
(2011) 09 BOM CK 0032

In the Bombay High Court

Case No : Criminal Appeal No. 950 of 2007 in Spl. N.D.P.S. Case No. 50 of 2005
a/w. Criminal Appeal No"s. 971 and 1279 of 2007

Ansar Ali Yusuf Khan and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 27-09-2011

Acts Referred:

Evidence Act, 1872 — Section 25, 26

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21(c), 29,
42, 43, 50

Citation : (2012) BomCR(Cri) 182

Hon'ble Judges : Bhatia J.H., J

Bench : Single Bench

Advocate : Yogini Kadam, in Appeal No. 950/2007, Atul Sarpande in Appeal No. 971/2007 and Sherali Khan in Appeal No. 1279/2007, for the Appellant; Mandar Goswami in all appeals, UOI-NCB. and Smt. P.P. Shinde, Assistant Public Prosecutor in all appeals, State, for the Respondent

Final Decision : Dismissed

Judgement

Bhatia J.H., J.—These appeals are preferred by original accused Nos. 1 to 3 against the order passed by the Special Judge for NDPS Cases, Greater Bombay, in NDPS Special Case No. 50/2005 whereby the accused persons were convicted for the offences punishable u/s 29 read with section 8(c) and section 21(c) of the NDPS Act and sentenced to undergo R.I. for ten years and to pay fine of Rs. 1 lakh each and in default to pay fine, to undergo further R.I. for six months. Prosecution case, in brief, is that on 28.11.2004, the Intelligence Officer PW-1 Jitendra Dubey attached to Narcotic Control Bureau of Customs Department and his colleagues Vipin Nair and P.C. Namboodiri received information that one person viz. Iqbal from Bhavani Mandi, Madhya Pradesh was likely to arrive at the Naka of Main Road at Rafi Ahmed Kidwai Marg, outside the Railway Gate No. 4, Wadala, Mumbai, around 9.15 to 9.30 a.m., along with his associate, for delivery of 2 kg. of heroin to one Ansar Ali, who would be wearing white shirt and white

dhobi Immediately, the information was typed on the computer, at about 8 a.m. As the intelligence note Exhibit 13, which was signed by all these three officers and was placed before their superior PW-7 Ajit Patil, who was the Superintendent of NCB. PW-7 Ajit Patil also endorsed and signed the said information and immediately placed the same before his superior Mrs. Alka Tyagi, who was the Zonal Director of NCB. She also endorsed and signed the said intelligence note and approved action of surveillance. Immediately after that a team consisting of PW-1 Jitendra Dubey, PW-3 Henry, PW-7 Ajit Patil and other officers namely, Kedare, Poojari, Nair, Namboodiri and Sepoy Darekar was formed. The said team proceeded and reached the spot at about 9 to 9.15 a.m. Two persons were called to act as panch witnesses and they were also informed about the information and purpose of raid. The members of this team kept a watch for about 15 minutes, when one person wearing white shirt and white dhoti came at the spot with a polythene carry bag in his hand. He was accused No. 3 -Ansar Ali. At about 9.45 a.m. two more persons, who are identified as accused No. 1 Iqbal Shaikh and accused No. 2 Abdul Rashid, approached the accused No. 3 Ansar Ali. Accused No. 2 Abdul Rashid was carrying a black coloured hand bag. He handed over the said black coloured hand bag to the accused No. 3. Immediately, all these three accused persons were surrounded by the members of the raiding party and were apprehended. The accused persons disclosed their names and the place of residence. Accused No. 1 Iqbal Shaikh disclosed that he was resident of Bhavani Mandi and accused No. 2 Abdul Rashid, who was holding the black coloured hand bag when he came there, disclosed that he was resident of Mandsour in Madhya Pradesh, while accused No. 3 Ansar Ali disclosed that he was resident of Calcutta. All these three accused persons were taken to the vehicle of the NCB which was parked at the spot. Before taking their personal search, the officers of NCB informed each of the three accused individually that they had right to be searched before the Gazetted Officer or Magistrate, but they declined. Thereafter, PW-3 Henry took personal search of accused No. 1 Iqbal Shaikh and accused No. 2 Abdul Rashid. However, no contraband was found from their person. During personal search of accused No. 1 some cash, a mobile phone and railway ticket were found. The cash amount was returned to him. During personal search of accused No. 2, a railway ticket and an election card were found. During personal search of accused No. 3 as well as during search of the bag which was with accused No. 3 since beginning, only personal belongings and some cash were found. Thereafter, the black coloured hand bag was searched. It contained some personal belongings of accused No. 2 Abdul Rashid and one heat-sealed polythene packet containing brown powder. On enquiry, accused Nos. 1 and 2 informed that the said powder was heroin and they had brought the same to deliver to accused No. 3 Ansar Ali. The said polythene packet was cut and opened and small quantity of powder was taken out and was tested with the help of testing kit. The result was positive for heroin. The total weight of powder was 2 kg. Two samples of 5 grams each were taken from the bulk quantity and they were kept in two polythene sachets, each of which was sealed and kept in separate paper envelopes, which were sealed with NCB Seal No. 02. The label,

