

(2008) 04 KAR CK 0008

In the Karnataka High Court

Case No : Criminal Appeal No's. 2236 of 2006 and 627 of 2007

R. Mayilvahanam Pillai and Rajesh Salecha

APPELLANT

Vs

Intelligence Officer, Narcotic Control Bureau

Intelligence Officer, Narcotic Control Bureau Vs Mohsin Khan
@ Mohsin Chacha

RESPONDENT

Date of Decision : 15-04-2008

Acts Referred:

Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 41, 42, 42 (2)

Citation : (2008) CriLJ 4425 : (2008) ILR (Kar) 4166

Hon'ble Judges : V. Jagannathan, J

Bench : Single Bench

Advocate : Hashmath Pasha, in Criminal Appeal No. 2236/2006 and Urval N. Ramanand in Criminal Appeal No. 627/2007, for the Appellant; Urval N. Ramananda in Criminal Appeal No. 2236/2006 and Hashmath Pasha in Criminal Appeal No. 627/2007, for the Respondent

Judgement

V. Jagannathan, J.—"In every case the end result is important, but the means to achieve it must remain above board" observed the Supreme Court in State of Punjab Vs. Baldev Singh, etc. etc., when the public interest to protect the society from the adverse effects of drugs abuse, is pitted against the procedural safeguards in ensuring fair trial to the accused and to protect his valuable human rights, what should be the approach of the courts. NDPS Act being a penal statute and the offence under it being a grave one attracting severe punishment, whether it is incumbent, on the part of the prosecuting agency to strictly follow the procedures provided under Sections 41, 42, 52 to 55 and 57 of the N.D.P.S. Act and whether the absence of any finding with regard to the percentage of heroin drug in the samples sent for examination, will be an irrelevant factor, are the important questions among others that call for answer in these appeals.

2. Criminal Appeal No. 2236/06 is filed by the A-1 and A-3 and they call in question their conviction for the offence punishable u/s 8(c) punishable under

Sections 21 and 29 of the NDPS Act and consequent sentence of 10 years R.I. and to pay a fine of Rs. 1 lakh by each one of them and in default of payment of fine, to undergo R.I. for one year. A-1 has further questioned his conviction by the trial court for the offence punishable u/s 8(c) punishable u/s 27-A of the NDPS Act and the sentence of 10 years R.I. and to pay a fine of Rs. 1 lakh and in default of payment of fine, to undergo R.I. for one year.

3. CrI. A. No. 627/07 is preferred by the Intelligence Officer, Narcotic Control Bureau, Chennai, questioning the legality of the acquittal of AS by the trial court in respect of the offence punishable u/s 27-A of the NDPS Act as well as Section 23 of the said Act. As both the appeals spring out of one and the same judgment, a common judgment is rendered in these two appeals.

4. The facts in brief areas under:

S. Gunabalan (FW-1), Intelligence Officer of Narcotic Control Bureau, Chennai ("NCB" for short) received credible information on 24.6.1999 that one R. Mayilvahanam (A-1) residing at Chennai and having a red Maruthi car bearing Regn. No. TN-02 E-8317 will be leaving for Bangalore on the night of 24/25.6.99 to procure 5 kgs of heroin from one Rajesh Salecha (A-3) and one Shivavadivelu (A-2) of Tanjore staying in a room at Renuka Lodge, near Abhinay theatre, Bangalore will be arranging for procuring the heroin and thereafter A-1 R. Mayilvahanam would be transporting the heroin to Chennai for being transported to Srilanka. Based on the said information said to have been received by FW-1, the Officers of the NCB, Chennai left in a group towards Bangalore and on reaching the desired destination i.e. Renuka lodge, Bangalore, the NCB officers kept a careful watch over the movements of the accused persons and on 26.6.99 the NCB officers were able to spot A-1 to A-3 as two of the accused were residing in two rooms i.e. Room No. 101 and 103 of the said Renuka lodge and on coming to know that after receiving the contraband from A-3 who brought it in a bag on the morning of 26.6.99 and sensing the possibility of the accused leaving the lodge with the contraband, the NCB officers led by PW-8 K. Raghavan and other officers surrounded the maruthi car and they noticed A-1 to A-3 being present in the car and A-1 was trying to do something with the speaker be found in the dickey of the car with the help of the driver. The NCB officers on approaching the accused persons, questioned them and A-1 is said to have admitted that the dickey of the car contained contraband, namely heroin. The said drug was seized under panchanama Ex. P10 in the presence of the panchas so also the vehicle and other documents. The quantity of heroin drug seized during the mahaar conducted in Renuka lodge is said to be 5.065 kgs.

5. Thereafter wards, following the voluntary statement given by A-3, the NCB officers proceeded to House No. 67, A.M. Lane, Kalasipalyam and on going to II floor of the premises, they found that one of the rooms in the II Floor was occupied by A-3 and other room was in the occupation of one Lalchand Jain. The NCB officers went into the said room of A-3 and after a thorough search, they were able to seize 5.565 kgs of heroin along with cash of Rs 2,95,000/-. In

respect of the search of seizure conducted at the said premises, a panchanama was drawn as per Ex. P3. In the course of the disclosure made by A-1 to A-3, it was revealed that the other two accused A-4 and A-5 were also involved in the conspiracy. Therefore, the investigating agency came to the conclusion that all the accused had conspired to commit various offences with which they were charged at the trial Complaint was lodged by PW-13 G. Shanmugam leading to the charge being framed against the accused persons. A-1 to A-3 were charged u/s 8(c) punishable u/s 21 of the NDPS Act A-1 to A-5 were also charged for criminal conspiracy for the offence u/s 8(c) punishable u/s 29 and also u/s 23 of the NDPS Act The conspiracy theory put forth by the prosecution is that, it was agreed that A-1, A-2 and A-4 would finance for the charges of 5.065 kgs of heroin at Bangalore from A-3 and A-5 and thereafter the said A-1, A-2 and A-4 would transport the said contraband from Bangalore to Unicorn for illicit export to Sri Lanka. It is in pursuance of this conspiracy that A-3 received 10.660 kgs of heroin from A-5 and then A-3 along with A-5 sold about 5,065 kgs of heroin to A-1, A-2 and A-4 by delivering the contraband to A-1 and A-2, A-3 kept remaining quantity of 5.595 kgs of heroin along with the cash of Rs. 2,95,000/- which being the sale proceeds of 5.065 kgs of heroin, in his residence at No. 67, II Floor, A.M. Lane, Kalasipalya, Bangalore.

6. Only A-1, A-2, A-3 and A-5 faced the trial as A-4 was found absconding. A-2 died during the course of the trial. Thus, in the effect, only A-1, A-3 and A-5 were put on trial. The said accused denied the charge levelled against them. The prosecution in order to establish its case, examined PW-1 to PW-16 and got marked documents Ex. P1 to P79. M.Os 1 to 29 were the material objects produced during the trial. After the dome of the prosecution evidence, statements of the accused came to be recorded. On behalf of the defence, DW-1 Lalchand Jain was examined and documents Ex. D1 to D6 were marked.

7. Out of the prosecution witnesses examined, a brief mention about each one of them would be useful at this juncture.

8. PW-1 Section Gunabalan is the Intelligence Officer of NCB, Chennai and he is said to have received the information on 24.6.99 as per Ex. P1 and accompanied by other officers of the NCB he took part in the search and seizure effected on 26.6.99. PW-1 also conducted the search of the house No. 67, A.M. Lane, Kalasipalyam, said to have seized 5 kgs of heroin and cash of Rs. 2,95,000/- from the premises in occupation of A-3. He also sent the samples seized by him for chemical examination and the articles seized were also sent to the NCB godown.

9. FW-2 F. Rajashekar, another Intelligence Officer of the NCB, accompanied the team to Bangalore and conducted the seizure and mahazar in respect of the maruthi car at Renuka Lodge, Bangalore, and seized 5 kgs of heroin from the speaker box of the maruthi car under mahazar Ex. P10. He also apprehended A-1 to A-3.

10. PW-3 Sureeh Joseph, yet another Intelligence Officer of NCB, Chennai, took part in the search and seizure that was conducted and he issued summons to A-1 who appeared before him and recorded his statement as per Ex. P15 and PW-4 Krishnaji Rao is the panch for the seizure effected from the premises belonging to A-3 at the Kalasipalyam and FW-5 Venugopal Rao is the cashier of Renuka Lodge who speaks about allotting the room Nos. 101 and 103 to two of the customers and the said customers vacating the room.

11. FW-6 S. Babulal Jain is yet another panch witness for the mahazar Ex. P3 which was conducted by FW-1 in the premises of A-3 and FW-7 N. Mohan another officer of the NCB, Chennai,, accompanied FW-9 K. Raghavan and others and was present when seizure was effected from the Maruthi car near the Renuka lodge and also said to have recorded the voluntary statement of A-2 as per Ex. P41.

12. PW-8 B. Sharan another Intelligence officer of NCB, Chennai also was member of the raiding party and on his part he issued summons to A-3 and recorded voluntary statement of A-3 as per Ex. P28 and also as per Ex. P32. K. Raghavan, Superintendent of NCB, Chennai, was examined as PW-9 and he is said to have taken part in the search and seizure effected both at Renuka Lodge as per Ex. P10 and the premises of A-3 as per Ex. P3. This witness also speaks about the seized articles being sent to the godown of NCB, Chennai, and sample packet being sent to chemical examination.

13. FW-10 M. Prabhu, officer from NCB, Chennai, went to the house of A-1 and questioned the family members and also recorded the statement of one G. Ramesh, owner of the Maruthi car and then conducted search in the house of A-3.

14. FW-11 Javeria Haseer speaks about issuing summons to PW-5 as per Ex. P64 and recording statement of Babulal as per Ex. P21 and that of PW-12 Rakesh Pande as per Ex. P66, PW 12 Rakesh Pande is the manager of Hotel Mahaveer who was also examined in respect of the customers who stayed in his lodge on 19.6.99 and 20.6.99.

15. PW-13 G. Shanmugam is the complainant who lodged the complaint as per Ex. P77 and he also speaks with regard to the summons being issued to CW-25 Lechumanan and recording the statement of the Manager M/s Prem Syndicate as per Ex. P75 and collecting the R.C books of the car as per Ex. P76.

