
(2018) 02 AHC CK 0033
In the Allahabad High Court
Case No : 3840 of 2016

Suneel Kumar Yadav @ Bhoori

APPELLANT

Vs

Union Of India And Another

RESPONDENT

Date of Decision : 22-02-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 100](#), [Section 313](#) - Person in charge of closed place to allow search - Power to examine the accused
[Indian Penal Code, 1860](#), [Section 176](#)

Citation : (2018) 02 AHC CK 0033

Hon'ble Judges : Dinesh Kumar Singh

Bench : Single Bench

Advocate : Dinesh Kumar Maurya, Sanjay Kumar Singh

Final Decision : Dismissed

Judgement

1. This criminal appeal has been preferred against the judgment and order dated 5.8.2015 passed by Special Judge (P.C. Act)/Additional Session Judge, Gorakhpur in S.S.T. No. 117 of 2011 (State Vs. Suneel Kumar Yadav @ Bhoori and one another), P.S. Cantt (D.R.I.), District Gorakhpur, whereby the accused-appellant Suneel Kumar Yadav @ Bhoori has been convicted and awarded punishment under Section 8/20 (ii) (c) of NDPS Act of 10 years rigorous imprisonment, fine of Rs. 1,50,000/- and in default of payment of fine, one year additional rigorous imprisonment. Further he has been convicted under Section 8/23 (C) of NDPS Act and has been awarded punishment of 10 years rigorous imprisonment, fine of Rs. 1,50,000/- and in default of payment of fine, one year additional rigorous imprisonment and both the sentences have been directed to run concurrently.

2. Facts of the case are as follows.

3. On 5.2.2011 at about 8:00 am Intelligence Officer Arvind Kumar Srivastava (PW-1) of Directorate Revenue Intelligence, Gorakhpur Branch received an specific information that a truck bearing Registration No. UP 92B 0638 was

coming towards Gorakhpur from Nepal through Sonauli border on 5.2.2011, in which contraband charas was being carried in a cavity built in the drivers cabin. After having received this information, PW-1 along with Sri R.L. Pathak, Sr. Intelligence Officer (PW-2), Sri Saumitra Bhattacharya, Intelligence Officer, Sri Sabhajeet Singh, Intelligence Officer (PW-4), Sri Raghav Ram, Head Hawaldar & L.N. Pandey, Driver and two independent witnesses namely Tanvir Alam and Farhan Khan proceeded for Campierganj Crossing located on Sonauli Gorakhpur Highway at about 8:00 hours on the same day and waited for the said truck to arrive. At about 15:20 hours the said truck was spotted at the Campierganj Crossing moving towards Gorakhpur. The complainant along with his colleagues and independent witnesses immediately chased the truck and had over taken it and signaled it to stop. The complainant disclosed his identity along with his colleagues to the occupants of the truck and apprised them about the information that they had received regarding charas being transported in the said truck. The occupants disclosed their names as Suneel Kumar Yadav @ Bhoori, Satyaveer Yadav and Anwar Khan. Initially, they denied about carrying any charas in the said truck but when confronted emphatically with the said information, all the three accepted that the charas was concealed by them in a especially built cavity in the driver's cabin. Thereafter, the complainant gave them option in writing for their personal search and search of their truck to be conducted before a Magistrate or a Gazetted Officer and simultaneously, they were also informed that their team consisted of Gazetted Officers i.e. Sr. Intelligence Officer of Directorate of Revenue Intelligence. At this, all the three gave their consent in writing that the truck could be searched before the said Gazetted Officer of their department. Thereafter, the accused due to requirement of sufficient space for search and for security reasons and requirment of the tools for reaching the cavity proposed to the accused that the truck be taken to Customs Division, Gorakhpur Office premises, to which all the three agreed. Pursuant to the said consent, the truck was brought to the premises of Customs Department, Gorakhpur, where the search was conducted. Personal search of all the three accused was also conducted and the details thereof were recorded in Annexure Ka. The documents recovered pursuant to the search were listed in Annexure-Kha of the said Panchnama. During the search of the truck, a specially built cavity was discovered in the roof of the driver's cabin and substance wrapped in thin transparent plastics (Cellophane) was found, which appeared to be charas, descreption of which was as follows:-

Shape of Charas

Nos. Gross Weight (in Kg)

Net Weight (in Kg)

Rectangular bricks

97 96 95.37

Spherical balls 638 66 65.24

Total

162 160.61

4. Four representative samples, each weighing 25 grams were drawn from both types of charas which were kept in yellow plastic bags. These plastic bags were placed in separate envelopes and they were sealed with DRI seal and markings A-1, A-2, A-3 and A-4 for samples of rectangular shaped and markings B-1, B-2, B-3, and B-4 for the samples of spherical shaped were assigned to them. The case number and date were also written on all the eight envelopes. All the accused, officers and the witnesses made their signatures on all the envelopes. The accused were interrogated and their statements made voluntarily, which were recorded in presence of the witnesses, in which they revealed that the said charas was loaded in the said truck at a place near Dumkibas (Nepal) at the instance of Suneel Kumar (preson responsible for the operation of the said truck) in collusion with one Deep Chand Nepali, whom they met in Nepal and whose address they did not know. The remaining charas (remainder) weighing 160.405 kg was valued at Rs. 48,12,105/- @ Rs. 30,000/- per Kg. On a reasonable belief that the said recovered charas was being transported in contravention of the provisions of Section 8 of the NDPS Act, 1985 (to be referred from here onwards as the Act in short). The said charas was seized under Section 43 of the Act. The said seized charas was stuffed in five plastic sacks and sealed with DRI seals, whereon all the accused, officers and the witnesses made their signatures on the plastic sacks. The truck valued at Rs. 5,00,000/- was found to have been used for transportation of the said charas and, hence, it was also seized under Section 43 of the Act, the same being liable to be confiscated under Section 60 of the Act. The panchnama and recovery memo (Ext. Ka-5) prepared and the seizure proceedings were completed at 22:30 hours on 5.2.2011 and all the accused, officers and the witnesses put their signatures on it and a copy of the same was made available to each accused under their acknowledgment. The statement of accused Suneel Kumar Yadav @ Bhoori was recorded, who appeared in response notice 6.2.2011 issued by the complainant under Section 67 of the Act, in which he reported the facts recorded in Panchnama dated 5.2.2011 and further stated that the registered owner of the said truck was Durgesh Kumar Yadav but it was being operated by Suneel Kumar, Resident of village Rurukhurd, Auraiya. Durgesh Kumar Yadav was also resident of the same village. He further revealed that he had undertaken the job of driver on the said truck upon direction of Suneel Kumar. It was at his instance that he had gone from Firozabad to Nepal with a consignment of bangles loaded on the said truck, a part of which was unloaded at Butawal (Nepal) on 3.2.2011, while the remaining consignment was taken to Narayanghat (Nepal) on 4.2.2011. Thereafter he contacted Suneel Kumar, who directed him to go to Dumkibas (Nepal), where a person called Deep Chand Nepali was to meet him and load the consignment of charas in a specially built cavity in the driver's cabin of the said truck. In compliance with the said direction he proceeded to Dunmkibas and contacted Deep Chand Nepali and with the help of some persons loaded the consignment of charas in specially built

cavity in the driver's cabin of the said truck in the late night of 4.2.2011, whereafter he started for Auraiya crossing from Sonauli Border in the morning of 5. 2.2011. While on way, the said vehicle was intercepted by Officers at Ramchaura. Further, he admitted that he had committed the offence at the direction of Suneel Kumar out of greed for money despite knowing that transporting charas was a punishable offence under Section 20 and 43 of the Act. All the three accused were duly arrested on 6.2.2011 under Section 43 of the Act for smuggling of charas and were disclosed the ground of their arrest. The other two accused also made confessional statement. They were produced before the court same day and were remanded to judicial custody. The confessional statement made voluntarily before Intelligence Officer, was not hit by Section 25 of the Indian Evidence Act. The follow up action was taken on the basis of confessional statements as well as documents recovered from the said truck. One sample each from the charas of both the shapes was sent to Chemical Examiner, Central Revenue Control Laboratory, New Delhi and Government Opium & Alkaloid Works, Ghazipur for being tested. The test report dated 14.3.2011 of Central Revenue Control Lab, New Delhi confirmed that each of the two samples answered positive for charas (Tetrahydrocannabinol). The Test Report No. 58 dated 26.3.2011, sent by the Joint Director, Government Opium & Alkaloid Works, Ghazipur dated 29.3.2011 also confirmed that each of the two samples contained charas (Cannabis) within the meaning of the Act. The registration certificate recovered from the said truck was got verified from the concerned Regional Transport Officer, Jalaun, who reported that it was registered in the name of Durgesh Kumar who had given two addresses, one of which was mentioned in the Registration Certificate and the engine number and chasis number were also found matching with the engine and chasis numbers mentioned in the Registration Certificate. The summons sent on the address of the Durgesh Kumar Yadav were received back with an endorsement that no such person by that name was residing in village Kuthaund. Summon sent to him on his Auraiya address was returned with remark that his old mother was found there who stated that he had gone somewhere for last six months and that he had no knowledge of his whereabouts. The accused had committed violation of Section 8/20/23 of the Act by carrying the seized charas weighing 160.405 kg in truck U.P. No. 92-B 0638 which was liable to be confiscated under Section 60 of the Act. The inquiry against Durgesh Kumar Yadav and Sunil Kumar were pending against whom the complainant would be filed subsequently after its conclusion.

