stated that after going through the records and, on the basis of the available materials, he prepared the complaint and filed it after consulting the lawyer. He admitted that the seizing officer Rohit Srivastava (P.W.4) did not put his signature on test memo in his presence. He further admitted that he does not have any special qualification to identify the signature of any other person. He admitted that the sample of the substance sent for test was not taken in his presence. He further admitted that on the FSL report neither Mritunjay Mistri nor Punam Kumari had put their signature before him. He personally did not see the seized substance. He added that it is the seizing officer, who alone can throw some light on this point. He denied the defence suggestion that the appellant was arrested from his house and he has been



implicated in a false case. He expressed his ignorance about any case lodged by the wife of the appellant.

24. After closing the prosecution evidence, the Trial Court recorded the statement of the appellant under Section 313 of the Code of Criminal Procedure (for short the 'Cr.P.C.') for enabling him personally to explain the circumstances appearing in evidence against him.

25. After the appellant was examined under Section 313 Cr.P.C., the defence also examined four witnesses in order to prove the innocence of the appellant. They are Sonamati Devi (D.W.1), Arman Ansari (D.W.2), Parmeshwar Sah (P.W.3) and Ramadhar Singh (P.W.4).

26. **Sonamati Devi (D.W.1)** stated in her testimony that she had lodged a missing person report in Harsidhi Police Station on 26.02.2013. In her report, she had stated that her husband Jagat Prasad (the appellant) had gone to attend the call of nature in the morning at 7:00 AM outside the house but he did not return to his house. According to her, the mobile phone of her husband was switched off. She was told by her co-villagers that her husband was taken by some person in a jeep. She stated that the said missing person report was entered into the station diary of the Harsidhi Police Station. She



submitted a xerox copy of the application submitted to the Harsidhi Police Station over which the police had made endorsement of the station diary entry, which was made in the Harsidhi Police Station, which was marked as 'X' for the purpose of identification. She stated that after two days of lodging of the report before the police station, she came to know that her husband has been sent to jail in connection with a case relating to trafficking of *ganja*.

27. In cross-examination, she stated that she had gone to the police station at 10:00 AM on 26.02.2013 along with co-villagers, namely, Rajendra Singh, Lal Babu Sah and others. She stated that she was informed by the co-villagers within ten minutes after her husband was taken by some persons in a jeep. She stated that station diary entry was made by one Kamta Mishra. She denied the suggestion made by the prosecution that she had made a false statement on oath.

28. **Arman Ansari (D.W.2), Parmeshwar Sah (D.W.3) and Ramadhar Singh (D.W.4)** are the co-villagers of Sonamati Devi (D.W.1) and they all have deposed before the court on the similar line as narrated by Sonamati Devi (D.W.1).

29. Mr. Nafisuzzoha, learned counsel for the appellant submitted that all the witnesses examined on behalf of the



prosecution are official witnesses. Though, it has come in evidence that large number of independent witnesses were present at the place of occurrence when the search and seizure was made, no independent person was examined on behalf of the prosecution during trial. He contended that the Trial Court failed to appreciate that the two seizure list witnesses, namely, Nagendra Kumar and Hari Shankar were not produced before the court. The Trial Court also failed to appreciate that the first Investigating Officer Abhijit Prakash, an Intelligence Officer of the NCB, who had conducted the major part of the investigation was not examined during trial. He has not been made a witness to the present case in the complaint. His withholdment has greatly prejudiced the case of the defence. He submitted that the Trial Court has also failed to appreciate that Sujit Kumar (P.W.7), the second Investigating Officer, who filed the complaint was a formal witness, who did not investigate the case from any angle. He merely filed the complaint on the basis of the materials available on the records and the legal advice of his counsel. He further contended that though a total of 50 slabs of brown-colored semi solid resinous substance is alleged to have been recovered from the black-colored carry bag carried by the appellant, only two samples of 25 grams each were drawn



randomly and marked as S-1 and S-2 and were kept in two separate plastic packets and, out of them, only one was sent to the Forensic Science Laboratory. He argued that the Intelligence Officer of NCB, who drew sample committed serious lapse while drawing samples from the seized substance. He urged that it has not come in evidence that out of the 50 slabs, from which slab the representative samples were drawn. He contended that individual sample from each of the 50 slabs ought to have been drawn in order to prove the charge against the appellant.

