

(2019) 02 J&K CK 0096

In the Jammu And Kashmir High Court

Case No : Criminal Appeals (CRA) No. 14 Of 2014, IA No. 31 Of 2014 01 Of 2017, 01 Of 2018

Mohd. Maqbool Raina

APPELLANT

Vs

Intelligence Officer, Narcotic Control Bureau, Jammu Zonal Unit, Jammu

RESPONDENT

Date of Decision : 22-02-2019

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 20, 52, 53, 55, 57, 67

Evidence Act, 1872 — Section 114

Citation : (2019) 02 J&K CK 0096

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Advocate : Jagpaal Singh, P.C. Sharma

Judgement

1. In the instant appeal, the appellant has assailed the judgment/order dated 27.12.2013, passed by court below, whereby the appellant has been convicted under Section 8/20 NDPS, Act and has been sentenced to undergo rigorous imprisonment for a period of 10 years and fine of Rs. 1.00 lac, in default of payment of fine, shall further undergo rigorous imprisonment for a period of one year.

2. The appellant through the medium of this Memo of appeal seeks indulgence of this Court for setting aside the impugned judgment of conviction and order of sentence inter alia on the following grounds:-

(1) That the very basis of the prosecution case i.e., the alleged information received by the Intelligence Officer, namely, Suresh Sharma and reduced into writing does not disclose the commission of any offence under law, which itself shows that the entire prosecution story against the appellant, is false.

(2) That none of the members of the alleged team constituted for the purpose of raid have been arrayed as witness nor the statement of any of such member has

been recorded, which clearly amounts to the suppression of material facts and thereby reflects without any doubt that no such team was ever constituted nor any such raid was conducted and the appellant has been falsely implicated.

(3) That the none of the persons from whom the intelligence officer Suresh Kumar alleged to have been taken the seal (NCB seal) have ever been examined as witness, which could prove that said seal was kept in safe custody.

(4) That the prosecution even failed to prove the existence of the place of occurrence and no site plan or any other document of any kind whatsoever have been annexed along with the complaint which could even prove the existence of the alleged place of occurrence, even the intelligence officer in his statement has said that he did not know in jurisdiction of which police station the alleged occurrence has occurred, which clearly shows that the entire story of place of occurrence and recovery there from is false.

(5) That all the three witnesses, namely, Vipin Kumar, Naresh Kumar and Sanjay Kumar gave entirely different version of the place of occurrence and in the absence of proof of the alleged place of occurrence as narrated in the preceding para the conviction of the appellant is not warranted under law.

(6) That the complaint has been filled by the Intelligence Officer (I.O), NCB but in the complaint or even during the trial the complainant fails to prove his rank i.e., whether he hold the rank of Inspector or above and thereby whether he is an authorized officer to file such complaint.

(7) That no FSL form was prepared on spot, which is mandatory under law, which clearly shows that no recovery of contraband has been affected from the appellant. Non preparation of the FSL form on the spot cause serious prejudice to the appellant but said omission on the part of the prosecution has been undermined by the trial court.

(8) That fact of conducting a false investigation against the appellant and preparing false documents against him can be well evidenced from the fact that I.O in his examination in-chief states that the alleged inventory of the seized articles have been prepared by him and same is in his handwriting but when has been cross examined in respect of the same, he himself states that this not the original inventory prepared by him as the original was misplaced and he did not even remember that where the original inventory has been kept.

(9) That no contraband was ever recovered from the appellant and the alleged document of recovery-cum-seizure memo prepared against the appellant is a false document as the same is reflected from the fact that the said recovery-cum-seizure memo prepared against the appellant is a false document as the same is reflected from the fact that the said recovery-cum-seizure memo is alleged to be prepared on spot prior to the registration of the case no. i.e. NCB/J2U/Cr. No. 1/2012 but the said document itself contains the said case no.

(10) That there is total violation of standing instruction no. 1/88 while taking the

alleged samples but the said major submission of the appellant have not been considered by the learned trial court nor the same has been discussed anywhere in the judgment impugned.

(11) That the I.O. states that he has seized only 16 balls of charas from the appellant but the photographs annexed with the file shows more than 32 balls which itself shows that the alleged recovery of charas is a false story.

(12) That the said photographs also shows that at 9:30 P.M. on the same day the accused was handcuffed and his statement under Section 67 of NDPS Act is alleged to be recorded from 5.00 P.M-10.00 P.M. hence the same cannot be considered as voluntary.

(13) That none of the superior officer have been examined who prove the compliance of Section 57 of NDPS Act or who could prove the forwarding of information and order for the constitution of raiding team.

(14) That I.O. is the person who has received the alleged information against the appellant, constituted the team, taken the accused into custody, effected the recovery, prepared documents, recorded the statement and filled the complaint, but in the light of the above said malafide acts and preparation of false documents against the appellants the role of the I.O right from the beginning till the end is malafide, unfair, doubtful and biased which causes serious prejudice to the appellant and clearly shows that he has been falsely implicated.

(15) That the evidence of the defense witnesses has not been considered by the learned trial court.

(16) That the non-compliance of the provisions of Section 53 and 55 as applicable to present matter has been wrongly understood and wrongly discussed by the learned trial Court.

