
(2020) 03 CAL CK 0058
In the Calcutta High Court
Case No : Criminal Appeal (CRA) No. 728 Of 2017

Md. Arif	Vs	APPELLANT
Union Of India		RESPONDENT

Date of Decision : 13-03-2020

Acts Referred:

Constitution Of India, 1950 — Article 20(3)
Narcotic Drugs And Psychotropic Substance Act, 1985, — Section 20(b)(c), 20(b)(ii), 20(b)(ii)(C), 35, 42, 43, 50, 50(1), 51, 52, 52A, 52A (2)(c), 52A(2), 52A(3), 52A(4), 53, 54, 67
Code Of Criminal Procedure, 1973 — Section 100, 161, 313
Evidence Act, 1872 — Section 24, 25, 26, 27, 106

Citation : (2020) 03 CAL CK 0058

Hon'ble Judges : Md. Nizamuddin, J; Sahidullah Munshi, J

Bench : Divison Bench

Advocate : Habibur Rahaman, Md. Abdur Rahaman, Maidul Islam Kayal, Kapil Guha, Kaushik Dey, Binoy Kumar Panda, Subham Kanti Bhakat

Final Decision : Dismissed

Judgement

Sahidullah Munshi, J

This appeal is against the judgment and order of conviction dated 17.07.2017 and 24.07.2017 passed by the learned Judge, Bench I City Sessions

Court Calcutta in NDPS Case No.12/2011 convicting the appellant under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substance Act,

1985, and sentencing the appellant Md. Arif (in jail), the appellant before us, to suffer rigorous imprisonment for eleven (11) years and pay fine of

Rs.1,00,000/- (Rupees One Lakh) only, in default to suffer simple imprisonment for one year further.

NDPS Case No. 12/2011 arose from a complaint lodged by one Saikat Saha, Senior Intelligence Officer, Directorate of Revenue Intelligence, Kolkata

Zonal Unit, Govt. of India, that acting on a specific intelligence that one person named Imran would be coming from Siliguri with a consignment of

â??Hashishâ?? (Charas) by a Sleeper coach Bus of Modern Travels and would hand over the same to one Arif, the appellant herein at Dharmatala

Bus Terminus in Kolkata. Accordingly, a batch of Officers belonging to the Directorate rushed to the said Bus Terminus on 03.08.2011 and kept

surveillance in and around the said place. When the Officers noticed one person getting down from a luxury bus of Modern Travels, at the said

Terminus, along with one multi-coloured rucksack on his back. The Officers found that after getting down from the bus, the said person waiting in

front of the ticket counter of Modern Travels and while they started talking each other the multi-coloured rucksack bag was handed over by aforesaid

person, that is, Md. Imran to the appellant. Ultimately, on search the contraband drug was recovered weighed 5 kg. from the possession of the

appellant. Samples were taken in presence of two independent witnesses as also the accused persons. The Officer of the Directorate seized that

recovered Alamet like multi-colored rucksack, 10 polythene packets and the brown-coloured adhesive tapes, two bus tickets of the Modern Travels,

two old mobile Handsets. On preparation of seizure list one copy of the said seizure list, that is, Panchnama and inventory was handed over to the

accused persons in presence of witnesses. Thereafter, notice under Section 67 of the NDPS Act was served and in response thereof accused

rendered his voluntary statement before the Directorate on 3rd August, 2011, wherein the said Md. Imran admitted, inter alia, that he had come to

Kolkata from Siliguri along with 5 Kg. â??Hashishâ?? for delivering the same to Md. Arif, that is, accused No.2 at Dharmatala Bus Stand. Similarly,

accused no.2/appellant also rendered his voluntary statement on 03.08.2011 that he used to receive â??Hashishâ?? (Charas) and after receiving the

same from Imran he used to deliver it against monetary consideration, to different persons at Kidderpore, for onward transmission to Hong Kong and

other places. Those two persons were arrested under Section 43 of the NDPS Act on the same day, that is, 03.08.2011.

