

(2014) 03 DEL CK 0142
In the Delhi High Court
Case No : Criminal Appeal 944 of 2010

Sunil Kumar Yadav @ Soni

APPELLANT

Vs

N.C.B.

RESPONDENT

Date of Decision : 18-03-2014

Acts Referred:

Constitution of India, 1950 — Article 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 313 451
Evidence Act, 1872 — Section 24 25 26 27
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(b)(C)
20(b)(ii)(B) 20(b)(ii)(C) 20(ii)(C) 29

Citation : (2014) 2 JCC 96

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : S.K. Santoshi and Mr. Sanjeev Kumar, for the Appellant; Satish Aggarwala, for the Respondent

Final Decision : Disposed Off

Judgement

V.K. Jain, J.—The case of the respondent NCB, in nutshell, is as follows.

On 16.9.2004 at about 6.00 pm, Shri N.S. Yadav, Intelligence Officer of NCB received a secret information that one person, namely, Soni aged about 22-23 years and resident of kharkhari Jatmal, Nazafgarh, Delhi would deliver about 10 kilogram of hashish out of the huge quantity of 75 kilogram received by him, to one of his customers at Subji Mandi, Nazafgarh between 3.00 pm to 4.00 pm on the next day. After the information had been reduced into writing and submitted to a superior officer, a search authorization was drawn in favour of Shri H.K. Pandey, Intelligence Officer and a team consisting of Mr. H.K. Pandey, Mr. Rajeshwar Singh, Mr. Mangal Dass, Mr. Ashwani Kumar, Mr. N.S. Yadav and other staff members reached the aforesaid spot where they met two public witness, namely, Dev Baux and Manoj. When the information was shared with them, they agreed to join the team of NCB officers. At about 3.20 pm, a person wearing kurta pajama and having light beard got down from a bus at the above-referred

bus stand and started conversing with a young person who was already waiting for him. After a few seconds, the person who was waiting at the bus stop handed over a plastic bag to the appellant. As soon as it was done, both of them were encircled by NCB officials and were questioned.

This is also the case of the complainant/respondent NCB that a notice u/s 50 of the Narcotic Drugs and Psychotropic Substances Act (for short "NDPS Act") was served to both the above-referred persons and they were told that they could ask that the search be conducted in the presence of a Magistrate or a gazette officer, that being their legal right. Both the persons, however, stated that NCB officers could take their search and also wrote so on their respective notices. On search of the plastic bag in the hand of the person who was wearing kurta pajama and had light beard, namely, Krishan Kumar, solid black coloured slices were found, which on being tested with the help of field testing kit gave positive test for hashish/charas. On being weighed, it was found to be 10 kilograms. Two samples of 25 gms each were drawn from those slices and the remaining quantity of hashish was packed in the same plastic bag. The samples were put in two polythene bags, were stapled and then again put into white envelopes. Paper slips bearing signatures of the appellant and Krishan Kumar as well as panch witnesses and Shri H.K. Pandey, Intelligence Officer were pasted on the envelopes which were sealed with the seal of "Narcotic Control Bureau-DZU5". The remaining quantity left in the white plastic bag was sealed with a plastic rope after affixing a cardboard on it. The cardboard had on it a paper slip signed by both the above-referred persons as well as by Shri H.K. Pandey and the panch witnesses.

2. When the NCB officers asked the appellant as to where he had kept the remaining quantity of drug, he stated that the same was lying at his village Kharkhari Jatmal Nazafgarh, Delhi. Thereupon, NCB officers decided to immediately raid the aforesaid house and requested the panch witnesses to accompany them. The panch witnesses agreed to their request. The NCB team reached the house of the appellant at 4.20 pm. The door was opened by a person who gave his name as Sunil Kumar and claimed that he was waiting there to receive some cash from the appellant, for the hashish which he had delivered to him. Two plastic bags were found lying on the floor in the room. The contraband found in those bags was identical in shape, size and colour to the substance which had been seized at the bus stop. A small quantity of the stuff was taken out from both the bags and on being tested, it was found to be charas. The weight of one bag was 30 kilogram whereas other bag was of 33.75 kilogram. Two samples of 25 gms each were drawn from each bag. The samples were put in polythene bags, stapled and then put inside white envelopes. The paper slips bearing dated signatures of the appellant, Krishan Kumar, Sunil Kumar and Shri H.K. Pandey was pasted on those envelopes which were also sealed with the seal of "Narcotic Control Bureau-DZU5" The remaining hashish was kept in the same plastic bags and their mouth were tied with plastic rope. These bags also were sealed the way other bag was sealed.

3. This is also the case of the respondent NCB that Shri H.K. Pandey served summons to the appellant as well as Sunil Kumar, who was found present in the room, u/s 67 of the NDPS Act, on 17.9.2004, requiring them to appear in the NCB office. Similar notice was served on Krishan Kumar as well as the public witnesses Shri Manoj and Dev Baux. Pursuant to the aforesaid summons, the appellant appeared before Shri Vikas Kumar, Intelligence Officer of NCB at 1.30 pm on 17.9.2004 where he made a voluntary statement which, on his request was written by another officer Shri Mangal Dass. In his statement, he, inter alia, admitted that on 17.9.2004, he was waiting near bus stand of Subzi Mandi, Nazafgarh along with 10 kilogram of charas kept in a small plastic bag and when Krishan Kumar came there, the bag was handed over to him. The appellant is alleged to have admitted the recovery of 10 kilogram of hashish from Krishan Kumar as well as 40 kilogram of hashish from his house. According to NCB, similar statement was made by Krishan Kumar who claimed that one Jagdish had promised to give money to him for bringing charas.

