

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1013 of 2024

Arising Out of PS. Case No.-26 Year-2023 Thana- D.R.I District- Muzaffarpur

Surendra Prasad, Son of Late Lakhraj Mahto, Resident of Village- Singhpur
Haraiya, P.S- Raxaul (Haraiya), District- East Champaran.

... .. Appellant

Versus

The Union of India through Custom Commissioner, Muzaffarpur.

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 1074 of 2024

Arising Out of PS. Case No.-26 Year-2003 Thana- D.R.I District- Muzaffarpur

Dilip Kumar Sah Son of Sri Yogi Lal Sah Resident of Village - Nayagaon,
P.O.- Nayagaon, P.S. -Nayagaon, District -Saran.

... .. Appellant

Versus

The Union of India through DRI, Muzaffarpur

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 1013 of 2024)

For the Appellant : Mr. Manish Kumar No. II, Advocate
Mr. Santosh Bharti, Advocate
Mr. Madhurendra Kumar, Advocate

For the Respondent : Mr. Anshuman Singh, Senior SC

(In CRIMINAL APPEAL (DB) No. 1074 of 2024)

For the Appellant : Mr. Ramakant Sharma, Senior Advocate
Mr. Umesh Prasad, Advocate

For the Respondent : Mr. Anshuman Singh, Senior SC

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and

HONOURABLE JUSTICE SMT. SONI SHRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 02-04-2026

Heard Mr. Ramakant Sharma, learned Senior Counsel,
Mr. Manish Kumar No.II, learned counsel and Mr. Santosh Bharti,
learned counsel representing the appellants in both the appeals and



Mr. Anshuman Singh, learned Senior Counsel representing the Directorate of Revenue Intelligence (DRI).

2. Both the appeals have been preferred for setting aside the judgment of conviction dated 27.06.2024 (hereinafter referred to as the 'impugned judgment') and the order of sentence dated 01.07.2024 (hereinafter referred to as the 'impugned order') passed by the learned Exclusive Special Judge-II (NDPS), Muzaffarpur (hereinafter referred to as the 'learned trial court') in NDPS Case No. 26 of 2023 arising out of DRI Case No. 26 of 2003. By the impugned judgment, the appellants have been convicted for the offences punishable under Section 20(b)(ii)(c) of the Narcotics Drugs & Psychotropic Substances Act (in short 'NDPS Act') and by the impugned order, they have been ordered to undergo rigorous imprisonment for fifteen years (15) years each with a fine of Rs.50,000/- each under Section 20(b)(ii)(c) of the NDPS Act and in default of payment of fine, they have to further undergo simple imprisonment for one year.

Prosecution Case

3. The complainant, who was an Intelligence Officer at Directorate of Revenue Intelligence, Muzaffarpur, has alleged that on 16.11.2003 on the basis of specific information, he had intercepted one truck bearing Registration No. WB-25-2127 along



with occupant of the truck, namely, Loki Rai and Dilip Kumar Sah at Chandani Chowk, Muzaffarpur. On search, in presence of independent witnesses, 28 bags or 56 packets of Ganja weighing 539 kgs (gross weight) or 525 kgs (Net Weight) was recovered from the truck which was concealed below the consignment of 64 bags of cattle feed. The recovered 525 kgs of Ganja and the Truck, which was used as mode of conveyance for transportation of Ganja, were seized under Section 42(c) of the NDPS Act. Further, the 64 bags of cattle feed used for concealment of Ganja was also seized.

It is further alleged that the above-named accused persons in their voluntary statement tendered before the independent witnesses admitted their guilt as regards their conscious involvement in trafficking of Nepali Ganja. They also stated that the Ganja was loaded on the truck at Laxmipur, Raxaul, Bihar in their conscious knowledge by the person, namely, Surendra Ji of Durga Transport and Yugal Mistry near Sona Cinema, Raxaul and the Ganja was to be delivered at Fatuha to a person, namely, Ram Prawesh at Fatuha Danapur. They could not disclose the complete address of the said Ram Parwesh and stated that they had to park the vehicle near Kacchi Dargan at Fatuha and had to deliver Ganja to the agent of Ram Prawesh on the direction of Yugal Mistri. They



further stated that they were carrying Ganja from Raxual to Fatuha consciously for transportation charges of Rs.15,000/-. The above-named accused persons were arrested and forwarded to judicial custody on 17.11.2003.

It is further alleged that in course of follow up action, the accused Sri Surendra Prasad, son of Sri Lakharaj Mahato, R/o Village- Harreiyen, P.S.- Raxaul, East Champaran was apprehended and subsequently arrested on 18.11.2003 and forwarded to judicial custody on 19.11.2003 for associating in trafficking of Ganja. It is also stated that the seized ganja was sent for chemical analysis to the Central Revenue Control Laboratory wherein it was reported by the Chemical Examiner, C.R.C.L. New Delhi, vide end F.N.-1/ND/R/2003-CLD-299(N)/24.11.2003 dated 24.11.2002 that the same is “Ganja” within the meaning of NDPS.

It is stated that in course of inquiry/investigation conducted, the accusation against (i) Loki Rai, son of Sri Bilat Rai and (ii) Dilip Kumar Sah, son of Sri Yogi Lal Sah, the accused persons, who are members of big smuggler syndicate operating from Nepal and indulged in smuggling of Nepali ganja into India, were fully established. Further from the statement of the accused Loki Rai, it appeared that the accused Surendra Prasad, son of Lakhraj Mahato is also involved in the case.



4. Learned trial court took cognizance of the offences under Sections 20, 23 and 25 of the NDPS Act agaisnt (1) Loki Rai, (2) Dilip Kumar Sah and (3) Surendra Prasad vide order dated 27.02.2004. Thereafter, vide order dated 26.10.2009, records of the accused Loki Rai was split off.