30. The next contention of the learned counsel for the appellant is that the contraband *charas* allegedly 25.450 kilograms was not produced before the court which has vitiated the conviction of the appellant.

31. He further contended that in view of the judgment of the Supreme Court in *Tofan Singh v. State of Tamil Nadu [(2021) 4 SCC 1]*, the confessional statement made under Section 67 of the NDPS Act before an Intelligence Officer of the NCB would not be admissible in law for the purpose of conviction.

32. Mr. Nafisuzzoha, learned counsel for the appellant argued that there is total non-compliance of Section 52(2) and 57 of the NDPS Act in the present case.



33. Another contention on behalf of the appellant is that the circumstances appearing against the appellant were not explained to him personally while examining him under Section 313 of the Cr.P.C. He contended that the circumstances which were not explained to the appellant by the Trial Court could not have been taken into consideration for holding him guilty.

34. On the other hand, Mr. Manoj Kumar Singh, learned counsel for the Union of India submitted that non-examination of independent witnesses would be of no consequence in the present case. He contended that altogether seven witnesses have been examined during trial on behalf of the prosecution and they all are consistent on each and every point. He further contended that the test memo in triplicate and the search-cum-seizure list were prepared on the spot. The signature of the appellant and the independent witnesses as well as the seizing officer and of the team members were obtained on the search-cum-seizure list. In presence of both the independent witnesses, the seized material so recovered was weighed by the electronic weighing machine on the spot and the weight of the seized material was found to be 25.450 kilograms. Hence, there is no doubt about the quantity of the contraband *charas* seized from the black-colored carry bag being carried by the appellant.



35. He further contended that the brown-colored semi solid resinous substance recovered from 50 slabs carried in a black-colored carry bag by the appellant were all identical. Hence, two samples of 25 grams each were drawn randomly. They were kept in two separate papers envelop and were sealed with departmental seal and signed by the officer concerned, independent witnesses and the appellant and the rest 25.450 kilograms of *charas* was also sealed in black-colored carry bag recovered from the appellant and further sealed with departmental seal in white-colored markin cloth over which also the two independent witnesses, the officer concerned and the appellant put their signature. He contended that the sample S-2 and seized material were kept in the departmental *Malkhana* of NCB, Patna and the sample S-1 was sent to the CRCL, Kolkata for test. The chemical examiner has confirmed the content of sample S-1 as *charas* vide test report dated 08.05.2013. Hence, the Trial Court did not find any illegality either in the sampling of the contraband or its weight.

36. He further contended that all the incriminating circumstances appearing against the appellant was explained to him while examining him under Section 313 of the Cr.P.C. Hence, no prejudice has been caused to the appellant on this



account.

37. He next contended that the statement of the appellant recorded by the NCB official was voluntary confession under Section 67 of the NDPS Act. He argued that since the statement was not recorded by any police officer and was made before P.W.4, an Intelligence Officer of the NCB. Hence, the same would be admissible in evidence.

38. Mr. Manoj Kumar, learned counsel for the Union of India argued that it has come in evidence that the team was constituted under the direction of the Superior Officer of the NCB after information in writing was given by the P.W.3 Manoj Shankar. Hence, the provision prescribed under Sections 52(2) and 57 were duly complied with.

39. Dr. Mayanand Jha, learned senior counsel for the State submitted that in the present case, the prosecution was launched by the Union of India. He contended that the State is a formal party. However, he adopted the submissions made on behalf of the Union of India.

40. We have heard the learned counsel for the parties and carefully perused the records.

41. Insofar as the question of search and seizure of the contraband substance is concerned, it was conducted in the



evening around 06:30 PM to 08:45 at a place frequented by large number of persons as admitted by the P.W. 3 and P.W.4 in their evidence. Despite adequate opportunity to involve independent witnesses, the NCB team did not associate anyone except the two seizure list witnesses, who also were not examined during trial. The veracity of the prosecution case regarding the search and seizure of the contraband from the carry bag being carried by the appellant could have been tested if the 1st Investigating Officer Abhijit Prakash would have been examined during trial, but he has been withheld by the prosecution. The 2nd Investigating Officer Sujit Kumar has admitted in cross-examination that he was not associated in any manner with the case before his appointment as Investigating Officer on 11.06.2013. The appreciation of the entire evidence points to an inference that the NCB team did not associate any independent person during the investigation of the case and withheld the seizure witnesses and the 1st Investigating Officer either because nothing took place at the place of occurrence or the manner of occurrence was different than what is alleged.