Those seized articles were sent to Chemical laboratory, Custom House, Kolkata and after chemical examination Custom House confirmed that the

samples are the â??resinous extract of plant Cannabis Sativa (Charas)â?. By lodging the written complaint complainant prayed for appropriate action

against the accused persons and to forward to court on 04.08.2011. Accordingly, the said NDPS case was started under Section 20(b)(ii)(C) of the NDPS Act.

Record reveals that after taking cognizance of the offence by the Court concerned copy of necessary documents were supplied to the accused. On considering the materials on record as also the case docket, charge was framed against both the accused persons under Section 20(b)(ii) of the NDPS

Act. On the charge being read over and explained to the accused persons they pleaded not guilty and claimed to be tried. Defence has pleaded that

the accused/appellant has been falsely implicated in the case.

From the order of conviction in NDPS Case No. 12/2011 only Md. Arif, the accused no.2 has preferred this appeal before us being C.R.A. 728 of 2017.

In order to prove the case prosecution has examined 11 witnesses including the complainant. Altogether 127 documents have been admitted into

evidence and marked Exbt.1 to Exbt. 127.

In this appeal the appellant has mainly canvassed the following grounds on dock against the order of conviction namely,

1) The complainant who lodged the complaint and joined the Directorate just before the filing of the complaint which according to the defence, is not

permissible and according to the learned Advocate for the appellant the complainant at least ought to have been in the said Directorate for six months

prior to lodging of the complaint.

2) There has been no compliance of Section 50 of the NDPS Act by the prosecution and yet the order of conviction has been passed.

3) Examination of the independent witnesses is absent and hence the prosecution case is bound to fail.

4) Whether the learned trial Court passed the order of conviction considering the confessional statement made under Section 67 of the NDPS Act.

Whether there had been substantial compliance under Section 52A of the said Act and if the order of conviction could have been passed even after

non-compliance thereof.

5) Evidence adduced by the prosecution had no corroborative value to lead to conviction.

To combat the first point urged by the learned Advocate for the appellant that the complainant joined office just before the complaint was lodged,

learned Advocate Mr. De for the respondent submitted that the complainant Saikat Saha as per pay registrar maintained by the Directorate, was in

the Office since 2008 and at least from 1st April, 2008 as Senior Intelligence Officer. He submitted there was no bar for him to make the complaint as

submitted by the appellant. Pay registrar has been shown to the court and the same has been verified in open Court. Therefore, the first point urged by

the appellant cannot be sustained.

Complainant Saikat Saha has been examined as PW1. He is a Senior Intelligence Officer of the Directorate of Revenue Intelligence, zonal Unit,

Calcutta. He deposed that he filed complaint against accused persons in discharge of his official duty as a public servant and he proved the said

complaint which is marked as Exbt.1.

Bijan Kumar Pani (PW2) was posted on 03.08.2011 as an Intelligence Officer at the Directorate of Revenue Intelligence, Calcutta and he received

one information from source regarding the accused no.1 coming from Siliguri with a consignment of Hashish in a bus and to drop the same at

Dharmatala bus stand and thereafter, the accused no. 1 and 2 were searched and the contraband was seized from the custody of accused no.2 when

accused no.1 handed over the bag containing the contraband to accused no.2. Option was given to the accused persons whether they wanted to be

searched in presence of Gazetted Officer and such option was given in writing which has been proved and marked Exbt.2 and Exbt.3. On such option

being given the bag was opened and it was found that there were 10 packets wrapped with brown adhesive tapes which were later on detected to be

Hashish. The articles were seized and thereafter, notice under Section 67 of the NDPS Act was issued. According to the prosecution, both the

accused agreed to accompany them and ultimately, they were taken to the D.R.I. Office at 8, Hochimin Sarani, Kolkata. PW2 in his cross-

examination stated that search and seizure was made at Dharmatala Bus Stand in presence of two independent witnesses and one staff of Modern

Bus Travel, Sri Montu Nag, where the accused persons were intercepted and further search in respect of the packets and the intercepted persons

were made at the Office of D.R.I. in presence of Gazetted Officer. PW2 stated

that one Panchnama was also made at the spot which has been proved and marked Exbt.4.