16. PW-14 and FW-15 are the chemical examiners of Customs Laboratory, Chennai and PW-14 has given his report as per Ex. P78 in respect of three packets which were sent to him as per M.Os.19, 20 and 22 and FW-15 speaks about the report issued by him as per Ex. P79 in respect of the box M.Os. 1, 3 and 5. Last of the witnesses is PW-16 G. Ramesh, owner of the Maruthi car who says in his evidence that he gave a Maruthi car to one Subbaram.

17. On behalf of the defence, DW-1 Lalchand Join was examined and he has not supported the prosecution case and denies any seizure having been effected in

the premises of No. 67, II Floor, A.M. Lane, Kalasiparyam, Bangalore and also says in his evidence that the entire premises in n Floor was in his occupation and was never in the occupation of A-3.

18. The learned special judge of the trial court after appreciating the evidence on record, come to the conclusion that the testimony of the HCB officers, namely PWs. 1, 2, 3, 7, 8 and 9 inspired confidence despite there being lengthy cross-examination and took the view that the case of the prosecution cannot be held to be suffering from any serious infirmity because of non-examination of independent panch witnesses for the mahazars. The 1 warned trial judge also took the view that in so far as the information report Ex. P1 is concerned, as the search and seizure was effected at a different place, the question of following mandatory provisions of Section 42 of the NDPS Act will not arise.

19. The trial court has also held that non mentioning of the details in the report submitted by the NCB officers u/s 57 of the Act also cannot be considered as a serious infirmity and so also the evidence placed with regard to search conducted in the premises of A-3 at No. 67, II Floor, A.M. Lane, Kalasipalyam. The learned trial judge though recorded a finding that DW-1 did not support the prosecution case, yet held that his evidence support the testimony of the NCB officers in so far as the search conducted under mahazar Ex. P3 is concerned. The trial court also did not find any material discrepancies in the evidence of the prosecution witnesses and when the seizure panchanama was conducted in the presence of PW-9 K. Raghavan who being the Superintendent of the NCB, Chennai, no infirmity can be found regarding noncompliance of the mandatory provisions of Section 42 or for that matter other relevant provisions of Sections 52, 53 and 55 of the said Act. As far as the chemical examination report is concerned, the trial court found that there is evidence to indicate that what was seized was heroin and therefore non conducting of qualitative test or purity test is not a serious defect in the prosecution case and so also the trial court did not find any infirmity in the absence of the percentage or quantity of heroin drug found in the sample packets sent for examination. The learned trial judge also accepted the voluntary statement recorded by the NCB officers of A-1, A-2 and A-3 and on the basil of the said material, the learned trial judge found that the prosecution had established its case against A-1 and A-3 but however the same is not the case as far as A-5 is concerned. The trial court did not accept the contention of the defence that the statement of co-accused cannot be treated as substantive evidence. Thus, on the above said reasoning and the finding that there is only minor discrepancies in the evidence, the learned trial judge held that once the possession is proved, the burden win shift to the accused to prove that they were not in possession in view of Section 35 and 54 of the NDPS Act The effect of the above said findings of the learned trial judge is, the conviction of the accused Nos. 1 and 3 and acquittal of A-5 as already indicated in the beginning of this judgment.

20. I have heard Sri Hashmath Pasha, learned Counsel for A-1 and A-3, and

learned senior counsel Shri Urval N. Ramanand for NCB, which is the appellant in Crl.A. No. 627/07. Both sides argued at great length over a long period. The learned Counsel Appearing for the parties also placed reliance on number of decisions to support their rival contentions.

21. Learned Counsel Sri Hashmath Pasha for the accused Nos. 1 and 3 put forward several contentions. The most important of the said contentions are as under:

The entire investigation leading to search and seizure is vitiated on account of non-compliance of mandatory provisions of Section 42 of the NDPS Act PW-1 though say that he received the information from an informant, he does not produce the same and what is produced before this Court as per Ex. P1 is not the information received by PW-1. The report at Ex. P1 has been tailor made only to suit the provisions of Section 42 of the NDPS Act. The said submission is fortified by placing reliance on the remand application Ex. P43 and complaint Ex. P77. As regards Ex. P6 the report sent by PW-1, in none of the said documents is there any reference to the information received on 24.6.99. But, on the other hand, the said documents give an impression that the credible information was received on 26.6.99. PW-2 who conducted the search and seizure in respect of the Maruthi car was not an empowered officer nor did he have any authorisation to conduct the seizure and search as deposed by him. Therefore, the entire procedure adopted by the investigating agency is vitiated on account of noncompliance of provisions of Section 42 of the NDPS Act.

22. The next submission made is that in respect of the search and seizure effected near the Renuka lodge, the testimony of the prosecuting witnesses varies from one to another and what they deposed before the court is nothing but total improvement by metes and bounds when compared to the report submitted by the HCB officers u/s 57 of the NDPS Act. The panch witnesses for the seizure effected under Ex. P10 were not examined nor was there any explanation forthcoming from the prosecution for the failure to examine those witnesses.

23. The Maruthi car was not found to be in possession of A-1 because it has come in the evidence that the said car belongs to PW-16 G. Ramesh. His contention put forward is that the NCB seal No. 11 was found to be freely available with all the NCB officers and the sample seal was not given to the custody of the panch witnesses. But on the other hand PW-2 continued to be in possession of NCB seal No. 11 and therefore the possibility of tampering with the sample packets cannot be ruled out. In this connection it is also contended that there is no seal put on the sample packets to show that they were received at the NCB godown at Chennai. As to the article, marked M.OS. 16 to 18, were in custody of PW-7 N. Mohan till the accused were remanded; the testimony of the official witnesses cannot be accepted and this doubt gets further strengthened because of variation in the quantity of the drugs sample sent to chemical examination as could be seen from the testimony of two chemical examiners PWs

14 and 15.

24. As far as the search conducted at No. 67, II Floor, A.M. Lane, Kalasipalyam, Bangalore, is concerned, the submission made is, that, the evidence on record discloses that A-3 was never a resident at the aforesaid address and he was a resident of Rajasthan and further the testimony of DW-1 Lakhand Jain totally destroys the prosecution evidence so far as the premises at No. 67, II Floor, A.M. Lane being in exclusive possession of A-3. The evidence of DW-1 could not have been rejected by the trial court and the defence witness also will have to be put on the very same scale as that of the prosecution witnesses whole appreciating the evidence. It was also contended in this regard that the prosecution has Med to prove that the premises No. 67 was in exclusive possession of A-3.

25. Coming to the evidence of the chemical examiners, learned Counsel Shri Hashmath Pasha argued that the witnesses examined fey the prosecution namely P.W. 11 and P.W. 15 have admitted unequivocally that what was conducted by them was only a preliminary test and that they did not conduct any quantitative test in order to confirm as to whether sample packets sent for examination contained the drug heroin. In this regard, learned Counsel referred to the U.N. Manual to submit that both chemical examiners have disregarded the authoritative opinion given in the manual, in respect of procedure to be followed for conducting test and therefore, the testimony of the examiners will not come to the aid of the prosecution to prove beyond all reasonable doubt that the sample packets sent for examination contained heroin and nothing eke. Another contention put forward in this regard is that the chemical examiners have admitted in their evidence that they did not conduct the test to ascertain the percentage of purity or the percentage of drug heroin found in the sample packets. This is a serious lacuna in the prosecution case particularly in the light of amended provision of Section 41 of the NDPS Act, under which the punishment will be proportionate to the quantity of the contraband seized. In other words, after the Amendment Act, 2001, the punishment will vary depending upon the size of the quantity seized namely "small quantity" "commercial quantity" and "one in between two". Therefore, in the absence of there being evidence to show the exact percentage of drug heroin found in the sample packets, it will be difficult to fix the liability for the offence alleged against the accused persons when the amended provisions have also been given effect in respect of the pending proceedings as well.

26. The next submission made by the learned Counsel Shri Hashmath Pasha is that the voluntary statement of A1, A2, and A3 could not have been acted upon by the learned trial Judge because of several infirmities in the evidence. The first to be noticed is that the accused persons were under arrest in literal sense. The moment A1 to A3 surrendered by NCB officers near the Renuka Lodge, since then A1 to A3 were never allowed to go anywhere but were put on restrain and they were taken to DRI office. Therefore, the said evidence on record coupled with the stand taken by the accused in their written statement as well as 313

statement that the accused were threatened at a gun point by the NCB officers and added to this, the fact that the accused first never admitted to have committed the alleged offences in the first statement, later on they were made to give a tailor made statement to suit the case of the prosecution also is an indication of coercion and duress with which the accused were subjected and for all these reasons, the trial Court could not have placed any reliance on the voluntary statement of A1 to A3.

27. For the very same reasons, theory of conspiracy also falls to the ground because any statement recorded after the arrest will have no evidentiary value. It is on the very statement of A1 to A3, that the trial Court had convicted them and once the said voluntary statement are taken out of picture, there is nothing to support the prosecution case. As far as the voluntary statement of A2 is concerned, it is submitted that A2 died during the course of the trial and as such, his statement could not have made basis for convicting co-accused A1 and A3 and A1 and A3 were not put on trial along with A2. The trial Court also committed error in holding that statement of co-accused is substantive evidence against other accused and this Boding is contrary to the law laid down by the Apex Court in several decisions. The procedure followed by the prosecuting agency is also in violation of Sections 52 to 55 of the NDPS Act as well as 100 and 165 of the Cr.P.C. in as much as after the alleged seizure of articles both at Renuka Lodge and at house No. 67, the said articles were not given to the custody of the police officers in charge of nearest police station nor the said articles were produced before the Special Court.

28. Therefore, it is argued that the procedure followed through out by the prosecuting agency is in violation of what is prescribed under NDPS Act read in conjunction with relevant provisions of the Cr.P.C. As far as the presumption against the accused is concerned, the defence has pointed out from the very evidence on record that the material placed by the prosecution cannot be accepted as being without any serious defect particularly when the search, and seizure enacted were in violation of the relevant provisions of Section 42 of the Act and the material on record itself is sufficient to rebut the presumption in favour of the prosecution u/s 35 and 54 of the NDPS Act. The last of the submissions made is that P.W. 13 Shanmugam is not the competent person to file the complaint as per Ex. P77 as he was not authorised to do so in this behalf. As far as the acquittal of A5 by the trial Court is concerned, the submission made by the learned Counsel Shri Hashmath Pasha is that the said finding does not require any interference as there is absolutely no material placed to connect A5 with the commission of any of the alleged offences and more over, the only material that is sought to be banked upon by the prosecution against A5 is said to be the voluntary statement of A1 to A3 which cannot be accepted in law.