5. Charges were read over and explained to the accused persons in Hindi to which they pleaded not guilty and claimed to be tried. Accordingly, vide order dated 12.09.2012, charges were framed against (1) Dilip Kumar Sah and (2) Surendra Prasad under Sections 20(b)(ii)(c), 23 and 25 of the NDPS Act.

6. In course of trial, the prosecution examined as many as three witnesses and exhibited several documentary evidences. The names of the prosecution witnesses and the exhibits are being shown hereunder in a tabular form:-

List of Prosecution witnesses

Prosecution Witness No.	Name of Witness	Description
PW-1	Rakesh Ranjan	Intelligence officer of DRI
PW-2	Rajesh Kumar Shrivastav	Intelligence officer of DRI
PW-3	Shailesh Kumar Sinha	

List of Exhibits on behalf of the Prosecution

Exhibit No.	Description of the Exhibit	Proved by/Attested by
‘1’	Seizure List	PW-1



‘2’	Statement of Dilip Kumar Sah	PW-2
‘2/1’	Statement of Lauki Ray	PW-2
‘2/2’	Statement of Surendra Prasad	PW-2
‘3’	Panchnama	PW-2
‘4’	Section-1 of sample of test memo	PW-2
‘5’	Section 2 of Test Report of sample of test memo	PW-2
‘6’	Certification Paper	PW-2
‘7’	Panchnama of Recovery Memo	PW-2
‘8’	Complaint Petition	PW-2
‘9’	Entry of seized article in the register of Custom Godown	PW-3

List of Material Exhibit

Material Object No.	Description of the Exhibit	Proved by/Attested by
Material Exhibit ‘1’	Signed and sealed envelope of sample	PW-3

7. Thereafter, the statements of the appellants were recorded under Section 313 of the CrPC in which they denied the allegations and pleaded innocence.

Findings of the Learned Trial Court

8. Learned trial court after examining the evidences available on the record found that the prosecution witnesses in their deposition have supported the case of the prosecution on the point of search, seizure and sampling of the seized ganja.



9. Learned trial court found that on 16.11.2003, PW-2, on secret information intercepted a truck on NH-28 and from the said truck ganja was found concealed under the cattle feed.

10. Learned trial court further found that in the presence of two independent witnesses, namely, Sudhir Kumar and Nagendra Chaudhary, truck was searched and 56 packets in 28 sacs containing altogether 525 kgs of ganja was recovered. Thereafter, PW-2 collected three samples each of 50-50 gms and sent the samples of seized substance which was confirmed to be ganja by the Chemical Examination Report (Exhibit '5'). Learned trial court found that the certification of the seized 525 kg ganja deposited in the customs godown was done by the Judicial Magistrate.

11. Learned trial court after considering all the facts and circumstances of the case held that the prosecution has been able to prove the charge under Section 20(b)(ii)c of the NDPS Act against these appellants beyond all reasonable doubts, however, prosecution has failed to prove the charges under Sections 23 and 25 of the NDPS Act. Accordingly, the appellants have been convicted under Section 20(b)(ii)(c) of the NDPS Act.



Submissions on behalf of the Appellants

12. Learned Senior Counsel for the appellants submits that the present case has been registered by the DRI on the basis of a search and seizure based on a secret information said to have been received by the complainant/informant (PW-2). However, there is no compliance with Section 42(2) of the NDPS Act. Relying upon the judgment of the Hon'ble Supreme Court in the case of **Boota Singh v. State of Haryana** reported in **(2021) 19 SCC 606** and **Karnail Singh v. State of Haryana** reported in **(2009) 8 SCC 539**, learned Senior Counsel for the appellants would submit that there being no compliance with sub-section (2) of Section 42 of the NDPS Act, the very search and seizure procedure has not been conducted in accordance with law.

13. Learned Senior Counsel for the appellants submits that the seizure is said to have taken place on 16.11.2003 at 15:30 Hours, the place of seizure has been vaguely shown as "Muzaffarpur, Bihar". In the Panchnama prepared by PW-2, it is recorded that the vehicle being Truck bearing Registration No. WB25- 2127 was chased at about 12:30 PM by the officers of the DRI at NH-28 and after overtaking the said truck was stopped. The seizure list witnesses, namely, Sudhir Kumar and Nagendra Chaudhary who were the residents under Brahmpur Police Station



in the district of Muzaffarpur claimed that they were standing at Chandni Chowk, Muzaffarpur where they had seen the officers chasing the truck and in their presence, the search and seizure were conducted. In course of search, 64 packets of cattle feeds and 28 plastic packets of ganja like substance were seized from the carrier of the truck. It is submitted that as per the prosecution case, 56 packets ganja were seized which were weighed 539 kg and the net weight was found at 525 kg of which three samples of 50 gm each were prepared and kept in a yellow colour plastic coated envelope which was sealed. The seizure list witnesses were not produced in course of trial.

14. It is, however, submitted that from the test memo (Exhibit '4'), it would appear that the Seizing Officer who prepared the test memo only on 17.11.2003 has recorded that one sample was prepared on 16.11.2003 and the same was dispatched on 17.11.2003. In front of the column showing "number of sample and marking of each of them for identification": it is recorded "one sealed with the seal of Directorate of Revenue Intelligence". It is, thus, submitted that the statements made in the panchnama that three samples were prepared of 50 gm each stand falsified from the test memo (Exhibit '4').



15. It is further submitted that the report of the chemical examination (Exhibit '5') has not been duly tendered in evidence and the author of the documents have not come in the doc. Even PW-2 has not tendered it in accordance with law, therefore, the very admissibility of Exhibits '5' and '6' would be doubtful.