So far the issue of non-compliance of Section 50 and the submission made by the learned Advocate for the appellant that this will render the order of conviction unsustainable, he relies on the following decisions to substantiate his argument about non-compliance of Section 50 thereof.

â?¢ Beckodan Abdul Rahiman â?¢Vs. â?¢ State of Kerala reported in AIR 2002 SC 1810;

â?¢ Narcotics Central Bureau â?¢Vs. â?¢ Sukdev Raj Sodhi reported in (2011) 4 SCC 319;

â?¢ State of Delhi â?¢Vs. â?¢ Ram Avatar reported in (2011) 6 SCC 134;

â?¢ Md. Saif â?¢Vs. â?¢ State of West Bengal reported in (2006) 1 CLT 196 (HC).

The answer is hidden in Section 50 of the NDPS act itself. Section 50 of the NDPS Act is set out herein below:-

â?¢S.50. Conditions under which search of persons shall be conducted.-â?¢

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he

shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in

section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in

sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith

discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest

Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic

substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate,

proceed to search the person as provided under section 100 of the Code of

Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within

seventy-two hours send a copy thereof to his immediate official superior.]â??

Sub-Section (1) of Section 50 mandates that the accused if requires the authorized officer will take him to the nearest Gazetted Officer of any of the

departments mentioned in Section 42 or to the nearest Magistrate. Thereafter, the Gazetted Officer or the Magistrate before whom any such person is

brought shall, if he sees no reasonable ground for search forthwith discharge the person but otherwise shall direct that of search be made.

In the present case the accused persons were brought to the Office of D.R.I. and they were searched in presence of the Gazetted Officer as per

their option given in writing which is marked as Exbts. 2 and 3. Submission, therefore, made by the learned Advocate for the appellant that it was

compulsory to bring the accused persons to learned Magistrate only, cannot be accepted. If the accused persons were brought before the Gazetted

Officer it would be deemed that there has been sufficient compliance of the requirement of Section 50. It is not only the learned Magistrate, but also a

gazette Officer, before whom the accused persons were brought, could have discharged the accused had there been no search and seizure of

contraband from their custody. It is alleged by the appellant that Hashish (Charas) was recovered from the rucksack not from their person and

therefore, option under Section 50 was not required at all. It is submitted by the learned advocate for the appellant that in such circumstances there

could be no application of Section 50 of the NDPS Act.

This argument advanced by the learned Advocate for the appellant cannot stand inasmuch as a written option has already been furnished by the

accused/appellant without contradicting anything and they admitted possession of the contraband in their custody during search and seizure. Learned

Advocate appearing for the respondent, however, relied on a decision of the Honâ??ble Apex Court in Ajmer Singh â??Vs. â?? State of Haryana

reported in (2010) 3 SCC 746 where the Honâ??ble Apex Court held in the same context as has been raised by the learned Advocate for the

appellant that question of compliance or non-compliance of Section 50 of NDPS Act is relevant only where search of a person is involved and the said

Section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc does not

come within the ambit of Section 50 of the NDPS Act, because Section 50 expressly speaks of search of a person. However, applying the

interpretation of the word "search of person" laid down by the Hon'ble Apex Court in the decision in State of H.P. Vs. Pawan Kumar

reported in (2005) 4 SCC 350, compliance of Section 50 is not recorded where the accused was confronted by the officials and he was informed that

he has the right to either be searched before the Gazetted Officer or before the Magistrate and the accused chose the former to be searched before

the Gazetted Officer and when before the Gazetted Officer he was searched and the contraband was found from his possession it is immaterial

whether the contraband was found from the bag or from the packet. Therefore, argument of the learned Advocate for the appellant cannot stand to

satisfy the Court to pass an order of acquittal in its favour for non-compliance of Section 50 of the said Act.