3. I have considered the rival contentions.

4. From the perusal of record, it is evident that on 11.02.2012 at about 0800 hours an information was received from reliable source in NCB that one person namely Mohd. Maqbool Raina/appellant herein would send a consignment of house hold to someone from M/s Gati Ltd. Parmandal Morh, Jammu which might contain narcotic drug. Immediately the said information was given in writing through FAX to the Zonal Director, Narcotics Control Bureau Jammu (camp at Jodhpur) by Suresh Kumar, Intelligence Officer and the said Zonal Officer directed Suresh Kumar investigating officer telephonically as well as in writing through FAX to go with available strength and take action. Accordingly, a team of NCB consisting of 1.Suresh Kumar, Intelligence officer; 2. P.P. Singh Technical Assistant; 3. P N Thoosu, Sepoy and Kaushal Kumar Sepoy. The team assembled in the NCB Office and left for M/s Gati Ltd, Purmandal Morh, Jammu and reached there at 1005 hours. Thereafter the team entered in the Warehouse and found that accused was standing in front of booking counter of M/s Gati Ltd. with a gunny bag. He was surrounded by the NCB team and they introduced themselves

to him and also enquired about his identity. He disclosed his name as Mohd. Maqbool Raina son of Gul Moha-u-din Raina r/o village Fremoo Gadoul, Tehsil Kokernag District Anantnag, Kashmir. The investigating officer Suresh Kumar told the said Mohd Maqbool Raina that he wanted to search the gunny bag, to which he agreed. The Investigating Officer, Suresh Kumar approached two persons, namely, Vipin Kumar and Naresh Kumar and disclosed his identity to them and requested them verbally as well as in writing to remain present as independent witnesses in the entire process of the search and seizure, if any contraband is seized. At about 11.20 AM Sanjay Kumar, Senior Tax Assistant also arrived at M/s Gati Ltd. and remained with the NCB team in the entire proceedings. The consignment was opened by Mohd. Maqbool Raina/accused with the help of scissor and on opening it one blanket, seven carpets and four packets wrapped with brown tape were found kept in four carpets' fold; on enquiry, accused told that those packets were of charas. Accordingly, inventory was prepared and their weight came to 8.200 kgs and after removing black tape and packing material its weight was found 7.796 kgs. The Investigating Officer, Suresh Kumar tested it with DD Kit and found positive for charas. Thereafter recovery cum seizure memo was prepared on spot and simultaneously seized contraband in the shape of balls were broken into pieces and made it homogenous mixture. Two samples of 24gms each were drawn from the said material and sealed and were marked as A-1 and A-2. The remaining contraband was kept in a transparent polythene bag and sealed. The seized material was deposited in the Malkhana for safe custody and godown receipt was obtained after making proper entry in the malkhana register. Notice under Section 67 of the NDPS Act was given to the accused and thereafter his voluntary statement was recorded in which he admitted the recovery of 7.976 kgs charas from him. The accused was arrested and the information of arrest, search and seizure was sent to the higher authority under Section 57 of the Act. Test memo was prepared and one sample marked as A-1 along with test memo was sent to CRCL, New Delhi on 12.02.2012 for chemical analysis. Chemical analysis report received from CRCL, New Delhi revealed that sample was found positive for charas and ultimately complaint was filed in the court.

After completing the investigation, complaint was presented before court below, where vide order dated 07.05.2012 accused was charged for the commission of offence falling under Section 8/20 NDPS Act to which he pleaded not guilty and claimed to be tried. During course of trial, Havaladar Maimudin PW-1, Vipin Kumar PW-2, Naresh Kumar PW-3, Sanjay Kumar PW-4, Suresh Kumar PW-5 and Bhuwan Ram PW-6 were examined and thereafter statement of accused was recorded u/s 342 Cr.P.C; accused denied the incriminating material and produced defence witnesses. Court below after full trial convicted the accused on the grounds that prosecution has proved its case beyond reasonable doubts.

5. I have given my thoughtful consideration to whole aspects of the matter and law on point. Before proceeding ahead and re-appreciating the evidence on record, in order to come to conclusion as to whether finding of court below is

correct or not, the brief resume of statements of witnesses recorded by court below is reproduced as under:-

PW-1 Hav. Maimudin has stated that in the month of February, 2012 he was posted as Havaladar NCB Unit Jammu and on 12.02.2012 he was given one letter and envelop of sample which was to be deposited at New Delhi and he deposited the same in CRCL at New Delhi on 13.02.2012 and got the receipt of the same. Letter dated 12.02.2012 bears hi signature and its contents are correct. It is exhibited as 'M'. Receipt on the file issued by CRCL New Delhi is also seen by him and is the same. In cross examination he has stated that the letter was given to him by Suresh Kumar, Investigating Officer.

PW-2 Vipin Kumar has stated that on 11.02.2012 he was sitting in his office Gati Limited Purnandal Morh, Jammu and the accused and one auto driver came there for booking luggage. Branch Manager asked him that a consumer had come and he should book his luggage. When he was booking luggage, some persons came to his office and they disclosed themselves as officials of NCB and said that they had received information that there was some intoxicant drug in the said luggage and they asked him to witness the same. They brought out a scissor from the kit and gave it to the accused who opened the packet in which there was one blanket and 6/7 carpets and four packets of brown colored material wrapped in tape were also recovered from the luggage. On enquiry the accused Mohd Maqbool Raina told them that it was charas. A small sample was taken from all the packets and checked by NCB and then they told him that it was charas. NCB gave him notice and he signed the same which is correct. It is exhibited as Ext.P4. NCB officials then mixed all the four packets and took sample of 24 gms each and sealed the same on the spot. One bundle of charas was prepared whereas separate bundles of blankets and packing material were prepared and sealed. He signed all the sealed samples and packet and besides him the accused and DRI person signed it. Inventory was prepared which bears his signature and its contents are correct. It is exhibited as Ext.P4/1. Recovery cum seizure memo also bears his signature and its contents are correct. It is exhibited as Ext.P4/2. Panchnama comprising of seven pages also bears his signatures and its contents are correct. It is exhibited as Ext. P4/3. There was rush on the spot and the NCB people came to the office along with seized material and the accused and he also accompanied them. The witness Naresh Kumar also came to the NCB office. The statement of the accused was recorded in the office which has been attested by him and it is correct. It is exhibited as Ext.P4/4. Personal search memo of the accused bears his signature and it is correct. It is exhibited as Ext.P4/5]. In cross examination he has stated that he had not filled the form for booking the luggage of the accused, but he had shown him his bill. Team of NCB officials came to his office at 10:20 AM and checked luggage of the accused. The Papers were prepared by the NCB official on the spot. Except documents mentioned above no other document was prepared. It is wrong that when NCB officials caught hold of the accused, he told them that he should not be implicated in false case. His statement was also recorded by NCB Inspector.

