
(2010) 05 CAL CK 0038
In the Calcutta High Court
Case No : C.R.A. No. 492 of 2007

Kasem Babu Mondal

APPELLANT

Vs

The State of West Bengal and Another

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Constitution of India, 1950 — Article 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 100, 161, 165, 313, 4
Evidence Act, 1872 — Section 103, 114, 21, 24, 25
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 41, 42, 42(2)

Citation : (2010) 05 CAL CK 0038

Hon'ble Judges : S.P. Talukdar, J;Prabhat Kumar Dey, J

Bench : Division Bench

Advocate : Malay Kumar Singh, Milon Mukherjee, Saibal Mondal and Rudradipta Nandy, for the Appellant;Asimesh Goswami, Pranati Goswami and J.N. Chatterjee, for the Respondent

Judgement

S.P. Talukdar, J.—This is directed against the judgment dated 11th July, 2007 and the order dated 12th July, 2007 passed by learned 6th Court of Additional District and Sessions Judge, Barasat, North 24-Parganas in N.D.P.S. Case No. 87 of 2004 (N.C.B. Crime No. 19/NCB/Cal/2004). Learned Trial Court held the appellant/convict guilty of the offence punishable u/s 21(c) of the Narcotic Drugs and Psychotropic Substance Act, 1985. The appellant thereby was sentenced to suffer rigorous imprisonment for a period of 10 years and to pay fine of Rs. 1,00,000/- only, in default to suffer further rigorous imprisonment for one year.

2. The prosecution case may briefly be stated as follows:

On 25th September, 2004, a batch of officers and staff of NCB, EZU, Kolkata led by the Superintendent went to Dum Dum Road at about 11:00 hours. They intercepted a person in front of Leela Cinema hall. He was identified by the informer. This was pursuant to a specific information, which was duly reduced in writing and after due intimation to the superior authority and of course, after

obtaining necessary movement order. The officials disclosed their identity to the person so intercepted and on being asked, he disclosed his name as Kasem Babu Mondal. They wanted to search him in person as well as the blue and brown coloured nylon carry bag in his right hand. Two independent witnesses from the onlookers were called. The officers offered to the person so intercepted in writing as to whether he wanted to be searched in person before a Magistrate or any Gazetted Officer. He, in his written reply, opted to be searched before the Gazetted Officer accompanying the raiding party. Before conducting search, he was offered to search but he declined to do so. Then search started in presence of Gazetted Officer and two independent witnesses. Two transparent polythene packets containing brown coloured wet substance kept in another polythene packet marked Damini both in English and Bengali were found inside the said nylon carry bag marked "Guinea mansion", which the intercepted person was holding in his right hand. No incriminatory documents or other contraband could be recovered from his possession. An amount of Rs. 120/- was recovered from the right front pocket of the trouser, which the appellant was wearing. Small quantity of the recovered substance was tested with field drug detection kit carried by the officers on the spot. It responded positive to the test of heroin. The polythene packets, so recovered, were 1 kg. each. The same was then seized u/s 43 of the NDPS Act, 1985. On spot interrogation, the appellant, Kasem Babu Mondal, revealed that he was waiting for one Kallu of Raigachi. One sample in duplicate of 5 grams each was drawn from both the packets and kept in four polythene packets sealed, labelled and signed by the owner/appellant, Seizing Officer, independent witnesses and Gazetted Officer. The same was kept in separate clothes envelops, which were sealed, labelled and signed by all the said persons. The remaining quantity of the recovered goods was sealed on cutting portion labelled and kept in separate clothes envelops, which were sealed, labelled and signed by all of them. The two clothes envelops containing the seized brown coloured wet substance as well as the said amount of Rs. 120/- were similarly dealt with in accordance with law. The seizure was made under proper seizure list, which was again signed by the owner of the goods, Seizing Officer, independent witnesses and Gazetted Officer. Copy of the said seizure list was handed over to the appellant/convict against his dated receipt. Notice u/s 67 of the NDPS Act 1985 was issued to the appellant asking him to appear before the Intelligence Officer on 25th September, 2004 at about 16:00 hours. He appeared as directed and voluntarily tendered written statement before the NCB Officers thereby admitting his guilt and accepting his involvement in the trafficking of the recovered heroin. The appellant was arrested u/s 43 of the NDPS Act on 25th September, 2004 at about 23:00 hours. The sealed packets of the seized goods, the samples and the godown register were produced before the learned Court of Magistrate for examination of the seals and endorsement of the godown register entries and seized articles. The samples drawn from the recovered heroin was sent to the Chemical Laboratory, Customs House, Kolkata for chemical test and the Chemical Examiner in his report opined that samples responded positive to the test of heroin.