42. In so far as the admissibility of the confessional statement under Section 67 of the NDPS act is concerned in *Tofan Singh v State of Tamilnadu (2013) 16 SCC 31*, a two



Judge Bench of the Supreme Court referred the following issues for consideration before a Larger Bench:

- (a) Whether an officer of the Central/State Government investigating a case under the NDPS Act is a police officer? and;
- (b) Whether statements recorded under Section 67 of the NDPS Act can be treated as confessional statement, regardless of whether officer is a police officer?

43. Answering the aforesaid issues, a three Judge Bench of the Supreme Court in *Tofan Singh v. State of Tamil Nadu [(2021) 4 SCC 1]* held that the officers, who are invested with the powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act and, therefore, any confessional statement made before them would attract the bar of Section 25 of the Evidence Act and cannot be taken into account to convict an accused.

44. Thus, the confessional statement of the appellant recorded under Section 67 of the NDPS Act by P.W. 4 Rohit Srivastava (P.W.4) in the present case cannot be taken into account to hold him guilty.

45. The next point argued on behalf of the appellant is about the illegalities committed in drawing the sample of the seized contraband *charas*.



46. The witness examined on behalf of the prosecution have consistently stated that a total of 50 slabs (41 slabs wrapped in brown-colored adhesive tape and 9 slabs wrapped in yellow-colored adhesive tape) of brown-colored semi solid resinous substance were recovered from the black-colored carry bag carried by the appellant. The material so recovered was tested with the field test kit on the spot and it responded positive to the test of *charas* and the same was seized. The material so recovered was weighed by the electronic weighing machine on the spot and the weight of the seized material was found to be 25.450 kilograms gross and from the recovered 25.450 kilograms of *charas*, two samples of 25 grams each were drawn randomly and marked as S-1 and S-2, which were kept in two separate papers envelop. The sample S-2 was kept in the *Malkhana* and the sample S-1 was sent to the chemical examiner, CRCL, Kolkata, who confirmed the content of sample no. S-1 as *charas* vide test report dated 08.05.2013.

47. The field test carried by the P.W.4, an Intelligence Officer of the NCB is only indicative that the substance so recovered responded positive to the test of *charas*. Such indicative test is not admissible as evidence in the court. It is only a notified government scientific expert, who can certify the



same after chemical analysis in a designated laboratory on the basis of test result obtained. It was, therefore, important that the representative samples should have been drawn from the seized substance and sent to such experts in designated laboratory for chemical analysis in accordance with law. It was also important that the seized substances and samples should have been handled properly and in the prescribed manner.

48. The manner of drawing a sample of narcotic has been laid down in the Standing Instruction No.1/88 dated 15.03.1988 of the NCB, Government of India. The relevant Clauses of Standing Instruction No.1/88 dated 15.03.1988 are reproduced as under:

1.5 Place and time of drawal of sample

Samples from the Narcotic Drugs and Psychotropic Substances seized must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug has been recovered, and mention to this effect should invariably be made in the panch nama drawn on the spot.

1.6 Quantity of different drugs required in the sample

The Quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except



in the cases of Opium, Ganja and *Charas/Hashish* where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

1.7.- Number of samples to be drawn in each seizure case

(a) In the case of seizure of a single package/container one sample in duplicate is to 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.

(b) However, when the package/containers seized together are of identical size and weight, bearing identical markings and the contents of each package given identical results on colour test by U.N. Kit, conclusively indicating that the packages are identical in all respect/packages/container may be carefully bunched in lots of 10 packages/containers. In case of seizure of Ganja and Hasish, the packages/containers may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn.