giving description of the contents, were affixed on the envelopes. The labels were duly signed by the panchas and PW-3 Henry. The balance quantity of heroin remained in the said bag which was again heat sealed and it was kept in card board carton which was closed with small scotch tape. The label giving description was affixed on it and it tied with jute string and was sealed with the seal. The black coloured hand bag was also kept in a separate cardboard. About all this proceeding, a panchnama was prepared, which was signed by the panchas as well as the officers.

2. After completing search and seizure proceedings and panchnama, the officers took the property and the accused persons to the Customs Office where the statements of all the three accused persons were recorded u/s 67 of NDPS Act. On the same day, after recording statements the accused persons were arrested under separate arrest memo and the reports were submitted to the Senior Officers. While the remaining property in the sealed carton and the seal were handed over to PW-7 Ajit Patil, who was the custodian of the godown of NCB, PW-3 Henry forwarded one sample to the Deputy Chief Chemist of the Customs Department and one sample to the Forensic Science Laboratory, Maharashtra State, for the purpose of analysis. C.A. Reports confirmed that the samples were heroin. The accused did not have any permit or authorization either for possession or transportation of the heroin. Therefore, after investigation, PW-3 Henry filed a formal complaint in the Court of Special Judge, NDPS and it came to be registered as NDPS Special Case No. 50 of 2005.

3. The accused Nos. 1 to 3 were charged for the offences punishable under sections 29 read with 8(c) and 21 (c) read with section 8(c) and section 29 of the NDPS Act. The accused pleaded not guilty.

4. On behalf of prosecution, in all 11 witnesses were examined and several documents were placed on record. The trial Court after hearing the parties convicted and sentenced the accused as stated above.

5. As far as the main incident about getting information, preparation for raid, search and seizure and actual procedure of search and seizure are concerned, evidence of PW1 Jitendra Dubey, PW-2 Chandrashekhar Kedare, PW-3 Henry, PW-4 Sanjay Poojari, PW-7 Ajit Patil and PW-8 Shridhar Pandey is important. PW-1 to PW-4 were the Intelligence Officers attached to the Narcotic Control Bureau. PW-7 Ajit Patil was the Superintendent of that department while PW-8 Shridhar Pandey was the panch witness.

Evidence of PW-] Jitendra Dubey shows that on 28.1.2004 in the morning, he was present in the office along with his colleague Vipin Nair and Namboodiri. They received information from the informant that one person by name Iqbal from Bhavani Mandi, Madhya Pradesh would be arriving at the Naka on main road of Rafi Ahmed Kidwai Marg, outside railway gate No. 4, Wadala, Mumbai, between 9.15 to 9.30 a.m., along with one associate for delivery of 2 kg. of heroin to a person by name Ansar Ali, who would be wearing white shirt and

white dhoti. As soon as the intelligence was received, PW-1 Jitendra Dubey typed it on the computer and prepared it at 8 a.m. The said Intelligence note, Ex. 13 was signed by PW-1 Jitendra Dubey as well as his two colleagues P.S. Namboodiri and Vipin Nair. As per his evidence, immediately he placed intelligence note before his superior PW-7 Ajit Patil, who endorsed the intelligence note and approved the proposal to maintain surveillance. PW-7 Ajit Patil placed this note before his senior the Zonal Director, Mrs. Alka Tyagi who also signed and approved the said intelligence note.

6. Evidence of PW-3 Henry shows that at about 8.15 a.m. on 28.1.2004, his Superintendent PW-7 Ajit Patil informed him about the intelligence received and handed over the intelligence note along with NCB Seal No. 02 and directed him to proceed for the raid and if seizure would be effected to use the seal for sealing the samples and seized articles. PW-7 Ajit Patil also asked him to form a team to proceed to the spot. PW-3 Henry deposed that he collected all the necessary material, including field testing kit, weighing machine, cardboard carton, envelopes, jute string etc. which would be necessary for the purpose of search and in case of seizure. A team consisting of PW-3 Henry, PW-1 Jitendra Dubey, PW-2 Chandrashekhar Kedare, PW-4 Sanjay Poojari, PW-7 Ajit Patil and other officers, namely, Vipin Nair, P.S. Namboodiri and other attendant staff was formed. All the members of this team reached Rafi Ahmed Kidwai Marg at about 9 a.m. According to PW-3 Henry, he called two panch witnesses and introduced the officers of the raiding party to panchas and informed them about the information and the purpose of raid.