In view of the ratio decided in Ajmer Singh (supra) we are not inclined to accept what has been submitted by the learned Advocate for the appellant

alleging non-compliance of the Section 50 of the said Act. At least the accused/appellant is not entitled to get an order of acquittal on the basis of this

submission of non-compliance of Section

50. The decision so cited by the learned Advocate has no bearing in the present facts and circumstances of the case.

The appellant submitted that compliance of Section 50 being mandatory and having not been complied with by the prosecution, the entire trial should

vitate. In support of such submission the learned Advocate relied on Beckodan Abdul Rahiman (supra) which is based on a prosecution case that

Sub-Inspector of Police received a telephonic message that narcotic drugs were being sold at a particular place and reaching such place he saw the

accused carelessly walking from the bus shelters and looking at his unnatural way of walking, the inspector with his team approached him and on

search it was found and detected that he was carrying contraband within the fold of his dhoti which the appellant was wearing. The contraband in this

case was opium and was kept concealed inside a polythene bag. In this case on enquiry from the accused whether he would like to meet a higher

official or gazetted officer, he allegedly replied in the negative.

In our case the contraband was found in possession of the accused at a public place after he got down from the bus. He was trying to hand over the

same to another person who had been waiting before to take charge of the same contraband and he was taken to D.R.I. Office. He was informed

about the option to mention in Section 50 regarding search being conducted in presence of Gazetted Officer or the Magistrate. The accused opted for

Gazetted Officer and in pursuance of such search and seizure, he was arrested. Therefore, ratio of the decision is different to the extent that search

and seizure was made by the inspector himself acting on the basis of the option not being exercised by the accused. Meaning thereby he agreed to be

searched by the inspector himself. The present case is totally different. As a result the ratio of the said decision has no bearing on the present case.

The decision in Sukhdeb Raj Sodhi (supra) is also on the principle under Section 50 of NDPS Act where the Honâ??ble Supreme Court referring to a

decision in Vijay Sinh Chandubha Jadeja Vs. State of Gujarat reported in 2011 (1) SCC 609 has held that compliance of Section 50 is mandatory. In

the present case the accused was presented before the Gazetted Officer. Statute clearly mandates that either the accused should be produced before

the Magistrate or before the Gazetted Officer; it neither says only Magistrate nor both Gazetted Officer and Magistrate. Therefore, in our considered

view there has been substantial compliance of Section 50 in the present case where the accused was produced before the Gazetted Officer.

Ram Avatar (supra) cited on the same ratio complaining of non-compliance of Section 50. In the cited case, an appeal was preferred by the accused

challenging conviction and order of sentence. High Court taking note of the notice which was allegedly issued to the accused under Section 50 of the

Act returned a finding in accordance with settled principle of law, that the notice served upon the accused was not in conformity with provisions of

Section 50 of the Act. Resultantly, there was no compliance with the provision of Section 50 of the Act in the eyes of law and, therefore, the accused

was acquitted of the charge. Against such an order appeal was filed before the Honâ??ble Supreme Court. So far the issue of compliance of Section

50 in this cited case is concerned, it is evident that the very notice issued under Section 50 of the act was itself defective and that is a ground for

acquittal against which appeal before the Honâ??ble Apex Court was dismissed. This fact is distinguishable and ratio therein cannot be applied in the present case.

Fourth decision cited by the learned advocate for the appellant in Md. Saif (supra) is also on the issue of non-compliance of Section 50 of the NDPS Act. In the cited case the fact was that the accused was not taken to nearest Gazetted Officer or a Magistrate despite option given which fact is totally distinguishable in the present case.

In this context the learned Advocate for the respondent has also cited a decision in the case of State of Punjab â??Vs. â?? Makhan Chand reported in (2004) AIR (SC) 3061 where the Honâ??ble Apex Court referring to a Constitution Bench in State of Punjab â??Vs. â?? Baldev Singh (supra) reported in (1999) 6 SCC 172 held â??The only question which appealed to the High Court, has been wrongly decided. As to the circumstances when the provisions of Section 50 of the Act would apply, the issue is no longer res integra. A constitution Bench of this Court in State of Punjab Vs. Baldev Singh, says this:-

â??12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.â??â??