29. In support of the above submission, learned Counsel Shri Hashmath Pasha placed reliance on the decisions reported in State of Punjab Vs. Balbir Singh, , Beckodan Abdul Rahiman Vs. State of Kerala, ; State of Punjab Vs. Baldev Singh,

etc. etc., , AIR 1936 253 (Privy Council); State of Uttar Pradesh Vs. Singhara Singh and Others, ; Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, , Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, , State of Punjab Vs. Balbir Singh, : Roy V.D. Vs. State of Kerala, , State of Punjab Vs. Balbir Singh, , State of Punjab Vs. Baldev Singh, etc. etc., , Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala, , Radhakishan Vs. State of U.P., : Bahadur Singh Vs. State of Madhya Pradesh and Another, , Mahmood Vs. State of U.P., , Valsala Vs. State of Kerala, : Gurbax Singh Vs. State of Haryana, ; State of Punjab Vs. Balbir Singh, , Radhakishan Vs. State of U.P., , Tippeshappa Vs. The State of Karnataka, , State of Punjab Vs. Baldev Singh, etc. etc., , Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, , AIR 1979 705 (SC); Sahoo Vs. State of Uttar Pradesh, , Pradeep Narayan Madgonkar etc. etc. Vs. State of Maharashtra,

30. Placing reliance on the aforesaid rulings of the Apex Court, the learned Counsel for the appellants argued that the trial Judge has failed to appreciate the evidence from proper angle and so also provisions of the NDPS Act as well as the law laid down by the Apex Court in regard to various provisions and its mandatory compliance.

31. On the other hand, learned Sr. Counsel and Special Public Prosecutor Shri Urval Ramanand for the NCB, Chennai, supported the findings of the trial court and at the outset, it was argued by him that in so far as the search and seizure in respect of the Maruthi Car at Remika Lodge is concerned, the provision that is applicable in Section 43 of the NDPS Act and not Section 42 of the Act. Because, the seizure was effected from public place, therefore, the question of P.W.I reducing the information into writing and following the requirement of the proviso to the said section as well as Section 42(2) of the NDPS Act does not arise. Secondly it was contended that the search and seizure were effected in the presence of P.W. 9 K. Raghavan and therefore no defect can be found in the prosecution case as regards violation of the provision of Section 42 of the Act. In the alternative, it was also submitted that Section 42(2) also has been complied in the instant case as could be seen from the evidence of P.Ws. 1 and 9.

32. As far as the search actually conducted at the Renuka Lodge as well as at the house No. 67, A.M. Lane, Kalasipalayam is concerned, the learned senior counsel referred to the evidence of material witnesses P.Ws. 1 to 3, P.Ws. 7, 8 and 9 and P.W. 10 to contend that the said evidence of the NCB officers will go to show that the search was conducted in accordance with the provision of the NDPS Act and the report was also submitted as per Section 57 of the said Act and therefore, no infirmity can be found in the prosecution case both as regards the search and seizure effected as per Ex. P10 and P3 respectively. As far as the search conducted at the premises bearing No. 67, A.M. Lane, Kalasipalayam, is concerned, the evidence placed by the prosecution will amply demonstrate that one of the rooms in the said premises was in occupation of A3 and defence has not been able to show by producing any document with regard to the said premises being let on lease to A3 and further more, the search of the above

premises was conducted pursuant to the voluntary statement given by A3 and therefore, the report given in this regard by P.W. 8 is not the report u/s 42 of the NDPS Act, but it was only on a follow up action.

33. Pointing to the evidence of two prosecution witnesses namely F.W. 4 and P.W. 6, it was contended that the said witnesses being panchas have supported the prosecution with regard to seizure effected from the room in occupation of A3. As far as the statements of A1 to A3 are concerned, the learned Counsel argued that conviction can be based solely on the statement of the accused and in the instant case, apart from the statement of the accused, there is also the evidence of NCB officers to prove the seizure effected at two places in question. As for as the chemical examiners' evidence is concerned, learned senior counsel Shri Ramanand argued that it has come in the evidence of the chemical examiners that the sample packets sent contained the diacetyl morphine (heroin) and rejecting the testimony of chemical examiners for want of quantitative test or purity test does not arise and so also absence of the percentage of drugs in the seizure sample is also not a material defect. It was also argued that it is not in dispute that what was seized by the NCB officers does not come within the expression "small quantity", as the total seizure was more than 10 kilograms of heroin.

34. As for as the difference in the dates concerning the receipt of specific information as pointed out by the learned Counsel Shri Hashmath Pasha is concerned, the submission made by the learned senior counsel Shri Ramanand is that remand application will have to be read as based on Specific information" and followed by a "comma", date 26.6.99 will have to be read and therefore, if the "comma" is put after the word "information", then there will be no ambiguity at all with regard to date of information and apart from this, the document produced also reveals that it was on the basis of specific information received, on 24.6.99, as per Ex. P1, that search and seizure followed. As far as the NCB seal No. 11 is concerned, it is submitted that there is no requirement that the sample seal will have to be left in custody of the panchas under the NDPS Act and as such, there is no violation of the procedure. Moreover, it has come in the evidence that the sample seal was found intact on the material objects as per the medical examiners' evidence and therefore, likelihood of tampering cannot arise.

35. As regards use of statement of A2 against other accused is concerned, the submission is that there is no bar to use the said statement against the co-accused. Because, A2 expired only during the pendency of the trial As far as the conspiracy factor is concerned, learned senior counsel submitted that the trial Court erred in acquitting A5 and if the statement of other accused A1 to A3 were taken into consideration, there is sufficient material to show the involvement of A5 in the whole affair and as there can be no direct evidence to prove conspiracy, one can only draw the inference from the surrounding circumstances and the statement of the co-accused is one such circumstance which indicates the role played by A5 as well. The trial Court erred in acquitting A5 despite there being

material to show the involvement of A5 in the entire conspiracy, as it was A5 who supplied 10 kgs. of heroin to the accused. The very agreement between the accused as revealed from the statement of AX to A3 itself is a proof of conspiracy hatched by all the accused persons. Therefore, the learned trial Judge was in error in not taking note of the above position in law with regard to conspiracy theory is concerned. Therefore, the trial Court ought to have convicted A5 also for the offence punishable u/s 29 of the NDPS Act read with Section 120-B of the IPC.

36. As far as the appeal against acquittal of A5 is concerned, learned Senior Counsel Shri Urval Ramanand drew the attention of this Court to the law laid down by the Apex Court in the case of Chandrappa and Ors. v. State of Karnataka AIR 2007 SCW 1850 to contend that this Court had every power to reappraise the evidence and come to the conclusion despite the acquittal order passed by the trial Court in favour of A5. As far as the rulings referred to by the learned Counsel Shri Hashmath Pasha is concerned, the submission made by the learned senior counsel Shri Urval Ramanand is that the said rulings are not applicable to the case on hand as the facts differ. Finally, the statement made by the learned senior counsel Shri Urval Ramanand is that the Court will have to take a pragmatic approach dealing with the evidence on record in the instant case and when P.W. 9 K. Raghavan was present during the course of both the seizure Mahazars conducted, no defect can be found in the case of the prosecution for having violated any of the mandatory provisions of the NDPS Act.

37. In support of his submission, learned senior counsel Shri Urval Ramanand placed reliance on the decisions of the Apex Court as well as other Courts reported in Ravindran @ John Vs. The Superintendent of Customs, , The Intelligence Officer and Others Vs. Arshad Saleem Khan and Others, : Suman Sood @ Kamal Jeet Kaur Vs. State of Rajasthan, , Raj Kumar Karwal Vs. Union of India and others, , State of Punjab Vs. Baldev Singh, etc. etc., , Pon Adithan Vs. Deputy Director, Narcotics Control Bureau, Madras, , Krishan Mohar Singh Dugal Vs. State of Goa, , Kalema Tumba Vs. State of Maharashtra and Another, , State of Haryana Vs. Jarnail Singh and Others, ; Narayanaswamy Ravishankar Vs. Asstt. Director, Directorate of Revenue Intelligence, , Poolpandi Vs. Superintendent, Central Excise and others etc. etc., ; Directorate of Enforcement Vs. Deepak Mahajan and another, , Sahoo Vs. State of Uttar Pradesh, , K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin, , Gulam Hussain Shaikh Chougule Vs. S. Reynolds, Suptd. of Customs, Mormugao, ; Devender Pal Singh Vs. State National Capital Territory of Delhi and Another, : State of Maharashtra Vs. Damu Shinde and Others, ; Naresh J. Sukhawani Vs. Union of India, : Ramji Duda Makwana Vs. The State of Maharashtra, ; Sarjudas and Another Vs. State of Gujarat, , Durand Didier Vs. Chief Secretary, Union Territory of Goa, , State of Himachal Pradesh Vs. Lekh Raj and Another, & State of Kerala Vs. Intelligence Officer, Directorate of Revenue Intelligence and Another,

38. Drawing support from the aforesaid decisions, the learned Counsel argued

that the conviction of A1 and A3 does not require airy interference and at the same time, acquittal of A5 needs to be set-aside and A5 also has to be convicted for the offence proved against him.

39. In the light of the aforesaid submissions made and the rulings cited, the following points arise for consideration:

a) Whether the conviction of A1 and A3 by the trial Court can be said to be proper and legal and whether the said accused have made out a case for conviction being set-aside?

b) Whether the acquittal of AS by the trial Court call for interference?

40. The answers to the first point lies in accepting or rejecting the various contentions put forward by the learned Counsel Shri Hashmath Pasha in the course of his argument. I therefore, deal with the said contentions hereunder.

41. The first and the foremost contention put forward by Shri Hashmath pasha is that there is violation of mandatory provisions of Section 42 of the NDPS Act and therefore, the entire proceeding is vitiated. This contention goes to the root of the matter in as much as if the prosecution has violated the mandatory provisions of Section 42 of the NDPS Act, the consequent result will be the vitiation of the entire proceedings, because, the illegal search and seizure cannot stand the test of law. The counter argument in this regard by the learned senior counsel Shri Ramanand is that Section 42 has no application to the case on hand but it is Section 43 that is attracted and in the alternative, the prosecution has complied Section 41 as well as 42(2) of the NDPS Act This question therefore, requires careful examination of the relevant provisions namely Sections 42 and 43 of the NDPS Act.