(c) Whereafter making such lots, in the case of Hashish and Ganja, less than 20



packages/containers remain, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

(d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hasish, one more sample in duplicate may be drawn for such remainder package/containers

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

49. A close reading of the aforesaid Clauses of the Standing Instructions would make it evident that where more than one container/package is found, it is the requirement in law to draw a sample from each of the individual container/package and test each of the sample with the field test kit. If the containers/packages are identical in shape, size and weight then lots of 10 of 40 packages may be prepared and, thereafter, representative samples from each container/package in a particular lot are to be drawn, mixed and sent for testing. The Standing Instruction does not provide for drawing of sample randomly. It is because such a sample would seize to be a



representative sample of the substance seized from different packages.

50. In the instant case, there is evidence that on test with the field test kit, the substance responded positive, but there is no evidence that the substance so recovered in 50 slabs were tested on the spot with the field test kit and they responded positive to the test of *charas*. It is not known that from which slab, the substance was taken for the testing by the seizing officer on the spot with the field test kit. It is not known that what was the actual weight of each slab of resinous substance so recovered from the black-colored carry bag carried by the appellant. It is also not known that from which slab the representative sample was randomly drawn.

51. There is no evidence that the 50 slabs of *charas* wrapped in brown and yellow-colored adhesive tape seized from the black carry bag being carried by the appellant were assigned separate serial number. There is no evidence that each slab was weighed separately. There is no evidence that the field test of each of the slab was carried on the spot. There is no evidence that the seized 50 slabs semi solid resinous substance were bunched in lots of 10 packages or in lots of 40 packages. There is no evidence that the contents of 50 slabs were well mixed to



make it homogeneous and representative before the sample in duplicate was drawn.

52. Thus, it is seen in the present case that there is total non-compliance with the guidelines issued in the Standing Instruction No. 1 of 88 dated 15.03.1988 in respect of sampling and dispatching the seized sample to the Forensic Science Laboratory for test.

53. The Standing Instructions dated 15.03.1988 do not have the force of law. They are directory in nature and intended to guide the officers and to see that a fair procedure is adopted by the investigating agency of a case during investigation. However, complete non-compliance with the guidelines issued under the aforesaid Instruction creates grave suspicion on the reliability of the prosecution case.

54. The Supreme Court in ***Khet Singh Vs. Union of India [AIR 2002 SC 1450]*** after examining the said issue held:

“10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the



investigation.....”

55. In **Noor Aga Vs. State of Punjab [(2008) 16 SCC 417]**, the Supreme Court after giving thoughtful consideration to the guidelines issued under the NDPS Act in the Standing Order, observed in paragraphs 89 to 91 as under:

“89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.

91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in



such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

56. In ***Union of India Vs. Bal Mukund & Ors. [(2009) 12 SCC 161]***, the Supreme Court observed in paragraph 36 as under:

“36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction 1/88 which has been issued under the Act, lays down the procedure of taking samples. The High Court has noticed that P.W.7 had taken samples of 25 gm each from all the five bags and then mixed them and then sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement of law.”

57. The next contention of the appellant is that the Trial Court failed to appreciate that the prosecution failed to produce the seized materials before the court and, thus, it cannot be said that the weight of the seized contraband was 25.450 kilograms.

58. In this regard, I find that there is no evidence that the seized narcotics substance was disposed of in terms of the



provisions under Section 52(A) of the NDPS Act.

59. In absence of any proof regarding disposal of the seized substance, it was incumbent on the prosecution to have produced the seized substance before the court during trial.

60. *In Jitendra and Another v. State of M.P.* reported in *(2004) 10 SCC 562*, as the seized contraband was not produced before the court, the conviction was held by the Supreme Court to be vitiated. Para-6 of the judgment reads as under:

“ In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned. The suggestion made by the



defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched.”

61. The decision of the Supreme Court in ***Jitendra (supra)*** was followed by the Supreme Court in the subsequent judgments in ***Ashok Alias Dangra Jaiswal v. State of Madhya Pradesh*** reported in ***(2011) 5 SCC 123*** and in ***Gorakh Nath Prasad v. State of Bihar*** reported in ***(2018) 2 SCC 305***. Hence, the contention of the appellant that mere production of the search-cum-seizure list would not discharge the heavy burden on the prosecution is well founded.