Paragraph 8 of the said decision is relevant for the present case and the same is set out below:

â??8. In the present case, for both the reasons discussed earlier, we are of the view that Section 50 does not apply at all. The mere fact that the officer concerned offered to have the search of the respondent-accused taken before a Gazetted Officer/Magistrate, or that there were no independent witnesses to evidence this offer, hardly makes any difference to the situation. In our view, therefore, the High Court erred in holding that the action of the police officers was contrary to Section 51 of the Act and giving the benefit of doubt to the respondent-accused when there was no

scope for raising such a doubt at all.â??

Undisputedly, according to the evidence, recovery of Hashish (Charas) found from the rucksack which was in possession of the accused person and

which is evident from the inventory and seizure list as well as from the panchnama both were duly signed by independent witnesses and the employee

of Modern Travels as also by the accused persons. PW3 being the Gazetted Officer in his cross- examination stated that he was present at the time

of search and seizure, such being the evidence on record, possession of the said Hashish (charas) from the custody of the accused person is beyond

doubt. That apart, there were no retraction of the said fact by the appellant during the trial including examination under Section 313 of the Code of

Criminal Procedure when the accused was examined.

The allegation of non-seizure from the custody of the person of the accused/ appellant is an afterthought and therefore, cannot be relied on.

In this respect, however, the learned Advocate for the respondent has pointed out that when possession of the contraband with the accused is proved,

the provisions of Section 35 and 54 of the

Act comes into play and those are set out below:

â??S.35. Presumption of culpable mental state.-â??

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of

such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an

offence in that prosecution.

Explanation.-In this section â??culpable mental stateâ?? includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when

its existence is established by a preponderance of probability.â??

â??S.54. Presumption from possession of illicit articles.-â??In trials under this Act, it may be presumed, unless and until the contrary is proved, that

the accused has committed an offence under this Act in respect of-

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he

has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or

controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance,

or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the

possession of which he fails to account satisfactorily.]â??

To buttress his argument learned Advocate for the respondent has relied on a decision in *Gian Chand & Ors. â??Vs. â??* State of Haryana reported in

AIR 2013 SC 3395. The Honâ??ble Apex Court in this decision held that if the accused is found to be in possession of the contraband article, he is

presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved.

According to Section 35 of the Act, the Court shall presume the existence of mental state for the commission of an offence and it is for the accused to

prove contrary. The presumption though rebuttable but during examination under Section 313 neither any plea has been taken by the accused nor any

prayer has been made to rebut the presumption under the said provision.

From the law laid down by the Honâ??ble Apex Court in various decision it is no more disputed that once possession of the contraband material with

the accused is established, which is the foundational fact of the case arose due to the complaint lodged by the prosecution, the accused has to establish

how could he be in possession of the same as it is thus is subject only and therefore, the case must fall within the meaning of the provisions of Section

106 of the Evidence Act which is set out below:

â??S.106. Burden of proving fact especially within knowledge.â??When any fact is especially within the knowledge of any person, the burden of

proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving

that intention is upon him.

Â (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.â??

Section 106 of the Evidence Act clearly lays down the burden of proving of the fact especially within the knowledge of a person. Here in the present

case since the possession of the contraband article has been clearly established with the accused/appellant it is his duty to discharge burden otherwise

reverse burden of proof has to be complied with by the accused under Section 54 of the NDPS Act and so long this is done the order of conviction

cannot be held to be inappropriate or illegal.

Coming to the issue of non-examination of independent witness as urged by the learned Advocate for the appellant relying on a decision in the case of

Radheshyam (supra) Vs. Union of India reported in 2012 (7) Supreme 503, submitted that all the witnesses examined by the prosecution are interested

witnesses being departmental persons. In the cited decision the cardinal question considered by the Honâ??ble Apex Court that on perusal of the

original records it was detected that the document claimed to have been signed by the accused person did not contain the signatures of two witnesses.

This generated a doubt in the mind of the court that the document so produced and marked in the evidence may not be the original statement of the

appellant before the court recorded under Section 67 of the NDPS Act. Such being the position the Honâ??ble Apex Court held that the accused is

entitled to get benefit of doubt. The said fact of omission and/or lacking of signature on the confessional statement under Section 67 is absent in the

present case and further that an attempt was made to file an application for retraction which was found to be without the signature of the appellant.