42. Section 42 of the NDPS Act reads as under:

42. Power of entry, search, seizure and arrest without warrant or authorisation -
(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including paramilitary forces or armed forces as is empowered in this behalf by general or special order by the Central Government. or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as a empowered in this behalf by general or special order of the State Governments if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under

Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,-

- a) enter into and search any such building, conveyance or place;
- b) in case of resistance, break open any door and remove any obstacle to such entry;
- c) Seize such drug or substance and all material used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and
- d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under Sub-section (1) or records grounds for his belief under the proviso thereof, he shall within seventy-two hours send a copy thereof to his immediate official superior.

(Emphasis supplied)

43. Section 43 of the NDPS Act reads as under:

43. Bower of seizure and arrest in public place - Any officer of any of the departments mentioned in Section 42 may-

(a) seizes in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe and offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for freezing or filing or forfeiture under Chapter V-A of that Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other

person in his company.

(Emphasis supplied)

44. A plain reading of the provisions contained in the above sections will make it clear, that, for the application of the provisions of Section 43 of the Act, all that is required is for the officer concerned (empowered officer), where he has reason to believe an offence punishable under this Act has been committed, in a "public place", he has the power to proceed to seize any narcotic drug or psychotropic substance. The expression "public place" has been explained to include any public conveyance, hotel, shop or other place intended for use by, or accessible to, the public. Therefore, it becomes clear from the language used in Section 43 of the Act that when the officer concerned believes that offence punishable under this Act has been committed in a public place, he can proceed to take action as contemplated in Section 43 of the Act. Whereas a careful reading of the provisions contained in Section 42 of the Act will make it clear to any discernable reader that the procedure contemplated in Section 42 can be given effect to only where the officer concerned has reason to believe from personal knowledge or information given by any person and Taken down in writing that any narcotic drug or psychotropic substance in respect of which an offence punishable under this Act has been committed, that he can do so by effecting the seizure of the property kept or concealed in any building, conveyance or enclosed place at any time between sunrise and sunset and to do all the things mentioned in Sub-clause (a) to (d) and also to comply with the requirement as kid down in the provisions of Section 42(1) and 42(2).

45. In other words, to proceed u/s 43 of the Act, there is no necessity for the officer concerned to have personal knowledge for his belief or to have any information given by any person and taken down in writing by him. Therefore, it is only under the circumstances which fail outside the purview of the expression "if he has reason to believe from personal knowledge or information given by any person taken down in writing", and place being a "public place" that taking action as per Section 43 of the Act arise, and if not, Section 42 of the Act comes into operation.

46. As far as the above interpretation concerning the applicability of Sections 42 and 43 of the Act is concerned, the above view of mine is also supported by the observations of the Apex Court in the case of State of Punjab Vs. Balbir Singh, . The relevant observations are as under:

The Magistrate or Officers especially empowered under the Act can proceed under Sections 41 and 42 on the prior information and/or having reason to believe thereupon that an offence under the Act has been committed. We may mention here that Section 43 which deals with the power of seizure and arrest in public place is slightly different from Section 42 in certain respects. Under this provision any empowered officer u/s 42 has the power to seize detain, search or arrest in public place or in transit if ha has reason to believe that an offence

punishable under Chapter IV relating to such drug or substance has been committed and seize any document or other article which may furnish evidence of the commission of such offence and can seize any animal or conveyance or article liable to confiscation and can detain and search any person similarly. The empowered officer while acting u/s 43 need not record any reasons of his belief. This Section also does not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to Section 42.

47. It is therefore clear from the above position in law as laid down by the Apex Court that while effecting search or secure or arrest in any public place u/s 43, there is no need to record any reasons for his belief and it also does not make it obligatory on the part of the empowering officer to put the information in writing, whereas it is not so in the case of Section 42 of the Act.

48. Section 42 and 43 of the Act also came up for interpretation before the Supreme Court in a number of cases and two such recant decisions are to be mentioned at this juncture. In the ease of Directorate of Revenue and Anr. v. Mohammed Nisar Holia (1) 2008 CCR 179 , his Lordship Justice S.B. Sinha J. has observed thus at paragraph Nos. 11 to 14.

11. Power to main search and seizure as also to arrest an accused is founded upon and subject to satisfaction of the officer as the terms "reason to believe" have been used. Such nay" be founded upon secret information that may be orally conveyed by the informant Draconian provision which may lead to a harsh sentence having regard to the doctrine of "due process" as adumbrated under article 21 of the Constitution of India require striking of balance between the need of law and enforcement thereof, on the one hand, and protection of citizen from oppression and injustice on the other.

12. This Court in Balbir Singh (supra) referring to Miranda V. Arizona (1966) 384 US 436 while interpreting the provisions of the Act held that not only the provisions of Section 165 of the Code of Criminal Procedure would be attracted in the matter of search and seizure but the same must comply with light of the accused to be informed about the requirement to comply with the statutory provisions.

13. Requirements of Section 42 were read into Section 43 of the NDPS Act. A somewhat different view, however, was taken subsequently. Decisions were rendered opining tat the conducting search and seizure in public place or moving vehicle, provisions appended to Sub-section (1) of Section 42 would not be attracted. Decisions were also rendered that in such a case even Sub-section (2) of Section 42 need not be complied with.

14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under Sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public

place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as noncompliance of the said provision would not render the search a nullity. A distinction therefore must be borne in mind that search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance. It is also possible to hold that rigours of the law used not be complied with in a case where the purpose for making search and seizure would be defeated, if strict compliance thereof is insisted upon. It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefore coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. No body, even the staff of the hotel can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and for house keeping of the room, the guest is entitled to maintain his privacy. The very fact that the Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given untrammelled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sought to be protected. Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a Court can do is to see that such a right is not unnecessarily infringed. Right of privacy deals with persons and not places.

49. In another decision of the Apex Court in the case of *Dilip and Anr. v. State of M.P.* 2007 (1) Crimes 43, reference was also made to the decision rendered in the case of *State Punjab v. Balbir Singh* and the conclusion reached in the said case were excerpted at para 14 as under:

Ms. Vibha Datta Makhija, learned Counsel appearing on behalf of the State, however would support the judgment of the High Court contending that this Court in *State of Punjab Vs. Balbir Singh*, , categorically held that an illegal search may not have any direct impact on the prosecution case. This Court

therein opined as under:

The questions considered above arise frequently before the trial Courts. Therefore, we find it necessary to set out our conclusions which are as follows:

1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) u/s 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, the such search or arrest if carried out would be illegal Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act, If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) u/s 41(2) only empowered officer can fpm the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) u/s 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record Ms reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) u/s 42(2) such empowered officer who takes down any information in writing

or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total noncompliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an empowered officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr.P.C. fails to strictly comply with the provisions of Sections 100 and 165 Cr.P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer u/s 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Sections 100 and 165 Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C. then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the Courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should, comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

50. In another decision namely in the case of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, , dealing with a case wherein the facts involved being the inspector of police on receiving information about Charas being transported in an Auto, (P.W. 2, the Inspector of Police) proceeded to the main road and at about 4.00 P.M., the auto was cited and it was stopped and when it was checked, four gunny bags were found inside the vehicle. The Apex Court on the basis of the said facts made the following observations at para No. 14 and also referred to the decision rendered in the case of State of Punjab v. Balbir singh and quoted

para 25 of the said decision at para 16 as under:

14. In this case P.W. 2 admitted that he proceeded to the spot only on getting the information that somebody was trying to transport narcotic substance. When he was asked in cross-examination whether he had taken down the information in writing he had answered in the negative. Nor did he even apprise his superior officer of any such information either then or later, muchless sending of copy of the information to the superior officer. However, learned Counsel for the respondent-Slate of Gujarat-contended that the action was taken by him not u/s 42 of the Act but it was u/s 43 as per which he was not obliged to take down the information. We are unable to appreciate the argument because, in this case, F.W.2 admitted that he proceeded on getting prior information from a constable and the information was precisely one falling within the purview of Section 42(1) of the Act. Hence, P.W.2 cannot wriggle out of the conditions stipulated in the said sub-section. We, therefore, unhesitatingly hold that there was non-compliance with Section 42 of the Act.

16. A two judge Bench of this Court has considered the said question along with other questions in *State of Punjab Vs. Balbir Singh*, . In paragraph 25 of that judgment the conclusion were laid down, of which what is relevant for this case regarding Section 42(1) is the following:

(2-C) u/s 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing, But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent, these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial....

51. In the cue of *State of West Bengal v. Babu* 2004 AIR SCW 4995, dealing with Section 42(1) and (2) of the NDPS Act, the Apex Court held that the proviso to Section 42(1) requires that where the officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time before sunset or sunrise after recording the grounds of his belief In the case of the aforesaid decision, the Court also held that where a raid was conducted in the house of the accused on obtaining the secret information and whether there was non compliance with mandatory provisions of Section 42 relating to recording of information and the ground of belief and the independent mahazar witnesses also not examined, the acquittal of the accused was held to be proper.

52. From the above preposition of law laid down by the Apex Court and also after having careful reading of the provisions of Sections 42 and 43 of the N.D.P.S. Act, it becomes clear that the requirement of Section 42 will not arise if the search is made in any "public place" under the circumstance mentioned in Section 43 of the Act.

53. With the above interpretation of Sections 42 and 43 of the Act and the law laid down in this regard by the Apex Court in the afore-mentioned cases, whether it can be said in the instant case that Section 42 of the Act is applicable or Section 43 applies.