62. I further find that no evidence has been adduced in support of the contention of the witnesses examined on behalf of the prosecution that the seized contraband was kept in the *Malkhana* of the NCB. Neither *the Malkhana* in-charge was



examined during trial nor the register of the *Malkhana* was produced before the court to suggest that there was entry of seized contraband in the *Malkhana*. It is worthy to note that after the arrest of an accused and seizure of the contraband under the NDPS Act, the Seizing Officer is required to take a series of steps. Section 52(3) of the NDPS Act, stipulates that every person arrested and every article seized under Sections 41 (2), 43 or 44 of the Act shall be forwarded without unnecessary delay to (a) the officer in-charge of the nearest police station, or (b) the officer empowered under Section 53. Since the Intelligence Officers of NCB are authorized officers under Section 53 of the NDPS Act, they are not required to forward the accused person to the nearest police station but the seizing officer is required to keep the sealed packages containing contraband and other seized articles in his safe custody till they are deposited in the go-down. The Seizing Officer is required to deposit the same as soon as possible within 48 hours of the seizure of such contraband with a forwarding memo indicating the case no., name of the accused person, reference of the test memo, description of drugs, drug wise number of packages and quantity and total number of all packages. He is required to take acknowledgment of receipt for such deposit from the *Malkhana*



in-charge. The Seizing Officer is required to hand over the acknowledgment of receipt of such deposit to the Investigating Officer. In the instant case as noted above, the Investigating Officer and the *Malkhana* in-charge have not been examined. The Seizing Officer has led no evidence to show that the seized substance was deposited in *Malkhana* and the substance was neither produced before the Trial Court nor any evidence of its disposal in accordance with law was adduced during trial. Apparently, there is lack of compliance with the prescribed procedure under the NDPS Act at all stages.

63. Further, Section 57 of the NDPS Act provides that whenever any person makes any arrest or seizure under the Act, he shall, within 48 hours next after such arrest, make a full report of all particulars of such arrest or seizure to his immediate official superior. In the instant case, P.W. 4 had arrested the appellant and prepared the search-cum-seizure memo. He has not uttered a word in his evidence that after the arrest and seizure, he made a full report of all the particulars of such arrest and seizure to his immediate official superior.

64. By now it is well settled that the provisions of Sections 52 and 57 of the NDPS Act are directory and the violation of these provisions' *ipso facto* would not vitiate the



trial or conviction, but the prosecution cannot totally ignore these provisions and such failure will have a bearing on the appreciation of evidence regarding arrest of the accused seizure of the contraband.

65. In the end, I would like to deal with the last submission made on behalf of the appellant with regard to Section 313 of the Cr.P.C.

66. The purpose to examine the accused under Section 313 of the Cr.P.C. is to meet the requirements of the principles of natural justice and to see that no one remains unheard.

67. In this regard, it would be apt to reproduce Section 313 of the Cr.P.C:-

“313. Power to examine the accused.

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the



accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3)The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may betaken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.”

68. The plain reading of Section 313 of the Cr.P.C. would demonstrate that the question under clause (1)(a) is discretionary. It empowers the court to put such questions to the accused as the court considers necessary for the purposes of enabling him personally to explain any circumstances appearing in the evidence against him at any stage without previously warning. However, clause (1)(b) empowers the court to question the accused generally on the day after the witnesses for the prosecution have been examined and before he is called upon for his defence. It casts a duty on court to give an opportunity to the accused to explain the incriminating material against him.

69. *In State of U.P. Vs. Mohd. Iqram & Anr*, since reported in *AIR 2011 SC 2296*, the Supreme Court held :



“Attention of the accused must specifically be drawn to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Court is under legal obligation to put all incriminating circumstances before accused to solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused. Circumstances not put to the accused in his examination under section 313, cannot be used against him.”

70. In ***Naval Kishore Vs. State of Bihar***, since reported in **(2004) 7 SCC 502**, the Supreme Court observed that the opportunity of examination under section 313 given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence. In the said case, the Supreme Court further observed that the practice of putting the entire evidence against the accused in a single question and giving an opportunity to explain the same is improper as the accused may not be in a position to give a rational and intelligent explanation.

71. It is well settled that the object of Section 313 of the Code is to enable the accused to explain the circumstances against him in the evidence personally except where the statute provides otherwise.



