

(2014) 12 DEL CK 0324

In the Delhi High Court

Case No : Criminal Appeal No. 1173 of 2010

Frank Kingsley Ugochukwu

APPELLANT

Vs

Directorate of Revenue Intelligence

RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 350, 437A
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 21(c),
23, 29, 35

Citation : (2014) 12 DEL CK 0324

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Yogesh Saxena, Advocate for the Appellant; Satish Aggarwala,
Advocate for the Respondent

Judgement

Dr. S. Muralidhar, J.—This appeal is directed against the judgment dated 14th July 2010 passed by the learned Special Judge in SC No.26-A/2006 convicting the Appellants under Section 21(c) and Section 29 read with Section 21 of the Narcotics Drugs & Psychotropic Substances Act, 1985 ("NDPS") and the order on sentence dated 17th July 2010 whereby each of them were sentenced to undergo rigorous imprisonment ("RI") of ten years and fine of Rs.1,00,000 each and in default to undergo simple imprisonment for three months for each of the offences under Section 21(c) and 29 of the NDPS Act. The sentences were directed to run concurrently.

The case of the prosecution

2. Mr. Kamal Kumar (PW-1) , Intelligence officer, attached to the Headquarters, Directorate of Revenue Intelligence ("DRI") , received a secret information on 23rd October 2005 that two African nationals would go from Hazrat Nizamuddin railway station to Bombay at about 4.55 pm, by August Kranti Express and would be carrying narcotic drugs concealed in six bags carried by them. The said information was reduced to writing (Ex.PW1/A) and submitted to Vinod Kumar,

Deputy Director (PW-7) who in turn directed Jyotimon Dethan (PW-9) , Investigating Officer ("IO") , DRI to take further action.

3. PW-9 along with a team of officers of the DRI reached the Hazrat Nizamuddin railway station at around 4 pm on the same day and kept a discreet watch on platform No.6 from where the August Kranti Express was to depart. PW-9 stated that at about 4.20 pm two person of African origin were seen with six bags on platform No.6. PW-9 then called two persons and told them about the secret information and requested them to be panch witnesses. One of these was Mohd. Farukh (PW-11) and the other one was Usman.

4. According to PW-9, the two African nationals were intercepted by the raiding party. They disclosed their names as Frank Kingsley Ugochukwu (Accused-1) (A-1) and Okechukwu Samuel Agubu (A-2) , Appellants 1 and 2 herein. PW-9 stated that he introduced the panch witnesses to them and disclosed the secret information they had received and asked them whether they were carrying any narcotic substance with them. Both the accused replied in negative. PW-9 then informed them that the luggage was to be checked and since the platform was a busy public place he requested them to accompany the raiding party to the DRI office along with the panch witnesses for the search. PW-9 stated that both the accused agreed to this.

5. On the platform itself PW-9 asked both accused to identify their respective luggage. A-2 identified three big black canvas bag and one black leather bag marked Kings as belonging to him. A-1 stated that the other three big black canvas and one red and white bag marked Feilong belonged to him. According to PW-9, both accused disclosed that the six black bags contained automobile parts.

Proceedings in the DRI Office

6. On reaching the DRI office, PW-9 served each of the accused with notices under Section 50 of the NDPS Act (Ex.PW9/B&C). He informed them that it was their legal right to be searched before a Gazetted Officer or Magistrate. Both accused replied in writing that any DRI officer could take their search. After their replies were written down, the panch witnesses also signed on the Section 50 notices.

7. PW-9 then undertook personal search of both the accused and nothing incriminating was recovered from A-2. A ticket for two persons of August Kranti Express issued on 22nd October 2005 was recovered from A-1. Three big canvas bags recovered from A-2 were marked A to C and black shoulder bag was marked G. The three canvas bags recovered from A-1 were marked D to F and the red and white bag was marked as H. From the black bag of A-2 his Nigerian passport and flight ticket from Mumbai to Addis Ababa and to Duala were recovered and baggage coupon from Addis Ababa to Duala to Delhi were recovered. From the red and white bag belonging to A-1, his Nigerian passport and flight ticket from Mumbai to Addis Ababa and to Duala were recovered and baggage coupon from Addis Ababa and Duala to Delhi was recovered.