5. With the aforesaid facts, the PW-1 filed the complaint (Ext. Ka-10) in the court of competent jurisdiction on 3.8.2011 with a prayer to summon the accused and put him on trial and award suitable punishment in accordance with law and it was also prayed that the seized charas be confiscated. Upon that complaint, the court below took cognizance against the accused-appellant Sunil Kumar Yadav @ Bhoori, Satyaveer Yadav and Anwar Khan. The file of accused Anwar Khan was separated vide dated 20.2.2013 because of his being a juvenile and, hence, the

trial of only the present accused-appellant and Satyaveer Yadav was held by him in the present S.S.T. The charge under Section 8/20 (ii) (c) and under Section 8/23 (ii) (c) of NDPS Act was framed against the accused-appellant to which he pleaded not guilty and claimed to be tried.

6. From the side of prosecution, in oral evidence Arvind Kumar Srivastava as PW-1, R.L. Pathak as PW-2, Pramod Kumar Pandey as PW-3 and Sabhajeet Singh as PW-4, were examined.

7. From the side of prosecution, Ext. Ka-1 and Ka-2 which are written information given to accused-appellant that his personal as well as search of the truck was to be taken under the provisions of NDPS Act and that, if he wanted, he along with truck could be taken for being searched in presence of a Magistrate or a Gazetted Officer and upon receipt of that notice the appellant had given his written consent saying that his personal search as well as search of the truck could be taken by the Gazetted Officer of the department; recovery memo (Ext. Ka-5); site plan (Ext. Ka-6); confessional statement of accused-appellant under Section 67 of the Act (Ext. Ka-7); complaint before the court of sessions (Ext. Ka-10); Inventory memo (Ext. Ka-11 and 12, were produced in evidence.

8. Thereafter, the evidence of prosecution was closed and the statement of accused was recorded under Section 313 of Cr.P.C., in which he denied the prosecution story and as well as of any such kind of recovery of contraband substance and further that the witnesses being of the same department were giving false evidence. The present appellant stated that earlier he used to drive bus. He was on his bus in Kasba Vidhuna, District Auraiya. The Sunil Kumar, Manager of the Truck and Durgesh Kumar approached him saying that their truck was standing loaded with bangles and their driver had disappeared somewhere but their Munshi Anwar Khan was available, therefore, he should take the truck to the Nepal and unload the said material there. At this he told them that he drives trucks locally, does not know the route of Nepal. Thereafter, this person told him that Munshi Anwar knows the route of the truck and its manager was also related to him, therefore, he consented and started with the truck on 29.1.2011. In Nepal, Munshi Anwar Khan got the clearance at the border. Prior to this, one bag ("petty") was unloaded at Farendia and at two places the bundles of bangles were unloaded at Nepal and by the time of reaching Naraynaghat, the truck had become empty. The owner of the vehicle telephoned on Munshi's mobile and apprised that now he had to take the vehicle to Dumkibas. After reaching there the owner of the truck said that it being hilly region it could not be easy for him to drive the vehicle, therefore, he asked him to handover the truck to one called Deep Chand Nepali who would load the truck and hand over the said truck back to him at the hotel where he would stay back. Deep Chand Nepali took away the truck and returned after eight hours but with an empty truck, by then it had become, time 12:30 hours on 4.12.2011. He told him that he could not get the articles/material from transport company and about this he had apprised the truck owner, at which the truck owner had told him that he

should not bother and truck should be brought back vacant. Thereafter, in the morning of 5.2.2011 he started from Dumkiibas at 10:30 am and was heading towards Sonauli border when the truck was apprehended by the arresting team at Farenda. When he was handed back the truck by Deep Chand Nepali, he did not sense anything abnormal in the cabin nor did Anwar Khan tell him that any contraband substance was kept in the said truck. The other accused Satyaveer Yadav belonged to his village. The owner of the vehicle Sunil Kumar had betrayed him by getting contraband substances placed there in and has got him implicated falsely. He is innocent. About three months after his arrest, the owner of the vehicle Sunil Kumar and one other person were arrested in Nepal and were sent to jail there but Satyaveer Yadav had come with him for the purpose of pleasure trip. Thereafter, the people at his village had held a panchayat against Sunil Kumar. Later on he came to know that Sunil Kumar indulges in this kind of activities. His parents have died and his wife could not come. While making the statement, he started weeping badly. He has examined in defense one witness as DW-1.

9. The learned court below after having heard the learned counsel for the State as well as defense side and after having seen the entire facts on record, found the case proved against the accusedappellant under above-mentioned Sections and has awarded him aforementioned punishment.

10. Perusal of the judgment of the court below would indicate that the learned counsel for the defense had urged before it that the compliance of Section 50 of the Act was not made although the prosecution side stated that it was fully adhered to and also drew the attention of the court below to the position of law as laid down in *Ajmer Singh Vs. State of Haryana*, 2010 (Cr.L.J.) 1899 SC and *Jarnail Singh Vs. State of Punjab*, 2011 (1) SCC (Cr.) 1191, wherein it was laid down by the Supreme Court that the provisions of Section 50 of the Act were applicable in respect of personal search only and not with regard to search made of a bag, brief case or container etc. The learned court below after having considered the 9 rival contentions has taken into consideration the evidence on record and has opined that although the charas was not recovered from the person of the accused, rather it was recovered from the special cavity made in the cabin of the truck, yet the prosecution has made full compliance of Section 50 of the Act, although, it was not required to be complied. It is mentioned by the trial court that the evidence on record would reveal that the accused-appellant was informed by the arresting party that he could opt for his personal search as well as search of the truck to be made before a Magistrate or a Gazetted Officer as it was his right regarding which he had given his consent (Ext. Ka-2) that he was ready to be searched by the Gazetted Officer accompanying the arresting team, therefore, in the light of said evidence on record, it reached the conclusion that the compliance of Section 50 was fully made.

11. Next argument made before the court below was that it was essential to

prove recovery to have been made of contraband substance in presence of two independent witnesses as was provided under Section 100(4) of the Cr.P.C. The prosecution had pointed out the names of two witnesses namely Tanvir Khan and Farhan Khan to be independent witnesses, in presence of whom the recovery was made but they were not examined, which would lead to suspicion about recovery of contraband substance being made from the accused. The learned court below has held that under Section 100 (5) of the Cr.P.C., such witnesses, in whose presence the search is made and, in pursuance thereof, the articles, which are seized at whatever places are indexed, his special summons would be required to be sent to such witnesses to appear before court, which has not been done in the present case, hence, it would be held that the prosecution had not made full compliance of Section 100(4) of the Cr.P.C.

12. Next argument made before the court below was that compliance of Section 57 of the Act had not been made as no information was sent by the arresting team to their Higher Authorities about the arrest of the accused as well as of the seizure of the contraband substance within 48 hours, which is apparent from Annexure-1. In response to this the learned court below has recorded that record reveals that on 7.2.2011, Deputy Director, Regional Office, Lucknow had appointed Arvind Kumar Srivastava, Intelligence Officer, Revenue Intelligence Directorate, Gorakhpur as I.O. in the matter of recovery of 160.605 Kg charas, which indicates that the said appointment of Intelligence Officer was made within 48 hours which would be taken to mean that information of the occurrence was given to the Higher Authorities. However, from the side of prosecution, it was urged that in the light of position of law laid down in State of Punjab vs Balbir Singh, (1994) 3 SCC 299, the provisions of Section 57 of the NDPS Act were only of directory nature and not mandatory.

13. The next argument made before the learned court below was that the accused has been held guilty on the basis of a confessional statement made by him which would not be admissible under Section 25 of the Indian Evidence Act, however, the said argument has been repelled by the court below on the ground that the Officers of the Revenue Intelligence do not qualify for the police Officers or equated with him, hence, the confession made before them would not be taken to be inadmissible under Section 25 of the Indian Evidence Act. In this regard, reliance is placed by the prosecution on the law laid down in Kanhaiya Lal Vs. Union of India, 2008 (2) SCC (Cr.) 330, which makes the confessional statement made before Intelligence Officer of Revenue Department, admissible.