72. The translated version of the statement of the appellant recorded under Section 313 Cr.P.C. in English is as under:

1- Question: Did you hear the evidence adduced by the witnesses?

Answer: Yes.

2. Question: The evidence against you is that on 26.02.2013 at 06:30 PM, 25.450 kilograms narcotic substance (*Charas/Hashish*) was recovered from the black-colored carry bag carried by you near Mithapur Bus Stand and your signature along with the signature of the Seizing Officer, witnesses and the members of the raiding party is found on the seizure list and the notice under Section 50 of the NDPS Act. The seizure list was prepared on the spot and a copy of the same was handed over to you. What you have to say regarding the aforesaid evidence?

Answer: It is not true.

3. Question: What do you want to say in your defence?

Answer: I am innocent. I was arrested from my house.

4 Did you disclose in your statement that the seized narcotics substance (*Charas/Hashish*) was given to you by one Raj Kumar and you had to deliver the substance to him at Mithapur Bus Stand?



Answer: -It is not true.

5. What you have to say regarding the evidence that you were transporting the narcotic substance in connivance with the drug peddlers from Indo-Nepal border which was being financed by Raj Kumar?

Answer: It is not true.

6. Question: Will you lead evidence in your defence?

Answer: Yes.

7. Question: Do you want to say anything in your defence?

Answer: I am innocent.

73. It would be evident from the examination of the appellant under Section 313 of the Cr.P.C. that the following circumstances were not brought to his notice:

(a) That an information regarding right to get the search conducted before Magistrate or Gazetted Officer as per Section 50 of the NDPS Act was given to the appellant.

(b) That the material so recovered from the carry bag being carried by the appellant was tested with field test kit on the spot and it responded positive to the test of *charas*.

(c) That in presence of the independent witnesses, the seized material so recovered was weighed by the electronic weighing machine on the spot.



(d) That from the recovered 25.450 Kilograms of *charas*, two samples of 25 grams each were drawn randomly and marked as S-1 and S-2.

(e) That the samples were kept in two separate plastic bags and were hot sealed and they were kept in two paper envelopes and were sealed with departmental seal and signed by the officer concerned, independent witnesses and the appellant.

(f) That the rest 25.400 Kilograms of *charas* was also sealed in the black-colored carry bag and further sealed with departmental seal in white- colored markin cloth.

(g) That he had made confessional statement under Section 67 of the NDPS Act.

(h) That the confessional statement made under Section 67 of the NDPS Act was voluntary.

(i) That the sample S-1 and seized material were kept at the departmental *Malkhana* of the NCB, Patna Zonal Unit and sample S-1 along with the test memo was sent to CRCL, Kolkata for chemical examination.

(j) That the chemical examiner report confirmed the content of sample S-1 as *charas*.

74. In my view, since no question was asked from the appellant on the circumstances referred to in the aforesaid paragraph, he did not have any chance to explain those circumstances. The circumstances which were never put to the



appellant while examining him under Section 313 of the Cr.P.C. could not have been used for his conviction. Though there was no evidence that the appellant was transporting the narcotic substance in connivance with the drug peddlers from Indo-Nepal border which was being financed by Raj Kumar, the Trial Court put the said question to the appellant. Surprisingly, the circumstances put forth by the witnesses in their testimonies were not brought to the notice of the appellant and the circumstances which have not been led in evidence were put to him while examining him under Section 313 of the Cr.P.C.

75. Thus, on appreciation of the entire evidence, I am of the opinion that there are serious infirmities in the prosecution evidence. Hence, the judgment of conviction and the consequent order of sentence passed by the Trial Court cannot be sustained.

76. I, therefore, hold that the appellant is entitled to get the benefit of doubt. Accordingly, the appeal is allowed. The impugned judgment of conviction dated 02.07.2016 and the consequent order of sentence dated 15.07.2016 passed by the learned Additional Sessions Judge-VII, Patna in Special Case No. 09 of 2013/N.C.B. No. 53 of 2013 are set aside.

77. The appellant Jagat Prasad is acquitted of the



charge levelled against him. He is directed to be set at liberty
forthwith unless his detention is required in any other case.

(Ashwani Kumar Singh, J)

Arvind Srivastava, J.-

(Arvind Srivastava, J)

rohit/-

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