8. From the three big black canvas bags belonging to A-2 (A to C) , automobile parts and 12 strut dumpers for Maruti 800 car were recovered. The three big black canvas bags belonging to A-1 (D to F) were found to contain likewise automobile parts and 12 strut dumpers for Maruti 800 car. On cutting one of the strut dumpers from the black bag of A-2, it was found to contain three cylindrical capsule type rolls covered with black insulation tape inside which there was transparent tape containing off-white powder. When all the strut dumpers were cut open, each was found to contain three cylindrical rolls. The off- white powder when tested gave positive result for heroin. The powder present in three cylindrical rolls from bag A were emptied in 12 different zip lock transparent polythene bag and were marked A-1 to A-12. This exercise was repeated with bags B to E and the off-white substance were marked as B1 to B12, C1 to C12, D1 to D12 and E1 to E12 respectively. The off white substance present in bag marked F was put in zip lock polythene bag and marked as F1 to F6. The weight of all the packets recovered from 66 strut dumpers containing the off- white substance of heroin was 20.856 kg. The samples were taken from each of the bags and then sealed and labelled. The panchnama was prepared and read by both the accused and they signed on all pages and annexures. The panch witnesses also signed on all pages and annexures. According to PW-9, the proceedings ended at 10 am, on the following day i.e. 24th October 2005.

9. PW-9 stated that on completion of the search proceedings he deposited the case property in sealed condition with Alok Aggarwal, Assistant Director, DRI (PW-8) and kept both sets of samples with himself i.e. PW-9 under lock and key in his drawer. He stated that both the accused were issued notices and they gave their voluntary statements under Section 67 NDPS Act (Exs.PW9/H1 and PW9/J1) respectively. Both the accused were arrested and on 25th October 2005 they were medically examined and produced before the committal Court.

10. PW-9 further stated that on 25th October 2005 he deposited the A set of samples at the Central Revenue Control Laboratory ("CRCL") and obtained a receipt in token of the samples having been received in intact condition (Ex.PW2/A). On 25th October 2005 he took the seized case property from PW-8 and deposited them in valuable godown at the New Custom House through Godown in-charge Dharam Vir, Inspector. Ex. PW5/A is the document containing the endorsement of one Mr. A.C. Wadhwa, the Custodian In-Charge of the valuable godown. On the same date, PW-9 submitted the report under Section 57 NDPS Act (Ex.PW3/A) to his immediate superior S.K. Sharma.

11. PW-9 issued a notice to the panch witness Usman (Ex. PW9/P) on 24th October 2005 itself. Pursuant thereto Usman is stated to have appeared before the DRI and given a statement on 14th November 2005 (Ex. PW9/P1) under Section 67 of the NDPS Act. Pursuant to the notice issued to other panch witness Farukh on 21st November 2005 (Ex.PW9/Q) , he gave a statement under Section 67 of the NDPS Act on 22nd November 2005 (Ex. PW9/Q1). He is supposed to have tendered during that time his platform ticket (Ex. PW9/R).

The trial

12. After charges were framed against both the accused for the aforementioned offences, the prosecution examined eleven witnesses. It was stated that one of the panch witness was not examined. The other panch witness Farukh (PW-11) was last examined on 25th September 2009. Thereafter he was not present in subsequent hearings, which were therefore adjourned. The trial Court directed that his evidence will not be read in evidence and no further adjournment would be granted for that purpose. However, the appeal was pending before this Court and this Court by order dated 29th January 2014 directed the trial Court to issue notice to PW-11 under Section 350 of the Code of Criminal Procedure ("Cr.PC") and to record his further examination-in-chief and cross-examination, which was concluded on 25th April 2014.