PW-3 Naresh Kumar has stated that the accused is not known to him. On 11.02.2012 he brought the accused to Purmandal Morh along with luggage in his Auto bearing No.JK02AF-4851 because there was booking agency at Purmandal Morh. When he dropped the accused and luggage there, some people surrounded him and told him that his luggage was to be checked and he was also detained there. There was one person of the agency who came there and he gave a scissor to the accused who opened the luggage and on its opening four packets weighing eight kilogram were recovered in which there were some balls which were broken with stone then mixed and thereafter two samples were taken. He signed the sample and manager of the agency also signed the same. Thereafter they left for the office of NCB along with the accused. Notice dated 11.02.2012 which was given to him is on the file and it bears his signatures and is correct. It is exhibited as Ext.P-05. Inventory on the file also bears his signature and is correct. It is exhibited as Ex.P4/i]. The recovery cum seizure memo Ext.P4/ii also bears his signature and is correct. Panchnama Ext.P4/iii bears his signature and is correct. His statement was also recorded which is on the file and it bears his signatures and is correct. It is exhibited as Ext.P5/1]. The personal search memo Ext.P4/5 bears his signature and is correct. In cross examination he has stated that his Auto was load carrier. The whole seized contraband was mixed and thereafter sample was taken. The accused was taken to the police station in a vehicle. He had no knowledge as to whether any FSL form was prepared on the spot or not. Now further proceedings took place on the spot except the seizure of contraband and taking of sample because thereafter they left the place. Whether NCB officials provided him copy of statement recorded under Section 67 of NDPS Act, he does not remember.

PW-4 Sanjay Kumar has stated that on 11.02.2012 he received telephonic call from his officers from Head quarter with a direction to meet NCB officials at Jammu and as per their directions, he went to the given address of transport company where NCB official Suresh Kumar along with other officials were present. They introduced him to the accused and the Manager of the transport and told that they had arrested the accused on the basis of suspicion of having some intoxicant drug in his possession. NCB officials gave scissor to the accused in his presence and asked him to open his luggage which was opened by him and it comprised of one blanket, some carpets and four packets of some brown colored material. Those packets were also opened with scissor and balls were recovered from them. On enquiry the accused told them that it was charas. NCB officials checked the charas with drug testing kit and found it to be charas. NCB officials prepared inventory of the seized contraband and he signed the same. Inventory Ext.P4/1 bears his signature and its contents are correct. NCB officials broke all the balls and prepared a mixture and also prepared two samples of same which were sealed on spot and slip was affixed on them which was signed by NCB officials and other witnesses and also by him and the accused. The remaining articles were also sealed on the spot and he signed seizure memo Ext.P4/2 which bears his signature and is correct. Panchnama Ext.P4/3 bears his

signature and is correct. Thereafter they came to the office of NCB where statements of Vipin Kumar, Naresh Kumar and the accused were recorded and the said statements were attested by him and NCB official Suresh Kumar. The statements of Vipin Kumar and Suresh Kumar had already been exhibited as Exp-PS-T and Ext.P4/4, whereas the statement of the accused is exhibited as Exp.2/i. In cross examination he has stated that SHO of the concerned police station was not summoned on the spot and after recovery of contraband they straightway came to NCB office. During investigation, the statement of the accused was recorded under the provisions of section 67 of NDPS Act in their presence.

PW-5 Suresh Kumar has stated that the accused is known to him. In the month of February 2012 he was posted as Intelligence officer NCB, Jammu Zone. On 11.02.2012 he received information from reliable source at 8 AM that a person by the name of Mohd Maqbool Raina was sending some luggage through booking agency at Purmandal Morh and there was charas in his luggage. He gave information in writing to his Zonal Director which is on the file and bears his signature. It is correct and exhibited as ExPW SK. He sent a letter to the Zonal Director which is in his hand writing, bears his signature and its contents are correct. It is exhibited as ExPwSK/1. He sent the said information to Zonal Director Jodhpur through FAX who directed him to constitute a team for conducting further proceedings. He received direction through FAX which is on the file. He came to office and summoned his employees and started for place of occurrence and reached there at 10:15 AM. The accused Mohd Maqbool Raina was sitting in the office of Gati along with big bag. He introduced his team to the accused and on enquiry he disclosed his name as Mohd Maqbool Raina. He further asked the purpose of his visit and he told him that he had come to get his luggage booked. He became suspicious that there might be some intoxicant drug in his luggage and the accused asked him to search the same. The clerk of the agency, namely, Vipin Kumar was also there and told him that the bag of the accused was to be searched and he should remain present on the spot as witness for which he served written notice on him. The written notice Ext.P4 is in his handwriting and bears his signature. He also served written notice Ext.P5 on another witness namely Naresh Kumar who was also present there and it is also in his hand writing. During proceedings, he contacted Zonal Director on telephone who told him that one person from DRI was coming on spot to help him and thereafter one Sanjay Kumar Sr. Section Officer DRI came on the spot and he gave him information about the case. In the presence of these persons, the accused was asked to open his luggage with scissor and on opening it one blanket and 6/7 carpets were found in it and in one of blankets four packets wrapped in black tape were found. On enquiry the accused told him that it was charas. He gave one letter to Sanjay Kumar which is in his hand writing and bears his signature and its contents are correct. It is exhibited as ExPWSK/2. He prepared the inventory Ext.P4/1 which is correct. From those packets black colored balls were recovered and they were tested with drug testing kit and its