16. Learned Senior Counsel further submits that it would appear from the trial court's records that on 17.11.2003, the arrest memo, seizure memo, panchnama, voluntary statement, fardbeyan were produced in the trial court. The two arrested accused were also produced who were taken into judicial custody. On that day, the I.O. did not produce the samples, if any prepared by him. The I.O. did not produce the test memo (Exhibit '4') which is said to have been prepared by him on 17.11.2003. No inventory was prepared and produced. The I.O. did not seek any permission from the learned trial court to send the samples of ganja prepared by him to a designated forensic science laboratory.

17. Learned Senior Counsel further submits that the I.O. filed the application in the trial court for appointment of a learned Magistrate for certification of inventory and drawal of samples. From Exhibit '6' which is the certification paper bearing signature of the learned Judicial Magistrate, Muzaffarpur, it would appear that a formal certification has been done by the learned Magistrate



on 13.12.2004. In the column showing description of goods, ganja has been shown with a quantity of 56 packets for 525 kg clearly suggesting that no sample was prepared out of the ganja produced before the learned Magistrate for certification. This would create doubt over the sanctity of the document (Exhibit '6'). The learned Magistrate has not been examined. Had the I.O. (PW-2) prepared the sample on 16.11.2003 by taking 50 gm from 3 different packets, the weight of the ganja could not have remained the same as stated in Exhibit '6'.

18. Learned Senior Counsel further submits that in this case, the very preparation of the sample of ganja is highly doubtful. Samples were taken only from three packets. It has not been prepared in presence of the accused in terms of the Standing Order No. 1 of 1988 dated 15.03.1988. The test memo does not bear any signature of the forwarding officer. The Exhibit '5' would show that date of receipt of ganja in laboratory is 24.11.2003 but the quantity received in the laboratory is said to be 32.7 gm only. Who took the samples to the laboratory is not known.

19. Learned Senior Counsel further submits that in this case, even as the certificate issued by the learned Magistrate (Exhibit '6') shows that the representative sample is drawn, no representative sample was produced before the learned trial court



either for sending the same to the FSL or as material exhibit after destruction of the ganja in terms of Section 52A of the NDPS Act. This would create huge doubt over the mandatory compliances with the provisions of law which are in the nature of safeguards provided to the accused.

20. Learned Senior Counsel has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Surepally Srinivas Vs. The State of Andhra Pradesh (now State of Telangana)** reported in **2025 SCC OnLine SC 683** and the judgments of this Court in the case of **Aslam Ansari Vs. The State of Bihar and Another** in **Criminal Appeal (DB) No. 137 of 2023**, **Lakshaman Mahto Vs. The State of Bihar** in **Criminal Appeal (DB) No. 338 of 2016**.

Submissions on behalf of the Respondent

21. On the other hand, Mr. Anshuman Singh, learned Senior Standing Counsel for the DRI has contested the appeal. Learned Senior SC submits that in this case, the fact that there was a secret information and on that basis, search was conducted is recorded in the panchnama and in the complaint petition which was filed later on.



22. Learned Senior SC submits that non-production of the seizure list witnesses would not take away the sanctity of the seizure of ganja.

23. Learned Senior SC further submits that three samples were prepared out of the seized ganja, however, it is not contested that in the test memo (Exhibit '4'), there is mention of only one sample and not three.

24. Learned Senior SC submits that even as Exhibit '4' has not been tendered in evidence through a competent witness and the signature of the author of the document and the name of the author of the document (Exhibit '4') has not been disclosed by PW-2 in his deposition, the document is admissible in evidence in terms of Section 293 CrPC.

25. Learned Senior SC further submits that in view of the judgment of the Hon'ble Supreme Court in the case of **Narcotics Control Bureau Vs. Kashif** reported in **(2024) 11 SCC 372**, any illegality or irregularity in compliance with Section 52A of the NDPS Act would not render the whole trial vitiated.

26. Learned Senior SC has also relied upon a Division Bench judgment of this Court in the case of **Ali Ahmad Vs. The State of Bihar** in Criminal Appeal (DB) No. 349 of 2023.



27. Learned Senior SC has further relied upon the judgment of the Hon'ble Supreme Court in the case of **Bharat Aambale Vs. State of Chhattisgarh** reported in 2025 SCC OnLine 110 and the judgment in the case of **Jothi alias Nagajothi Vs. State. Rep. By the Inspector of Police** reported in 2025 SCC OnLine SC 2774.

Consideration

28. Having heard learned Senior Counsel for the appellants, learned Senior Standing Counsel for the DRI and upon perusal of the trial court's records, this Court finds that the search and seizure of the truck and the contraband in question was conducted on the basis of a prior secret information that one truck bearing Registration No. WB-25-2127 was coming with some cattle feeds beneath which ganja has been concealed. Rakesh Ranjan (PW-1), who was posted as Intelligence Officer in DRI, Muzaffarpur on 16.11.2003, was a member of the team which had chased the truck, stopped it and had participated in the search, seizure and sampling procedure. He has stated in his evidence that the secret information was recorded by R.K. Shrivastava in DRI-I. R.K. Shrivastava has been examined in this case as PW-2. In his examination-in-chief, he has not stated that he had recorded the secret information. This DRI-1 has not been produced by the



prosecution. In the kind of the evidence on this aspect of the matter, the submission of learned Senior Counsel for the appellants that there is non-observance with the mandate of Section 42(2) of the NDPS Act, is correct. In the case of **Karnail Singh** (supra), the Hon'ble Supreme Court has been pleased to held as under:

“35. In conclusion, what is to be noticed is that *Abdul Rashid*¹ did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham*² hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally *precede* the entry,

1. Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513: 2000 SCC (Cri) 496
2. Sajan Abraham v. State of Kerala, (2001) 6 SCC 692: 2001 SCC (Cri) 1217



search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

29. Karnail Singh (supra) has been discussed by the Hon’ble Supreme Court in the case of **Darshan Singh vs. State of Haryana** reported in **(2016) 14 SCC 358**. Paragraphs ‘13’ to ‘15’ of the said judgment are being extracted hereunder for a ready reference:-



“13. Having given our thoughtful consideration to the submission advanced at the hands of the learned counsel for the respondent, we are of the view that the mandate contained in Section 42(1) of the NDPS Act, requiring the recording in writing, the details pertaining to the receipt of secret information, as also, the communication of the same to the superior officer are separate and distinct from the procedure stipulated under the provisions of the Criminal Procedure Code. Sub-section (1) of Section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of Second Class specially empowered by the State Government may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Sub-section (2) of Section 41 refers to issuance of authorisation for similar purposes by the officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence, etc. Sub-section (1) of Section 42 of the NDPS Act lays down that the empowered officer if he has a prior information given by any person, should necessarily take it down in writing, and where he has reason to believe from his personal knowledge, that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search, without warrant between sunrise and sunset and he may do so without recording his reasons of belief. The two separate procedures noticed above are exclusive of one another. Compliance with one, would not infer compliance with the other. In the circumstances contemplated under Section 42 of the NDPS Act the mandate of the procedure contemplated therein will have to be followed separately, in the manner interpreted by this Court in *Karnail Singh case*² and the same will not be assumed, merely because the Station House Officer concerned had registered a first information report, which was also dispatched to the Superintendent of Police, in compliance with the provisions of the Criminal Procedure Code.

2. *Karnail Singh v. State of Haryana*, (2009) 8 SCC 539; (2009) 3 SCC (Cri) 887



14. In the above view of the matter, it is not possible for us to accept the submission of the learned counsel for the respondent State that the registration of the first information report at the hands of the Station House Officer, Police Station Shahar, Panipat and its communication to the Superintendent of Police, Panipat would constitute sufficient compliance with the mandate of Section 42 of the NDPS Act.

15. In the aforesaid view of the matter, we are satisfied that Section 42 of the NDPS Act was not complied with at all, insofar as the present controversy is concerned. Thus viewed, Conclusion (d) recorded in para 35 of the judgment rendered in *Karnail Singh case*² would fully apply to the facts and circumstances of the present case, and we are left with no other option, but to set aside the conviction and the sentence of imprisonment of the appellant-accused Darshan Singh. Ordered accordingly. The appeal stands allowed.”

30. In the facts of the present case, this Court would record that there is no compliance with the requirements of Section 42(1) and 42(2) of the NDPS Act.

31. It is further found from the evidence that the search of the truck was conducted in presence of two witnesses, namely Sudhir Kumar and Nagendra Chaudhary, who were the residents under Brahmpur Police Station in the district of Muzaffarpur, their complete address is not available in the seizure list and they have not been examined in course of trial. No plausible explanation has been furnished by the prosecution for non-examination of the two seizure-list witnesses. The seizure memo (Exhibit ‘1’) shows the

2. *Karnail Singh v. State of Haryana*, (2009) 8 SCC 539: (2009) 3 SCC (Cri) 887



place of seizure “Muzaffarpur, Bihar”. PW-2 admits it. Thus, it is evident that the actual place where truck was stopped and search was conducted has not been recorded by the seizing officer. As per the complainant (PW-2), 56 packets kept in 28 sacks were recovered from the truck and these packets were containing ganja. In his examination-in-chief, PW-2 has stated that at the time of seizure, no one else was there. He has stated that from the seized ganja, three samples of 50-50 gram were taken out and the samples were kept in a yellow colour plastic on which he, the two accused Lauki Rai and Dilip Kumar Sah and the two independent witnesses had put their signature. He has admitted in the cross-examination in paragraph ‘11’ that he had opened two packets of ganja and had taken out the sample. It is, thus, evident from the deposition of the complainant (PW-2) that the samples were not taken from all the packets. In this regard, the submission of learned Senior Counsel for the appellants that the sampling was not done in accordance with the Standing Order No. 1 of 1989 dated 13th June, 1989 issued by the Anti-Smuggling Unit, Department of Revenue, Ministry of Finance, appears correct. Clause 2.2 of the Standing Order reads as under:-

“2.2 All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search



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

32. In the case of Noor Aga vs. State of Punjab reported in **(2008) 16 SCC 417**, the Standing Order came for consideration before the Hon’ble Supreme Court. It has been held that the guidelines mentioned in the said Standing Order should not only be substantively complied with, but in a case involving penal proceedings, the rigours of such guidelines may be insisted upon. Here, it is worth mentioning that in this case even though PW-2 claims to have prepared three samples of 50 gram each out of two packets only, he had not produced the samples in the court and had not sought any direction for sending the sample to the designated laboratory. In paragraph ‘17’, PW-2 has stated that the seized ganja was not produced in the court. In paragraph ‘18’, he admits that no prior permission was obtained for sending the sample for examination. PW-2 has stated in paragraph ‘24’ of his deposition that he had seized 525 kg of ganja and the committee had destroyed the same. The defence suggested to this witness that if 525 kg of ganja was seized and the same has been destroyed, it means no sample was taken out. PW-2 denied the suggestion, but at this stage when this Court goes through the trial court’s records, it is found that the prosecution has brought on record page no. 43,



serial no. 2 of Godown Entry Register (Exhibit '9') to show that ganja was kept in the godown vide entry no. 2. The quantity of ganja is being shown as 525 kg in 25 bags. The prosecution case is that ganja seized were 56 packets in 28 bags/sacks, therefore, there is not only a difference in respect of the bags shown in the godown register (Exhibit '9'), the quantity shown being 525 kg would create a huge doubt as to whether three samples of 50 gram each were taken out.