3. This gave rise to the case against the present appellant for his violation of the provision of Section 8 of NDPS Act, 1985 (as amended) and the same is punishable under Sections 21(c) and 29 of the NDPS Act, 1985 (as amended).

4. The prosecution in order to establish the charge examined as many as seven witnesses.

5. Of them, P.W. 1 is an Intelligence Officer of the NCB, who filed complaint against the accused person u/s 21(c) and Section 29 of the NDPS Act. Being proved by him, the same was marked Exhibit- 1. In cross-examination, he denied that he was a mere signatory of that complaint or that the allegations are all false.

6. P.W. 2 is the Assistant Chemical Examiner, who, on 28th September, 2004, received two test memos along with two sealed sample packets in the Chemical Laboratory, Customs House. After verification of the identity of the sample packets from the test memos as well as from the facsimile of the seal, which were in order, the samples were taken for analysis. The poly packets contained in the sample were weighed. It was 6.6 grams and 7.2 grams respectively. The samples responded to the test for heroin. P.W. 2 stated that the percentage of heroin in the first sample was 72.0 by weight and in the second case, it was 79.4 by weight. P.W. 2 claimed that everything was done strictly in compliance with the provisions of law. He identified the test memos marked Exhibits 2 and 2/1 as well as the sealed packets being marked Mat-Exhibits I and II respectively.

7. P.W. 3 is an Intelligence Officer of the NCB, E.Z.U., Kolkata. In his evidence in chief, he stated in details about the raid conducted on 25th September, 2004. He deposed in details as to the manner in which the accused was detained and the bag in his hand was also seized and thereafter, searched. P.W. 3 in his evidence claimed that the search was conducted in presence of two independent witnesses, who were picked up from the persons, who assembled at the spot at the relevant time. P.W. 3 then deposed that the accused was given the option as to whether he wanted to be searched by any Magistrate or Gazetted Officer. According to him, the accused in writing gave his option that he wanted to be searched in presence of the Gazetted Officer accompanying the team. Such written option had been marked Exhibit 3. The endorsement therein had been marked Exhibit 4. The NCB officials wanted to search the bag in the right hand of the accused. On search, they could recover a polythene bag with the printing "Damini" both in English and Bengali. They could recover two polythene packets containing brown coloured weighty substance believed to be heroin from such bag. Taking portion out of it, they conducted field test and it responded positive to the test of heroin. They took weight of the polythene packets. Each packet contained 1 kg. of heroin and thus, they could recover 2 kgs. of heroin from possession of the accused. Personal belongings of the accused were searched as well and they recovered Rs. 120/- from possession of the accused person. P.W. 3 in his elaborate evidence in chief described in details the various steps taken by him as well as the members of his team at the time of arrest, search and

seizure. He appears to have stood the test of cross-examination quite well.

8. Such evidence of P.W. 3 had been corroborated on all material points by P.W. 4, who was again another Intelligence Officer of the NCB. In his cross-examination, P.W. 4 admitted that at the time of detection, the shops and establishments surrounding the place of occurrence were all open. He further deposed that the Superintendent did not ask him to bring any other shop owners and request them to be present at the time of search and seizure. Similarly, he was also not asked to find out as to whether any other Gazetted Officer of some other department could be made available. It is admitted that the place of interception of the appellant was a busy place.