54. It is not in dispute that there was secret information received by FW-1 and we shall presently postpone as to whether FW-1 was the person who received the information or not. But nevertheless it is the evidence of FW-1 that he received the specific information about accused No. 1 proceeding to Bangalore to collect the contraband drugs from Accused no.3 at Renuka Lodge. It is also not in dispute that the contraband drugs were seized from the Maruthi Car bearing Registration No. TM-02 E-8317, which car was said to be found in front of Renuka lodge. No doubt, Renuka lodge being a hotel is a "public place" coming within the said expression as per the Explanation u/s 43 of the Act. Nevertheless can it be said that the Maruthi Car is a public conveyance. The answer will have to be an emphatic "No". It is nobody's case that the Maruthi car which was seized in front of Renuka lodge is "a public conveyance". Therefore the question of Section 43 of the N.D.P.S. Act coming into operation will not and cannot arise. The second reason is that it is not the case of no secret information being received by FW-1 so as to attract u/s 43 of the Act the only conclusion to be drawn from the above discussion is that Section 43 of the Act has no application but it is Section 42 of the N.D.P.S. Act that comes into play. The learned trial Judge in the course of his reasoning has taken a view that as the Maruthi Car was searched near Renuka lodge, the case fell within Section 43 of the Act but not Section 42 of the Act. The said conclusion arrived by the learned trial Judge is totally erroneous both on facts and in law and as such the finding cannot be sustained.

55. Once it is concluded that Section 42 of the Act is applicable to the case on hand, the next question that arises is whether there has been compliance of mandatory requirement of Section 42 by the prosecution. This takes us to the evidence on record.

56. PW-1 S. Gunabalan, an independent officer of NCB has deposed in his evidence that he received the information on 24.6.99 at 22 hours and the same was reduced into writing by him as per Ex. P1. At the same time, he has also admitted categorically in the course of his cross-examination that the informant personally appeared before him and gave oral information and the same was reduced into writing and thereafter the informant had signed the said information, FW-1 goes on to say that Ex. P1 is not that information and further says in his cross-examination that the information received by him from the

informant was submitted in a sealed cover to his immediate superior FW-9 K. Raghavan. Therefore, doubt arises to whether Ex. P1 is the Information received by PW-1 or not and since Ex. P1 is not the information given by the informant, there is merit in the submission made by the learned Counsel Sri Hashmath Pasha that the original information has not seen in the light of the day. Though PW-1 deposed to the effect that he sent the original information in a sealed cover to PW-9, FW-9 K. Raghavan on his part says in his evidence that the report that was received by him from PW-1 is Ex. P1.

57. In the absence of written information given by the informant being placed on record and PW-1 admitting in his evidence that Ex. P1 is not the information that he received, it cannot be said that the prosecution has proved one of the mandatory requirements of Section 42 of the Act, in as much as the information received, by PW-1 from the informant though said to have been reduced to writing and signed by the informant has not been placed on record. Secondly, even if it is considered for argument sake that PW-1 did receive the information from the informant and that it was signed by the informant, nothing prevented PW-1 from mentioning about the said information in Ex. P1. The contents of Ex. P1 therefore will have to be referred to in this regard and they are as under:

In Formation Report u/s 42 of NDPS Act, 1985

To:

The Intelligence officer, NCB, Chennai.

Sir,

One Mayil, residing at 110-A, Appurao Garden Shenny nagar, Chennai-30, having a Cherry Red colour Marathi Car bearing Registration. No. TN-02-E-8317/25-6-99 procure about 5 Kgs of Heroin from one Rajeah of Bangalore. One Siva of Thanjoor staying in a room at Renuka lodge near Abinaya Theatre will be arranging for procuring the Heroin. Mayil will be transporting the Heroin to Chennai by canceling it in this above mentioned Maruthi Car. I request that necessary action may please be taken to apprehend the above said persons at Bangalore, which may result in seizure of Heroin, kindly take immediate action I may require identity for the information.

Date: 24/6/99 Time: (22-00 hours Place Chennai

sd/- Informer Information received by me. Sd/- (S. Gunjalan)

Ex-P.1(b) Sd/- E. Raghavan 24/6/99

Submitted to the Superintendent NCB Chennai for immediate necessary action.

58. Therefore in the light of the aforesaid contents of Ex. P1, the testimony of PW-1 even if it is accepted in toto, as regards Ex. P1 is concerned, it cannot be said that the prosecution has proved beyond all reasonable doubt that information was received by PW-1, the information was taken down in writing.

Secondly, the requirement of Sub-section 2 of Section 42 that the information which was taken down in writing has to be forwarded to the official superior within 72 hours also cannot be said to have been proved in the instant case, Moreover, the time framed of 72 hours was not there in the earlier Sub-section 2 prior to the amendment and the requirement at that relevant period was the report to be submitted "forthwith". Thus from the evidence of PW-1 itself, it has been established that the mandatory requirements of Section 42 of the N.D.P.S. Act have not been complied and the consequence of the same is that it vitiates the entire proceedings that ensued thereafter in view of the law laid down by the Apex Court in the aforesaid mentioned decisions. The learned trial Judge was therefore in error in holding that Section 42 of the Act will not applicable nor Section 41 but that Section 43 applies to the case on hand. The said finding as such therefore cannot be sustained in law.

59. The next contention of the appellant's Counsel Sri. Hashmath Pasha is that the search and seizure effected in respect of the Maruthi Car on 26.6.99 in front of Renuka Lodge also cannot be said to have been proved beyond all reasonable doubt As regards this, no doubt, the learned trial Judge has found the testimony of FWs 1 to 3 and 7 to 9 acceptable and has even observed that the presence of FW-9 K. Raghavan, Superintendent of NCB will takeaway any infirmity in the prosecution case with regard to non-compliance of the mandatory provisions of Section 42 or for that matter Sections 52 to 55 of the N.D.P.S. Act But the evidence on record disclose that though the said prosecution witnesses being the officers of the NCB, have deposed with regard to the search and seizure effected by them, no panch witness has supported the seizure effected under Ex. P10. No doubt the prosecution has not examined any of the panch witness despite the best efforts made by them. This omission therefore puts the Court on guard while appreciating the evidence of the officers of the NCB. Though PWa 1 to 3 and 7 to 9 deposed about the search conducted by them while seizing the car, a look at the contents of the various reports submitted by each one of the officers, u/s 57 of the Act, does not give the impression that the testimony of the above witnesses can be accepted without any reservation. A plain look at the provisions of Section 57 of the act, makes it clear that whenever any person makes any arrest or seizure, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. No doubt, it has been held by the Apex Court in several decisions, Section 57 of the N.D.P.S. Act is not a mandatory provision and it is only directory in nature. Nevertheless as has been observed by the Apex Court in the case reported in 2008 PCR 179, the non-examination of the panch witness in respect of the seizure effected under Ex. P10 and the reports submitted by the NCB officers u/s 57 of the Act not being the full report of all the particulars of such arrest or seizure, it has to be held either the testimony of the above witnesses in regard to the seizure under Ex. P10 will have to be viewed with suspicion as they do not mention about all that they say in evidence in their report submitted to the immediate official superior or will have to be inferred that

the report 57 was submitted only in order to show compliance of Section 57 of the Act.

60. Though the learned advocate in the course of the examination of the above material witnesses has brought out in great detail as to the omissions in the report submitted by each one of the NCB officers u/s 57 of the Act, what is surprising is that in many of the reports u/s 57, vital information has been omitted and all these has been brought out during the cross-examination of all the above witnesses. Therefore non-compliance of Section 57 of the N.D.P.S. Act puts the Court on guard while appreciating the testimony of the above material witnesses of the prosecution. Looking at the examination of the above witnesses in respect of their omission in the report u/s 57 of the N.D.P.S. Act, as has been brought out by the defence itself, it goes to show that the prosecuting agency has not taken (sic) pains to give full particulars of the entire search, seizure or arrest of the accused.

61. Although the learned Counsel Sri. Urval Ramanand for the NCB argued that it is not necessary to given all the details in the report submitted u/s 57 of the Act, yet the basic details and the vital information could not have been omitted by the NCB officers while submitting their reports u/s 57 of the Act, it has been held by the Apex Court in several decisions that one of the reasons for putting Section 57 into the Act is to ensure that the search and seizure are conducted in a fair manner and without any prejudice being caused to the accused. This is more so, having regard to the serious nature of the offence under the Act and the severe punishment prescribed for the commission of the offence under the Act.

62. As far as the search and seizure conducted at premises No. 67, II floor, A.M. Lane, Kalasipalyam, Bangalore is concerned, it is the specific case of the prosecution that one of the two rooms in the 2nd floor of the said premises was in the occupation of accused No. 3 Rajesh Salacha. It is also the evidence of PW-1 that the seizure was effected from the room occupied by accused No. 3 and contraband drug worth 5.595 Kgs of heroin and cash of Rs. 2,95,000/- was seized from the room of accused No. 3. Whether the evidence placed by the prosecution in this regard through FWs 1 to 3 and 7 to 9 can be accepted without any second thought is the question. The answer has been given in the "affirmative" by the learned trial Judge. No doubt, the learned trial Judge has believed the testimony of all the above witnesses in respect of the seizure enacted from the premises in question and the room said to be in occupation of accused No. 3. But what the learned trial Judge has lost sight of is the evidence of DW-1 Lalchand Jain. The said witness DW-1 Lal Chand Jain in the course of his evidence has deposed to the effect that he occupied the premises i.e.f II Floor portion bearing No. 67, A.M. Lane, Kalasipalyam, Bangalore, which he has taken on rent. He and his wife Sunitha were residing in the said premises and no other person was residing in the said premises, He has also deposed to the effect that after his marriage, he returned to Bangalore and occupied the premises and thereafter accused No. 3 Rajesh Salecha had come to his house only once to

congratulate DW-1 on his marriage. What is more shocking from the evidence of DW-1 is his statement is that the officers who came to conduct the search threatened Mm and even assaulted two panchas namely Babulal Jain and Krishnoji Rao. In fact the very specific words are spoken to by DW-1 will have to be mentioned and they are as under:

The said persons rushed into my house and they compelled me and my wife to sit at one place. Thereafter they searched the entire house. All household articles were scattered. They did not find any incriminating articles but they found only rent agreement of the premises taken by me on rent.

The whole night we were kept there and we were threatened by the said persons. They also assaulted me and two others namely Babulal Jain and Krishnoji Rao. On 29.6.99 at about 10 a.m. in the morning the said persons threatened us to put our signatures on blank papers, envelops, photos of Rajesh Salecha and packets in Indiranagar Office. At the time of putting our signatures, the papers and envelops were blank and nothing was written on them. Even after taking the signatures we art detained there in the office till 9 or 10 p.m. and thereafter the said persons brought some written documents and told us to write on the papers as per their dictation. I have not given any statement before the officials. Those persona compelled us to write the statement. The whole night of 29.6.99 we were detained in the said office. Thereafter on 30.6.99 at about 11 a.m. we were released by saying that we should come to the Court and give evidence as per their instructions.