7. The evidence of PW-1 Jitendra Dubey and PW-3 Henry reveals that at about 9.30 a.m., they noticed one person wearing a white shirt and dhoti waiting outside the Railway Gate No. 4 and looking for someone. He was also having a plastic carry bag. The description of that person tallied with the person who was to receive the consignment. At about 9.45 a.m., they also noticed two more person coming there. One of them was carrying a black coloured hand bag. These two persons approached the first referred person wearing white shirt and dhoti and had handed over the black coloured hand bag to the said person. At that stage, the members of the raiding party along with the panchas approached those three persons, who are accused before the Court. The person who was wearing white shirt and dhoti and received the black coloured hand bag disclosed his name as Ansar Ali from Calcutta. He is accused No. 3. Other two persons, who had come there with the bag identified themselves as accused No. 1 Iqbal Shaikh from Bhavani Mandi, Madhya Pradesh and accused No. 2 Abdul Rashid from Mandsour. As per the evidence of PW-1 Jitendra, when accused Nos. 1 and 2 came there, the black coloured bag was actually with the accused No. 2 and he handed over the same to accused No. 3 Ansar Ali.

8-A. As per their evidence, all these three accused persons were taken to the office vehicle of NCB, which was parked there. Each of them was informed by PW-3 Henry that they had the right to be searched in presence of the Gazetted

Officer or Magistrate, but they declined that offer. Thereafter personal search of accused persons was taken. As per the evidence of PW-1 Jitendra Dubey and PW-3 Henry as well as other officers, during personal search of the accused persons, no contraband was found. Only some personal belongings, railway tickets and cash were recovered. Railway tickets found with accused Nos. 1 and 2 were seized, while cash was returned to them. After personal search was over, the black coloured hand bag was searched. It contained personal belongings of accused No. 2 - Abdul Rashid and also one heat sealed polythene bag containing brown powder. On enquiry, accused Nos. 1 and 2 informed that the powder was heroin and they had brought the same to deliver to accused No. 3 Ansar Ali. The polythene bag was cut open and a small quantity of powder was taken and tested with the help of field testing kit. The result was positive for presence of heroin. The powder in the polythene bag weighed 2 kg. Out of that powder, two samples were taken and put in separate polythene sachets, each of which was heat sealed and kept in a separate paper envelope. The paper envelopes were even closed and sealed with NCB Seal No. 02. The description of the contents were written on the said envelopes. The balance or the bulk quantity of the powder was allowed to remain in the polythene bag, which was again heat-sealed and kept in a cardboard carton, which was closed with scotch tape. The label with description of the contents was also affixed on the said carton. It was sealed with Seal No. 02. The black coloured hand bag in which the contraband was found was kept in another cardboard carton which was also tied and closed and label giving description was affixed on the same. About all this proceeding, the panchnama Ex. 18 was prepared. The panchnama was signed by both panch witnesses and PW-3 Henry who had conducted the search and seizure and drawn the panchnama. The copies of the panchnama were supplied to each of the accused and they acknowledged receipt and put their signatures below the said panchnama. PW-1 Jitendra Dubey and PW-3 Henry deposed about the search, seizure and panchnama in detail. Other witness PW-2 Chandrashekhar Kedare, PW-4 Sanjay Poojari and PW-7 Ajit Patil also broadly corroborated the evidence of these two officers. PW-8 Shridhar Pandey the panch witness also supported the prosecution case.

8. Evidence of PW-3 Henry shows that after completing the search and seizure and recording of panchnama, he along with accused and other members of the raiding party went to the office of NCB. He submitted search and seizure report Ex. 22 to his superior PW-7 Ajit Patil, who signed and dated and then the said search and seizure report was placed before the Zonal Director, who also signed it. As per his evidence, he deposited the carton marked H containing the balance or bulk quantity of 1.990 kg. Heroin along with another carton marked P, containing the black coloured hand bag, with PW-7 Ajit Patil, who was in charge of godown or warehouse of the NCB, used for keeping the property with deposition letter dated 28.11.2004 Exhibit 23. This letter also disclosed that two samples of 5 grams each, S-1 and S-2, were drawn from the total quantity of 2 kg. Heroin. He also deposed that he had handed over the NCB Seal No. 02 to

PW-7 Patil within five minutes after reaching the office. As per evidence of PW-3 Henry, he forwarded sealed sample S-1 to the Deputy Chief Chemist through PW-11 Khan Mohamed along with cover test memo Ex. 25 and the sealed sample marked S-2 to the Director Forensic Science Laboratory with his covering letter Ex. 24 through PW-5 Narayan Panigrahi. Evidence of PW-5 Narayan Pannigrahi shows that he received sealed sample packet marked S-2 along with the forwarding letter from PW-3 Henry on 30.11.2004 and on the same day he went to the office of the Forensic Science Laboratory and deposited the said sample in intact condition. Exhibit 24 the covering letter addressed to the Director, FSL, Kalina reveals that one sealed envelope was receive by the office of Director, FSL on 30.11.2004 itself along with the test memo. Exhibit 27 is the report from the Chemical Analyser to the Government Forensic Laboratory. It shows that one sealed envelope marked S-2 with seals intact and as per the copy sent was received on 30.11.2004 from one Panigrahi from the office of NCB. On analysis heroin (Diacetyl Morphine) along with other opium alkaloids was detected in the exhibit.