Why such a futile exercise was undertaken by the appellant is best known to him. Fact remains, no attempt was made to claim retraction of the

statement made apart from the fact that the statement of confession made under Section 67 of the act was duly signed by the appellant and witnessed

by the two witnesses. The decision cited by the appellant has no manner of application in the fact situation of the present case.

Mr. De learned Advocate appearing for the respondent/D.R.I. placed reliance on Ajmer Singh (supra) which we have already discussed earlier and

we do not repeat the same again and again save and except that we firmly hold that official witnesses even in absence of its corroboration by

independent evidence, can form basis of conviction as held by the Honâ??ble Apex Court in Ajmer Singh (supra). The same is also the ratio in Gian

Chand (supra) where law has been settled to be â??Non-joining of an independent witness where the evidence of the prosecution witnesses may be

found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no

reason on record to falsely implicate the appellantsâ??.

We do not find any situation different from the situation dealt with by the Honâ??ble Court in those two decisions. Therefore, neither the appellant, is

entitled to any benefit of doubt nor any order of acquittal on this submission as has been advanced. So far as the issue urged by the appellant regarding

confessional statement under Section 67 of the NDPS Act and his reliance upon the self-same decisions in Radheshyam (supra) where the

accused/appellant alleged to have sold 10 boxes of poppy husk (total quantity of about 162 kg) for Rs. 50,000/- to other co-accused persons, who were

found in possession of the said poppy husk and where the prosecution laid the only evidence. In so far the appellant was concerned from the

statement made by the appellant under Section 67 of the NDPS Act 1985 and on the basis of this sole statement the learned Session Judge convicted

and sentenced the appellant which has been set aside by the Honâ??ble Apex Court. The fact situation of the present case is totally different.

Conviction in the present case is not based only on the confessional statement made by the accused under Section 67. His confessional statement is

coupled with too many other grounds on which conviction is based. Therefore, the fact involved in the cited decision is completely distinguishable and

we are unable to accept the argument advanced by the appellant. In this regard, however, the respondent/D.R.I. has relied on a decision in

Kanhaiyalal Vs. Union of India (supra) reported in 2008 (3) SCC 668 and submitted that statement made under Section 67 of the NDPS Act cannot

be equated at par with the statement under Section 161 of the Code of Criminal Procedure unless made under threat and coercion. The element of

threat or coercion is totally absent in the present case even no such allegation has been made and this is partly evident that he never attempted to

retract this statement made under Section 67 of the act. In the decision in Kanhaiyalal (supra) Honâ??ble Apex Court determined up to what extent

statements under Section 67 of NDPS Act be relied upon for convicting the person accused of having committed offence under the provisions of

the said act. The Honâ??ble Apex Court held that in order to arrive at a decision in regard to such issue it will have to be considered whether such a

statement would attract both Sections 24 to 27 of the Indian Evidence Act as also Article 20 (3) of the Constitution of India.

Ultimately, it has been held by the Honâ??ble Apex Court that an officer vested with the powers of an officer-in-charge of a police station under

Section 52 of the above act is not a â??police officerâ?? within the meaning of Section 25 of the Evidence Act. The Honâ??ble Apex Court held

that statement made under Section 67 of the NDPS Act is not a statement under Section 161 of the Code, unless made under threat or coercion.

Because of this vital difference, statement under Section 67 of the NDPS Act is to be used as a confession against the person making it and exclude if

from the operation of Sections 24 to 27 of the Evidence Act. In this case also nothing appears from the evidence on record that the appellant has

made this statement under Section 67 under any kind of compulsion or threat after he had been placed under arrest which could render such statement

inadmissible and not capable of being relied upon in order to convict him.

In this case it may not be out of place to mention that arrest memo has been proved as Exhibits 85 and 86 and, thereafter, notice under Section 67 was

given to both the accused and they made voluntary statement under Section 67 of the said act. Those documents have been proved by the prosecution

and marked Exhibits 101 and 102.