Statements of the Appellants under Section 313 Cr.PC

13. When the evidence was put to the two Appellants under Section 313 Cr.PC, both of them denied it. Both of them stated that they have never been to the Hazrat Nizamuddin railway station much less apprehended there by PW-9. A-1 and A-2 stated that they had been picked up from their residence at Mohammad Pur near Safdarjung Hospital, taken to the DRI office, tortured there for two days and their signatures were forcibly taken on many blank papers. They denied that anything was recovered from them. They claimed that the entire case had been fabricated and manipulated by the officers of the DRI. It was stated that even the panch witnesses were stock witnesses or planted witnesses.

Judgment of the trial Court

14. The trial Court on an analysis of the evidence came to the following conclusions:

(i) The original rail tickets recovered from A-1 had been proved by B.R. Meena, Senior Commercial Manager Railways (PW-6). The air travel documents of both the accused also showed that they were to board a flight from Mumbai to Addis Ababa on 24th October 2005 and therefore it was natural for them to travel from Delhi to Mumbai by train on the previous day i.e. 23rd October 2005. This corroborated the testimony of PW-9 that both the accused were apprehended from Hazrat Nizamuddin railway station at around 4.15 pm, on 23rd October 2005 at platform No.6.

(ii) Merely because the accused were not seen arriving at the said platform and it was not noticed how six big bags were brought to the railway station, it could not be presumed that the bags were not recovered from the possession of the accused person.

(iii) Since no investigation was conducted by the DRI officials at the platform No.6, the failure to examine the porter who was seen standing by the trolley in which the bags were placed was not material.

(iv) The confessional statements of both the accused under Section 67 NDPS gave the complete details without which it would be difficult to know that the contraband was concealed in the strut dumpers which then had to be cut open. This was adequately proved by the prosecution although the public witnesses had not been examined.

(v) The link evidence proved that any chance of tampering of the samples was ruled out.

(vi) Since the case was investigated by the officers of the DRI and the case property had been deposited in the valuable godown with seal intact on 25th October 2005, there was no failure to comply with the provisions of Section 55 NDPS Act.

(vii) In the present case since the search was not conducted in an enclosed space or premises Section 42 NDPS Act did not apply.

(viii) The ingredients of Section 23 NDPS Act were not made out since the contraband was to be carried from Delhi to Mumbai. Both the accused were accordingly held guilty of the offence under Sections 21(c) and 29 NDPS Act. The trial Court proceeded to sentence them in the manner indicated hereinabove.

Compliance with Section 42 NDPS Act

15. It is first submitted by Mr.Yogesh Saxena, learned counsel for the Appellants, that the IO Kamal Kumar (PW-1) did not place the secret information before his immediate superior S.K.Sharma (PW-3) , the Senior Intelligence Officer ("SIO"). Instead he placed it before Vinod Kumar (PW-7) , the Deputy Director, DRI. It is submitted that if the report under Section 57 of the NDPS Act was submitted by PW-9 to PW-3, then it had to be likewise even for the purposes of compliance with Section 42(2) of the NDPS Act. He submitted that PWs-7 and 8, who are senior officers of DRI, had given contradictory replies on whether IOs posted in the General Intelligence Section were reporting to SIOs who in turn were reporting to Deputy Directors or Assistant Directors. Since there was non-compliance with the requirement of Section 42(2) of the NDPS Act, the case of the prosecution should fail.

16. In reply it is submitted by Mr. Satish Aggarwala, learned counsel for the Respondent, that the testimony of PW-1 proves that the secret information was brought before the Deputy Director (PW-7) who was any way senior to PW-3. Further PW-7 has stated that PW-1 was working with him and he was the immediate superior of PW-1. Thirdly, no prejudice has been shown to have been caused to the Appellants. Fourthly, the interception was at a railway station, a public place, and, therefore, Section 42 was in any event not applicable.

17. The Court is of the view that in the present case as long as the secret information was placed by PW-1 before a superior officer, the failure to place it before the officer immediately superior to him would not constitute non-compliance with mandate of Section 42 of the NDPS Act. Consequently, the Court

does not find any merit in the submission of the Appellants. There is also merit in the contention that since the seizure was effected from a public place viz., a railway platform, Section 42 did not apply.