9. P.W. 5, being a retired Inspector of National Crimes Record Bureau, sought to substantiate the evidence of P.W. 3. In his cross-examination, such P.W. 5 stated that after arrival in the office, an entry was made in the godown register regarding the alamsats. P.W. 5 claimed that he was the godown Registrar-in-Charge at the relevant time. He also identified the purported voluntary statement of the appellant/accused person, being marked Exhibit 7. He deposed that the accused was given caution before recording his voluntary statement. This was, however, not incorporated on any paper. He claimed to have put some questions to the accused person who answered the same. According to him, after getting such statement of the accused, he recorded the same in his own hand. He admitted that in such statement so recorded, he did not incorporate that the statement was made voluntarily.

10. P.W. 6, being another official of the NCB, in his evidence in chief deposed that on being asked, the accused disclosed his name. The accused accepted in writing that search could be done in presence of the Gazetted Officer of the department.

11. P.W. 7 referred to the godown register and the entries made therein.

12. The present/accused person in response to the questions put to him at the time of his examination u/s 313 of the Cr.P.C. just pleaded innocence and denied the allegations made against him.

13. Learned Trial Court, after taking into consideration all such evidence on record, held the accused person guilty of the offence punishable u/s 21(c) of the NDPS Act and the appellant was convicted and sentenced accordingly.

14. Mr. Mukherjee, appearing as learned Counsel for the appellant, first submitted that the appellant was not properly told of his right to be searched in presence of a Gazetted Officer. In this context, he referred to the evidence of P.W. 3 in cross-examination that "it is a fact that we did not search for any other Gazetted Officer or Magistrate since in the raiding party, a Gazetted Officer was present in our raiding party." He further deposed that "it is a fact that in the offer letter, I did not mention the Gazetted Officer as well as the department with which he was attached to. It is a fact that there is no endorsement in the offer letter that the contents of the offer letter was read over and explained to the

accused and he understood the same. Not a fact that the offer and acceptance letters were obtained forcibly from the accused."

15. On behalf of the appellant, the purported voluntary statement had been assailed on the ground that it was not recorded or obtained in compliance with the provisions of law.

16. Mr. Mukherjee, in this context, invited attention of the Court to the evidence of P.W. 5 in cross-examination, which is:

It is a fact that I gave caution to the accused before recording his voluntary statement. So far as caution is concerned excepting on the statement the same was not incorporated on any paper. It is a fact that I put some questions to the said person and he answered accordingly. It is a fact that after getting the statement of the accused I gave my own language to make the statement properly.

17. Reference was made to the fact that the alleged seizure was made on 25th of September, 2004 whereas accused was produced in Court on 27th of September, 2004.

18. According to Mr. Mukherjee, Exhibit-3 and Exhibit-4 cannot amount to compliance with the provisions u/s 50 of the NDPS Act. It was further submitted that the prosecution could not give any satisfactory explanation for non-production of the independent witnesses. Even the manner in which the accused person was examined u/s 313 of the Cr.P.C. and his statements were recorded had been assailed on the ground that the questions, as framed, reflect half-hearted approach. It was, however, submitted that since the present case was started as far back as in 2004, it would not, perhaps, be just and proper to send the case back on remand in order to take care of the said lapses in the matter of examination of the accused u/s 313 of Cr.P.C.

19. On the other hand, Mr. Malay Singh, as learned Counsel for the respondent/ NCB, categorically submitted that there had been compliance of Section 50 of the NDPS Act and there was no reason for physical search of the accused person. He then submitted that the voluntary statement, as recorded, leaves virtually no scope for any controversy.

20. Section 21(c) of the NDPS Act 1985 reads as follows:

21. Punishment for contravention in relation to manufactured drugs and preparations.? Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,-

(a)....

(b)....

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

21. Mr. Mukherjee, referring to the decision of the Apex Court in the case between Ritesh Chakravarti v. State of Madhya Pradesh as reported in (2006) 2 C.Cr.LR (SC) 645, submitted that an offence committed under the NDPS Act being a grave one, procedural safeguards to the accused provided under a statute require strict compliance.