contents were found positive for charas. The said charas was weighed on the spot and its weight was nine kilogram 76 gms. The recovery memo Ext.P4/2 was prepared on the spot which bears his signature and its contents are correct. Then all the balls of charas were broken and mixed and two samples of 24 gms each were taken and sealed on the spot with a seal and strip affixed on it was signed by the accused and the witnesses in presence of each other. The remaining charas was sealed in a big envelope which was signed by him, the accused and other witnesses. A Panchnama was also prepared on the spot. Samples were marked as A1, A2, whereas remaining charas was marked as A. Panchnama Ext.P4/3 is on the file and it bears his signature and its contents are correct. Thereafter he served notice on the accused under section 67 of the NDPS Act which is on the file and is in his hand writing. It is exhibited as ExPWSK/3. Notices were given to the witnesses namely Naresh Kumar and Vipin Kumar which are on the file and are in his hand writing and they have been exhibited as ExPWK/4 and ExPWSK/5 respectively. Thereafter he along with all the witnesses, accused, the seized contraband and other team members came to his office and deposited the seized contraband in the Malkhana and got receipt which is on the file. Thereafter he recorded the statements of the accused and witnesses which have been exhibited as Ext.P4/4 and ExtP5/1 which are in his hand writing and are correct. The statement of accused Ext.P2/4 is also in his hand writing. He arrested the accused and arrest memo was prepared which is in his hand writing and correct. It is exhibited as ExPWSK/4. Personal search memo of accused Ext.P4/5 is in his hand writing bears his signature and is correct. The documentary proof about his arrest and written information is on the file which is in his hand writing and bears his signature. It is correct and exhibited as ExPWSK/5. He also informed the concerned SHO about the arrest of the accused through his written communication ExPWSK/6 and thereafter he informed Zonal Director as envisaged under Section 57 of NDPS Act. Havaladar Maimudin was sent to CRCL New Delhi along with sample and test memo and authority letter and he recognizes his signature on it. It is exhibited as ExPWSK/7. The test memo is also correct which is exhibited as ExPWSK/8. PW Maimudin deposited the said sample in the laboratory and handed over the receipt marked A to him. The receipt of the seal is on the file which is in his hand writing and bears his signature. It is exhibited as ExPWSK/9. The said seal was deposited by him in the office after concluding the proceedings. CRCL report was received and the sample was found positive for charas and thereafter he filed the complaint in the Court. On seeing the Malkhana register, the witness further stated that the entry on Malkhana register A/2012 dated 11.02.2012 is correct and he has seen all the articles in the court which were deposited by him in the Malkhana. On seeing Lot-C, the witness stated that he has seized those blanket and carpets in the presence of the witnesses.

In cross examination he has stated that except information ExPWSK, no other information was received by him. As per contents of ExPWSK commission of offence under NDPS Act is not found to have been committed. He does not

remember the distance of police station from the place of occurrence. Mr. R C Bodh was his Superintendent but during those days he had gone on training. Half of the inventory was prepared by him and the rest of the inventory was prepared by Hema Kumar as his hand writing was good. There is a provision to keep only two witnesses and that is why he did not keep Manager Gati Ltd. as witness. No site plan was prepared on the spot in order to show that the accused was arrested at Purmandal Morh. CRCL document was not prepared on the spot but it was prepared in the office. It is correct that he had deposited seized articles in the Malkhana before 4:20 PM. On 12.02.2012 he was working as Incharge Superintendent NCB, Jammu. It has been stated by the accused in his statement that he got charas from Muzafar Dar resident of Anantnag, but he did not search him as his address was not given to him by the accused. No identification proof of witness Vipin Kumar and Naresh Kumar has been attached by him with the file. He recorded the statement of the accused in the presence of witness Sanjay Kumar. In his statement recorded under Section 67 NDPS Act, it is written that the accused gave statement when he asked him and he recorded the statement of the accused on his request. He did not call any civil witness on the spot except Naresh Kumar and Vipin Kumar. It is written in the statement of the accused that he could understand and speak both Hindi and Kashmiri language. In the Panchnama it is written that whole proceedings were explained to the accused in Hindi but it is not written in it and no separate document has been prepared by him which would reveal that it was read over and explained to the accused. It is incorrect that the accused worked with NCB as their source.

PW-6 Bhuwan Ram has stated that on 13.02.2012 he was posted as Chemical Examiner Grade II CRCL, New Delhi and on the same day a sample brought by NCB official was acknowledged by him and he directed to Rajeev Anand, Assistant Chemical Examiner to receive the sample and he tallied the specimen impression of seal on test memo with seal affixed on the sample. All the seals were intact. Later on Rajeev Anand, Assistant Chemical Examiner issued the receipt which is on the file and he identifies his signature on it and same is marked as A. Then the sample was kept in a strong room by Rajeev Anand, in his presence. Again the sample was taken out in his presence on 29.02.2012 for analysis and the same was tested qualitatively and found positive answer for charas. The report was issued on 01.03.2012 which is on the file. It bears his seal and signature. Its contents are true and correct and same is exhibited as ExtP BR. The remaining sample duly sealed was returned back along with test report to the NCB, Jammu. In cross examination he has stated that he has not stated anywhere in his report that who conducted the test for identifying the sample. As per mark A, it is nowhere mentioned that he had acknowledged the sample first and directed Rajeev Anand to receive the same and deposit in the strong room, however, in the forwarding letter received from NCB he had put signature and directed Rajeev Anand, Assistant Chemical Examiner to receive and deposit the same in the strong room and that record is lying in the laboratory. Rajeev Anand is Assistant Chemical Examiner and is not the chemist.