33. At this stage, we would discuss the test memo (Exhibit '4'). This has been prepared on 17.11.2003 by R.K. Shrivastava (PW-2). In column '4', the date and place of seizure has been shown as "16.11.2003 Muzaffarpur". In column '5', date of drawal and dispatch of sample has been shown as "16.11.2003 and 17.11.2003". In column '6', number of sample and marking on each of them for identification has been shown as "One, sealed with the seal of "Directorate of Revenue Intelligence"." From the test memo (Exhibit '4'), it is evident that only one sample of 50 gram (approx) has been shown, which was sealed with the seal of the Directorate of Revenue, Intelligence. The date of drawal of the sample is 16.11.2003, but the sample drawn and sealed by PW-2 on 16.11.2003 was not produced in the court with the other documents on 17.11.2003. According to PW-2, the dispatch of



sample was made on 17.11.2003, admittedly, no prior order was obtained from the court for sending the sample to a designated laboratory. PW-2 claimed in his deposition that samples were prepared in presence of the accused, but there is no evidence of preparation of samples in the presence of the accused, which is again in violation of the provisions of the Standing Order and the judgment of the Hon'ble Supreme Court in the case of **Bharat Aambale** (supra).

34. The latter part of the test memo (Section-II) which is meant for use in the laboratory, the date of receipt in the laboratory is 24.11.2003 and the net weight found in the laboratory as shown is 32.7 gm. This part (Section-II) has been shown signed by a Chemical Examiner and an Analyst. This has been marked Exhibit '5', at the instance of the complainant (PW-2). On perusal of Exhibit '4' and Exhibit '5' together, it appears that while PW-2 has shown preparation of a sample of 50 gram on 16.11.2003 and dispatched the same to the laboratory on 17.11.2003, the same was received in the laboratory on 24.11.2003. What was the mode of dispatch, whether it was sent through any special messenger is not evident from the deposition of PW-2. The net weight found in the laboratory was 32.7 gram, whereas the sample prepared is said to be of 50 grams (approx). Here, this Court finds that the seizing



officer has, while filling up Exhibit '4', recorded the quantity of sample as "50 gram (approx)", it means he was only tentative with regard to the weight of the sample. His approximate weight shown in Exhibit '4' is not correct as per the information furnished in Exhibit '5'. This would create huge doubt over the sampling procedure. We have already mentioned hereinabove that PW-2 claimed that he had prepared three samples, what happened to the other two samples is not known. We further find that Exhibit '5' has been proved by the complainant (PW-2) in course of his deposition. He has stated that the test report had come to him from the laboratory. PW-2 has not even mentioned who is the author of Exhibit '5' and by what mode he had received the test report (Exhibit '5'). PW-2 has admitted in paragraph '23' of his deposition that he had not mentioned about taking out of sample in the seizure list. The defence has suggested that the fact that 525 kg of ganja was seized and the same quantity was destroyed only shows that no sample was taken out. Although, the complainant (PW-2) has denied this suggestion but to this Court it appears that the defence has been able to create doubt in the prosecution case. The Inspector-cum-Godown In-charge (PW-3), who has proved the entry in the godown register (Exhibit 9), has stated that the seized articles were entered in the register of the year 2004-2005 at



page no. 43 at serial no. 2. He has stated that in this case on 13.12.2004, in presence of the learned Judicial Magistrate, First Class, Muzaffarpur, sample was taken out. He produced the envelope (Material Exhibit No. '1'). On perusal thereof, we do not find any seal and signature. In his cross-examination, this witness has admitted that in the godown entry, there is no mention that sample was taken out. He has admitted that on the envelope there is no signature of any of the accused or the witnesses and on the envelope there is no mention of the weight. Thus, this Court finds that the ganja which was seized on 16.11.2003 was neither produced in the court nor any permission was taken from the court to keep the ganja in a designated godown. Only in the year 2004-2005 register, an entry has been produced to show that the ganja was kept in the godown but the chain of possession of the ganja, where those were kept during all this period from 16.11.2003, has not been established by the prosecution.

35. So far as the evidence against Surendra Prasad (appellant in Criminal Appeal (DB) No. 1013 of 2024) is concerned, it is the statement of the complainant (PW-2) that Surendra Prasad was not present at the place of occurrence, he was not explained the ramification of the statement under Section 67 and PW-2 had not given any certificate that his statement may go



against him. He had not seized anything from the possession of this appellant. PW-2 has stated in paragraph '15' of his deposition that he had recorded statement of the arrested persons under Section 67 in the DRI Office, Muzaffarpur. Dilip Shah had stated that ganja was loaded near Laxmipur Raxaul by Surendra Transport. Dilip Shah had not said that who were the persons who got loaded the ganja and he had not stated about the charges for transportation. It is evident that the implication of this appellant is solely on the basis of the vague statement of Dilip Kumar Shah. PW-2 himself says that Dilip Kumar Shah had stated about a person named Surendra Kumar, but he admits in paragraph '21' that he could not verify the name and address of the persons, namely Surendra and Jugal Mistry. We are, therefore, of the opinion that the prosecution has not at all brought any material, much less reliable piece of evidence, to connect Surendra (the appellant in Criminal Appeal (DB) No. 1013 of 2024), as the person who had loaded the ganja.