22. In the said case in absence of evidence of any independent witness and taking into consideration the fact that the search witnesses were declared hostile and the place of search was a busy place, the Apex Court held that the accused in such a case is entitled to acquittal. In the background of the fact that despite seizure in a public place, there had been no evidence of any independent witness and the evidence on record also was not free from contradictions, the Apex Court held that conviction, in such circumstances, was not justified.

23. In the said case, the Apex Court observed that "despite the provisions of Section 103 of the Indian Evidence Act, even if alibi is not proved, the prosecution cannot rest its case only in terms thereof. In other words, even if an alibi is not proved, the Court shall not record a judgment of conviction unless the prosecution is found to have established its case."

24. In the case between Md. Sayeed v. The State of West Bengal as reported in 2007 (1) CLJ (Cal) 688, the learned Division Bench of this Court laid emphasis on the need for strict compliance of the provisions relating to search and seizure. In the said case, in absence of the evidence of any seizure witness and since there was no other convincing witness in support of the prosecution case, the learned Division Bench observed that the accused was entitled to get an order of acquittal.

24. In the case between Dilip and Anr. v. State of M.P. as reported in (2007) 1 SCC (Cri) 377, the Apex Court held that procedural safeguards provided under Sections 41, 42 and 50 of the NDPS Act should be complied with. The Apex Court in the said case held that the effect of a search carried out in violation of the provisions of law would have a bearing on the credibility of the evidence of the official witnesses.

25. In the case between Jadunandan Roy v. The State of West Bengal as reported in 2000 CWN 373, it was observed:

When neutrality has been imposed and element of fairness is attached in the process of taking a decision u/s 50 by introducing the participation of the Magistrate thereto, should it not be reasonable to except that some neutrality or

fairness ought to be maintained in the participation of Gazetted Officer of any of the departments mentioned in Section 42 by ensuring that he is equally a person who is not involved either in the receiving of prior information, detention of the person to be searched and/or in accompanying the searching officer as per the provisions of the NDPS Act? In the provisions of law engrafted in Section 50 on being considered with the concept of personal liberty and the indispensable requirement of maintenance of fairness, non-arbitrariness and non-oppressiveness in the application of the procedure established by law, it can be held unhesitatingly that a Gazetted Officer under the Act to search, seizure and arrest and investigate the offences under the Act, is not entitled to take a decision u/s 50(3) of the Act and any option given to the person concerned that he can be taken before such Gazetted Officer for a decision under Sub-section (3) is against the spirit and letter of Section 50 and does not also conform to the requirement of fair, just and non-arbitrary procedure established by law.

26. Mr. Singh, as learned Counsel for the respondent/NCB, deriving inspiration from the decision of the Apex Court in the case between Pon Adithan Vs. Deputy Director, Narcotics Control Bureau, Madras, submitted that in absence of any complaint of threat and pressure made when produced before Magistrate on next date or making any complaint thereafter till recording of statement u/s 313 of Cr.P.C., the confessional statement made before the Officer of the NCB can very well be held to be voluntary. He further submitted that minor inconsistency as regards the weight of the sample would also not render the identity of the sample doubtful.

27. While assailing the impugned judgment, learned Counsel for the appellant, referring to the Division Bench decision of this Court in the case between Md. Moinuddin and Anr. v. The State of West Bengal as reported in (2005) 1 C Cr LR (Cal) 442, submitted that merely because an option was given either to be searched in the presence of a Gazetted Officer or a Magistrate without disclosing the right conferred upon the accused person, such offer is no compliance of Section 50 of the NDPS Act. In this context, reference was further made to the three-Judges Bench decision of the Apex Court in the case of Laleshwar Rajak Kalanand Dhobi v. State of Gujarat, 2002 (7) SCC 704

28. The Apex Court in the case between Saiyad Mohd. Saiyad Umar Saiyed and Ors. v. The State of Gujarat as reported in 1995 C Cr LR (SC) 346, held:

Having regard to the object for which the provisions of Section 50 have been introduced into the NDPS Act and when the language thereof obliges the officer concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or a Magistrate, there is no room for drawing a presumption u/s 114, illustration (e) of the Indian Evidence Act, 1872. By reason of Section 114 a court "may presume the existence of any act which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case." It may presume "(e) that judicial and official acts have

been regularly performed". There is no room for such presumption because the possession of illicit articles under the NDPS Act has to be satisfactorily established before the Court.