9. Evidence of PW-11 Khan Mohamed reveals that on 29.11.2004, he received one sealed sample envelope "marked S-1" from PW-3 Henry for depositing the same with Deputy Chief Chemist of NCB. PW-11 Khan Mohamed himself typed the test memo in triplicate, signed the same and put the seal mark of NCB Seal No. 02 on the test memo, after obtaining the seal from PW-7 Superintendent Patil. According to him, after putting the seal on the test memo, he returned the seal to PW-7 Ajit Patil. According to him, he himself went to the office of the Deputy Chief Chemist and deposited the same in sealed condition along with test memo in that office. Exhibits 25 and 26 are copies of the same test memo bearing Lab No. 155 dated 29.11.2004, which was deposited in the office of Deputy Chief Chemist. It bears signature of PW-11 Khan. It also bears the specimen seal of NCB, which was used for sealing the sample. The endorsement on the same also reveals that one H.K. Yadav from the office of Deputy Chief Chemist had received the sample along with test memo on the same day. Exhibit 26-A is the test report from the Assistant Chemical Examiner, New Customs House. It shows that one sealed sample marked S-1 was received. The sample was in the form of brown coloured powder and on test it answered for Diacetyl Morphine i.e. heroin. The remnant of the sample was again sent back in the sealed packet with facsimile of the seal affixed on the same by the office of the Asst. Chemical Examiner, Customs House. This report is proved by PW-6 Harindrakumar Yadav, Asst. Chemical Examiner. The above evidence goes to show that the sealed sample packets were sent to the State Forensic Laboratory and the Laboratory of the NCB with intact seals and specimen of the seals used for sealing samples and both the samples were found to contain heroin.

10. Evidence of PW-4 Sanjay Poojari shows that after completing the search and seizure procedure at the spot, these officers and the accused persons went to the office of NCB. After reaching the office, PW-7 Ajit Patil instructed Sanjay Poojari to record statement of accused No. 2 Abdul Rashid and he recorded his

statement in Hindi u/s 67 vide Exhibit 31. In that statement, the accused No. 2 Abdul Rashid disclosed that he had received two kg. heroin from accused No. 1 Iqbal on 25.11.2004 at his native place at Bhanpua, Madhya Pradesh and he was instructed by accused No. 1 Iqbal to catch a train for Mumbai on 27.11.2004 and to meet him at platform No. 2, Malad, Mumbai and accordingly, he came to Mumbai with the consignment of heroin and accused No. met him at Malad Station in the morning of 28.11.2004. Then both of them proceeded to the spot, where accused No. 2 handed over the said bag containing 2 kg. Heroin to accused No. 3. He also confirmed the procedure of search and seizure as recorded in the panchnama. After recording of his statement was completed, PW-4 Sanjay Poojari arrested him by serving the memo of arrest Exhibit 32 and also submitted arrest report Ex. 33 to his superior Superintendent Patil.

11. PW-10 Ashokkumar Singh, who was also working as Intelligence Officer in NCB office at Mumbai, deposed that on 28.11.2004, he was directed by his Superintendent Mr. Patil to record statement of accused No. 1 Iqbal Shaikh u/s 67. In the statement, accused No. 1 Iqbal disclosed that he was resident of Village Malipura, Tehsil Bhanpura, District Mandsaur, M.P. He had handed over 2 kg. Heroin to accused No. 2 Abdul Rashid on 25.11.2004 with instructions to carry the consignment to Mumbai and meet him at Borivali Station. He also deposed that he had travelled by general coach of Jaipur Super Fast which he boarded at Bhavani Station. He reached Mumbai Central Railway Station at about 8 a.m. He also stated that he had assured to pay amount of Rs. 5,000/- to the accused No. 2 Abdul Rashid for carrying the consignment of heroin to Mumbai. It may be noted that on the previous day also some contraband was seized by NCB and accused No. 1 Iqbal was interrogated and his statement was recorded not only about seizure made in the morning of 28.11.2004 in respect of the present case, but also about seizure made on the previous day. The original statement was produced in another case and copy of the same marked Ex. 47 was produced in this matter. He also admitted that the said consignment of black coloured hand bag was handed over to the accused No. 3 at the spot where it was finally seized by NCB. His evidence also shows that after recording statement of accused No. 1 Iqbal Shaikh, he had served the arrest memo on the accused No. 1 and arrested him. He also submitted the arrest report Ex. 39 before the Superintendent Patil.