36. At this stage, we are conscious of the judgment in the case of **Kashif** (supra) and **Bharat Aambale** (supra) where the Hon'ble Supreme Court has discussed the scope, purpose and effect of Section 52A of the NDPS Act. It has been held that mere non-compliance or delayed non-compliance with Section 52A is



not fatal unless the irregularity creates discrepancy affecting the integrity of seized substance or rendering the prosecution case doubtful. We would refer the judgment of the Hon'ble Supreme Court in case of **Surepally Srinivas** (supra) where the Hon'ble Supreme Court has discussed the case of **Kashif** (supra) and **Bharat Aambale** (supra). Paragraph '13', '14', '15' and '16' of the judgment in case of **Surepally Srinivas** (supra) are quoted hereunder for a ready reference:-

“13. In *Bharat Aambale* (supra), this Court held that the purport of Section 52-A, NDPS Act read with Standing Order No. 1/89 extends beyond mere disposal and destruction of seized contraband and serves a broader purpose of strengthening the evidentiary framework under the NDPS Act. This decision stresses upon the fact that what is to be seen is whether there has been substantial compliance with the mandate of Section 52-A and if not, the prosecution must satisfy the court that such non-compliance does not affect its case against the accused. This is also what has been held in *Kashif* (supra).

14. In the present case, from the evidence on record, it can be seen and it is clear that the seized contraband was not properly sealed. Coupled with this is the fact of the seized contraband not being produced before the trial court prior to 3rd July, 2010. It is difficult to accept the prosecution case that though there may not have been strict compliance of Standing Order No. 1/89, the seized contraband was not tampered at all. Keeping of the



seized contraband by PW-3 in a separate room in his office for fifteen days could give rise to an allegation that the seized contraband was by itself substituted and some other items planted to falsely implicate the accused. To avoid suspicious circumstances and to ensure fair procedure in respect of search and seizure, it is always desirable to follow the standing order which provides suitable guidance for the officers investigating crimes under the NDPS Act. Should there be any departure, the same must be based on justifiable and reasonable grounds. We are, satisfied, on appreciation of the evidence on record, that the possibility of tampering during this fifteen-day period cannot be totally ruled out and that not only has there been no substantial compliance of the standing order, the departure has also not been justified.

15. We have also found from the materials on record that there has been clear non-compliance with the provisions contained in Section 52-A of the NDPS Act. Either possibly due to lack of experience of the investigating officer or his lack of knowledge of the relevant provisions of the NDPS Act, there were lapses which were duly noted by the Sessions Judge. Thus, we are unable to hold that there was primary and reliable evidence before the trial court in respect of the offence committed. The onus of proving that compliance with Section 52-A did not affect the case of the prosecution has not been duly discharged by the prosecution.

16. For the foregoing reasons, we are inclined to extend the benefit of doubt to the appellants. The judgment of conviction and order on sentence passed by the Sessions Judge, since affirmed by the High Court, stands set aside. The appeals stand allowed.”



37. Learned Senior Standing Counsel for the DRI has relied upon a judgment of the Hon'ble Supreme Court in case of **Jothi alias Nagajothi** (supra) to submit that unless the appellant lays down a foundational material to suggest that the sampling process was unreliable or that the integrity of the samples stood compromised, the appellants cannot succeed. Mere reduction in weight of the sample cannot affect the identity or integrity of the sample. We have gone through the facts of the case of **Jothi alias Nagajothi** (supra). It would appear from a bare perusal of the said judgment that in the said case PW-5 had forwarded the seized samples to the court along with a requisition for chemical analysis. The samples were received by PW-6 (Scientific Officer) through PW-4. PW-6 analysed the sample, detected cannabinoids and furnished the report. Thereafter, PW-5 recorded the statements of PW-6 and the remaining members of the raiding team under Section 161 of the CrPC. Contrary to the facts of the said case, in the present case nothing has been brought on record in course of trial to show that the complainant (PW-2) had forwarded the seized samples to the court along with requisition for chemical analysis. The officer who received the samples in the laboratory and the officer who submitted the samples in the laboratory are not known and they have not been examined. The authors of Exhibit '5' have



not deposed and during investigation, the I.O. has not recorded their statements. In the case of **Jothi alias Nagajothi** (supra), the Hon'ble Supreme Court found from the records that (i) the samples were drawn at the spot in the presence of PWs 1 to 3, (ii) the sample packets were duly sealed with signatures and seizure details, (iii) the seized material, along with the samples, was produced before the Magistrate and (iv) pursuant to the judicial order dated 20.10.2019, sample 'S-1' was forwarded to the Forensic Science Laboratory while 'S-2' was retained in judicial custody. The Scientific Officer (PW-6) affirmed that the seal on the packet received for analysis was intact and bore the correct identifying particulars. Contrary to these materials on the record before the Hon'ble Supreme Court, in the present case, this Court finds that there is no such material. We have already pointed out that PW-2 claimed that he had prepared three samples of fifty gram each but he had not produced the samples in sealed condition before the learned court and even the test report (Exhibit '4') was not filed in the court on 17.11.2003. The shortfall in the sample sent to the laboratory is 17.22 gram within seven days, which has not been explained by the prosecution.

38. The Standing Instruction No. 1 of 1988 dated 15.03.1988 of the Narcotics Control Bureau, Government of India,



issued under Section 52 of the NDPS Act, prescribes the detailed procedure for sampling, sealing and dispatching the sealed samples to the laboratory for test. Clauses '1.4', '1.5', '1.6' and '1.9' of the Standing Instruction No. 1 of 1988 read as under:-

"1.4 If the drugs seized are found in packages/containers, the same should be serially numbered for purposes of identification. In case the drugs are found in loose form, the same should be arranged to be packed in unit containers of uniform size and serial numbers should be assigned to each package/ container. Besides the serial numbers, the gross and net weight, particular of the drug and the date of seizure should invariably be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a Card Board label, should be affixed with a seal of the seizing officer and on this Card Board label, the above details should be recorded.

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.

1.9 It needs no emphasis that all samples must be drawn and sealed; in the presence of the accused, Panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person, from whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the duplicate of each of the samples.”