29. The Apex Court further held that the protection that Section 50 gives to those accused of being in possession of illicit articles under the NDPS Act is sacrosanct and cannot be disregarded on the technicality that the point was not taken in the Court of first instance.

30. Learned Counsel for the appellant further submitted that the purported voluntary statement, as relied upon by the learned Trial Court, does not really pass the test of legal scrutiny.

31. In this context, reference was made to the another decision of the learned Division Bench of this Court in the case between Md. Salim Akthar v. The State of West Bengal and Anr. as reported in (2008) 2 C Cr LR (Cal) 233.

32. Attention of the Court was invited to the Apex Court decision in the case between State of Punjab v. Balbir Singh as reported in (1994) C Cr LR (SC) 121. This was in support of the contention that the combined effect of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 of the Cr.P.C. regarding arrest and search under Sections 41, 42 and 43 is that the provisions of Cr.P.C. namely Sections 100 and 165 would be applicable to such arrest and search. Consequently, the principles laid down regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.

33. The Apex Court held :

To avoid harms to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, those provisions make it obligatory that such of those officers mentioned therein on receiving an information should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(2). To that extent they are mandatory, consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial.

34. The Apex Court in the case between State of Punjab Vs. Baldev Singh, etc. etc., held:

In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the Court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an

unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

35. Their Lordships in the said case further observed that a presumption u/s 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption u/s 54 of the Act.

36. In response to the submission made on behalf of the appellant, Mr. Singh, appearing as learned Counsel for the respondent/NCB, submitted that there could be little merit in the grievances, as ventilated on behalf of the appellant. According to him, the officials of the NCB duly complied with all the required formalities. Referring to the decision of the Apex Court in the case between Rajendra and Another Vs. State of Madhya Pradesh, , it was submitted that Section 50 of the NDPS Act cannot have any applicability in cases of search of bags and suitcases.

37. Mr. Singh contended that in case of arrest and seizure in a public place like that of a place in front of a Cinema hall, Section 42 of the NDPS Act is not attracted. He referred to the decision in the case between Ravindran @ John Vs. The Superintendent of Customs, in this regard.

38. It was then submitted by Mr. Singh that since search in the present case was made in a public place and not in a building, what was applicable is Section 43 and not Section 42(2). He referred to the Apex Court decision in the case between K. Chithayan Vs. State of Tamil Nadu, while submitting that Section 50 of the NDPS Act could not have had any application in the present case since search was conducted only in respect of the bag in the hand of the appellant.

39. Where a person is not personally searched, the plea of non-compliance with Section 50 is without substance. This was held by the Apex Court in the case between the State of Haryana Vs. Mai Ram,

40. Mr. Singh on behalf of the respondent/NCB categorically submitted that incriminatory statements of person called to provide information relevant to inquiry should not be construed as same as statement u/s 161 of Cr.P.C. The bar under Sections 24 - 27 of the Evidence Act would not operate nor would the provisions of Article 20(3) of the Constitution, unless such statement is made under threat or coercion. Ref: Kanhaiyalal Vs. Union of India (UOI), .

41. Mr. Singh then contended that in absence of any retraction of voluntary confession, minor variations in the evidence of the prosecution witnesses should be of little consequence. He referred to the decision in the case between Ram Kumar Vs. Central Bureau of Narcotics, and Union of India (UOI) Vs. Satrohan, in this regard.