The witness has also deposed to the effect that

the office have not written anything or any documents at his house after conducting search at his house. The premises under my occupation was consisting of two bed rooms, one hall, one kitchen attached latrine and bathroom. I have not given any statement that Rajesh Salecha is residing in a room opposed to the toilet in premises No. 67, A.M. Lane, Kalasipalyam, Bangalore. "I have put the signature in Indiranagar office on 29.6.99 at about 10 a.m. and at the time of putting signature nothing was written in Ex.P3 Mahazar".

63. The above evidence of DW-1 which has not been seriously tested in the cross-examination and who denied all the suggestion put to the contrary, the net effect is the testimony of DW-1 ought not to have been ignored by the learned trial Judge. In this regard, it is necessary to refer to the decision of the Apex Court reported in 2002 SSC (Cri) 175 and the observation m that:

The evidence rendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a Par with that of the prosecution.

64. The learned trial Judge did not taken into consideration the above proposition

of law as regards the weight to be given to the evidence of defence witness and in the course of his reasoning, he has stated with regard to the evidence of DW-1 in so far as the search and seizure conducted at the premises concerned is that the said witness DW-1 has corroborated the testimony of the official witnesses to the extent of the presence of panchas when the search and seizure was conducted. In other words, the trial Court having held that DW-1 had not supported the prosecution case with regard to search and seizure of heroin and cash could not have refused to act upon his testimony, when what is spoken to by DW-1 has not been shown to be false or untrustworthy despite the cross-examination. Therefore the testimony of DW-1 does not in any way help the prosecution in advancing its case any further notwithstanding that he is the defence witness.

65. Looked from any angle the prosecution case that the premises bearing No. 67, II Floor, was in occupation of accused No. 3 also cannot be believed having regard to the other evidence on record. The address of accused No. 3 given in the complaint Ex. P77, the remand application EX.P43 are not that of Bangalore but is of Rajasthan. Accused No. 3 was not found in the house when the NCB officers conducted the search and seizure, But according to the very prosecution evidence itself, accused No. 3 was in custody on the relevant date. Apart from the prosecution failing to prove the premises in question being in the occupation of accused No. 3, there is yet another strong reason in not accepting the prosecution evidence with regard to the seizure of contraband drug heroin worth 5.595 Kgs and cash of Rs. 2,95,000/- from the exclusive possession of accused No. 3, since it has come in the evidence of DW-1 that he was in exclusive possession of the entire II floor premises including the two bed rooms. Therefore the prosecution has failed to prove that one of the bedroom was in occupation of accused No. 3.

66. The said interference gets further strengthened by the further evidence placed by the prosecution itself, that when their official witness went there the door lock of the room of accused No. 3 was with FW-1 and it was PW-1 who opened the door lock of the room said to be in occupation of accused No. 3. Under these circumstances, it is very difficult to accept the prosecution version that accused No. 3 was in exclusive possession of one of the two bed rooms in the premises bearing No.67, II floor, A.M. Lane, Kalasipalyam. In this regard, it is also worthwhile to refer to the decision of the Apex Court with regard to exclusive possession. In the case of Radhakishan Vs. State of U.P., , the Apex Court rejected the prosecution case that the almirah in question was in exclusive possession of the accused because from the evidence in the court, it was found that both the father as well as the son (the son being the accused) were in joint possession of almirah and therefore the Apex Court went on to hold that no presumption can be drawn against the accused that he had secreted the articles, merely because they were found in the almirah which at best may be regarded as being in the joint possession of himself and his father. But even the interference of joint possession would not be legitimate and therefore the fact

that the accused had opportunity to get at the articles is not sufficient to infer exclusive possession of the accused of those articles.

67. The case on hand is much very stronger on facts in as much as the case of the prosecution is that one of rooms was in joint possession of accused No. 3 and DW-1. Though the learned Counsel for the respondent NCB contended that the entire premises bearing No. 67, II floor, A.M. Lane, Kalasipalyam, was in the occupation of accused No. 3, the evidence of PW-1 is quite contrary to the said stand taken by the prosecution. Under the above circumstances, the seizure of the heroin drug from the premises in question along with the cash under mahazar Ex. F3, cannot in any way help the prosecution to proves beyond all reasonable doubt that what was seized was seized from the possession of accused No. 3. The learned trial Judge has therefore not appreciated the entire evidence in proper perspective. Had the trial Court taken note of the evidence of DW-1, it would not have arrived at the finding as it had done with regard to the possession of the contraband drug heroin and cash by accused No. 3.

68. The next aspect of the matter is with regard to the voluntary statement said to have been given by accused Nos. 1 to 3. No doubt, the prosecution has placed the evidence of the NCB officers to show that voluntary statement of accused No. 1 was recorded by PW-3 Suresh Joseph as per Ex. P15 and Ex. F16. FW-8 recorded the voluntary statement of accused No. 3 as per Ex. P28 and Ex. P32. How far reliance can be placed on the voluntary statement of the accused is the question that requires an answer at this juncture. It is not in dispute that both accused Nos. 1 and 3 were questioned by the NCB officers and at the first instance, the said accused did not confess to have committed the alleged offence under question. But it was only the subsequent statement of accused Nos. 1 and 3 that revealed the entire episode according to the prosecution. It therefore becomes clear that accused Nos. 1 and 3 declined to give their statement voluntarily and it was only after they taken to the DRI office that they were asked to give the subsequent statement which formed the basis For the prosecuting agency to proceed with the case. It has come in the evidence of FW-3 Suresh Joseph that he did not allow the accused to go out of the DRI office either on 26.6.99 or on 27.6.99 and further no other NCB officer had allowed accused No. 1 to go out of the DRI office. Apart from this, this witness has also admitted that in Ex. P16, there are several words, which have been struck off or re-written. We have also seen from the evidence of FW-1 and FW-9 that alt the NCB officers surrounded the Maruthi Car when they were on the spot near the Renuka Lodge on 36.6.99 and since then the accused persons were under the control of the NCB officer, they wrote "under custody" of the NCB officers.

69. Whether the accused did give their statements voluntarily or not can also be gathered by looking to the stand taken by the accused in their 313 statement. Both accused Nos. 1 and 3 have given their written statement giving their explanation and it is stated by accused No. 1 in his statement that the officers at DRI officers tortured him by scolding with bad words and he was threatened with

rivalwar by Gunabalan (FW1) that accused No. 1 would be killed and it would be shown as "encounter". He has also stated that he was continuously tortured and ill-treated and was threatened to write something which they had dictated and he refused to write it. Again he was tortured and threatened and he became unconscious and when he became conscious, he was asked to write or that they would fix him. He has also stated that by making false promise, the NCB officers forced him to write on number of papers and obtained signature, on empty envelopes. He has also stated in para-2 of the statement that when he was produced before the Magistrate, he could not understand the language and the Magistrate did not asked him anything. Similar is the statement given by accused No. 3 Rajesh Salecha and he also has stalled at para-2 and para-3 of the statement that he was threatened and the officers also threatened to kill him by keeping rivalwar on his head and tortured and assaulted continuously and forced to write as per the dictation in his handwriting on the evening of 26.6.99 and he refused., but again he was tortured and clothes were removed and he was assaulted with lathi and became unconscious. It is also his statement that FWs. 2, 7, 8 and 9 surrounded him and again beat him there, and forced him, to write in his hand whatever they dictated to him.

70. Thus a plain reading of the statement given by the two accused does not do any good to the image of the NCB officers. The statement taken from the accused under these circumstances cannot be accepted and it is also trite in law that the accused cannot be forced to give his confession statement under threat or coercion and if it is so, it would only be a case of violation of the fundamental right as mentioned in Article 20 of the Constitution of India.

71. It is a well-settled law that in view of the bar under Article 20(3) of the Constitution of India, no person accused of an offence shall be compelled to be a witness against himself. In the instant case, right from the time when the H.C.B. officers surrounded the accused at the Renuka Lodge on seeing them in the Maruthi Car, the accused were under the complete control of the N.C.B. officers and they were taken to the D.R.I. office and were not allowed to go out and even food was served within the premises of the D.R.I. office and coupled with that, the statements of A-1 and A-3 given by way of reply to 313 statement all go to show that the confession statements of A-1 and A-3 taken by the N.C.B. officers cannot be given any value at all and, on the other hand, it only goes to show that the accused persons did not have any fair trial and their valuable human rights were violated.

72. Such being the material on record, the learned trial judge could not have accepted the voluntary statements of A-1 and A-3 in particular to base conviction of the said accused and, as far as A-2's confession is concerned, as he died during the course of the trial, the question of his statement being put against A-1 and A-3 also does not arise.

73. Another contention put forward by the learned Counsel Shri Hashmath Pasha for A-1 and A-3 is that the Chemical Examiners evidence cannot help the

prosecution to prove that the sample packets seized and examined contained heroin drug. As far as this submission is concerned, the evidence of P.Ws. 14 and 15 will have to be looked into.

74. P.W. 14 K.C. Pillai, Assistant Chemical Examiner, Customs House Laboratory, Custom House, Chennai, has deposed in his evidence that he conducted the test as per the United Nations Manual used by the National Narcotics Laboratory and he conducted qualitative colour tests and thin layer chromatographic test and found each of the three powders in the samples sent to him answered positive for the presence of Di Acetyl Morphine (Heroin). But, this witness has admitted that he has not carried out quantitative analysis of each powder. Ex. P-78 is the test report.

75. In the cross-examination, P.W. 14 has stated that the three samples as per M.Os. 19, 21 and 23 did not contain N.C.B. seals and in Ex.F-78, the test report, the grounds or reasons for forming the opinion are not mentioned and he admits that he has not conducted quantitative test with regard to the purity of the substance and goes on to say further that it is true that the quantitative test will determine the percentage of the drug present in the sample received.

76. P.W. 14 also admits that, on all the sample packets, it is written as "5 grams of sample" whereas, the weight of the samples that were examined by him were 4.7 grams (S1), 5.02 grams (S3) and 4.9 gms (S5). It is also an admission made by P.W. 14 in his evidence that as per the manual, colour test is not a definite test and it is mentioned in the manual that while testing heroin, colour test will be achieved while conducting the tests of other alkaloids and uncontrolled substances. This witness also admits in the cross-examination that he has not conducted the two confirmatory tests viz., gas chromatography and mass specific copy.