12. Evidence of PW-2 Chandrashekhar Kedare shows that he was a member of the team, which conducted the raid and searched and seized the property. According to him, after reaching the office, he was directed to record statement of accused No. 3 Ansar Ali u/s 67. He recorded statement of accused No. 3 Ansar Ali as per the information given by him. While confirming the events which had taken place that morning resulting into seizure of 2 kg. Heroin from his possession, accused No. 3 Ansar Ali also stated that on 25.11.2004 at about 10 p.m. he had come to Mumbai from Kolkatta by Gitanjali express. After reaching Mumbai, he contacted accused No. 1 Iqbal Shaikh on his mobile and had asked for heroin. To this, accused No. 1 Iqbal Shaikh had told him that he was not

having the stock at that time but would arrange heroin within 2-3 days. Therefore, accused No. 3 Ansar AH stayed at the house of his friend in Wadala Slum Area. In the morning on 28.11.2004, he received a call from the accused No. 1 Iqbal that he had arranged heroin for him and he would be coming personally to deliver the same at the Naka of the main road of Rafi Ahmed Kidwai Marg, Railway Gate No. 4, Wadala. He also disclosed that he had come into contact with accused No. 1 Iqbal in Arthur Road Jail, because both of them were undergoing sentence of imprisonment in separate cases under the NDPS Act. The statement Ex. 15 was signed by accused No. 3. Evidence of PW-2 Chandrashekhar Kedare shows that after recording the statement, he arrested the accused No. 3 Ansar Ali at 14.30 hrs. on 28.11.2004 and served him with the arrest memo and also submitted arrest report to his superior Exhibit 17.

13. Thus, the prosecution relies on the actual search and seizure as well as the statements of accused persons recorded u/s 67 to prove the offence and to bring home guilt to the accused. The learned Counsel for the accused persons vehemently attacked the whole procedure of search and seizure and contended that the mandatory provisions of law were not strictly complied. They also contended that the seal, which was allegedly used for sealing the samples, was freely available to the officers and, therefore, the possibility of tampering with the seals according to the convenience of the officers of NCB could not be ruled out. It is also contended that there is no evidence to show that PW-7 Ajit Patil was custodian of the property. It is contended that the provisions of section 42 and sections 50, 55 and 57 of NDPS Act were not strictly complied. It is contended that the accused persons were in custody of the NCB Officers, who were vested with the power of police, since the time they were allegedly apprehended in the morning along with the said black coloured bag and were also shown as accused even before their statements were allegedly recorded u/s 67. Therefore, the confessional statements of the accused persons are not admissible in evidence.

14. On the other hand, the learned Public Prosecutor contended that all the mandatory provisions of law were strictly complied. The provisions of sections 42 and 50 were not applicable, still the provisions have been complied. The seal was in custody of the Zonal Director, which was taken by PW-7 Ajit Patil for the purpose of use in this case and he had handed over the same to PW-3 Henry for the purpose of search and seizure and thereafter it was returned to him immediately. Later on, the said seal was made available by PW-7 Ajit Patil to PW-11 Khan for the purpose of putting specimen seal on the test memo which was to be sent to the Deputy Chief Chemist. He contended that the seal, samples and the bulk quantity were never in possession of one officer at any time from the moment these officers seized the property and the accused reached the office of NCB after completing the search and seizure procedure at the spot of the incident. The rival contentions will have to be scrutinized in the light of evidence on record.

15. The evidence of PW-1 Jitendra Dubey shows that he and his two colleagues had received the information and he prepared the intelligence note Exhibit 13. It was ready at 8 a.m. It was signed by him and his two other colleagues and he placed the same before his superior PW-7 Ajit Patil, who endorsed it and PW-7 Patil, in turn, placed the report before his Superior Zonal Director, who also endorsed and approved it. Section 42 is applicable where entries, search, seizure and arrest is to be made without a warrant or authorization from any building, conveyance or other place. In such case when an information is received, the concerned officer is to take down that information in writing and has to submit the same to immediate superior within 72 hrs. In the present case, no entry was made into nor any search or seizure was made from any building, conveyance or any place. As per the information, the accused persons came to the spot, while accused No. 3 Ansar Ali had come to the spot to receive the consignment in the open place near gate No. 4 of Wadala. Accused Nos. 1 and 2 came together to deliver the consignment. Accused No. 2 was actually holding the black coloured bag containing the packet which contained heroin and that bag was handed over by accused No. 2 to accused No. 3. It is settled in a chain of cases that when search, seizure and arrest is made at a public place like the railway station, bus stand or airport, the provisions of section 42 are not applicable, but provisions of section 43 would be applicable. See Ravindran @ John Vs. The Superintendent of Customs, . In the present case, though section 42 would not be applicable, still the evidence of PW-1 Jitendra Dubey and that of PW-7 Ajit Patil goes to prove that the provisions were in fact complied.