14. Next important argument made before learned court below was that accused-appellant had no knowledge about the charas being kept in the cabin of the truck and that he was deceived by the owner of the truck by getting the said contraband substance kept/placed in the said truck through Deep Chand Nepali, hence, he should not be held guilty as he had no conscious possession of the contraband substance. The learned court below has recorded in the judgment that Intelligence Officer has recorded the statement of accused¹¹ appellant

under Section 67 of the Act, which has been given voluntarily (Ext. Ka-7), in which he has stated that he had told that since a Gazetted Officer was with them, search could be taken in his presence. Initially, he had told that there was no secret place in the truck, which he had spoken due to apprehension, subsequently, he told that there was a secret place carved out in the roof of the cabin of the truck which could be accessed through cabin, which was covered by plank ("Patra") and was fixed with the help of nuts & bolts. He had no tools to open the same and, hence, he had told the officials that the same could be opened at a safe place. Thereafter, he drove the truck with two witnesses and Officers and took the same to premises of Customs Division, Gorakhpur near bus-station where during search of the cabin of the truck, in the roof of it, one secret cavity was found which was 1 and 1/2 feet x 1 and 1/2 feet, which had opening inside and which was sealed by a plank ("Patra") tied with nuts & bolts. In his presence, those nuts & bolts were opened and inside was found charas in rectangular and spherical shapes (97 pieces of rectangular and 638 pieces of spherical shapes). The appellant admitted that the said quantity of charas was recovered from his truck and the same was in his knowledge. Further the learned court below has recorded in the judgment that the appellant stated under Section 313 Cr.P.C. that in Dumkibas, the owner of the truck had telephoned him about the road being hilly, hence, had told him to handover truck to be driven by one Sri Deep Chand Nepali, who was directed to load the truck with consignment and he (accused-Suneel Kumar Yadav @ Bhoori) was directed to remain at the hotel but he (owner of the truck) did not inform as to where Deep Chand Nepali was directed to take the truck, where he (accused- Suneel Kumar Yadav @ Bhoori) could not drive the truck, which was that place where the consignment was to be loaded by Deep Chand Nepali and when the truck was returned to him by Deep Chand Nepali, he found that the truck was empty, why he did not make enquiry that it did not contain any illegal contraband substance. The court held that it was absolute responsibility of the accused-appellant that there was no contraband substance kept in the truck and his plea that he had no knowledge about the contraband substance having been kept in it seems unbelievable. The statement of Rajesh (DW-1) examined by him in defense to the effect that when the charas was being loaded in the truck, he was not in Nepal nor had he seen the contraband substance being loaded in the truck, he has even admitted that accused-appellant had taken the truck to Nepal and has simply stated about his false implication about the recovery of charas but the basis of false implication has not been indicated by him, hence, the learned court below has discarded the plea taken that he had no knowledge that charas was kept in the said truck, and it is held by the court below that he was in conscious possession of the said charas.

15. Heard, the arguments of learned counsel for the appellant as well as learned A.G.A. and perused the entire record.

16. Before this Court the first point which has been raised by learned counsel for the appellant is that he has been falsely implicated as he was only a driver of the

said vehicle in which the said quantity of charas (contraband substance) is being alleged to have been recovered. He had no knowledge that any such contraband substance was kept inside the truck and, therefore, not being in conscious possession, he could not be held guilty. In this regard, he has relied upon *Avtar Singh Vs. State of Haryana*, 2007, Cri.L.J. 4478, and *Mukhtiar Singh Vs. State of Haryana*, 2008 Cri.L.J. 2454.

17. It would be pertinent to see as to under what circumstances the court did not hold conscious possession of the contraband substance in abovementioned cases and whether the facts of the aforesaid cases were comparable with the present case or not.

18. In *Avtar Singh's* case (supra), the facts were that on 31.7.2000, S.I. Subhash Chand with his companion Police Officials was coming from village Amupur towards village Brass in a Government Jeep in connection with patrolling. When police party reached near Kacha path leading to Dera Tehal Singh, a driver of the jeep i.e. accused Avtar Singh applied breaks all of a sudden and seeing police, two persons, whose names were later on identified as accused Binder Singh and Baba Harnam Singh, had fled away, whereas accused Avtar Singh was apprehended. On search being made of the jeep from two gunny bags containing 40 kgs. poppy husk each were found lying in the rear portion of the jeep, out of which, sample of 500 grams from each were taken from the bags and the remaining poppy husk was weighed to be 39 kgs. in each bag. F.I.R. was registered against the accused. Ultimately, the remaining two accused were also arrested and all the three were put to trial. It was found that the prosecution version from the very inception was that when police party was patrolling, it came across a jeep being driven by Avtar Singh whereas Baba Harnam Singh and Balwinder Singh absconded while only Avtar Singh could be apprehended with contraband substance kept in the said jeep. The argument of learned counsel for the appellant centred around the line that since the recovery was effected from rear seat of the jeep whereas the accused was said to be the driver, therefore, he could not be said to have conscious possession of the said contraband, particularly when a person sitting on the rear seat ran away and later on they were acquitted by the trial court and also for the reasons that the appellant was not the owner of the jeep. The High Court held in this case that the no investigation was made regarding the fact as to for what purpose two other accused were travelling in the jeep. No particular question had been asked from the accused as to whether he had loaded the bags in the jeep or whether he had knowledge of the contents of the bag. In absence of such evidence, no presumption under Section 54 of the Act without addressing to the question of the possession, could be drawn against the accused and accordingly the appeal was allowed and the impugned order was set aside and accused Avtar Singh was acquitted. In this case the reliance is placed by the High Court on the law laid down by the Supreme Court in several cases which are mentioned on the paragraph 10 of the judgment which is reproduced hereinbelow for the sake of convenience. "10. The expression "possession" is a polymorphous term which

assumes different colours in different contexts. It may carry different meaning in contextually different backgrounds. As was observed in *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja*, AIR 1980 SC 52 to work out completely logical and precise definition of possession uniformly applicable to all situations in the context of all statutes. The words "conscious possession" connotes a particular state of mind which is deliberate and intended. No doubt, possession could be constructive or physical but still the possession must be to the knowledge of the offender. In this case, there were three accused, out of which two had run away and the conduct of the persons who ran away itself indicates their knowledge about the contraband and excludes the intention of the driver who had been prior to see the police party. Had the appellant been alone in the jeep, then the element of possession could be attributed to him but when the vehicle was occupied by various persons and out of them two showed their nefarious designs by running, then the knowledge could be imputed to them. The failure to give any satisfactory explanation by the accused for being present on that place or in the said jeep as driver, does not prove that he was in possession of these articles. A similar proposition arise before the Apex Court in *Avtar Singh v. State of Punjab*. The facts of the said case reveal that the accused were travelling in the truck belonging to accused No. 5. On checking near village Dhang 16 bags of poppy husk were recovered from the truck. Balbir Chand (appellant No. 3) was driving the truck. A person sitting by the side of the driver and another person sitting backside of the truck ran away leaving the vehicle. The appellants Nos. 1 and 2 and the driver of the vehicle appellant No. 3 were apprehended at the spot. In such situation, the Apex Court while dealing with the issue of possession observed as under (para 6):

Possession is the core ingredient to be established before the accused in the instant case are subjected to the punishment under Section 15. If the accused are found to be in possession of poppy straw which is a narcotic drug within the meaning of Clause (xiv) of Section 2, it is for them to account for such possession satisfactorily, if not, the presumption under Section 54 comes into play. We need not go into the aspect whether the possession must be conscious possession. Perhaps taking clue from the decision of this Court in *Inder Sain v. State of Punjab*, 1973 (2) SCC 372 arising under the Opium Act, the learned trial Judge charged the accused of having conscious possession of poppy husk. Assuming that poppy husk comes within the expression poppy straw, the question, however, remains whether the prosecution satisfactorily proved the fact that the accused were in possession of poppy husk. Accepting the evidence of P.W. 4-the Head Constable, it is seen that appellant No. 3 (accused No. 4) was driving the vehicle loaded with bags of poppy husk. Appellants 1 and 2 (accused Nos. 1 and 2) were sitting on the bags placed in the truck. As soon as the vehicle was stopped by ASI (P.W. 2), one person sitting in the cabin by the side of the driver and another person sitting in the back of the truck fled. No investigation has been directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. The word "possession" no

doubt has different shades of meaning and it is quite elastic in its connection. Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three appellants - one of whom was driving the vehicle and other two sitting on the bags were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence that the appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting in the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be the custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. For instance, if they were labourers engaged merely for loading and unloading purposes and there is nothing to show that the goods were at least in their temporary custody, conviction under Section 15 may not be warranted. At best, they may be abettors, but, there is no such charge here. True, their silence and failure to explain the circumstances in which they were travelling in the vehicle at the odd hours, is one strong circumstance that can be put against them. A case of drawing presumption under Section 114 of the Evidence Act could perhaps be made out then to prove the possession of the accused, but, the fact remains that in the course of examination under Section 313, Cr. P.C. not even a question was asked that they were the persons in possession of poppy husk placed in the vehicle. The only question put to them was that as per the prosecution evidence, they were sitting on the bags of poppy husk. Strangely enough, even the driver was questioned on the same lines. The object of examination under Section 313, Cr. P.C. it is well known is to afford an opportunity to the accused to explain the circumstances appearing in the evidence against him. It is unfortunate that no question was asked about the possession of goods. Having regard to the charge of which appellants were accused, the failure to elicit their answer on such a crucial aspect as possession, is quite significant. In this state of things, it is not proper to raise a presumption under Section 114 of Evidence Act nor is it safe to conclude that the prosecution established beyond reasonable doubt that the appellants were in possession of poppy husk which was being carried by the vehicle."