39. In the case of **Khet Singh vs. Union of India** reported in **AIR 2002 SCC 1450**, **Noor Aga vs. State of Punjab** reported in **(2008) 16 SCC 417** and **Union of India vs. Balmukund and Others** reported in **2012 (9) SCC 161**, the Hon’ble Supreme Court had occasion to consider the question as to whether or not the compliance with the guidelines issued by Standing Instruction No. 1 of 1988 would vitiate the trial.

40. In the case of **Khet Singh** (supra), the Hon’ble Supreme Court held in paragraph ‘10’ as under:

“**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.....”



41. In the case of **Noor Aga** (supra), the Hon'ble Supreme Court after giving thoughtful consideration to the guidelines issued under the NDPS Act in the Standing Order, held in paragraphs '89' to '91' as under:-

“**89.** Guidelines issued should not only be substantially complied with, 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 v. Kurian Abraham (P) Ltd.*⁴⁷, following the earlier decision of this Court in *Union of India v. Azadi Bachao Andolan*⁴⁸ 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 with 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.”

47 (2008) 3 SCC 582
48 (2004) 10 SCC 1



42. In the case of Union of India vs. Balmukund

(supra), the Hon'ble Supreme Court held in para '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.”

43. In the case of Jitendra and Another vs. State of

M.P. reported in **(2004) 10 SCC 562**, the Hon'ble Supreme Court has held that mere oral evidence as to the features of the seized contraband 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. *Panchnama* is nothing but a document written by the police officer concerned.

44. In the present case, we find that Rakesh Ranjan

(PW-1), who was posted as Intelligence Officer in DRI, Muzaffarpur and was a member of the raiding team, has admitted in paragraph '20' of his deposition that the sample was not taken from all the packets. Sample was taken from random packets. He has not stated that after taking samples from the random packets



those were sealed as per the Standing Order. Rakesh Kumar Srivastava (PW-2) has submitted that he had taken out three samples of the seized ganja of fifty gram each but in the list memo (Exhibit '4'), he talks of only one sample.

45. It appears from the records that the prosecution filed a complaint petition (Exhibit '8') through the complainant (PW-2). It was filed only on 16.02.2004 (in the ordersheet, there appears a typographical error as the date has been shown as 16.02.2003). A perusal of the complaint petition would show that sample of the seized ganja is said to have been sent for chemical analysis to the Central Revenue Control Laboratory, but the complaint petition does not disclose that in what mode it was sent to the said laboratory. The complaint also states that the inquiry/investigation so far established the case against the accused persons. The complaint is completely silent on the mode and manner in which the sampling was done. This Court has also noticed that as back as on 17.11.2003 itself, a learned Magistrate was deputed for purpose of certification of inventory of the seized goods under Section 52A of the NDPS Act. The Office was directed to send the records to the court of Sessions Judge for further proceeding. This order was passed by learned In-charge CJM, whereafter the records were transferred to the Court of Session. The certificate dated



13.12.2004 (Exhibit '6') would show Godown Entry No. 2/NDPS/04/05 dated 20.07.2004 which only demonstrates that from 16.11.2003 to 20.07.2004, the seized contraband was not lying in the godown then a question arises as to in whose custody the contraband was lying during this period. We have already seen that the packets seized were not serially numbered and samples were drawn only from two packets, at no point of time the seized contraband or the samples were produced in the court although the certificate (Exhibit '6'), which is prepared in a given format, talks of drawing of representative sample, the statement nowhere shows the quantity of the representative sample drawn, if any, in presence of the Magistrate. The learned Judicial Magistrate seems to have done only a formality in the name of certification, he has not been brought to depose in course of trial.

46. Learned Senior Standing Counsel for the DRI relied upon the statement of the accused persons extracted by PW-2. This statement was got recorded in the pen of Shri Satyanarayan, a resident of Kachipakki, Atardah, who is the deed writer. This deed writer Satyanarayan has not been examined in course of trial for no plausible reason. The accused Dilip Kumar Shah is said to have put his thumb impression on the statement (Exhibit '2') but his thumb impression has not been identified by any person. The two



seizure list witnesses Sudhir Kumar and Nagendra Chaudhary, who have put their signature on the statement of the accused Dilip Kumar Shah, have not turned up in course of trial. The statement of the appellant Surendra Prasad has been recorded on 18.11.2003. This is a confessional statement made before the complainant (PW-2). Two persons, namely, Braj Bhushan Kumar and Anil Kumar Sinha are said to have signed the statement as witnesses but again these two witnesses have not turned up. Prosecution has relied upon the statement of the seizure list witnesses (Exhibit '3') which has been shown prepared in presence of the accused Dilip Kumar Shah. This Court finds that the learned trial court has relied upon the recorded statement of the seizure list witnesses without giving any opportunity to the defence to cross-examine them. This procedure adopted by the learned trial court to rely upon the statement of the seizure list witnesses recorded by the complainant (PW-2) is contrary to the fundamental principles of law in India. The judicial pronouncement on the subject is very clear.

47. In the case of **Tofan Singh vs. State of Tamil Nadu** reported in **(2021) 4 SCC 1**, the Hon'ble Supreme Court has discussed the fundamental rights and the NDPS Act. It has been observed that "the first most important constitutional protection provided in the fundamental rights chapter so far as these cases are



concerned is provided by Article 20(3), which is the well-known right against self-incrimination. Article 20(3) reads as follows:

“(3) No person accused of any offence shall be compelled to be a witness against himself.”