16. It is contended on behalf of the accused that the provisions of section 50 were not complied as the accused persons were not taken to any Gazetted Officer or Magistrate for the purpose of search. It is also settled position of law that the provisions of subsections (1) and (2) of section 50 are applicable, where a personal search of the person is to be taken and he is to be informed of his right to search in presence of Magistrate or a Gazetted Officer and if he so requires, he is to be taken to such Magistrate or Gazetted Officer for the purpose of search. It may be noted that in the present case during personal search of accused Nos. 1, 2 and 3, no contraband was found. The contraband was found in the black coloured hand bag which was handed over by accused No. 2 Abdul Rashid to accused No. 3 Ansar Ali and this fact was noticed by several witnesses, including PW-1 Jitendra Dubey, PW-3 Henry and PW-7 Ajit Patil as well as PW-8 Shridhar Pandey though PW-8 Shridhar Pandey, who was a panch witness, did not recollect names of the accused persons. He deposed that accused No. 1 Iqbal was holding a bag and he handed over the same to accused No. 3. The contraband was found during search of that black coloured hand bag. It has been held that provisions of section 50 are not applicable when contraband is found in the search of a bag, etc. being carried by a person. It is applicable only when the personal search is to be taken. For this purpose, (State of Punjab Vs. Makhan Chand), 2004 S.C.C.(Cri.) 830, State of Punjab Vs. Leela, , Ravindran Vs. Superintendent of Customs (supra) and (State of Haryana Vs. Mai Ram)4,

2008(8) S.C.C. 292 may be referred to. In view of this settled position of law, it is clear that the provisions of section 50 are not applicable to the facts of the present case as the contraband was found during search of the hand bag and not during personal search of any of the accused persons. However evidence of PW-1 Jitendra and PW-3 Henry shows that section 50 was also complied.

17. From the evidence on record, it is established that Seal No. 02 of NCB used to be in custody of the Zonal Director. As per evidence of PW-7 Ajit Patil, he had taken that seal from the Zonal Director and then he had handed over the same to PW-3 Henry for the purpose of use at the time of seizure, if any, in the present case. Evidence of PW-3 Henry shows that he received that seal from PW-7 Ajit Patil. Not only this, within five minutes after going back to the NCB Office after completing search and seizure procedure, he had returned the said seal to PW-7 Ajit Patil. According to PW-3 Henry, he also deposited the bulk or remnant quantity of heroin in the sealed carton that PW-7 Ajit Patil, who was custodian of the property and in charge of the warehouse along with the deposition note Ex. 23 on the same day. Thereafter this property was in custody of PW-7 Ajit Patil. Both the sealed samples were in possession and custody of PW-3 Henry and as per is evidence he handed over sample S-1 to PW-11 Khan on 29.11.2004 and another sealed sample packet marked S-2 to PW-5 Narayan Panigrahi on 30.11.2004. PW-5 deposited the said sealed sample packet S-2 in the office of Forensic Laboratory on 30.11.2004 itself along with covering letter and test report. The report of the C.A. Office and the oral evidence show that the said sample was received with intact seals as per specimen. Similarly evidence of PW-11 Khan shows that on 29.11.2004, after receiving the sealed sample packet S-1 from PW-3 Henry, he prepared a covering letter and test report memo. For the purpose of supplying facsimile or specimen of the seal used for the purpose of sealing the sample he had taken the seal from PW-7 Superintendent Ajit Patil and put the specimen of that on the test report memo and submitted the same sample along with the covering letter and test report memo in the office of Deputy Chief Chemist of NCB. After using the seal for the purpose of putting specimen of the same on that test memo, he returned the said seal to PW-7 Ajit Patil immediately. The evidence of Assistant Chemical Examiner of NCB as well as the report clearly show that the sample was received with intact seals as per the specimen of the same.

18. From this evidence it becomes clear that the seal used to remain in possession of the Zonal Director, from whom it was taken by PW-7 Ajit Patil. He handed over the seal to PW-3 Henry for the purpose of use in this case at the time of search and seizure. PW-3 used the same for the purpose of sealing the samples as well as other cartons, including the carton containing the remaining bulk quantity of heroin. The procedure as well as writing of the panchnama was completed at 12 hrs. and immediately these officers went to the office of NCB along with property and accused. Within five minutes, the seal was returned to PW-7 Patil. The evidence shows that the seal, the sample packets and the remaining bulk quantity were never in possession of one officer at any time after

they returned to the NCB office. The samples were in custody of PW-3 Henry till they were sent to the concerned Chemical Analyser through PW-5 Panigraha and PW-11 Khan while the seal and the remaining bulk quantity in the sealed carton were in possession of Ajit Patil. It is true that all these witnesses are officers of the same department they are responsible officers and there is no reason to believe that they had entered into conspiracy to create false evidence against the accused persons. There is nothing on record to show that they had tampered with the evidence or the samples in any manner. The signatures of the ponchos were put on the labels on the said samples as well as the carton in which the remaining bulk quantity was kept. Therefore, I am unable to accept the contention that there was possibility of tampering the samples.