77. The testimony of P.W. 15 A. Ameer Razakhan, another Assistant Chemical Examiner, is also to the same effect and Ex. P-79 is his report and this witness also admits in the course of his cross-examination that he has not conducted quantitative or qualitative tests and goes on to say that M.Os. 1, 3 and 5 sample packets did not contain N.C.B. seal and the weight of S1 packet was 4.6 gms, the weight of SSI packet was 4.9 gms and the weight of S3 packet was 4.7 gms. He admits that he has not mentioned the reasons or grounds for his opinion and also for the delay in conducting the tests. It has been brought out further in the cross-examination of this witness that Method A in respect of screening of samples and Method B is in respect of confirmatory tests and Method A is presumptive test that includes colour test and he has not conducted any test mentioned in Method B, which is confirmatory test.

78. What is clear from the testimony of the above Assistant Chemical Examiner, is that they only conducted preliminary test or presumptive test but did not conduct any confirmatory test so as to formally fix that the sample packets contained contraband heroin and nothing but heroin. This procedure adopted by

the Assistant Chemical Examiners and their failure to point out the percentage of purity of the contraband drug and the difference in weight of the samples received by them when compared to the weight mentioned on the sample packets on the top, all give rise to doubt the prosecution case insofar as its effort to establish through the testimony, beyond all reasonable doubt, that the sample packets which were tested by the Assistant Chemical Examiners contained heroin and nothing but heroin. In the absence of purity test being conducted and the percentage of heroin drug being indicated and no confirmatory test or quantitative test also being held, I am of the view that the evidence of the Assistant Chemical Examiners also creates yet another loophole in the prosecution case.

79. In this regard, it is also pertinent to refer to a decision of the Delhi High Court in the case of *Ansar Ahmed v. State (Govt. of NCT of Delhi)* reported in IV (2005) CCR 1. The Delhi High Court dealt with the effect of the Amendment Act 9 of 2001 by which deterrent punishment for various offences was prescribed by rationalising the sentence structure and the sentence was depending upon the significant quantities of drugs, lesser the quantity, lesser was the punishment; and, having regard to the said amendment, the court considered the question as to whether the alleged recovery was of small quantity or commercial quantity or intermediate quantity of heroin. After examining the evidence on record and taking note of Entry 56 and Entry 239 of the Notification dated 19.10.2001 issued by the Central Government for each of the narcotic drugs/psychotropic substances listed therein, the court held that what is to be seen is the content of heroin by weight in the mixture and not weight of the mixture as such.

80. After observing thus in the said case, the Delhi High Court went on to give an illustration by way of a supposed example of a person throwing a pinch of heroin (say 0.5 gram) into a polythene bag containing small steel ball bearings having a total weight of 1 kg: would the steel ball bearings be also weighed in and it be declared that a commercial quantity (1000.5 grams) of heroin was recovered. The court answered it by saying that, surely it is only the content of heroin (0.5 gram) in the mixture of heroin and steel ball bearings that is relevant. Therefore, in a mixture of narcotic drug or a psychotropic substance with one or more neutral substances, the quantity of the neutral substance or substances is not to be taken while considering whether a small quantity or a commercial quantity of the narcotic drug or psychotropic substance is recovered. Ultimately, the court held that only the actual content by weight of narcotic drug or psychotropic substance is relevant. For determining whether it would constitute a small quantity or commercial quantity.

81. Applying the aforesaid reasoning to the case on hand also, the Assistant Chemical Examiner's evidence does not indicate the actual percentage of purity of the drug heroin and, as no confirmatory test was also conducted, it could not be known as to what was the proportion of the drug heroin that was present in the sample packets. The defect in the prosecution case is a vital one as it has

bearing on the proportionate sentence to be passed depending upon the quantify of heroin being small, intermediate or commercial Though the learned trial judge has referred to the said contention put forward by the defence counsel before the trial court in the course of hearing the accused on the sentence issue, the trial court has dismissed the said contention at wholly irrelevant. In my view, the said reasoning of the trial court cannot be sustained in law particularly in the face of the amended provision which has given graded punishment depending upon the quantity of the narcotic drug seized.

82. The next contention to be considered is with regard to search of the person of the accused and whether has been compliance of Section 50 of the N.D.P.S. Act The Apex Court has held in the case of K. Mohanan v. State of Kerala reported in 2000 S.C.C. (Cri) 1228, that u/s 50 of the N.D.P.S. Act, the accused must be informed that, under law, he has right to be produced before a gazetted officer or a Magistrate for the purpose of search and, same m the effect of another decision of the Apex Court in the case of Vinod v. State of Maharashtra reported in 2003 S.C.C. (Cri) 14.

83. Relying on the aforesaid rulings, it is contended that the accused were not made known about their right under law. Having regard to the evidence on record and in the report submitted u/s 57 of the N.D.P.S. Act by the H.C.B. officers, there a no indication in any of the reports u/s 57 that the accused were told that, under law, they had the right to choose a gazetted officer or a Magistrate before their person was examined. Though the prosecution witnesses have stated to the contrary in their evidence, in the course of the cross-examination, it has been brought out that no such information was given to the accused as the report u/s 57 was silent on this aspect of the matter.

84. Though nothing was seized from the person of A-1 and A-3, it is immaterial so long as the N.C.B. officers complying the provisions of Section 50 of the Act. The mine on record does not give such impression with regard to compliance of Section 50 of the Act in the light of the aforesaid decisions of the Apex Court. Thus, there is another important infirmity in the prosecution case, which has escaped the notice of the learned trial judge.

85. As far as N.C.B. seal No. 11 is concerned, the contention put forward by the learned Counsel Shri Hashmath Pasha is that the N.C.B. seal No. 11 was freely available with the officers and it is also spoken to by the very same officers and the Assistant Chemical Examiners" evidence reveals that the samples sent to them did not contain N.C.B. seal. That apart, it has also come in the evidence of the prosecution witnesses and even it is an admitted fact which is not in dispute that neither the accused oar the seized articles were taken to the nearest police officer in charge of the police station.

86. Thus, there has been no compliance of Sections 52 to 55 of the N.D.P.S. Act and, at the same time, it has come in the evidence of the N.C.B. officers that the articles which were sent to the godown at Chennai did not bear any seal of the

N.C.B. Godown at Chennai. More importantly, P.Ws. 1 and 2 admit in their evidence that the N.C.B. seal was never given to the custody of the panch witnesses. Such being the admitted evidence on record, whether it can be said that the procedure followed by the N.C.B. officers is above board and beyond suspicion. My answer is in the negative because, it has been held by the Apex Court in the case of *Rajesh Jagdamba Avasti v. State of Goa* reported in 2005 (1) All India Criminal Law Reporter 539, that when the seal and packets remained in the custody of same person and when the quantity of charas was found to be different from the quantity which was sealed by scientific officer, there is every possibility of the seized substance being tampered with and after observing so, the Apex Court set aside the conviction.

87. In the case on hand, not only it is admitted by the prosecution witnesses themselves that the N.C.B. seal No. 11 was never given to the hands of the panch witnesses, but that they retrained with P.Ws. 1 and 2 throughout and further, the said N.C.B. seal No. 11, being a general seal used by the N.C.B. officers even in respect of other substances seized by them in the course of their investigation, and coupled with that, the quantity of heroin which was said to be 5 grams mentioned on the cover of the sample packet not tallying with the quantity spoken to by P.Ws. 14 and 15, I am of the view that the prosecuting agency has failed to eliminate the possibility of fabrication of evidence or to dispel the suspicion as to its genuineness. The Apex Court has observed in the said case that under the mistaken seal for success of the case, the officers of the investigating agency are likely to resort to padding and suppression and distortion of facts. I, therefore, hold that in view of the difference in the quantity of heroin {bund from the evidence of P.Ws. 14 and 15 and the N.C.B. seal No. 11 being a general seal and not being given to the custody of the panchas and the seized articles not being taken to the nearest police station and kept in the custody of the police officer, all in all, the argument of the counsel for At and A-3 that there was tampering of the sample packets, cannot be ruled out and has to be accepted as having substance in it.

88. As far as the rulings submitted by the learned senior counsel Shri Urval N. Ramanand for the N.C.B. are concerned, in view of the nature of the evidence which is on record in the instant case and the facts involved in the referred to by him. I am of the opinion that all those decisions, though lay down the settled position in law with regard to the interpretation of Sections 41, 42 and 43 of the N.D.P.S. Act as well as appreciation of evidence, the said rulings, cannot, in my opinion, assist the N.C.B. in dispelling the serious doubts that have arisen in the prosecution case.

89. As far as the submission made by the learned senior counsel for the N.C.B. that the court will have to take a pragmatic approach is concerned, the Apex Court, in the case of *Sajan Abraham v. State of Kerala* reported in 2001 (3) Crimes 377, has observed that in construing any Facts to find whether the prosecution has complied with the mandate of any provision which is mandatory,

one has to examine it with pragmatic approach and the court, however, while construing such provision, strictly should not interpret it so literally so as to render its compliance impossible. The court also held further that, before drawing such inference, it should be examined with caution and circumspection and, in other words, if in a case, following of mandate, strictly results in delay in trapping an accused, which may lead the accused to escape, then prosecution case should not be thrown out.

90. Having regard to the aforesaid proposition of law, it can be said that even on facts, the present case is a different cup of tea. It is not a case of the delay in trapping the accused, leading to escape. In the case on hand, even by the very own admission and evidence of the prosecution witnesses, the information is said to have been received by P.W. 1 on 24.6.1999 and P.W. 1, along with other N.C.B. officers, left Chennai on that night and reached Bangalore on the following day and kept a vigil in the place surrounding Renuka Lodge and, on the following day i.e., 26.6.1999, they noticed a Maruthi Car which was parked in front of Renuka. Lodge and, thereafter, the officers are said to have seen the three accused in the car.