19. The second citation relied upon by the learned counsel for the appellant is Mukhtiar singh" case (supra). The facts of this case are that, on 2.10.1995, police party headed by S.I. Pawan Kumar, was out on patrolling duty. He received a secret information that accused were habitual in dealing with poppy husk jointly, were coming with poppy husk in a tractor trolley and if a raid was conducted, they could be apprehended. On receipt of the said information, Naka was set up. Seeing a tractor trolley emerge from the side of railway crossing it was directed to stop, which was being driven by Mukhtiar Singh, accused. He stopped the tractor trolley but made an attempt to escape. His co-accused fled

away by jumping from the trolley but Mukhtiyar Singh was intercepted. On interrogation, he disclosed the identity of his co-accused. The S.I. suspected poppy husk to be there in the trolley and, hence, he served a notice upon Mukhtiar Singh calling upon him to tell as to whether he wanted to be searched in presence of a Gazetted Officer or a Magistrate. He opted to be searched in presence of a Gazetted Officer. On receiving a message, DSP reached the spot. At his direction search of the trolley was made and 10 bags of poppy husk were recovered beneath the sand loaded in the trolley. 200 gram of poppy husk was drawn from each bag to serve as a sample and the same was kept into separate parcels. The residue of each bag when weighed, were found to be 35 kgs and they were also turned into parcels and thereafter all the parcels were seized. On return to the police station, the Investigating Officer produced the accused, the case property and the witnesses before the S.H.O., who thereafter, affixed his own seal on the parcels and thereafter the case property was deposited with MHC. After investigation, the charge sheet was filed. In this case, reliance was placed on the law laid down in Avtar Singh Vs. State of Punjab, 2002 (4) RCR (Criminal) 180, which is not being reproduced herein because it would amount to repetition. If the matter was looked in the back ground of observations by the Apex Court in the above mentioned case. It was difficult to say that the appellant was in custody or control of the bags. It was not put to the appellant in his statutory statement that he was found in conscious possession of the bags. He had also not been charged under Section 8 of the Act for carrying offensive goods. Merely because he was driving the tractor, he could not be presumed to be intelligent and conscious possession of the alleged bags of poppy husk. Accordingly, the appeal was accepted setting aside the impugned judgment and the appellant was acquitted.

20. Facts of the above cases are totally different from the facts of the present case because in the case at hand, accused along with two others was found sitting in the truck which was carrying contraband charas in special cavity made in the cabin under the roof which was well covered. There is also a confessional statement by the accused which has been reproduced by the court below in its judgment which clearly indicates that he was in full knowledge about the contraband charas being carried in the said truck. Nowhere had he made an application whether it be at the time of remand or thereafter at the time of trial that he had made no such confessional statement. Only at the time of conclusion of the trial at the stage of recording of statements under Section 313 Cr.P.C., has he stated that he had no knowledge about the contraband substance being kept in the such truck. There was no enmity of the arresting party which could be a motive of false implication of the accused by them.

21. Therefore, it would be treated that this accused had full knowledge about the said contraband substance being transported in the said vehicle. In this regard it would be pertinent to point out that learned counsel for the Union of India has relied upon Dehal Singh Vs. State of Himachal Pradesh, 2010 (9) SCC 85. The facts in which were that at 10:00 am one maruti esteem car was stopped by

PW-16, found two persons sitting in the car, including the driver. PW-16 made an inquiry from the person who was driving car and he disclosed his name as Dehal Singh. The other person sitting on the front seat by the side of the driver seat disclosed his name as Dinesh Kumar, resident of Goa, and the luggage lying inside the car was searched but nothing incriminating was found. Mechanic was called who opened the shield of the windows/doors and then packets of brown colour were found sealed between the shields and doors wrapped with black and read adhesive containing charas. In this case, Supreme Court held that both the appellants had been found travelling in the car with charas which was recovered, therefore they were in possession thereof. They were knowing each other. They were not travelling in public transport vehicle. Hence, conscious possession was attributed to them. Relevant paragraphs 24 and 25 are reproduced hereinbelow:-

"24. Both the appellants have been found travelling in the car from which Charas was recovered and, therefore, they were in possession thereof. They were knowing each other. They were not travelling in a public transport vehicle. Distinction has to be made between accused travelling by public transport vehicle and private vehicle. It needs no emphasis that to bring the offence within the mischief of Section 20 of the Act possession has to be conscious possession. Section 35 of the Act recognizes that once possession is established the Court can presume that the accused had a culpable mental state, meaning thereby conscious possession. Further the person who claims that he was not in conscious possession has to establish it. Presumption of conscious possession is further available under Section 54 of the Act, which provides that accused may be presumed to have committed the offence unless he accounts for satisfactorily the possession of contraband.

25. The view which we have taken finds support from a judgment of this Court in the case of Madan Lal and another vs. State of H.P., 2003 (7) SCC 465, wherein it has been held as follows:

"26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

22. The facts of this ruling are close to the facts of the present case because in the present case also, the accused along with two others was found sitting in the truck which is not a public vehicle rather was a private vehicle. All the three knew each other well and, hence, conscious possession of the illegal contraband substance (charas) would be attributed to them in the present case. Other

citation relied upon by the learned counsel for the Union of India is Mohanlal Vs. State of Rajasthan 2015 (6) SCC 222. The facts of this case are that an F.I.R. was lodged at police station on 13.11.1985 by PW-8 who was posted in the court of Magistrate informing that at the intervening night of 12.11.1985/13.11.1985, it was found by him that locks of the main gate of Malkhana were broken open and the goods were lying scattered as the details of the stolen articles could not be provided by the criminal clerk after he came from Diwali holiday an F.I.R. was lodged for an offense u/s 457 IPC. Presiding Officer, PW-6, on being informed, visited the premises, got Malkhana articles verified and got an inventory prepared by the criminal clerk in charge of the Malkhana, PW-4 on 16.11.1985, it was found that 10 kg 420 gram opium and some other articles were stolen from several packets. In connection with F.I.R. No. 95 of 1985, the applicant was arrested for the offences punishable under Section 457 and 380 IPC, while in custody it was informed by him that he had broken open the lock of the Malkhana of the court and stolen the opium and kept it in white bag and concealed it in a pit under-neath a small bridge. The appellant had to the discovery in presence of independent witnesses. The bag and cloth were taken out by the accused digging the pit and the bag contained 10 kg and 200 gram of opium, the stolen contraband articles from the Malkhana which was the matter of investigation in FIR No. 96 of 1985. The trial court convicted him under Section 18 of the NDPS Act and sentenced him to rigorous imprisonment for ten years and fine of Rs. 1,00,000/- and in default of payment of fine, one year simple imprisonment. Dismissing the appeal, the Supreme Court held that the appellant had requisite degree of control, even if, the said narcotic substance was not with in his physical control at that moment. A person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance, even if he is not, at the moment, in physical control. The situation cannot be viewed differently when a person conceals and hides the prohibited narcotic substance in a public place. It would be pertinent to reproduce here paragraph 27 of the judgment which is as follows:- "27. Mr. Shiv Mangal Sharma, learned Additional Advocate General for the State has also drawn inspiration from Udai Shankar Awasthi v. State of Uttar Pradesh (2013) 2 SCC 435. In the said case, while dealing with the concept of continuing offence, after referring to Section 472 of Criminal Procedure Code, 1973, (CrPC) the Court has stated that the expression "continuing offence" has not been defined in CrPC because it is one of those expressions which does not have a fixed connotation and, therefore, the formula of universal application cannot be formulated in this respect. The court referred to Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneswar Maharaj Sansthan AIR 1959 SC 798, Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath 1991(2) SCC 141 and eventually held thus (Uday Shankar Awasthi's case 2013 (2) SCC 435, SCC p. 446, para 29):

29. Thus, in view of the above, the law on the issue can be summarised to the effect that, in the case of a continuing offence, the ingredients of the offence

continue i.e. endure even after the period of consummation, whereas in an instantaneous offence, the offence takes place once and for all i.e. when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue."

23. In view of law laid down in the above judgment, the Supreme Court has made absolutely clear that even if somebody conceals the contraband substance at a place which is discovered at his instance, it would be taken to be in his conscious possession and for that he would be held liable. In the case at hand, it is absolutely clear that evidence has come on record that in the presence of accusedappellant, the search of the truck was made and from the cavity which was pointed out by him, the alleged quantity of the charas has been recovered regarding which he has already made a confessional statement as well. The finding in regard to the accused being in conscious possession of the said contraband substance recorded by the court below is, therefore, found to be in consonance with law and there is no infirmity in the said finding.