19. The learned Counsel for the accused also contended that no documentary evidence was produced to show that PW-7 Ajit Patil was in charge of Muddemal property and that provisions of section 55 were properly complied. He deposed that the Zonal Director had, by passing an office order, made him in-charge of the godown or warehouse where such properties would be kept by NCB. During the cross-examination, he was asked as to whether he had produced any document about the assignment of such a duty and he naturally replied that the said documents were not filed before the Court. However, there is nothing on record to show that he was either directed to produce or was asked as to whether he could produce such a record and in spite of that he failed to produce the same. If he would have been directed or an opportunity would be given, he could have produced the record. He could not anticipate that in the cross-examination, a question will be put about the said record. Therefore, merely because the record about his appointment as custodian of the property was not produced, his evidence cannot be disbelieved that he was in fact custodian of the property. PW-3 Henry produced the property, except the samples, before PW-7 Ajit Patil and it was proper compliance of section 55.

20. Evidence of PW-3 Henry and the evidence of other three witnesses, who recorded statements of accused persons and arrested them clearly go to show that immediately after the search and seizure, PW-3 Henry had submitted a detailed report Exhibit 22 before PW-7 Ajit Patil in compliance of the provisions of section 57. Other three officers also submitted the arrest reports of accused Nos. 1, 2 and 3 immediately after their arrest. Therefore, I find that the provisions of section 57 have been properly complied.

21. It is contended that the panch witnesses were not independent and PW-8 Shridhar Pandey was not a panch witness. In the panchnama Ex. 18, names of panch witnesses were shown as Shri Radhey Shyam Pandey and Shri Sultan Khan. Sultan Khan was not examined as witness before the Court. PW-8 has given his name as Shridhar Radhyshyam Pandey in his deposition before the Court. The learned Counsel contended that while the panch witness has given his full name as Shridhar Radhyshyam Pandey and this claims to be son of Radhyshyam Pandey. The evidence of panch Shridhar shows that he claims to be

panch witness and he fully supported the prosecution. He identified the signatures on each page of the panchnama, on the labels affixed on the sample packets as well as cartons containing the bulk quantity and the empty black coloured bag. Nowhere in the cross-examination his identity as a panch witness was challenged on behalf of the defence. He also identified the accused persons before the trial Court. Possibility cannot be ruled out that some clerical mistake might have been committed in recording his name as Radhyshyam Pandey or Shridhar Radhyshyam Pandey. As identity of this witness was never challenged in the cross-examination nor it was put to him that the signatures on the panchnama and the other samples and other article were not of this witness, now for the first time in the appeal the defence cannot be allowed to raise suspicion about identity of the panch witness.

22. From the evidence of PW-8 Shridhar, it would appear that he was a vehicle mechanic. In the morning on 28.11.2004, he was called at Gate No. 4 to repair a vehicle and there only he was also called to act as panch witness by PW-3 Henry. According to him, Sultan used to do work of polishing the cars. Merely because these persons were ether vehicle mechanic, etc. and were working near the office of NCB, their evidence cannot be discarded. As far as Sultan is concerned, it appears that he was also called as panch witness at the time of entire search and seizure on the earlier day. A question was put to PW-10 Henry as to whether Sultan was called as panch witness in 3-4 other mattes but he denied any knowledge about it. There is noting on record to show that PW-8 Shridhar was previously called as a panch witness in the matter. There is nothing to show that these two persons were habitual panch witnesses acting for NCB. Therefore, on this ground also the evidence of PW-8 Shridhar could not be discarded nor search and seizure can be discarded on the ground that these panch witnesses were not independent.

23. Mr. Khan, learned Counsel for accused No. 1 contended that the confessional statement of accused persons are not admissible in evidence because when these statements were recorded, all the three accused persons were already in custody of NCB as accused. According to him, while u/s 67 of NDPS Act, an officer authorized u/s 42 in this behalf, during the course of any enquiry in connection with contravention of the provisions of NDPS Act, may call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of the Act or rules or order made therein and may also examine any person acquainted with the facts of the case when the alleged contravention of the provisions are already established and the contraband has been recovered from the accused, the question of satisfying himself whether there had been any contravention of the provisions does not arise. According to him, once accused persons are in custody as accused, the statement recorded by the officers of NCB amounts to confession and it is hit by section 25 of the Evidence Act, because the officers claim to be invested with powers of Police Officer. He pointed that on 28.11.2004, PW-3 Henry produced the balance quantity of heroin in the carton marked "H" before PW-7 Ajit Patil