Charas is the mixture of different isomers. It is not mentioned in the report whether THC was present in the sample or not, since it is not in practice to mention individual content of the charas. This is the evidence of prosecution; the accused/appellant produced following witnesses.

DW-1 Pervez Ahmed Mir has stated that the accused is known to him. Two days before 7th May 2011, the accused came to him and demanded loan from him and he asked him to come later on. On 07.05.2011 the accused came and he advanced a loan of Rs.30,000/- to him and the accused told him that the said amount was required by him in order to purchase vehicle. He came to Srinagar along with accused on the second day and purchased vehicle from Srinagar bearing registration no. DL2CH-6391 for sale consideration of Rs.90,000/-. Receipt for the purchase of said vehicle was issued to the accused which is on the file. It is marked as D-1. The accused told him that he worked as informer with NCB and the said vehicle was to be given to them. He showed his identity card on which NCB was written and the accused has been shown as informer. When he demanded money, the accused told him that he would return after getting the same from NCB. On 15th or 16th Feb. 2012, he visited the house of the accused to get money but his wife told him that he had gone to Jammu for collecting money from NCB and thereafter he did not return back. In cross examination he has stated that identity card issued by NCB does not bear the signature of the accused. He cannot say as to who has put stamp of NCB on his identity card.

DW-2 Abdul Rashid has deposed that he is Panch of village Farmoo. On 11.02.2012, the wife of the accused came to him in the evening and told him that the accused had gone to Jammu along with six persons but he could not be contacted on telephone. She further told him that the accused had to get Rs.90,000/- from NCB and she apprehended that he might not be killed by some person at Jammu. He took the wife of the accused and children to the police station Anantnag where they lodged report and got information from Jammu that the accused had been arrested by the NCB in some case. In cross examination he has stated that the identity card which was in possession of the accused had been issued by the NCB. It is wrong that he is giving false statement in order to save the accused.

6. The court below held that sequence of events has proved the fact in issue that on 11.02.2012 accused was standing in front of booking counter of M/s Gati Ltd. with a gunny bag and on opening it one blanket, seven carpets and four packets containing charas like material weighing 7.796 kgs was found. The court below has further held that accused has confessed the same in his statement under section 67 of Act; it has also been held that all the witnesses so produced by NCB clearly demonstrate that all the valid procedures laid down in NDPS Act has duly been complied with.

7. I have given my thoughtful consideration to whole aspects of the matter and law on the subject.

8. All offences under NDPS Act are heinous and are against society. There are certain cardinal provisions of Act which has to be followed by investigating agency during investigation. Investigation in NDPS Act gets completed on spot except resealing, depositing of contraband in malkhana and obtaining of FSL report. Due to stringent punishment, there are certain safeguards in Act and certain judicial pronouncement, which has to be followed by investigating officer, while conducting the investigation in such like case.

9. Counsel for appellant, besides arguing with regard to infirmities of facts and law in prosecution case, has taken a foremost and important plea that I/O and complainant happened to be one and same person namely PW-5 Suresh Kumar; and this aspect of matter has totally vitiated the whole trial, in view latest law laid down by three judges bench of apex court in 2018 SCC on line SC 974 in case titled Mohan Lal v State of Punjab.

10. I have considered this aspect of the matter. Admittedly in present case PW Suresh Kumar, the intelligence officer of NCB is person who received the information (EXPW SK) at 0800 through reliable source with regard to the fact that accused will send contraband in household to someone from M/S Gati Ltd. as per para 3 of complaint; it is he, who informed the higher officer vide (EXPW-SK/I) to Zonal Director NCB through FAX; it is also PW Suresh Sharma, who was directed by higher officer to constitute the team for taking action. It is also he, who conducted the proceeding during investigation as I/O and prepared various documents, recorded the statements of accused and witnesses u/s 67 of Act; he is also complainant as he has lodged the complaint before court below, as is evident from perusal of complaint, which bears his signature at the end as complainant.

11. In 2018 SCC on line SC 974 in case titled Mohan Lal v State of Punjab, it is held as under:-

?It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also.

Any possibility of bias or a predetermined conclusion has to be excluded.

This requirement is all the more imperative in laws carrying a reverse burden of proof. Resultantly, the appeal succeeds and is allowed. The prosecution is held to be vitiated because of the infraction of the constitutional guarantee of a fair investigation. The appellant is directed to be set at liberty forthwith unless wanted in any other case.

12. But now Apex court has made it clear in case titled Varinder Kumar v. State of Himachal Pradesh (Criminal Appeal no.2450 -2451 of 2010 decided on 11.2.2019) that above stated law shall not be applicable to pending prosecution, trials and appeals, the relevant part of judgement reads as under:-

?18.The criminal justice delivery system, cannot be allowed to veer exclusively to the benefit of the offender making it uni-directional exercise. A proper administration of the criminal justice delivery system, therefore, requires balancing the rights of the accused and the prosecution, so that the law laid down in Mohan Lal (supra) is not allowed to become a spring board for acquittal in prosecution prior to the same, irrespective of all other considerations. We therefore hold that all pending criminal prosecutions, trials and appeals prior to the law laid down in Mohan Lal (supra) shall continue to be governed by the individual facts of the case?.