24. Next point, it is argued before this Court that compliance of Section 42 & 50 of the NDPS Act has not been made. In this regard, it would be pertinent to mention that compliance of Section 42 & 50 of the NDPS Act is a finding of fact based on the evidence which has been adduced by prosecution. In recovery memo, it has been recorded that PW-1 had received information on 5.2.2011 at 8:00 am that the Truck No. UP 92-B 0638 coming from Nepal was having a cavity in the driver's cabin, in which charas was being transported, pursuant to which two independent witnesses were taken by him along with companion officers and proceeded towards the informed place from where the said truck was about to pass. Accordingly, the truck was intercepted and three persons were found therein including the present appellant who was driving the same and the other two Satyaveer and Anwar Khan were its cleaner. All of them were informed about the secret information received, but initially they did not reveal about the said truck containing any contraband substance but later on they admitted that there was a secret cavity in the driver's cabin in which charas was concealed by them. After having come to know about the contraband charas, they were given option of being searched personally as well as for the search of the truck to be made in presence of a Magistrate or a Gazetted Officer, if they so opted, and it was also apprised to them that Gazetted Officer was accompanying them in their team before whom they could get themselves searched along with truck. At this, all the three gave a written consent each to be searched in presence of Gazetted Officer, pursuant to which the search was made and 97 pieces of rectangular shaped charas weighing 96 kg and 638 pieces of spherical shapes charas weighing 66 kg were recovered. This statement has been corroborated by the PW-1 saying in examination-in-chief that the departmental information received was that in Truck No. UP-92 B 0638, in driver's cabin there was a cavity in which huge quantity of charas was sealed and it was being brought into India from Nepal, for recovery of whcih on the instructions of his department, two independent witnesses namely Tanvir Alam and Farhan Khan were found outside

his office, who were informed about this piece of information having been received and they were requested to remain present during the recovery proceedings. Both of them had consented to the request, thereafter, both the witnesses were introduced to R.L. Pathak, Sr. Intelligence Officer, Bhattacharya and Sabhajeet Singh, Information Officers, and the driver of the vehicle L.N. Pandey and Raghav Ram, Hawaldar and were told to remain with him during recovery proceedings. All of them had gone in two jeeps on Gorakhpur, Sonauli road to Campearganj and started waiting for the said truck to arrive. On 5.2.2011, at about 15:20 hours the said truck was seen coming towards them at high speed which was chased by them towards Ram Chaura and at about 15:30 hours, it was over taken and was got stopped. Three occupants of it were informed about the information received and were told that the said truck was required to be searched along with their personal search. They denied any contraband substance being with them but they were again apprised that they had to be subjected to search by them then they accepted that they had charas with them. All the three disclosed their names. When it was told by them that they had charas, they were apprised in writing about their right that in case, they wanted to be searched, in presence of a Gazetted Officer or a Magistrate, they could be taken before them for the search. This information was given to each of them separately, which is on record, in his hand writing and is paper No. 5Ka/1, given to the accused Suneel Kumar Yadav @ Bhoori (Ext. Ka-1) and the consent given by him of being searched by the accompanying Gazetted Officer is Ext. Ka-2. Thereafter, the said truck was taken to Regional Customs Office, Gorakhpur for search to be made of the charas kept in secret cavity because the same was required to be made at a safe place which required to be weighed also and it was taken there with the consent of the accused. Personal search of all the three occupants were taken according to rules and from Suneel @ Bhuri D.L. and Rs. 5,000/- were recovered. From the cabin of the truck, insurance, permit and the voters identity card of the accused-appellant were also found. Thereafter, the cavity in the cabin of the driver was got opened which was sealed by a ply wood of 1 and 1/2 X 1 and 1/2 square ft. tied with nuts & bolts, which were opened and from the cavity 96 pieces of rectangular pieces of charas and 638 pieces of charas in spherical shape, total 735 pieces were recovered, which were weighed and their weight was found to be 162 kg with "Panni" and excluding "Panni" it was found to be 160.605 kg. From each packet 25 grams was taken and four samples were prepared. The samples taken from rectangular shaped charas were sealed in four separate envelopes marked as A-1, A-2, A-3 and A-4 and upon them the signatures were made by all the officers and the accused. Similarly, the samples collected from spherical shaped were separately sealed in envelopes and after keeping them in "Panni", these envelopes were marked as B-1, B-2, B-3 and B-4 and these were also signed by the accused persons as well as the witnesses. It was further revealed by them that they had gone from Ferozabad to Nepal by that truck loading therein the bangles out of which some bangles were unloaded at Butawal and rest were unloaded on 4.2.2011 at Narayanghat and thereafter driver Suneel Kumar Yadav @ Bhoori (accused-appellant) contacted

the Manager of the Truck Suneel Kumar on phone, whereon he was told that the empty truck be taken to Dumkibas where he would meet Deep Chand Nepali but would get the consignment loaded in the cavity of the truck and thereafter they would come straight to Auraiya with the said truck without loading any other thing. In compliance with the said direction they had taken the truck to Dumkibas where they met Deep Chand Nepali and in the same night i.e. 4.2.2011, he got the charas loaded in the said truck and sealed the same in the cavity of the driver's cabin. Thereafter, all the three with an intention proceeded towards Auraiya, came to Sonauli border and as soon as they reached the crossing of Campierganj of 5.2.2011 in the morning, they were apprehended at Ramchaura. All of them admitted their guilt in respect of carrying charas due to greed for money. Eight samples, which were taken, of 200 grams each which left the remainder to be 160.45 kg charas which was kept in five plastic sacks and were sealed according to rules and seal of department was affixed thereon and the samples of seal were also prepared. The accused persons and the companion officers and the witnesses had put their signatures. Thereafter, Panchnama was prepared which was read out to the accused, all the witnesses and the officers and their signatures had been obtained thereon. On the said panchnama, impression of the sample seal was also present. With the said panchnama (Ext. Ka-5) the site plan (Ext. Ka-6) was also prepared. Further, it is stated by him in examination-in-chief that all the three sacks had been brought before court, the seal on the sacks was compared with the sample seal affixed on the panchnama and it was found to be the same. Even, the court had compared the same at the time of first remand and found it to be genuine. All the three sacks were opened and out of them 97 rectangular and 638 spherical pieces of charas were found which were recovered from the said truck. The entire recovered charas was exhibited as material Ext.-1 and said truck was also seized. The statement of all the three accused persons including the present accused-appellant were on file and the said confessional statement recorded by the appellant Suneel Kumar Yadav @ Bhuri under Section 67 of the Act was exhibited as Ext. Ka-7). All the three had admitted their involvement in smuggling and the recovery of the contraband substance and accordingly they were arrested on 6.2.2011 and arrest memo was prepared and the copy of the same given to them. All the accused were presented in Court on 6.2.2011 along with recovered contraband substance, from where they were sent to Jail. He further stated that he had made investigation in this case. Out of the samples taken, the samples marked as A-1 and B-1 were sent by him to Central Revenue Control Lab, New Delhi Nirakaran Prayogshala and samples marked as A-2 and B-2 to Government Opium & Alkaloid Works, Ghazipur. These samples were sent along with test memos which were on record and were signed by him under the seal of the Department. A detailed report regarding them was kept on the file which was Paper No. 22 Ka, similarly the test memos of the samples sent to Ghazipur were sent by him under his signatures and a detailed report received from there is paper no. 23-Ka. Both these papers have proved that the said samples were found to be charas. He has proved the complaint filed by him in court (Ext.

Ka-10). He has further stated that on 5.2.2011 the Truck No. UP 92-B 0638, from which 160.405 kg charas was recovered, out of that 200 grams was taken out as sample and inventory of the rest of the charas was prepared in two copies, which was Ext. Ka-11.

25. In cross-examination PW-1 has stated that the secret information about contraband being transported in the truck was with him from before. He did not consider it necessary to produce the accused before any other Gazetted Officer because in their team already there was one Gazetted Officer namely, R.L. Pathak was available. He had not registered this information in his official file that in the cabin of the truck number U.P. 92-B 0638, charas was being carried and that the same was to be recovered. He had received this information orally from Deputy Director, Revenue, Intelligence Directorate, Lucknow Dinesh Baudh on phone and was instructed to act upon that. At the time of occurrence his senior officer was Shri R.L. Pathak, Senior Intelligence Officer. The information which he had received, was also apprised by him to his Senior Officer, and then he also told him that he had already received this information from Shri Dinesh Baudh. The said information was received one day before, that is, on 04/02/2011 and the same was confirmed on 05/02/2011, whereafter their movement had started, when it was also apprised that the said truck would start from Nepal on 05/02/2011 and would pass through Gorakhpur sometime in the afternoon. Our department was DRI, one office each of which is located in Gorakhpur and Lucknow. When he had arrested the accused, at that time compliance of the provisions of section 42 of the Act was done. The information of arresting the accused was passed on to the Higher Authorities but no written document in this regard was available on file. No written order was received by them from the Government of India regarding arrest of the accused.