along with the forwarding memo. The forwarding memo shows that Crime No. 22/2004 was already registered and the accused Nos. 1 to 3 were shown as account in that memo. As per the oral evidence, he deposited property on 28.11.2004 at 17.30 hrs. and that time is to be found on the forwarding memo also. As per the evidence of three different officers, statements of accused Nos. 1, 2 and 3 were recorded immediately after they were taken to NCB office and they were arrested at about 2.15 or 2.30 p.m. on the same day and immediately the arrest reports were submitted. The property was deposited along with the letter Ex. 23 along with forwarding memo at 17.30 hrs. In view of this, it cannot be said that the accused Nos. 1, 2 and 3 were already made accused before the statements were recorded. It is true that the accused persons were apprehended at about 9.30 a.m. and as heroin was found with them, it can be presumed that they were not free to go anywhere and they were in custody of the officers of NCB though they were not formally arrested. The search and seizure was completed at 12 hrs. and thereafter they could have been formally arrested.

24. In (Raju Premji Vs. Customs), 2010(3) S.C.C.(Cri.) 344, the Supreme Court observed thus in paras 20, 21 and 26:-

20. From the very beginning, concededly, the appellants were in the police custody. They were put to interrogation by the Police Officers. They were not free persons. They were under orders of restraint and thus would be in the custody of the Police Officers. Any statement made by them while in custody of a Police Officer would be inadmissible in evidence in terms of section 26 of the Evidence Act, 1872, which reads as under:

26. Confession by accused while in custody of police not to be proved against him. No confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation, In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).

21. The Customs Officer as per the notification issued by the central Government was an officer in charge of the Police Station. All powers available to an officer in charge of a Police Station, therefore, were available to him One of the attributes of the power of an officer in charge is a power to investigate into commission of a cognizable offence. He can also file a charge-sheet

26. In any event if they were in custody of the Police Officers as also the Customs Officers, although they were not accused in strict sense of the term, any confession made by them would not be admissible in terms of section 26 of the Evidence Act, 1872.

It appears that in that case the accused were already in police custody and they

were handed over to the Customs officers, who were also conferred with powers of the officers in charge and therefore it was held that the statement recorded u/s 67 of NDPS Act by such officer, wielding all the powers of the officer, is hit by section 26 of the Evidence Act. In the present case, there is nothing on record to show that the officers of NCB involved in search and seizure and in recording the statements were conferred with powers of police. Therefore, it cannot be said that statements of the accused recorded by them u/s 67 are hit by sections 25 and 26 of the Evidence Act.

25. In Francis Stanly @ Stalin Vs. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram, , the Supreme Court held that confessional statements made before the officer of the Department of Revenue Intelligence may not be hit by section 25 of the Evidence Act, yet such a confession must be subject to closer scrutiny than a confession statement made to private citizens. The Supreme Court also referred to the observations made by the Supreme Court in State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, as follows:-

A retracted confession may form the legal basis of a conviction if the Court is satisfied that it was true and was voluntarily made. But it has been held that a Court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only a rule of prudence that under no circumstances can such a conviction be made without corroboration, for a Court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the Court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars."

26. This is settled position of law that a confessional statement before the officers of NCB or Revenue Intelligence u/s 67 of NDPS Act is not hit by section 25 or section 26 of the Evidence act and is admissible but it is necessary to scrutinize the same strictly though the Court may act upon it if it is satisfied about its absolute truth but at the same time it is held unsafe to rely on the confessional statement without some corroboration.

27. Coming to the present case, the prosecution has established that the accused Nos. 1 and 2 had come together with a black coloured hand bag containing heroin and that bag was handed over by accused No. 2 to accused No. 3 from whom it was seized and from search of that bag heroin was found. Independently of the confessional statement of the accused persons, prosecution has satisfactorily established that the accused persons were in possession of heroin. The confessional statements provide corroboration to the other prosecution witness. If it is put in other words, the confessional statement of the accused Nos. 1, 2 and 3 are strongly corroborated by the other evidence led by the prosecution and that evidence itself is unimpeachable and does not suffer from any flaws. Therefore, I find that the prosecution has proved beyond reasonable doubt that as per the conspiracy hatched by the accused persons, accused No. 1

procured 2 kg. Heroin and handed over the same to accused No. 2 for carrying the same to Mumbai for the purpose of delivery to the accused No. 3 and accordingly accused No. 2 brought the said hand bag containing heroin to Mumbai and in presence of accused No. 1 delivered that bag to accused No. 3, but they were apprehended by the officers of NCB immediately and it followed search and seizure. Therefore, in my opinion, the trial Court was right in passing the impugned order of conviction and sentence. The sentence awarded is minimum prescribed by law and therefore that also needs no interference. For the aforesaid reasons, all the appeals stand dismissed.