Proving the presence of the accused at the railway station

18. It is next submitted by Mr. Saxena that apart from the sole testimony of PW-9 there was no other evidence to show that the Appellants were intercepted on the given date and time at the Hazrat Nizamuddin railway station. PW-11, the panch witness, has not supported the case of the prosecution. Reliance was placed on the decisions in *State of Punjab Vs. Baldev Singh, etc. etc.*, , *Pentapati Veerababu Vs. State of A.P.*, and *Avtar Singh and Others Vs. State of Punjab* .

19. It is further submitted that there was no interception memo prepared at the spot; no proceedings for interception were drawn up; it was unlikely that a single DRI officer intercepted two persons with six bags at a railway station since no other DRI official forming part of the raiding party was examined; the names of the other DRI officials were neither mentioned in the panchnama nor in the complaint; PW-9 could not name the other DRI officers who helped him in the seizure proceedings; no enquiry was made from the porter/loader at the railway station who was controlling the trolley on which the bags were placed; although the secret information was not in respect of Platform No. 6, the raiding party still reached there and intercepted the Appellants; no site plan was prepared; no log book was maintained for the movement of the official vehicle; no case diary or controller's record of the work done by the officers of the DRI was produced. In other words, it is submitted that the conscious possession of the contraband by the Appellants has not been proved by the prosecution beyond reasonable doubt.

20. In reply it is submitted by Mr. Satish Aggarwala that the place of interception was established by the panchnama signed by the Appellants; their statements tendered under Section 67 of the NDPS Act; the statements of the panch witnesses and the testimony of PW-9 who was reliable and trustworthy and who had no reason to falsely implicate the Appellants.

21. It is submitted by Mr. Aggarwala that in view of the presumptions under Sections 35 and 54 of the NDPS Act, the onus of proving that they had no knowledge of heroin being kept in the bags was upon the Appellants and by failing to enter into the witness box to adduce evidence, they had failed to discharge the onus. Reliance was placed on the decisions in *Bahadur Singh Vs. State of Haryana*, , *Madan Lal v. State of Himachal Pradesh* 2003 (3) JCC 1330, *State of Punjab v. Lakhwinder Singh* 2010 (3) JCC (Narcotics) 142, *Jagdish Budhroji Purohit Vs. State of Maharashtra*, , *Megh Singh Vs. State of Punjab*, , *Devchand Kalyan Tandel Vs. State of Gujarat* and another, , *Pawan Mehta v. State* 2002 (1) JCC 34, *Union of India (UOI) Vs. Munna and Another*, and *Shah Guman Mal Vs. State of Andhra Pradesh*, .

22. Additionally, it was submitted by Mr. Aggarwala that merely because PW-11 turned hostile, his entire evidence could not be rejected outright and that part of

his testimony which was corroborated by the documents on record could be relied upon. Also there was no need to disbelieve the official witnesses even if no independent witness supported the case of the prosecution. Reliance is also placed on the decisions in Krishna Mochi and Others Vs. State of Bihar, and Inder Singh and Another Vs. The State (Delhi Administration), to urge that the proof of beyond reasonable doubt was only a guideline and it is not necessary that it should be perfect.

23. The above submissions have been considered. An unusual feature of the case is that of the entire raiding party of DRI officers deployed to intercept the Appellants, only one of them, PW-9 speaks about the raid. Although in his cross-examination, for the first time, he names five officers as part of the raiding party, only three of them, i.e., PWs 1, 3 and 4 were examined and none of them has stated that he was part of the raiding team. It is also strange that in the panchnama drawn up, the names of the other officers of the DRI who formed part of the raiding party were not mentioned. Everywhere what is mentioned is "the DRI Officers" as a group. Even in the complaint filed before the trial Court reference is made only to the "DRI Officers". As a result the entire case of the prosecution depends wholly on the evidence of PW-9. His evidence, therefore, requires to be carefully scrutinised.