91. Given the said set of facts, which are admitted by the prosecution witnesses, it cannot be said that this is a case where it was impossible for the officers of the N.C.B. to have complied with Section 42 of the N.D.P.S. Act when so much of time and so many days were at their disposal I have carefully considered the entire evidence on record keeping in view the above observations of the Apex Court and, on a careful examination of the entire evidence, it cannot be said that it was impossible for the N.C.B. officers to have complied with Section 42 of the N.D.P.S. Act. As such, the said ruling cannot be of any assistance to the learned senior counsel for N.C.B.

92. Coming to the acquittal of A-5, the learned trial judge has found that there was no material against A-5 so as to convict him despite there being voluntary statements of A-1 to A-3 placed by the prosecuting agency. I have held that the voluntary statements of the accused cannot be looked into because of the serious infirmities noted above and the accused being compelled to give statements against their own free will and the said statements being hit by Article 20(3) of the Constitution. Once we remove the voluntary statements out of the purview of consideration, there remains nothing to indict A-5. The teamed trial judge has rightly acquitted A-5 in the absence of there being any evidence against him.

93. As far as the submission a? the learned senior counsel Shri Urval N. Ramanand with regard to the conspiracy is concerned, though the rulings referred to by him lay down the law with regard to what amounts to conspiracy and as to whether there could be any strict evidence or not to prove the conspiracy and the said fact can only be proved through an inference being drawn from the material on record, I am of the view that the said decisions also will not come to the assistance of the learned senior counsel for N.C.B. as the

evidence on record does not bring A-5 anywhere into the picture once we rule out the acceptance of the voluntary statements of A-1 and A-3 and even A-2 for that matter.

94. One last word that requires to be said is with regard to the applicability of Section 68 of the N.D.F.S. Act and the learned trial judge, by referring to the said Section, has held that the N.C.B. officers are not and cannot be compelled to disclose the source of information with regard to the commission of any offence. In my view, the trial court's reasoning is against the spirit of Section 68 because, on a plain reading of the said Section, it becomes clear that the officer exercising the power cannot be compelled to say as to when he got any information as to commission, of an offence, but the said Section does not preclude the officer concerned from at least disclosing the contents of the information though not the identity of the informant, In this connection, I also refer to the two decisions of the English Courts.

95. In the case of *R v. Agar* reported in (1990)2 All. ER 442, it has been held thus:

Notwithstanding the special rule of public policy which inhibited the disclosure of the identity of informants, the public interest in ensuring a fair trial for a defendant outweighed the public interest in protecting the identity of a police informer if the disclosure of the informer's identity was necessary to enable the defendant to put forward a tenable case that he had been entrapped by the police and the informer acting in concert. Since it had not been possible to put the appellant's case to the police witnesses without asking them whether they had received their information about the appellant from X and the appellant's case had thereby been hindered the appeal would be allowed and the conviction quashed.

96. In another decision, in the case of *Maries v. Beyfus* reported in Vol. XXV Queen's Bench Division 494, it has been held that the prosecution is entitled to refuse to disclose the names of the persons from whom it received the information and nature of the information received, unless upon the trial of a prisoner, the judge is of the opinion that the disclosure of the name of the informant or of the nature of the information, is necessary or desirable in order to show the prisoner's innocence.

97. In yet another decision in the case of *Liladhar Umersi v. Emperor* reported in 1915 Vol. XXIX Indian Cases 79, dealing with Section 125 of the Indian Evidence Act, it has been held by the Judicial Commissioner's Court at Sind that Section 125 of the Indian Evidence Act rests upon public policy and it protects the name of a spy or secret informant, not the nature of the information and it has no application whatever to an informant who lays a sworn information and thereby initiates criminal proceedings.

98. Applying the aforesaid proposition of law to the case on hand, we have seen from the evidence of P.W. 1 that he received specific information from the

informant and it was reduced into writing and it was signed by the informant. But, the said information was not forthcoming in the entire evidence placed on record, his view of the aforesaid ruling, nothing prevented P.W. 1 from laying before the court, the information which was signed by the informant and given to him and, as such, the trial judge was in error in holding that Section 68 of the N.D.P.S. Act gives the officer receiving the information, the protection to refuse to disclose the same.

99. As far as the ruling referred to by the learned senior counsel Shri Urval N. Ramanand for N.C.B. is concerned, in the case of Gyan Chand and Another Vs. State and Another, a learned Single Judge of the Allahabad High Court has taken the view that where there was specific evidence of the officer that on getting the information about likely recovery of contraband from the premises in question, he recorded it in writing and sent it to Deputy Director, there is sufficient compliance of Sections 42(1) and 42(2) and, simply because the written information was not produced before court, the same do not vitiate the proceedings. In the very said decision, reference was also made to the decision of the Apex Court in the case of T. Thomson v. State of Kerala 2004 SCC (Cri) 447, wherein it has been held that there is no statutory requirement that such written record of the information prepared u/s 42(1) and dispatched to the immediate superior officer under Sub-section (2) be produced in the court as a matter of course.

100. In my considered opinion, the aforesaid decision of the Allahabad High Court as well as the decision in Thomson's case are not applicable as far as the facts and circumstances with which we are concerned in these appeals. There is no evidence on record to show that P.W. 1 acted on the information said to have been given to him by the informant and P.W. 1 admits that Ex. P-1 is not the information which was given to him by the informant. Secondly, if there is evidence to indicate that the written record of information prepared u/s 42(1) has been dispatched immediately to the superior, then, as has been held by the Apex Court in Thomson's case, it is not necessary to produce the said information in the court as a matter of course. But, in the instant case, not only there is evidence with regard to the information received by P.W. 1 from the informant which was reduced to writing and signed by the informant, but there is also evidence placed by examining the Assistant Director, who is said to have given directions to P.W. 2 to go ahead with the search and seizure of the car at Renuka Lodge. Thus, even on facts, the aforesaid decisions cannot be of much help to the prosecution.

101. One other aspect which is to be referred to before concluding the judgment is with regard to the submission made by the learned senior counsel for the N.C.B. that the trial judge has not exercised his discretion in controlling the length of cross-examination by the defence counsel. In this connection, the learned senior counsel for N.C.B., referring to the evidence on record, pointed out that the prosecution witnesses were subjected to a lengthy cross-

examination at the hands of the learned defence counsel Shri Hashmath Pasha and this has also resulted in the proceedings being dragged on for long time.

102. In my view, having regard to the nature of the admissions made by the prosecution witnesses in the course of the cross-examination, it cannot be said that the lengthy cross-examination by the defence counsel was unnecessary or unwarranted. But, on the other hand, on a careful scrutiny of the cross-examination portion of each one of the prosecution witnesses not only reveals the great pain taken by the defence counsel, to unearth the truth of the matter and it also, in my view, reflects the anxiety of the learned defence counsel to ensure that the accused are not convicted without a fair trial. In fact, a Constitution Bench of the Apex Court, in the case of *State of Punjab Vs. Baldev Singh, etc.*, has considered the importance of the accused being entitled to a fair trial and has held that a conviction resulting from an unfair trial is contrary to our concept of justice. To use the precise words of the Apex Court in the aforesaid decision, at paragraph-55(4), it has been held thus:

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned officials so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. Use legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

103. Therefore, it has to be said to the credit of the learned Counsel Shri Hashmath Pasha for A-1 and A-3 that the counsel has spared no efforts in trying to unearth the truth of the matter and to ensure that the accused are entitled to a fair trial. As such, I do not see any procedural defect by the learned trial judge in permitting the defence counsel to cross-examine the prosecution witnesses at great length, for it is a well settled notion of evidence that cross-examination is the crucible in which the veracity of a witness statement is tested. Unless the defence is permitted to effectively cross-examine the prosecution witnesses and more so, in cases of the nature coming under N.D.P.S. Act, which is a penal statute having severe sentences being passed on the accused if convicted, a lengthy cross-examination of the prosecution witnesses has only helped in the cause of justice and this court, after a careful examination of the entire evidence

on record in the light of the rulings cited by both sides, has come to the conclusion, that there has been failure on the part of the prosecuting agency to comply with the mandatory provisions of Section 42 of the Act thereby vitiating the entire proceedings.

104. When public interest of society is pitted against the interest of the accused for fair trial and protection of his valuable human rights, it is the former which has to yield to the latter and, in our country, when the preamble to the Constitution states that every citizen is entitled to justice according to law, and as the great British Jurist A.V. Dicey has observed in his classical work "Law and the public opinion" that one of the cardinal principles of democracy being the rule of law, it is incumbent on the part of the prosecuting agency to have strictly followed the provisions of the N.D.P.S. Act and the anxiety or the zeal to secure! the conviction of an accused person at the cost of disregarding and throwing to the winds, the specific mandatory provisions of the N.D.P.S. Act against the authoritative pronouncements made lay the Apex Court in this regard, should not be permitted, lest the accused will be deprived of not only a fair trial, but the rule of law will disappear and, if such thing happens, democracy itself will not survive.

With these passing words, I hold that the conviction of A-1 and A-3 cannot be sustained in respect of the offences with which they were charged and, at the same time, no interference is called for as against the acquittal of A-5 by the trial court and hence, I proceed to pass the following order:

105. Criminal Appeal No. 2236/2006 is allowed. The conviction of A-1 and A-3 by the trial court for the offence u/s 8(c) punishable under Sections 21 and 29 of the N.D.P.S. Act as well as the conviction of A-1 for the offence u/s 8(c) punishable u/s 27-A of the N.D.P.S. Act stand set aside.

106. Criminal Appeal No, 627/2007 is dismissed and the acquittal of A-5 by the trial court is upheld.

107. A-1 and A-3 are said to be in custody and they shall be set at liberty forthwith, if not required in connection with any other case or cases.

108. The operative portion of this judgment shall be sent forthwith to the jail, authorities as well as the trial court for compliance.

109. At this stage, the learned senior counsel for N.C.B. Shri Urval N. Ramanand submitted that the operation of the judgment delivered be stayed for a period of six weeks to enable N.C.B. to approach the Apex Court. For this the submission made by the learned Counsel for A-1 and A-3 Shri Hashmath Pasha is that, there is no provision in the N.D.P.S. Act to stay the judgment of acquittal and, as such, the said prayed be rejected.

110. Having heard both sides and this Court having acquitted the accused on several counts and more particularly, on the failure to follow the mandatory provisions in Section 42 of the N.D.P.S. Act and the other provisions as well, I am

of the view that the prayer made by the learned senior counsel for the N.C.B. cannot be granted and the same is rejected.