42. On behalf of the respondent/NCB, Mr. Singh submitted that the alleged

infirmities, as referred to on behalf of the appellant, found to be unrealistic, there could be little scope for reversing the impugned judgment and order of conviction and sentence. Ref: State of A.P. Vs. P. Satyanarayana Murthy,

43. It is now necessary to analyze the evidence on record in the present case in the context of the legal position, as referred to earlier.

44. It cannot be disputed that NDPS Act is an Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substance and for matters connected therewith.

45. As held in the case between Gulam Mohiuddin v. State of Jammu and Kashmir (1994) 1 Crimes 204 (J & K), the NDPS Act has been enacted with a view to make stringent provisions for the control and regulation of operations relating to the narcotic drugs and psychotropic substances. The present Act was enacted since the scheme of penalties under the earlier Acts was not sufficiently deterrent to meet the challenge of well organized gangs of smugglers. The Central laws enforced prior to enactment of the present Act did not provide for investing the officers of a number of important Central enforcement agencies with the power of investigation of offences under the said laws. The addiction of drugs known as psychotropic substances has posed serious problems both at the National as well as International level. There was an urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances. The penalties prescribed in the Act being stringent, there is naturally need for more care and caution in the matter of compliance with the legal formalities.

46. Whereas NDPS Act quite justifiably prescribes severe punishment, there can be no escape from the need to prove a case beyond all confusion and controversy. Law in this regard, perhaps, demands dotting of every "i" and cutting of every "t". Any abuse of this legislation may lead to a serious threat to the liberty of an individual. After all, liberty of a person is as important as his limb and life.

47. Prosecution in the present case has quite justifiably relied much upon the voluntary statement of the accused/appellant. If such statement passes the test of legal scrutiny, there is little scope for any further confusion or controversy.

48. Accused/appellant reportedly stated that on 25.9.2004 as asked by Kalu, he went to the spot near Cinema Hall, Dum Dum Road, along with Wahid at 12:00 noon taking 2 kgs of heroin and they were waiting there for Kalu. According to him, they were waiting for Kalu, as planned earlier. Wahid was a little distance away from him. At the time, some persons dressed ordinarily encircled him and on being asked by them, he disclosed his name as Kasem Babu Mondal. They introduced themselves as officers of the NCB. He admitted that he had a nylon bag in his right hand, which contained 2 kgs of heroin. Two persons from onlookers were then invited by the NCB officials to be witnesses. He was

informed of his right to get searched before a Gazetted Officer or a Magistrate. The accused/appellant agreed to be searched in presence of the said departmental Gazetted Officer. Though offered, the accused/appellant declined to search the NCB officials.

49. It was submitted on behalf of the appellant that all the seven witnesses examined in this case in support of the prosecution case are NCB officials. There is no evidence of any independent witness. Whereas some of the prosecution witnesses gave the number of seizure witnesses two, P.W. 5 deposed that there were three independent witnesses. Learned Trial Court relied upon the report of the Chemical Analyst, the Malkhana register, the seizure list, the written offer and acceptance while arriving at the conclusion that the accused/appellant was guilty of the offence u/s 21(c) of the NDPS Act.

50. Mr. Mukherjee, as learned Counsel for the appellant, submitted that the learned Trial Court failed to take into consideration the inconsistencies in the evidence of the prosecution witnesses. In the petition of complaint as well as in the seizure list, it had been claimed that the alleged sample packet was sealed and labelled at the place of occurrence. P.Ws. 3, 4 and 5 in their respective oral evidence substantiated the said claim. But P.W. 2, the Chemical Analyst, deposed that the poly packet in the said envelope was not sealed. The inconsistency in the weight of the sample taken by the NCB officials and the weight taken by the Chemical Analyst in the Laboratory has also not been taken into proper consideration. The test memo reflects that the weight of the sample taken by the NCB was 5 grams, whereas the weight of the sample with poly packet received by the Chemical Analyst was 7.2 grams. It was brought to the notice of this Court that in the test memo, P.W. 5 put his signature on 25th September, 2004 whereas in the serial No. 5 of the said test memo, it was written that the sample was despatched on 28th September, 2004. Question was raised as to how the said prosecution witness write down on 25th September, 2004 that the sample packet had been despatched on 28th September, 2004.