13. This judgement has also been passed by three judges' bench of Apex court. In view of above law, this aspect of matter can be considered along with other attending circumstances of the case.

14. Another argument of counsel for appellant is that, no CFSL form has been prepared and filed on spot, which goes to root of the case and made entire case false. I have considered this aspect of the matter. From the perusal of file, I find that I/O Suresh Kumar has not prepared or filled CFSL form on spot at the time of seizure and sealing of contraband. Even seal with which contraband and samples were sealed has not been produced during trial. One of the safeguards which could ensure sanctity of seal was affixation of specimen of the seal on the CFSL form which had to be done simultaneously with sealing of parcels. It was for the prosecution to prove that not only the case property was duly sealed with the particular seals and was duly deposited in the Malkhana un-tampered but it was also incumbent on the prosecution to show that the samples which had been duly sealed remained intact till they reached the office of CFSL. In proving these facts, it was necessary for the prosecution to prove that the CFSL form containing the specimen seals which was duly filled-in at the time of taking the sample also remained intact and it reached the office of CFSL along with the samples. Same view has been taken in a large number of cases decided by this Court and other Courts.

15. In Radha Kishan vs. State of Delhi, (2000) 87 DLT 106, the Court has explained the importance of ensuring that the CFSL form is duly sent with the sample for testing and held as under:-

"26. It is normal procedure that when the incriminating articles are seized and are required to be sent to the Central forensic Science laboratory, those articles are immediately sealed and deposited at the Malkhana at the police station till they are taken out and sent to the Laboratory. In the instant case, this was not done. Contemporaneously with seizure and sealing of such articles, impression of seal used on the seal is put on a form, commonly called, the CFSL form. This is so done because at the time of analysis of sealed packets in the laboratory, the analyst concerned is able to tally seal impressions on sealed packets with those appearing on the CFSL form in order to rule out any possibility of tampering of tampering of seals on sealed packets after seizure anywhere or in transit till receipt in laboratory. The importance of the CFSL form thus cannot be

overemphasized because this document provides a valuable safeguard to an accused to ensure that no tampering has been done during intervening period. The CFSL form is a document or forwarding note accompanying a sample sent by the police to the Forensic Science Laboratory. Such a form contains the nature of the crime, list of samples being sent for examination, nature of examination required and specimen of the seal/seals affixed on the exhibit besides particulars of the case/ police station."

16. In *State of Rajasthan vs Gurmail Singh*, (2005) 3 Supreme Court Cases 59, in which following is held in paragraph 3:

"3 . We have perused the judgment of the High Court. Apart from other reasons recorded by the High Court, we find that link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though seized articles are said to have been kept in the Malkhana on 20/5/1995, the Malkhana register was not produced to prove that it was so kept in Malkhana till it was taken over by PW 6 on 5/6/1995. We further find that no sample seal was sent along with the sample to the Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after the seizure of the contraband. These loopholes in the prosecution case have led the High Court to acquit the respondent."

17. High Court of J&K in 2011 (1) JKJ HC 751, in case *Sudershan Bakaya and anr. Vs. State*, it is held as under:-

?Filling of F.S.L. form at the spot is a very valuable safe-guard to ensure that the seal sample is not tampered with till its analysis by the F.S.L. The FSL form in all respect should not only be prepared by the officer making seizure at the place where the case property is seized from the accused, it should also be kept in safe custody by the SHO to whom the sample and the case property is handed over and then the same should accompany the sample to Chemical Examiner for tallying the seals. The idea behind taking such a precaution is to complete the material link in the prosecution case by eliminating the possibility of the sample being tampered with at any stage. One should not forget that the stringent provision is provided under the Act where the sentence is very severe. It cannot be less than 10 years R.I. and a fine of Rupees one lac. Therefore, it is the duty of the Court to insist for the standard of proof beyond shadow of all reasonable doubt against the accused and to see that the investigation is not faulty at any stage. As observed hereinabove, the investigation in this case is very weak on vital issues. Mr. Sethi has also pointed out certain discrepancies in the statements of the witnesses produced by the prosecution with regard to the presence of Pushpa Devi-accused at the spot, but I do not feel the necessity of delving deep into this aspect as I am doubting the case of the prosecution as it is on account of aforesaid weaknesses in it.

In my view, no other point is left untouched, which calls for discussion. As an upshot of the aforesaid discussion, the net result now surfaces is that the prosecution has not been able to prove the recovery of the contraband (charas) from the house of both the accused as alleged and by extending the benefit of doubt, I acquit them of the charge(s) framed. The judgment impugned herein is, thus, set aside and the appeal on hand is hereby allowed. Both the accused are stated to be in custody and they shall now be released forthwith, if not required in any other case. Registrar Judicial of this Court to take effective steps in this regard without any delay.

Before parting with the judgment, I wish to make certain suggestions with regard to some of the safeguards to be adopted by the investigating agency dealing with the cases under the Act. Link evidence, undoubtedly, plays a vital role. Any material lapse on the part of the prosecution on this count is being taken seriously by the Courts as it is the duty of the prosecution to prove that the sample(s) remained intact right from inception of the proceedings till its deposit with the Chemical Examiner.

The investigating officer should fill up Form at the time of effecting the recovery so that the same is deposited in the Malkhana along with the entire case property. The said Form should be produced before the Illaqa Magistrate/ Executive Magistrate as the case may be along with the case property and the accused on the following day as it is the requirement of Section 52 of the Act, so that the investigation conducted till then is cross-checked. The Magistrate concerned may also put his own seal on the sample produced before him. The seal impression of the Court can also be put in one of the columns of the said Form which ultimately is to be sent to Chemical Examiner along with the sample so that he can also tally the seals from the seal impression(s) already put on the said form before opening the sample for testing. This way the chance of tampering with the sample shall be ruled out absolutely.?