24. PW-9 stated that he was called by Vinod Kumar, Deputy Director (PW-7) at around 2.30 pm on 23rd October 2009 and was told that a secret information had been received that "two persons of African origin would board August Kranti Express going to Mumbai today from Hazrat Nizamuddin railway station and they would be carrying narcotic drugs concealed inside automotive parts in six bags." He then proceeded to the Hazrat Nizamuddin railway station at around 4 pm along with the team of DRI officers. Interestingly, the secret informer was not part of the raiding party. The secret information also did not mention that the two persons of African origin would be departing from Platform No.6 although the name of the train was mentioned. At the platform, PW-9 called two persons i.e. Farooq (PW-11) and Usman (who was not examined) and requested them to associate themselves as panch witnesses to which they agreed. Then he along with the DRI officers and the panch witness intercepted the two African nationals at Platform No.6.

25. In his cross-examination, PW-9 states that he had not seen the information reduced to writing before the raid but saw it on 24th October 2005 after conclusion of the panchnama proceedings. He stated that there were 10 to 12 DRI officials in the raiding party and for the first time named five of them. He admitted that "we were not having photographs of two accused when we reached Platform No.6 or 7. Secret informer was not with us when we reached there." He further stated that he saw a porter near the trolley but did not ask him about the luggage in the trolley. He made no investigation to find out about who owned the trolley. Importantly, the names of the owner of bags and the destination were not mentioned on any of the bags. He added "I made no inquiry to find out

ownership of bags since accused persons have claimed to be the owner of those bags."

26. PW-9 was confused about the trolley on which the baggages were kept. He stated that "when trolley arrived on the platform, I cannot tell but it was spotted by us after about 15 minutes of our reaching the platform." He claimed that all members of the raiding party were scattered at different places in the platform. He could not see if any of them had in fact seen anyone with the trolley when it was being brought to the platform.

27. The above answers of PW-9 indicate that barring the confessions of the Appellants themselves under Section 67 of the NDPS Act, there was nothing to connect them with the bags that were found on the trolley on the platform. This is further evident from the reply of PW- 9 in his cross-examination that "There was no marking on any of the bag or any of the baggage to link the same with any of the accused before the bags were opened."

28. PW-9 was unable to name any of the daily wagers who helped them to lift those six bags from the ground floor of the DRI office to the 7th floor. He was also unable to name the persons who helped to cut open the shock absorbers.

29. The only other person who could have corroborated PW-9 was PW-11, the panch witness. He claimed that on 23rd October 2005 he went to the Hazrat Nizamuddin railway station to drop his uncle who was going to Mahim by the August Kranti Express from Platform No.6. He was approached by the DRI officers to be a witness. When he was first examined in the Court on 4th May 2009, he stated that "Two black persons who were carrying three bags each were found on Platform No.6" and when asked they disclosed that "they were carrying automobile parts." He then stated that "The officers disclosed that they wanted to take search of their baggages and they had information that they were carrying some narcotic substance. The officers disclosed that the platform is not proper place for search and they requested them to take to their office."

30. PW-11 then stated that on opening the bags at the DRI office after the two accused declined their search to be conducted in the presence of a gazetted officer, they were found to contain shockers which when cut revealed heroin. However, he was unable to identify the accused persons in Court. The record of proceedings of 4th May 2009 showed that both accused were present and yet it is recorded "witness after seeing the entire Court says that those accused persons are not present in the Court today." Clearly, therefore, PW-11 did not support the case of the prosecution.

31. PW-11 was again examined on 11th May 2009 and 25th September 2009 on which dates the accused were present in Court but he was not asked to identify them any further.

32. Finally, PW-11 was examined on 24th and 25th April 2014, pursuant to the orders of this Court. While all the case material was produced before him and he

could identify them including his signatures on various documents, he was still unable to identify the two accused persons. His specific reply in response to the question put to him by the SPP was as under:

"I cannot identify the above two accused persons now. At this stage, both the accused persons present in the Court are shown to the witness who states that he cannot identify them as a long time has been passed since he was join in the seizure of this case and he is not in a position to identify the accused persons. It is wrong to suggest that I have been influenced or won over by or on behalf of the accused persons and that is why I had not identified them in my statement made in this Court on 4th May 2009 as well as today. It is also wrong to suggest that I am deposing falsely to this extent and with regard to the identity of the accused."