26. PW-2, R.L. Pathak has stated in examination-in-chief in this regard that on 05/02/2011 he had gone to his office in Gorakhpur, where Intelligence Officer Shri Arvind Kumar Srivastava on the basis of an earlier received information that on the said date a Truck No. U.P. 92-B 0638 with huge quantity of Nepali charas, kept in a secret cavity carved out in the roof of the driver's cabin was to pass through there, had brought two independent witnesses namely Tanvir Alam and Farhan Khan in the office for interception of the truck, who were introduced to him, other Intelligence Officer Shri Saumitra Bhattacharya, another Intelligence Officer Sabhajeet Singh, driver L N Pandey and head hawaldar, Raghav Ram. All of us were informed of this news. On the instructions of the Dept., he along with others were present there for his help. All started for Sonauli road and after reaching near Campierganj, started waiting for the said truck to arrive. Soon after the truck reached near, it was chased and got stopped and the occupants of it were informed about the information received, who ultimately admitted that they had charas in the cabin of the truck in a secret cavity built in there. All of them disclosed their names and after having received the information about charas being there, they were apprised about their right by Shri Arvind Kumar Srivastava of being searched in presence of a Gazetted Officer or a Magistrate,

including the fact that there was a Gazetted Officer (PW-2 himself) accompanying the team, before whom the truck could be searched along with personal search. All the three had given written consent to be searched in presence of the Departmental Gazetted Officer. In cross-examination this witness has stated that his office hours were 9:00 AM to 6 PM. The information was received by him on his telephone, after which he had reached office at 7:00 AM. From which number this information was received, he had not written it down nor could he tell as to who was that Officer who had given this information. This information had reached his house at 6:00 AM. Nowhere it is recorded that after getting information he had come to office because there was no such provision. This information was not passed on by him to any Higher Authority because this information was received from Higher Authorities only. His Higher Authorities were Asst. Director, Deputy Director and Additional Director. Which of these three authorities had given this information, he does not recollect. All these three Higher Authorities were not informed about this news because this news had emanated from them only. He recognises voice of all the three Authorities as he talked to them often. He does not recollect how many times this information was received and how long he had talked on mobile in this regard. Panchnama was prepared in front of him. All the three were asked in writing whether they would like to be searched along with the truck in presence of any Gazetted Officer or a Magistrate. The word "right" was not written in Exhibit Ka-10, but he stated that they were apprised of their right. He could not tell the reason why it was omitted from being mentioned in Exhibit Ka- 10.

27. PW-4, Sabhajeet Singh, Intelligence Officer, Revenue has also stated in this regard in examination-in-chief the same version which PW-1 have stated with regard to receipt of the secret information and with regard to stopping the vehicle which was being occupied by all the three accused and all the three accused being apprised of their right to be searched in presence of a Gazetted Officer or a Magistrate as well as the fact that their team had a Gazetted Officer before whom search could be made and that written consent was given by them, pursuant to which the search was made and the contraband was recovered. In cross-examination this witness has stated that in Gorakhpur Office he had reached at about 8:00 a.m. in the morning, where besides Arvind Kumar Srivastava and Saumitra Bhattacharya there were two other persons, who were introduced as panchas and Senior Intelligence Officer Shri R.L. Pathak was also in the room. On 04.02.2011 he was at his house, then he had received a phone call at about 10:00 am - 11:00 a.m. in the morning of Shri R.L. Pathak to the effect that he had to come for an operation in Gorakhpur. Saumitra Bhattacharya had also been telephoned, but he could not tell as to when he was informed. Both had gone there separately. After reaching office, Arvind told him about the said truck coming from Nepal with contraband, which was to be apprehended for personal search at the Customs Office, Gorakhpur. No charas was recovered from the person of the accused, the same was recovered from the cabin of the truck.

28. It is apparent from the above evidence that all the three witnesses of fact

have clearly stated that a secret information was received from their Higher Authorities with regard to the said truck carrying charas in a cavity carved out in cabin of the driver, however they failed to pinpoint who was that Higher Authority. In this regard it may be mentioned here that in other cases also when mukhbir gives any secret information, it is not essential that the name of mukhbir be disclosed by the witness. Identically it may be held that it was not necessary for the prosecution witnesses to disclose the name as to who had informed them about this occurrence. It has very much been made clear that the said information was received from Higher Authorities of their Dept., hence there was no requirement for reducing the said information into writing to be passed on to the Higher Authorities in compliance of section 42 of the Act. It may also be mentioned here that the Higher Authorities had only authorised the PW-1 to investigate into this matter, who after investigation and finding sufficient evidence on record against the appellant and two others had filed a complaint in the competent Court. Therefore, in such a situation, when the direction was emanating from the Higher Authority itself, there was no need to inform any further Higher Authority in compliance with section 42 of the Act.

29. It would be pertinent to reproduce here the provisions of section 42 of the Act, which are as follows: - "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 para-military 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 is empowered in this behalf by general or special order of the State Government, 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 VA 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 materials 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 VA 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 thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

30. The reliance is placed by the learned counsel for the appellant upon *Kishan Chand vs State of Haryana*, (2013) 2 Supreme Court Cases 502, in which it is held that in *Karnail Singh's case*, (2009) 8 SCC 539, it has been held by a Constitution Bench that if the information was received when the Officer was not in a police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per section 42 (1) (a) to (d) of the NDPS Act and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the Official Superior. The compliance of the requirements of section 42 (1) and 42 (2) of the NDPS Act in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. In special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the Official superior may get postponed for a reasonable period, after the search and seizure. The question is one of urgency and expediency. It was further held by the Constitution Bench in *Karnail Singh's case*, that while total non-compliance with the requirements of section 42 (1) and (2) is impermissible, delayed compliance with satisfactory explanation about the delay, will be acceptable compliance with respect to Section 42 of the NDPS Act. It was illustrated therein that if any delay could result in the accused escaping or the goods or evidence being destroyed or removed, nonrecording in writing of the information received, before initiating action, or non-sending of a copy of such information to the Official superior forthwith, may not be treated as violation of section 42. But, if the information was received when the police Officer was in the police station with sufficient time to take action, and if the police officer fails

to record in writing the information received, or fails to send a copy thereof, to the Official superior, then it will be a suspicious circumstance being a clear violation of the section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the Official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate substantial compliance with section 42 of the NDPS Act or not is a question of fact to be decided in each case.

31. It is apparent from the above position of law that the compliance of the provision of section 42 (1) and 41(2) Cr.P.C. is mandatory, even though the same may be belated with justifiable reasons but total non-compliance of it would adversely affect the recovery as well as the ultimate conviction. It was argued by the learned counsel for the appellant that, in the case in hand, when PW- 1 had received secret information about the said truck carrying contraband charas, the said information ought to have been reduced into writing as per the above-mentioned provisions and it should have been passed on to the Higher Authorities. The same has not been done, hence, the accused appellant deserves to be acquitted.

32. On the contrary, from the side of learned AGA, reliance is placed upon Mohan Lal's case (supra), in which it has been laid down that if a search is made in a public place, the Officer taking the search is not required to comply with subsections (1) and (2) of section 42 of the NDPS Act. It is stated that, in the case in hand, search was made at a public place because the truck was intercepted on the road and it was only for the purposes of safety that it was taken to the Customs Office, Gorakhpur for thorough checking where the contraband was recovered from the secret cavity of the cabin of the driver. The relevant paragraph 32 is reproduced herein below:- "32. In the present case, the High Court has noticed that information was given to the competent authority. That apart, the High Court has further opined that in the case at hand section 43 applies. Section 43 of the NDPS Act contemplates seizure made in the public place. There is a distinction between section 42 and section 43 of the NDPS Act. If the search is made in a public place, the officer taking the search is not required to comply with the subsections (1) and (2) of the section 42 of the NDPS Act. As has been stated earlier, the seizure has taken place beneath a bridge of public road accessible to the public. The Officer, Sub Inspector is an empowered officer under section 42 of the Act. As the place is a public place and section 43 comes into play, the question of noncompliance of section 42 (2) does not arise. The aforesaid view gets support from the decision in Directorate of Revenue vs Mohammad Nisar Holia, (2008) 2 SCC 370 and State (NCT of Delhi) vs Malvinder Singh (2007) 11 SCC 314."

33. Besides this, in Union of India vs. Major Singh and others, (2006) 9 Supreme Court Cases 170, it is held that if a public conveyance is searched in a public place between sunrise and sunset, compliance of section 42 (2) of the Act would not be required. The relevant paragraph 4 is quoted herein below:- "4. Turning

now to section 42 (2) of the Act, in this regard, it may be stated that from the prosecution case and evidence it would be clear that search and seizure was made of a public carrier at the public place and 127 bags of poppy straw (opium) were seized from public carrier. This point is also concluded by a judgment of this Court in *State of Haryana vs Jarnail Singh*, (2004) 5 SCC 188 in which it has been categorically laid down that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by proviso to section 42 for searching the vehicle between sunset and sunrise. In the case in hand the search was made of a public conveyance at a public place between sunrise and sunset. Therefore, the provisions of section 42 (2) of the Act shall have no application to the case. This being the position, the High Court was not justified in acquitting the respondents and the trial Court was quite justified in convicting them."

34. The another important citation which may be relied upon here is *Union of India vs Satrohan*, (2008) 8 SCC 313, in which it is held that if the Empowered Officer himself is a Gazetted Officer, he need not comply with the provisions of section 42 of the Act. The relevant Paragraph No.13 of the said case is reproduced herein below:- 13."So far as the applicability of Section 42 is concerned few decisions need to be noted. In *M. Prabhulal v. The Assistant Director, Directorate of Revenue Intelligence* (JT 2003 (2) Supp SC 459) it was noted as follows:

.....