In the decision of Kanhaiyalal (supra) the Honâ??ble Apex Court clearly held â?? The consistent view which has been taken with regard to

confessions made under provisions of Section 67 of the NDPS Act and other criminal enactments, such as the Customs Act, 1962, has been that such

statements may be treated as confessions for the purpose of Section 27 of the Evidence Act, but with the caution that the Court should satisfy itself

that such statements had been made voluntarily and at a time when the person making such statement had not been made an accused in connection

with the alleged offence. In addition to the above, in the case of Raj Kumar Karwal Vs. Union of India and others, this Court held that officers of the

Department of Revenue Intelligence who have been vested with powers of an

Officer-in-Charge of a police station u/s 53 of the NDPS Act, 1985, are not "police officers" within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence against him. It was also held that power conferred on officers under the NDPS Act in relation to arrest, search and seizure were similar to powers vested on officers under the Customs Act. Nothing new has been submitted which can persuade us to take a different view."

Learned Advocate for the appellant has urged before us about non-compliance of the provision of Section 52A of the NDPS Act it has been

strenuously argued by the learned Advocate that non-compliance of the provision regarding disposal of seized narcotic drugs and psychotropic

substance even may vitiate the trial itself and non-compliance of such provision may lead to a positive decision for acquittal of the appellant. Section

52A is set out below:

"S.52A. Disposal of seized narcotic drugs and psychotropic substances.-"

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft,

substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such

narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their

seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure

hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the

officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic

substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars

of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer

referred to in sub-section (1) may consider relevant to the identity of the

narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose ofâ?

(a) certifying the correctness of the inventory so prepared;

or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list

of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court

trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn

under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence].â??

From a bare reading of Section 52A it is found that Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution,

constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substance, controlled substances

or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances, class of controlled

substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that government

may, from time to time, determine after following the procedure. It is true that if the specified instruction are not complied by the authority under

Section 52A the benefit of non-compliance may be beneficial for the accused provided that the seized drug is under safe custody but when it is proved

that the seized goods or drugs are in safe custody merely because of non-compliance of under Section 52A, the appellant cannot get benefit out of it.

In this regard, however, learned Advocate for the appellant has relied on the following decisions:

â?¢ Makhan Barman â?"Vs. â?" State of West Bengal passed by High Court in C.R.A. No. 534 of 2008 decided on 18.03.2015;

Union of India Vs. Bal Mukund & Ors. passed in Criminal Appeal No. 1397 of 2007;

Union of India Vs. Mohanlal & Anr. passed in Criminal Appeal No. 652 of 2012;

Tej Bahadur Singh & Anr. Vs. Narcotic Control Bureau & Anr. reported in (2000) 1 CHN 803.

The decision in Makhan Barman (supra) has no manner of application in the present case inasmuch as the conviction based on the charge under

Section 20(b)(c) of the NDPS Act has been found to be unsustainable for the reason that the prosecution held to have miserably failed to prove that

any contraband articles under NDPS Act had been recovered and seized from the house of the appellant by a police team and a fate quite contrary to

the said fact stated by the prosecution came on record. Court held that the prosecution failed to prove alleged possession of the contraband by the

appellant and as such presumption under Section 35 and 54 could not be made applicable and conviction passed thereon had been held to be bad. This

issue is not at all similar to the present case.

Bal Mukund (supra) is a case where conviction was set aside by the High Court by a judgment of acquittal which was challenged before the

Honorable Supreme court and the Honorable Supreme Court did not interfere with the said judgment of acquittal on the ground that the procedure

adopted by the prosecution for search and seizure as also taking samples for the purpose of chemical examination were in complete doubt and not in

compliance of the mandatory statutory provisions vis-à-vis direction issued by the Central Government in doing such search and seizure. The fact on

which the said decision was passed is completely distinguishable from the present one. The decision, however, has also elaborately discussed about

the scope of voluntary statement which satisfies the conditions precedent laid down under Section 67 of the Act and the ratio decided in Shri D.K.

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reported in (1997) 1 SCC 416 based on the issue where a person in custody if subjected to interrogation and any confession has been recorded

whether the same came to be admitted into evidence. The decision is distinguishable on fact and has no manner of application in the present case.