33. It is clear, therefore, that PW-11 was consistent that the two accused in Court were not the persons whom he had seen in the DRI Office on 23rd October 2005. In his further cross-examination by the counsel for the accused, he stated that "I cannot tell when I met with DRI officials at the railway station. When I was requested by the DRI officials to join the raiding party at the railway station the goods were not seized and was not shown to me, however, the same was shown to me in the DRI office. The black colour bags from which Gabriel Strut Damper were recovered were shown to me for the first time in the DRI office." On the contents of the documents, he admitted as under:

"I do not know what is written therein because these documents were written in English and I cannot read and write English. I do not remember as to when I signed the aforesaid documents."

34. As regards his statement under Section 67 of the NDPS Act, PW-11 stated:

"My statement was not recorded. However, I was made to write a statement. I had written in my above statement only the things which were seen by me, and I had not written the above statement on the dictation of the DRI officers. I cannot now tell the time taken in recording of my above statement or the time spent in the DRI office on that day. I was explained something with regard to the provision of Section 67 of the NDPS Act at the time of recording of the above statement, but I do not now recollect if I had written something about the same in my above statement or not. I do not now remember if in my previous examination recorded in this Court on 4th May 2009, I had told that I was explained the above provision of NDPS Act. The same is also my reply with regard to the writing of the above statement by me as per the things seen by me. I do not even now remember if on 4th May 2009 or any other date, I had stated about the contents of my above statement in this Court or not."

35. A desperate attempt was then made by the learned SPP to salvage some part of the statement of PW-11 and he was re-examined. He then stated as under:

"I had seen the bags for the first time at the Nizamuddin Railway Station but the

same were closed at that time, and I had not seen them for the first time in DRI office. When I had stated in my cross-examination today that I had seen the bags for the first time in the DRI Office, I mean to say that the bags were opened and the opened bags were seen by me for the first time."

36. In his further cross-examination by learned counsel for the accused PW-11 stated:

"When I had first seen the above bags, the same were lying on floor of the platform of railway station and the officers of DRI were standing near the bags. I do not now remember if any luggage trolley was also there or not. I also do not remember if services of any Coolie were taken or not for carrying the above bags."

37. What emerges from an analysis of the evidence of PW-11 is that first and foremost he failed to identify the two accused as being the persons whom he saw at the Hazrat Nizamuddin railway station Platform No.6 on 23rd October 2005. Importantly, he failed to identify them at the first instance when he was examined in Court on 9th May 2009. Even on 24th April 2014 that position did not change. Therefore, it cannot be said that on this most material aspect of the case, viz., fixing the identity of the two accused as the persons who were at Platform No.6 with the luggage, there is no corroboration of the evidence of PW-9.

38. It cannot also be said that the other part of the evidence of PW-11, which supports the recovery helps the prosecution establishing the case against the two Appellants. As regards their identity, we only have the evidence of PW-9 who admits that he did not take the secret informer with him and did not have any photograph of either of the accused to be able to correctly identify them. There were no markings on the bags or any other identification marks which would connect the bags that were recovered with the two accused.

39. Given the several questions that arise about the investigation, this Court does not find the evidence of PW-9 to be safe and reliable as regards fixing the identity of two accused as the persons who were in possession of the bags.

Preservation of samples

40. The next issue that arises is the preservation of the samples and their deposit in the malkhana and the compliance with Section 55 of the NDPS Act. As it turns out in the DRI cases there is a different system of ensuring the compliance with provisions of Section 55 which requires that all articles seized should be kept in safe custody within the local area of the police station and talks about affixing seals on such articles not only of the raiding officer but also of the SHO/Incharge of the PS.

41. In DRI cases, the equivalent to the police malkhana is the Customs godown. In the present case, the godown was in the Customs House and PW-9 states that he had deposited the case property intact in a sealed condition with PW-8.

However, as pointed out by Mr. Saxena, learned counsel for the Appellants, PW-8 does not mention this fact at all. The document relevant in this regards is Ex.PW-5/A. It is titled as "Inventory of Goods Seized/Detained" which is a typed document signed by PW-9 and counter-signed by PW-8. Below that is a typed endorsement which reads "received 7 package with seals as per description above in intact and sealed condition" and this was signed by A.C. Wadhwa (PW-5).