51. Mr. Mukherjee further submitted that mere opinion of the Public Analyst without there being full and complete data disclosing the test or experiments performed by him cannot satisfy the requirement. In this context, reference was made to the Division Bench judgment of the Gujarat High Court in the case between Hanif Sk. Ibrahim v. The State of Gujarat as reported in Crimes 1995 Vol. No. 1 at page No. 274.

52. It was further submitted that according to P.W. 3 and P.W. 4, the raiding party arrived at the place of occurrence at 12 noon whereas P.W. 6 claimed that the team arrived at the P.O. at 11:00 hours. P.W. 3, the Seizing Officer, deposed that he could see the accused within 2/4 minutes of their arrival at the place of occurrence, whereas P.W. 4 stated that there had to wait for 5/10 minutes. According to P.W. 5, the raiding party had to wait 30/35 minutes for intercepting the accused. Strangely enough, P.W. 6 deposed that the accused was seen as soon as the raiding party reached the place of occurrence. Then again, there had

been inconsistencies in the evidence on record as regards the manner in which the accused/appellant was first identified.

53. Another significant aspect of the case, as pointed out by learned Counsel, Mr. Mukherjee, is that the evidences on record do not conclusively indicate that the appellant was given any lawful caution.

54. In this context, reference was made to the decision in the case between Abdul Salam Vs. Union of India (UOI) and Another, . It was observed:

Voluntary means that a person doing an act/acts of his own volition and knows the nature of his acts and does not act in performance of a legal duty, not due to coercion or fraud or misrepresentation or mistake.

55. True, credibility of testimony depends on judicial evaluation of the totality, not isolated scrutiny. It cannot be disputed that minor inconsistencies or discrepancies cannot demolish the prosecution case. It also cannot be disputed that truth may sometime suffer from infirmity when projected through human process.

56. In the present case, for the reasons as discussed hereinbefore, we find it difficult to brush aside the grievances, as ventilated on behalf of the appellant. In the considered opinion of this Court, the evidence on record do not appear to be sufficient enough so as to satisfy the judicial conscience of the Court in finding the accused/appellant guilty of the said offence. We further find that the learned Trial Court did not appreciate the evidence on record in its proper perspective and the aforesaid discussion would make it abundantly clear as to where and how the learned Trial Court failed.

57. Law very well demands that right means must be employed to achieve right ends. Ends cannot justify the means. Non-examination of independent witness without offering any satisfactory explanation, absence of proper caution to the accused before recording of purported voluntary statement and other inconsistencies and antagonistic contradictions, as discussed earlier, harmoniously combine to raise suspicion. This makes it difficult for the Court to deny the benefit of the same to the accused appellant.

58. No doubt, offence alleged is grave. It cannot be disputed that such offences, unless effectively checked, will have far reaching consequences. Our society and the law enforcement agencies cannot afford to be passive onlookers. But laws do not also permit a casual, if not indifferent, approach. If well-orchestrated evidence of departmental witnesses, without proper compliance of the statutory procedural formalities, can be considered sufficient, it may lead to disastrous results.

59. Considering all such relevant aspects and having regard to the evidence on record, we find it difficult to brush aside the grievances, as ventilated on behalf of the appellant.

60. In our considered opinion, learned Trial Court was not justified in convicting the present appellant/petitioner for the offence u/s 21(c) of the Narcotic Drugs and Psychotropic Substances Act.

61. Impugned judgment dated 11th of July, 2007 and order dated 12th of July, 2007 passed by the learned Trial Court be accordingly set aside. The appellant/petitioner be held not guilty of the said offence and be acquitted accordingly.

62. Send a copy of this judgment along with the LCR back to learned Trial Court for information and immediate necessary action.

63. Criminal department is directed to supply certified copy of this judgment, if applied for, to the learned Counsel for both parties as expeditiously as possible.

Prabhat Kumar Dey, J.

64. I agree.