Mohanlal & Anr. (supra) is a decision dealing in detail with the situation where

keeping in view the importance of the subject the Honâ??ble Apex court requested the Honâ??ble Chief Justices of the High Courts concerned to appoint a committee of Judges on the administrative side to supervise and monitor progress made by the respective States in regard to the compliance of the directions and that Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts and wherever necessary, to issue appropriate directions for a speedy action on the administrative and even on the judicial side in public interest whenever considered necessary.

The Honâ??ble Apex Court clarified that â??It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act

that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.â? Therefore, it cannot be contended that because of some discrepancies in following the provisions under Section 52A the accused will get an order of acquittal or it cannot be contended that the trial shall stand vitiated. Section 52A does not empower the Central Government to lay down the procedure for search of an accused which only deals with the disposal of seized narcotic drugs and psychotropic substance. As cited by Mr. De, learned Advocate appearing for the D.R.I. rightly submitted relying on the decision in Makhan Chand (supra) that Section 52A does not empower the Central Government to lay down the procedure even to cause search an accused rather it only deals with the disposal of seized narcotic drugs and psychotropic substance. The Honâ??ble Supreme Court also held that the standing orders are intended merely to guide the officer to see that an application and procedure is adopted by the officer-in-charge of the investigation and standing order were inexorable rules this contention of the appellant that in absence of non-compliance of Section 52A of NDPS Act, the benefit would go in favour of the appellant, is not at all a sound, legal and valid proposition and we do not agree with such proposition as argued by the learned Advocate for the appellant. Moreover, there is no violation of the provisions of Section 52A of the NDPS Act by the respondent in the instant case. In the case at hand the seized narcotic drugs and psychotropic substance were presented before the learned court below and were marked exhibits numbered as material exhibits. The learned court below permitted Director of Revenue Intelligence (DRI) by its order dated 04.08.2011 to send one set of representative sample to the chemical examiner. Remaining representative samples

were duly examined during trial and the chemical examiners recorded their evidence. Chemical examination reports were also exhibited and considered by the learned court below during trial. After conclusion of the trial, seized hashish (charas) was destroyed by the competent authority issued certificate of destruction to this effect. Therefore, it cannot be agitated that the authority did not comply with the provisions of Section 52A of the said Act does not render any benefit to the appellant.

In this case, there is no room for the appellant to advance an argument that he is an innocent person or that he has been falsely implicated in the instant proceeding. The recovered hashish (charas), from the rucksack apparently was in possession of the accused persons as evident from the inventory and seizure list and the Panchnama as well duly signed by the independent witnesses and employee of Modern Travels and after all signed by the accused persons.

If this factum is taken into consideration the fact that the accused persons as well as the officers of the raiding team read with the voluntary statement of admission made by the accused persons under Section 67 of the NDPS Act together with the fact that there had been no retraction statement by them, the reasonable conclusion would be to hold the accused/appellant guilty.

More so, when during examination of the accused under Section 313 of the Code of Criminal Procedure, they never questioned and/or doubted the recovery, seizure nor even raised any question that their confession under Section 67 of the said Act was taken by force or inducement or threat. If this fact is taken into consideration with the fact situation of the decision of the Honâ??ble Apex Court in Gian Chand (supra) this will lead to the conclusion that if the accused is found to be in possession of the contraband article under Sections 35 and 54 of the NDPS Act would be the only answer for the accused by proving the contrary, otherwise the only fate for the accused/appellant would be the conviction.

It certainly leads to a case at least of having possession of the contraband by the accused persons. This evidence formed the foundational fact of possession of the contraband by the accused persons and if that be so, rebuttal evidence would be the only course for the accused to get relief by proving that thing was otherwise. The impugned judgment and order of conviction cannot be disturbed.

The order of conviction and sentence under challenge are thus confirmed. The appeal fails and hence stands dismissed.

Criminal Section is directed to send down the records together with a copy of the judgment forthwith to the concerned learned trial Court.

Urgent Photostat certified copy, if applied for, be delivered to the learned counsel for the parties, upon compliance with all usual formalities.

I agree.