18. In *Bhola Singh vs State of Punjab* 2005 (2) RCR (Crl.) 520, this Court has held that CFSL Form no.29 should be prepared by the Investigating Officer at the spot and the same should be deposited in the Malkhana along with sealed contrabands. It has further been held that after sealing the sample parcel of the contraband as well as remaining contraband, the seal should be handed over to the independent person so that till the case property is deposited to the Forensic Science Laboratory, the same should not be available to the prosecution agency. This is necessary to safeguard the possibility of sealed contraband and the sample being tampered with by the police official.

19. In another case titled as *Gurcharan Singh vs State of Punjab* 2005 (4) RCR (Crl.) 681, the accused was acquitted of the charge on the ground that the seal affixed on seized Opium was given to Head Constable and not to the independent witness which creates doubt about the credibility of the prosecution story.

20. Similarly, in *Gurjant Singh Vs. State of Punjab*, 2007 (4) RCR (Criminal) 226,

it has been held by the Court that where the seal remained with the police official after use and CFSL form was not prepared at the spot, it creates serious doubt in the prosecution case as filing of such form is a valuable safeguard to ensure that the sealed sample is not tampered with till the contraband is analyzed by the Forensic Science Laboratory. It has further been held that the seal was not given to independent witness but kept with the Investigating Officer or with the raiding party is also fatal to the prosecution case as possibility of tampering cannot be ruled out.

21. In *State of Rajasthan vs Gurmail Singh*, 2005 (2) JT 574, in which it is held that the link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though the seized articles were said to have been kept in Malkhana on 20th May, 1995, the Malkhana register was not produced to prove that it was so kept in Malkhana till it was taken over by PW-6 on June 5, 1995. It was further found that no sample of the seal was sent along with the sample to Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband. These loopholes in the prosecution case led the High Court to acquit the respondent correctly. This Court is of the view that in the present case also it is apparent that it has not come on record that sample seal was sent to the FSL as well as to Court, this lacunae makes a dent in the case of prosecution.

22. From above stated law, it is evident that preparation of CFSL form on spot by I/O on spot at the time of seizure of contraband is most important in all NDPS cases; and in case of fail, an adverse inference can be drawn. In the present case, the prosecution has clearly failed to discharge the sacred duty and obligation to have kept the samples of the contraband articles and CFSL form intact till the sample reached the CFSL. Further as per documents in complaint, seal was kept on superdnama of one Pawan Dev PA to Zonal Director. But during trial he has not been produced. Even Malkhana (Godown) receipt annexed in complaint has not been proved; because Hardeep iIntelligence officer whose signature has been appended on the receipt has not been produced; although register of Malkhana was produced during trial.

23. One more vital infirmity in the case is that, as per complaint /prosecution case a team of four officers consisting of Suresh Kumar I/O, P.P Singh, P.N. Thusoo and Koushal Kumar of NCB official was constituted who went on spot at warehouse at M/S Gati Ltd. on relevant date; these all members were present on spot during conducting of search of accused and its gunny bag. But during trial except Suresh Kumar I/O, no other official namely P.P. Singh, P.N. Thusoo and Koushal Kumar of NCB have been produced, their names have also been mentioned in recovery cum seizure memo EXT-P4/II and Panchnama EXT-P4-III; even their names have not been cited in complaint. Further as per complaint Manager of M/s Gati Ltd. namely Chander Mani was also present and he is also

witness to inventory EXT-P/4-1, but during course of trial neither he has been produced nor he has been cited as witness in complaint. No explanation has been given.

24. Section 114 of Evidence Act reads as under:-

?114. Court may presume existence of certain facts:

The Court may presume the existence of any fact 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 the facts of the particular case.? Illustrations: The Court may presume,- (g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

25. There are other missing link in prosecution case; as per complaint, the seized contraband -charas was weighed on spot; but in complaint as well in statement of I/O there is no evidence as to with which scale/ machine it was weighed and who weighed it and where the weigh machine or scale was kept after weighing the contraband. Next as per complaint the recovered charas which was in balls shapes; these were broken and were made in homogenous mixture; and thereafter duplicate samples of 24 grams was taken on spot; but photographs which were taken in office of NCB annexed in file clearly demonstrate that charas was in still in balls shapes.

26. Next argument of counsel for appellant is that provision of sections 52 and 55 of Act have not been complied by I/O. The provisions of Section 52 of the NDPS Act inter alia provide that every person arrested and article seized by an Investigating Officer shall be forwarded without unnecessary delay to the Officer Incharge of the nearest police station, or to an officer empowered u/s 53 of the NDPS Act. Section 55 of the NDPS Act inter alia provides that an Officer Incharge of a Police Station shall take charge of and keep in safe custody, articles seized under this Act within the local area of that police station which may be delivered to him. The said procedural safeguard have been provided under the NDPS Act so as to make sure that the substances recovered by Investigating Officer is immediately put in the custody of an officer Incharge so that the same cannot be tampered with.