(14) Section 41 (1) which empowers a Magistrate to issue a warrant for arrest of any person whom he has reason to believe to have committed any offence punishable under the NDPS Act or for search, has not much relevance for purpose of considering the contention. Under section 41 (2) only a Gazetted Officer can be empowered by the Central Government or the State Government. Such empowered officer can either himself make an arrest or conduct research or authorise an officer subordinate to him to do so but that subordinate officer has to be superior in rank to a peon, a sepoy or a constable. Sub-sections (3) of section 41 vests all powers of an officer acting under section 42 on three types of officers (i) to whom a warrant under sub-section 1 is addressed, (ii) the officer who authorised the arrest or search under subsection (2) of section 41, and (iii) the officer who is so authorised under sub-section (2) of section 41. Therefore, an empowered Gazetted Officer has also all the powers of section 42 including the power of seizure. Section 42 provides for procedure and power of entry, search, seizure and arrest without warrant or authorisation. An empowered officer has the power of entry into and search of any building, conveyance or place, break open any door, remove obstruction, seize contraband, detain, search and arrest any person between sunrise and sunset in terms provided in sub-section (1) of section 42. In case of an emergent situation, these powers can also be exercised even between sunset and sunrise without obtaining a search warrant or authorisation, in terms provided in proviso to sub section (1) of

section 42. Subsections (2) of section 42 is a mandatory provision. In terms of this provision a copy of information taken down in writing under sub-section (1) or ground recorded for the belief under proviso thereto, is required to be sent by officer to his immediate superior official. It is clear from section 41 (2) that the Central Government or the State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorise his subordinate on the terms stated in the section. Under sub-section (1) of section 42, however, there is no restriction on the Central Government or the State Government to empower only a Gazetted Officer. But on an officer empowered under sub-section (1) of section 42, there are additional checks and balances as provided in the proviso and also provided in sub-section (2) of section 42. It is clear from language of the sub-section (2) of section 42 that it applies to an officer contemplated by sub-section (1) thereof and not to a Gazetted Officer contemplated by sub-section (2) of section 42, when such a Gazetted Officer himself makes an arrest or conducts search and seizure. It would be useful to also notice section 43 which relates to power of seizure and arrest in a public place. Any officer of any of the departments mentioned in section 42 is empowered to seize contraband, etc. and detain and search a person in any public place or in transit on existence of ingredient stated in section 43. It can, thus, be seen that sections 42 and 43 do not require any officer to be Gazetted Officer whereas section 41 (2) requires an officer to be so. A Gazetted Officer has been differently dealt with and more trust has been reposed in him can also be seen from section 50 of the NDPS Act which gives a right to a person about to be searched to ask for being searched in presence of a Gazetted Officer. The High Court is, thus right in coming to the conclusion that since the Gazetted Officer himself conducted the search, arrested the accused and seized the contraband, he was acting under section 41 and, therefore it was not necessary to comply with section 42. The decisions in *State of Punjab vs Balbir Singh*, (1994) 3 SCC 299, *Abdul Rashid Ibrahim Mansuri vs State of Gujarat*, (2000) 2 SCC 513 and the *Beckodan Abdul Rahim vs State of Kerala*, (2002) 4 SCC 229 on the aspect under consideration are neither relevant not applicable.

.....

15 . Section 41 (2) deals with 2 situations. One is relatable to Gazetted Officer while in the other case the Gazetted Officer may authorise his subordinate to do the relevant act or may do it himself. Section 41 (3) refers to the power under section 42 which refers to subordinates."

35. In the light of above position of law, it is apparent that, in the case at hand, there is no denying the fact that the arresting party comprised Gazetted Officer, hence there was no necessity for compliance of the provisions of section 42 of the NDPS Act and that the argument in this regard of the learned counsel for the appellants does not hold good.

36. Now comes the question as to whether the compliance of section 50 of the Act has been made or not and also whether the same was required to be

complied with or not. In this regard reliance is placed by the learned counsel for union of India upon *Sarjudas Das vs State of Gujarat*, (1999) 8 SCC 508, wherein in paragraph 5 following is held:- "5 . We do not find any substance in this contention as the charas was not found on the person of the appellants but it was found kept in a bag which was hanging on the scooter on which they were riding. Therefore, this was not a case where the person of the accused was searched and from his person narcotic drug and psychotropic substance was found. The correct position of the law on this point has been stated by this Court in *State of Punjab vs Baldev Singh*, (1999) 6 SCC 172."

37. Concerning compliance of section 50 of the Act it would be pertinent to refer here to the law laid down by the Supreme Court in *State of Rajasthan vs Parmanand and another*, (2014) 5 Supreme Court Cases 345, in which it is laid down that if only a bag carried by a person is searched, without there being any search of his person, Section 50 will not have any application, but if the bag carried by him is searched and his person is also searched, Section 50 will have application even if no contraband is recovered from his person. The relevant Para 15 of the said judgment is reproduced herein below:- "15 . Thus, if merely a bag carried by a person is searched without there being any search of his person, section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, section 50 of the NDPS Act will have application. In this case, respondent No. 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of the respondent 2 Surajmal was also conducted. Therefore, in the light of the judgements of this Court mentioned in the preceding paragraphs, section 50 of the NDPS Act will have no application."

38. It is apparent from the above position of law that in the case at hand, the citation relied upon by the learned counsel for the Union of India cited above, would not be applicable, rather the position of law as is made clear in Parmanand's case (supra) would be applicable because it has come in evidence on record that the appellant along with two other co-accused was personally searched, although no contraband substance was found from his person rather the same was recovered from the cavity carved out in the cabin of driver, hence the provisions of section 50 of NDPS Act shall be applicable. It may also be mentioned here that the evidence clearly establishes that all the three witnesses of fact have proved that the accused appellant was apprised of his legal right to be searched in presence of a Gazetted Officer or a Magistrate, if he so desired, and it was also proved that there was Gazetted Officer of the Department who was accompanying the arresting party, in case he wanted to be searched by him and the truck as well, he could opt so. This option was given to the appellant in writing and he consented in writing to be searched by the Departmental Gazetted Officer who was accompanying them, whereafter only the search was made and the contraband substance recovered from the said cavity. Therefore there is no question of non-compliance of the provisions of Section 50 of NDPS Act in the case at hand. Much emphasis was laid by the learned counsel for the appellant

during arguments that the appellant was not apprised of his legal right of being searched before a Magistrate or a Gazetted Officer because word against "legal" does not find mention in the recovery memo. This argument deserves to be repelled on account of the interpretation made by the Supreme Court in *Dehal Singh vs State of Himachal Pradesh*, (2010) 9 Supreme Court Cases 85 (supra), which has been relied upon by the learned counsel for the Union of India, the relevant paragraph nos. 16, 17, 18 and 19 of which are reproduced herein below:- "16 . Mr. Rai, then submits that though option was given to the appellant to be searched before a Gazetted Officer or nearest Magistrate but they were not apprised of their right to be searched in their presence and hence the procedure followed does not fulfil the requirement of section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act"). He emphasised that the accused is not to be given an option to be searched in presence of the Gazetted Officer or the Magistrate but to be apprised of his right to be searched in their presence. According to him conveying option and apprising the right are distinct. According to him, this does not satisfy the mandate of section 50 of the and once its violation is established the search and seizure is rendered illegal and on this ground alone the appellants conviction is vitiated. He points out that charas was not recovered from the possession of the appellants but from the vehicle, but nonetheless the appellants were also searched and thus it was obligatory to follow the provisions of section 50 of the Act.

17 . Mr. Rai finds support to the aforesaid submission from the decision of this Court in *Dilip vs State of U.P.*, (2007) 1 SCC 450 and our attention has been drawn to Para 16 of the judgment which reads as follows: (SCC page 456)

"16 . In this case, provisions of section 50 might not have been required to be complied with so far as the search of a scooter is concerned, but, keeping in view the fact that the person of the appellants was also searched, it was obligatory on the part of PW 10 to comply with the said provisions. It was not done."

18 . The above-mentioned submission of Mr. Rai does not commend us at all. In the present case the vehicle was searched and the charas was recovered from the vehicle and the persons of the appellants were not searched. As the recovery has been from the vehicle the provision of section 50 of the Act, in our opinion, was not required to be complied with. It is relevant here to mention that the appellants were not searched at the place where the vehicle was intercepted and searched but after they were arrested, and brought to the police station, their search was made to find out the articles possessed by them before lodging them in lock-up. Not only this, the prosecution has also claimed compliance with section 50 of the Act.

19 . Section 50 (1) of the Act, which is relevant for the purpose, reads as follows:

"50 . Conditions under which search of persons shall be conducted. - (1) when any officer duly authorised under section 42 is about to search any person under

the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 to the nearest Magistrate."

From a plain reading of the aforesaid provision it is evident that it comes into play only when search of a person other than vehicle, etc. is taken. Further the authorised officer is to apprise the person about to be searched to be taken to the nearest Gazetted Officer or to the Magistrate, if the person about to be searched so requires. Such an option was given to the appellants and, in our opinion, it is nothing but apprising them of their right. Option to choose is given to an accused when he has the right to choose. It is communication of the right either to accept or reject. Therefore, in our opinion giving the appellants option to be searched satisfied the requirement of section 50 of the Act."