48. The majority view has held that the NDPS Act is to be construed in the backdrop of Article 20(3) and Article 21. Several safeguards are contained in the NDPS Act, which is of an extremely drastic and draconian nature. The Hon’ble Apex Court held that the interpretation of a statute like the NDPS Act must be in conformity and in tune with the spirit of the broad fundamental right not to incriminate oneself and the right to privacy. The Hon’ble Supreme Court discussed the scope of Section 67 of the NDPS Act keeping in view Sections 42 and 53. The case laws on the subject have been reviewed. Paragraphs ‘81’ to ‘85’ of the judgment from **Tofan Singh** (supra) case are quoted hereunder:-

“**81.** It is important to remember that an officer in charge of a police station, when he investigates an offence, begins by gathering information, in the course of which he may collect evidence relating to the commission of the offence, which would include search and seizure of things in the course of investigation, to be produced at the trial. Under the scheme of the NDPS Act, it is possible that the same officer who is authorised under Section 42 is also authorised under Section 53. In point of fact, Notification No. S.O. 822(E) issued by the Ministry of Finance (Department of Revenue), dated 14-11-1985,



empowered the following officers under Sections 42 and 67 of the NDPS Act:

“**S.O. 822(E).**—In exercise of the powers conferred by sub-section (1) of Section 42 and Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby empowers the officers of and above the rank of Sub-Inspector in the Department of Narcotics and of and above the rank of Inspector in the Departments of Central Excise, Customs and Revenue Intelligence and in Central Economic Intelligence Bureau and Narcotics Control Bureau to exercise of the powers and perform the duties specified in Section 42 within the area of their respective jurisdiction and also authorises the said officers to exercise the powers conferred upon them under Section 67.”

82. Notification No. S.O. 823(E), also dated 14-11-1985, the Ministry of Finance (Department of Revenue), empowered the following officers under Section 53(1) of the NDPS Act:

“**S.O. 823(E).**—In exercise of the powers conferred by sub-section (1) of Section 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government, after consultation with all the State Governments hereby invests the officers of and above the rank of Inspector in the Departments of Central Excise, Narcotics, Customs and Revenue Intelligence and in Central Economic Intelligence Bureau and Narcotics Control Bureau with the powers specified in sub-section (1) of that section.”

83. These notifications indicate that officers of and above the rank of Inspector in the Departments of Central Excise, Customs, Revenue Intelligence, Central Economic Intelligence Bureau and Narcotics Control Bureau were authorised to act under both Sections 42 and 53. These Notifications dated 14-11-



1985 were superseded by the following Notifications issued by the Ministry of Finance (Department of Revenue) on 30-10-2019:

“S.O. 3901(E).—In exercise of the powers conferred by sub-section (1) of Section 42 and Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), and in supersession of the notification of the Government of India in the Ministry of Finance, Department of Revenue number S.O. 822(E), dated 14-11-1985, published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (ii), except as respects things done or omitted to be done before such supersession the Central Government hereby empowers the officers of and above the rank of Sub-Inspector in Central Bureau of Narcotic and Junior Intelligence Officer in Narcotics Control Bureau and of and above the rank of Inspectors in the Central Board of Indirect Taxes and Customs, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau to exercise the powers and perform the duties specified in Section 42 within the area of their respective jurisdiction and also authorise the said officers to exercise the powers conferred upon them under Section 67.”

“S.O. 3899(E).—In exercise of the powers conferred by sub-section (1) of Section 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of the Notification of the Government of India in the Ministry of Finance, Department of Revenue number S.O. 823(E), dated 14-11-1985, published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (ii), except as respects things done or omitted to be done before such supersession, the Central Government after consultation with all the State Governments hereby invests the officers of and above the rank of Inspectors in the Central Board of Indirect Taxes and Customs, Central Bureau



of Narcotics, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau and of and above the rank of Junior Intelligence Officer in Narcotics Control Bureau with the powers specified in sub-section (1) of that section.”

84. Thus, even the new Notifications dated 30-10-2019 indicate that the powers under Sections 42 and 53 of the NDPS Act are invested in officers of and above the rank of Inspectors in the Central Board of Indirect Taxes and Customs, Central Bureau of Narcotics, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau and of and above the rank of Junior Intelligence Officer in Narcotics Control Bureau.

85. The observations of the Constitution Bench in *Mukesh Singh*¹⁴ are, therefore, to the effect that the very person who initiates the detection of crime, so to speak, can also investigate into the offence—there being no bar under the NDPS Act for doing so. This is a far cry from saying that the scheme of the NDPS Act leads to the conclusion that a Section 67 confessional statement, being in the course of investigation, would be sufficient to convict a person accused of an offence.”

49. Upon discussions, the Hon’ble Supreme Court answered the reference in **Tofan Singh** (supra) in paragraph ‘158’, ‘158.1’, ‘158.2’ as under:-

“**158.** We answer the reference by stating:

14. *Mukesh Singh v. State (NCT of Delhi)*, (2020) 10 SCC 120



158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

50. We observe that *Panchnama* (Exhibit ‘3’) in itself cannot be taken as a piece of evidence to prove the prosecution case. The contents of the *Panchnama* were required to be proved by the prosecution through cogent oral as well as documentary evidence. The prosecutor cannot be allowed to become a judge in his own case, therefore, it was incumbent upon the prosecution to discharge their burden beyond all reasonable doubts. We have no iota of doubt that the accused persons in this case laid down sufficient foundation to create doubt in the prosecution story.

51. In result, we are of the considered opinion that the impugned judgment and order are liable to be set aside and the appellants have made out a case for their acquittal giving them the benefit of doubt. The impugned judgment and order of the learned trial court are hereby set aside.



52. These appeals are allowed.

53. The appellants are in jail, therefore, they shall be released forthwith if not wanted in any other case.

54. Let a copy of the judgment together with the trial court's records be sent down to the learned trial court.

(Rajeev Ranjan Prasad, J)

(Soni Shrivastava, J)

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