27. No doubt provisions of section 52 or 53 are not mandatory in nature, but the same also cannot be reduced to a mere formality. In a case titled as Gurbaksh Singh Vs. State of Haryana reported in 2001 (3) SCC 28, the Hon'ble Supreme Court has held that though the provisions of section 52 and 57 are directory and the violation of these provisions do not ipso facto violate the trial or conviction, the investigating agency cannot totally ignore these provisions and such failure will have a bearing on the appreciation of the evidence regarding arrest of accused and seizure of articles. In AIR 2000 SC 468 in case titled Thandi Ram v State of Haryana, it has been held that non compliance of section 55 of Act renders the prosecution case doubtful and merit to be rejected. Relevant portion

of said judgement reads as under:-

?..... in view of pronouncement of this court in aforesaid cases and in view of the finding recorded in the judgement of the High Court that provisions of sections 55 and 57 have not been complied with the conviction is bad in law.....

28. It can be held therefore that the provisions of section 52 and 55 are not an idle formality but the provisions have been enacted to ensure that the case property remained in safe custody to avoid any tampering of the same. Now in the present case I/O has neither complied the provision of section 52 or 55 of Act as is evident from perusal of trial court file. As per complaint, the contraband has been deposited in Godown of NCB Malkhna by I/O which is in office of NCB and receipt in this regard was obtained by I/O; but during trial as already held this receipt has not been proved as Hardeep Singh Intelligence officer who issued receipt has not been produced. Further admittedly, neither the sample nor the main seizure of contraband was produced by I/O to officer as provided under section 53 of Act.

29. Another argument of counsel for appellant is that statement of accused u/s 67 of Act has not been recorded by independent person/ officer and in presence of independent witness, so confessional statement has no value in the eyes of law and so cannot be relied. From the perusal of evidence on record, it is evident that confessional statement of appellant u/s 67 of Act EXTP/2-1 has been recorded by I/O Suresh Kumar, the intelligence officer on 11.2.2012; it has been witnessed by PW Sanjay Kumar Senior Tax Assistant. It has not been recorded by independent person; there is also no evidence as to whether the statement recorded in Hindi was ever read over to accused in his own language.

30. In 2007 (3) JKJ (HC) 362 in case titled Mohd. Ashiqeen v. State, it has been held as under:-

?VII- CONFESSION-STATEMENT-

30.The prosecution has failed to prove that notice was served to accused-appellant for making statement under section 67 of Act. In the statement allegedly recorded under section 67 of the Act, it is not mentioned that it came to be recorded at the request of accused which cannot be believed. Normally the statement is to be recorded by independent officer and has to make the accused understand its implication and consequences of its recording in terms of section 67 of act.

31. The prosecution has failed to prove that contents of so called statement were read over and explained to accused -appellant in the language known to him and he was made to believe that it could be read against him.

32 No independent witness has been witnessed recording the statement and no independent witness has been shown as a marginal witness despite of the fact that two witnesses were available as per prosecution story and substantive

evidence. ?

31. In present case, it is prosecution case that two independent witnesses namely Vipin Kumar and Naresh Kumar were with them, but despite it, they have not been cited as witness. Even statement of Sanjay Kumar, Senior Tax Assistant, who has attested the statement of accused, has not been recorded during investigation; so there was no occasion for accused to confront it with his previous statement in order to shake his credibility; this witness has given statement before court first time in court.

32. Last argument of counsel for appellant is that no site plan has been prepared so neither place of occurrence has been proved nor recovery of contraband can be said to have been proved by cogent means. Sketch maps showing places of occurrence help both supervising officers and trial courts to get an idea of the scene of crime. Maps and plans are useful in criminal investigation and prosecution for the reason these make a lucid explanation of an intricate case fairly easy; these also help judges, Magistrate and others to an accurate understanding of case; these often prove whether a witness is reliable or not thus a plan may show as to where eye witnesses were standing especially in heinous offence where stringent punishment has been provided. This also helps during trial for judge or magistrate to know as to whether place of occurrence was public place or it was lonely place or it was easily assessable. The truthfulness of allegations in FIR /Complaint can be gathered from perusing the place of occurrence. This is useful in giving a picture of the scene of crime and all its surroundings - up to a considerable distance including such items as buildings, fields, roads leading to place of occurrence. It helps the court to see as to whether prosecution has manufactured the case by creating the evidence or occurrence has really happened. So site map of place of occurrence plays a vital role for court to come to conclusion with regard to commission of crime. Sometimes site plan totally negate the prosecution version. No rule or any other procedural law has been brought to the knowledge of court from which it can be inferred that I/O of NCB is not obliged to prepare site map of occurrence.

33. In view of what has been discussed above and keeping in view infirmity in the prosecution case and also taking into consideration the fact of matter that complainant was himself as I/O in the case, I am of considered view that prosecution has not established his case beyond reasonable doubts. It has been repeatedly reiterated by the Hon'ble Supreme Court in its various judgments that it must be borne in mind that severe the punishment, greater has to be the care taken to be seen that the case of the prosecution is proved beyond all reasonable doubt. In State of NCB Vs. Vs. Baldev Singh (1999) 3 SCC 977 it was held that "It must be borne in mind that severe the punishment, greater has to be taken care to see that the safeguards provided in a statute are scrupulously followed". The Apex Court in the case of Noor Aga vs. State of Punjab and Anr. 2008 (3) JCC (Narcotics) 135 has held that in cases arising out of the provisions of NDPS Act the Legislature in its wisdom has provided a very stringent punishment and

therefore the courts have to be extremely cautious and careful in adjudicating the case pertaining to NDPS Act. The Hon'ble Supreme Court has observed that there has to be a perfect balance and fine tuning between the interest of society and protection of the statutory safeguards available to the accused and that a court must not forget that the standard of proof required to prove the guilt of the accused on the prosecution is 'beyond all reasonable doubt.

34. This appeal is thus allowed; complaint is dismissed. Conviction and sentence passed by court below are set aside. Appellant is acquitted of charge; he be set free, if not required in any other case.