39. From the above position of law it is clear that, the compliance of section 50 of the NDPS Act would be treated to be sufficient in the case in hand , if option was given to the accused to choose as to whether he wanted to be searched by a Gazetted Officer or a Magistrate. Merely because word "legal" was not mentioned in the mode chosen to apprise the accused of his above right, would not amount to non-compliance of the provisions of section 50 of the Act. Therefore the objection in this regard of learned counsel for the appellant does not sustain. In the estimation of this Court it is well proved that the prosecution had complied with the provisions of section 50 of the NDPS Act.

40. The next point raised by the learned counsel for the appellants is that the prosecution has not complied with the provisions of section 57 of the NDPS Act. Section 57 of the Act provides that whenever any person makes any arrest or seizure under the Act, he shall within 48 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. The provision of this section has been interpreted by the Supreme Court in *Sajan Abraham vs State of Kerala*, (2001) 6 SCC 692 and it had been expounded that section 57 was not mandatory in nature so much so that if a substantial compliance thereof was made, it would not vitiate the case of the prosecution. In *Balbir Singh's case*, (1999) 6 SCC 172, it was enunciated adverting to section 52 and 57 of the Act that these provisions contained certain procedural instructions for a strict compliance by the officers, but clarified that if there was none, such omission by itself would not render the acts done by them null and void and at the most, it may affect the probative value of the evidence regarding arrest or search and in some cases, it may invalidate such arrest or search. It was further held that it must be established that non-compliance had caused prejudice to the accused persons and had resulted in failure of justice. In the present case it may also be taken into consideration that a Gazetted Officer was also accompanying the arresting party, who is a Higher Authority. The purpose of sending report of arrest and seizure to the Higher Authorities is to avoid false implication considering the fact that a Gazetted Officer enjoys more

confidence of public. Therefore in the case at hand there being a Gazetted Officer accompanying the arresting party, no prejudice would be taken to have been caused even if report was not sent to their Higher Authorities. The prosecution has proved beyond reasonable doubt that the contraband substance recovered from the truck was sealed properly under the seal of the Dept. of PW-1 with his signature and the samples taken therefrom were also separately sealed and the same were sent to the two different laboratories one at Delhi and the other at Ghazipur and from both the laboratories the report tested positive for charas. There was no dispute with regard to sample seals. The recovered contraband substance was presented before Court during statements of the witnesses of prosecution, who identified them as the same substance which was recovered from the truck, the sample of which was found positive for charas by the laboratories. Hence, the recovery from the conscious possession of the appellant has been well proved by the prosecution, therefore, the burden shifted upon the accused under sections 25 and 54 of the Act to explain how he came in possession of the said charas. In *Madan Lal and another vs State of HP*, 2003 (7) SCC 465, following is held:- "26 . Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of section 54 where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of section 35 and 54 of the Act."

41. In the case at hand, it is stated by the accused in the statement under section 313 Cr.P.C. that the owner of the truck Sunil Kumar son of Tale Singh had betrayed him and had got him falsely implicated because when he started from Nepal he did not know that Deep Chand Nepali had stuffed illegal Nepali charas in the truck. He has tried to prove his defence by examining DW-1, Rajesh, who has stated that he knew Suneel Kumar Yadav @ Bhoori since long, who used to drive vehicle with him for about 4 - 5 years. Suneel Kumar Yadav @ Bhoori was a driver of the bus while he was its conductor. On the date of occurrence, the owner of the vehicle, Sunil Kumar had requested the accused to drop his vehicle in Nepal and thereafter he has been falsely implicated in this case. He had no other case against him. In cross-examination he has admitted that he did not know Sunil Kumar son of Tale Singh nor did he ever drive his vehicle. Since he did not know Sunil Kumar son of Tale Singh, how could he know that it was Sunil son of Tale Singh who asked the accused to drive his vehicle up to Nepal. Therefore on the basis of statement of DW-1, it is not proved that the accused has been falsely implicated. Moreover, the accused ought to have been vigilant while proceeding from Nepal and should have become suspicious when he received direction from the owner or the manager of the truck that he should be

drive the truck back empty, although it was spoken that Deep Chand would load the consignment on the truck and would hand over the truck back to him to be driven back to India. His not doing so creates doubt about his conduct being suspect. In addition to that he has also made a confessional statement about recovery of the said contraband substance from the truck which he was driving. At no point of time right from the stage of remand till final stage of the case, was it ever stated by him that the confessional statement was not made by him and the same was forcibly obtained, hence the same would be treated to have been made voluntarily and worth believing. The interpretation in respect of confessional statement has been made In Ram Singh vs Central Bureau of Narcotics, (2011) 11 Supreme Court Cases 347, in which the relevant paragraph are as follows:- "15 . Now, we proceed to consider the second question set out at the outset and in order to answer that we deem it appropriate to reproduce section 24 of the Evidence Act which reads as follows:

"24 . Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding. - A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

From a plain reading of the aforesaid provision it is evident that a confession made by an accused is rendered irrelevant in criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise with reference to the charge against the accused.

16 . A confession, if it is voluntary, truthful, reliable and beyond reproach is an efficacious piece of evidence to establish the guilt of the accused. However, before solely acting on confession, as a rule of prudence, the Court requires some corroboration but as an abstract proposition of law it cannot be said that a conviction cannot be maintained solely on the basis of confession made under section 67 of the Act.

17 . Bearing in mind the the principles aforesaid, now, we proceed to consider the facts of the present case. The appellant's first confession was recorded by PW-6 Jagdish Mawal on 19-7-1997 and he was produced before the Court on 20-7-1997 and he made no grievance in regard to the confession recorded. Another confession was recorded on 20-7-1997 and, thereafter, he was produced before the Special Judge on 21-7-1997 and a copy of the police diary was handed over to him. This obviously would have contained the confessions made by him. No complaint about the same was made then also. Thereafter the appellant was produced before the Court several times but he never retracted his confession. The appellant retracted the confession made by him for the first time

in his statement under section 313 of the Code of criminal Procedure.

18 . In our opinion, when an accused is made aware of the confession made by him and he does not make complaint within a reasonable time, the same shall be a relevant factor to adjudge as to whether the confession was voluntary or not. Here in the present case the appellant was produced before the court on several dates and at no stage he made any complaint before the Special Judge of any torture or harassment in recording the confession. It is only when his statement was recorded under section 313 of the Code of Criminal Procedure that he retracted and denied making such a confession and went to the extent of saying that his signatures were obtained on blank pages. In the facts and circumstances of the case we are of the opinion that the confessional statements made by the appellant were voluntary in nature and could form the basis for conviction.

19 . The view which we have taken above finds support from the judgment of this Court in *M. Prabhulal vs Directorate of Revenue Intelligence*, (2003) 8 SCC 449, in which it has been held as follows: (SCC page 452, Para 5).

"5 . It has been established that the Customs Office was about 20 km from the place where the truck and the car were apprehended. Having regard to the large quantity of the heroin, the said vehicles with the Accused 2, 3 and 6 were brought to the Customs Office. Further, accused 1 and 2 did not know Tamil. A Hindi-knowing officer had to be arranged. There was, under the circumstances no delay in recording the statements of the appellants. Further, it is also to be borne in mind that the appellants did not make any complaint before the Magistrate before whom they were produced complaining of any torture or harassment. It is only when their statements were recorded by the trial Judge under section 313 of the Code of Criminal Procedure that a vague stand about the torture was taken. Under these circumstances, the confessional statements cannot be held to be involuntary. The statements were voluntarily made and can, thus, be made on the basis of the appellants' conviction."

(emphasis supplied)

20. The same view has been reiterated by this Court in *Kanhaiyalal*, (2008) 4 SCC 668 in which it has been observed as follows: (SCC page 682, Para 47)

"47 Since it has been held by this Court that an officer for the purpose of Section 67 of the NDPS Act read with section 42 thereof, is not a police officer, the bar under Sections 24 and 27 of the Evidence Act cannot be attracted and the statement made by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. Since a conviction can be maintained solely on the basis of a confession made under Section 67 of the NDPS Act, we see no reason to interfere with the conclusion of the High Court convicting the appellant."

The second question posed at the outset is thus answered accordingly."

42. In the light of above position of law, there is no reason why the confession

made by the appellant be not taken to be voluntary and why the said confession single-handedly be not treated sufficient enough to hold him guilty.

43. The other arguments made by the learned counsel for the appellant are not very significant. It was argued that the size of the cavity, that is, 1 1/2 feet ? 1 1/2 feet would not be adequate enough to stuff the quantity of charas, which is alleged to have been recovered. This argument also does not hold good because the depth could be more which has not been mentioned. Moreover no crossexamination on this point has been made from the witnesses. Moreover there was no enmity of the accused appellant with the arresting party and there was no reason of false implication.

44. Thus in view of the above analysis, this Court is of the view that the prosecution has succeeded in proving the charges against the accused appellant under the aforesaid sections beyond reasonable doubt. Therefore, the appeal deserves to be dismissed and is, accordingly, dismissed.

45. Lower court record be returned immediately with a copy of the judgment and order of this Court, for immediate compliance.