42. What was deposited were not the samples but the remaining substance along with the seals containing strut dampers of brand Gabriel. PW-9 states that he retained the samples with himself in the drawer of his table till such time it was sent to the CRCL for testing. In other words, the samples and the seals all remained with PW-9 during this period. R.P. Meena (PW-2) testifies that PW-9 brought the 11 samples and the test memo along with a forwarding letter on 25th October 2005. The receipt issued by him is Ex.PW-2/A. He stated that they were kept in a store room under the supervision of the Chemical Examiner Mr. D.K. Beri. The samples were then taken out after more than a month on 25th January 2005 for analysis under the supervision of Chemical Examiner Mr. M.D. Mondol with the assistance of Chemical Assistant Mr. Sanjeev Singh. PW-2 stated that the seals and the 11 sample plackets were in intact condition and facsimile of seal was tallied with specimen seal as given on the test memos.

43. Although PW-2 stated that they do not maintain any register in respect of keeping and taking out of the samples, he stated that they did maintain the record of the movement of the samples in the laboratory. Nothing much has been elicited from this witness in his cross-examination to doubt his testimony. It is also seen that A.C. Wadhwa (PW-5) has confirmed about the deposit of the case property at the godown.

44. The Court is, therefore, not persuaded to hold that in the present case the prosecution failed to preserve the samples in a tamper-proof condition. B.K. Banerjee (PW-4) has proved the issuance of the DRI seal to PW-9 on 23rd October 2005 and its return to him by PW-9 on 24th October 2005. Some questions were put to him about the correction of the entries and he confirmed that he had done so.

Section 67 statements

45. It is next submitted by Mr. Saxena, learned counsel for the Appellants, that their statements under Section 67 of the NDPS Act were retracted and by themselves weak pieces of evidence. They cannot form the sole basis of conviction.

46. It has come on record that when the Appellants were brought before the Magistrate for the first time on 25th October 2005, they were not represented by a lawyer. This is evident from the record of the proceedings of the learned ACMM on 25th October 2005. It is possible that they were able to obtain legal assistance only thereafter. On 8th November 2005 both the Appellants filled

retraction applications. Therefore, it cannot be said that they failed to retract their statements at the earliest point in time. The retractions are consistent with their statements under Section 313 Cr.PC that the signatures were forcibly taken on many papers.

47. Particularly in response to Question No. 25 both A-1 and A-2 stated that they were under threat and pressure and that the statements were dictated to each of them which they then retracted. They specifically stated that they had retracted the statements at the first available opportunity. As held by the Supreme Court in *Noor Aga Vs. State of Punjab and Another*, and *Union of India (UOI) Vs. Bal Mukund and Others*, , the Court has to be extremely cautious in proceeding to rely on retracted statements. They still have to seek independent corroboration from other reliable evidence.

48. In the present case, apart from PW-9 there is not a single witness to speak of the identity of the Appellants and as to what happened at the raid proceedings. The very basis of the entire case i.e. the two Appellants being found in possession of the contraband is not supported by any independent evidence other than PW-9. The unusual feature of the case that out of the entire raiding party only one officer i.e. PW-9 was named and was examined is not even commented upon by the trial Court. The trial Court failed to notice the aforementioned two decisions of the Supreme Court in *Noor Aga* and *Balmukund* (supra) while considering the effect of the retracted confessional statements.

Conclusion

49. Consequently, this Court is unable to concur with the conclusion reached by the trial Court regarding the guilt of both Appellants under Sections 21(c) and 29 of the NDPS Act. Accordingly, the impugned judgment of the trial Court dated 14th July 2010 and the consequent order on sentence dated 17th July 2010 are hereby set aside. The Appellants are acquitted of the offence under Sections 21(c) and 29 of the NDPS Act.

50. The appeal is allowed, however, the bail bonds and surety bonds of the Appellants shall continue for a period of three months in terms of Section 437A Cr.PC. The trial Court record be sent back forthwith.