4. Three persons, namely, the appellant Sunil Kumar Yadav @ Soni and Krishan Kumar who was later convicted along with him and Sunil Kumar, S/o. Late Anoop Prasad who died during trial, were prosecuted by NCB. All the three persons were charged u/s 20(ii)(C) of NDPS Act read with Section 29 thereof. Since they pleaded not guilty to the charge, 15 witnesses were examined by prosecution. No witness was examined in defence.

5. PW-12 Shri N.S. Yadav, Intelligence Officer, NCB, inter alia, stated that on 16.9.2004, he received a secret information from a reliable source that a person, namely, Soni would deliver 10 kilogram hashish, as a part of big consignment received by him, to one of his customers at Subji Mandi, Nazafgarh between 3.00 pm to 4.00 pm on 17.9.2004. The information Ex. PW 12/A was reduced into writing (Ex. PW 12/A) and placed before Shri R.R. Kumar, Superintendent. He further stated that on 17.9.2004, he along with other members of the NCB team, recovered 10 kilogram of hashish from Sunil Kumar and Krishan Kumar at bus stop Subji Mandi, Nazafgarh. He also deposed with respect to service of notice u/s 50 of the NDPS Act upon the appellant and Krishan Kumar and claimed that both of them said that they did not want to be searched in the presence of a gazetted officer or a Magistrate. He also deposed with respect to drawing of two samples weighing 25 gms each from the bag containing hashish and sealing of the samples as well as the residual substance with the seal "Narcotic Control Bureau-DZU5". He claimed that the mouth of the bag containing the residual substance was tied with the rope and sealed by affixing cardboard and paper seal in the same manner in which the samples were sealed. He further stated that when Shri H.K. Pandey was preparing panchnama, the appellant told him that the part of the consignment which he had received was lying in his house at Kharkhari, Jatmal, Nazafgarh. Thereupon, they along with the public witnesses, went to the house of the appellant in Kharkhari, Jatmal, Nazagarh. The house was opened by a person whose name later on came to be known as Sunil. He further stated that the appellant Sunil opened the room on the left side of his

house and two plastic bags were lying on the floor of that room. According to him, after serving notices u/s 50 of the NDPS Act and informing the appellant and Sunil Kumar that it was their legal right to be searched in the presence of a gazetted officer or a Magistrate, the contraband found in the room was tested with the help of field testing kit and on being tested, it was found to be hashish. After drawing 2 samples of 25 gms each from both the bags, the samples were kept in polythene and then in white envelopes which were sealed with the seal of "Narcotic Control Bureau-DZU5" after fixing a paper seal with the signature of panch witnesses, Shri H.K. Pandey and the accused persons on them. He further stated that the plastic bags containing residual contraband were also tied with the cardboard and paper slips were affixed on the cardboard. The paper slips had dated signatures of the above referred persons i.e. accused persons, Shri H.K. Pandey and the public witnesses and were sealed with the seal in such a way that the bag could not be opened without breaking the seal/cutting the rope/thread. He claimed that nothing could be taken out from the bag, which after sealing were marked as B" and C".

6. PW 7, Shri H.K. Pandey corroborated the deposition of PW 12 Shri N.S. Yadav in all respects including the appellant Sunil Kumar @ Soni being found present at the Bus Stand, his co-accused Krishan Kumar coming there and the appellant handing over a plastic bag to him. He also corroborated the deposition of Shri N.S. Yadav with respect to service of notice u/s 50 of the Act, the response to the said notice, recovery of contraband from the bag, drawing of samples and sealing of the samples as well as the residual substance with the seal of NARCOTIC CONTROL BUREAU DZU5. He also deposed with respect to their visiting the house of the appellant in Village Kharkhari Jatmal, the appellant opening a room in the said house with the key he had with him and recovery of contraband found in two bags lying in that room. He also deposed with respect to drawing of samples from the aforesaid bag and sealing of the samples as well as the bags containing residual substance with the same seal.

7. PW 2 Shri Rajeshwar Singh deposed with respect to recovery of 10 kg of hashish at the Bus Stand, drawing of panchnama and recovery of contraband from the house in Village Kharkhari Jatmal.

PW 3 Shri P.L. Verma, who was an official of NCB on 17.9.2004, inter alia stated that on the aforesaid date seal of NARCOTIC CONTROL BUREAU DZU5 was issued by him to Shri H.K. Pandey after making an entry in the register, a copy of which Ex. PW 3/A. The seal was returned to him at 7:15 p.m. on the same day. According to the witness Shri H.K. Pandey deposited the case property samples and CRCL form with him on 17.9.2004 and an entry in this regard was made by him in the register. A copy of the said entry is Ex. PW 3/B. He further stated that the samples-A1, B1 & C1 were sent by him by forwarding letter Ex. PW 3/C.

PW 4 Shri Vikas Kumar inter alia stated that on 17.9.2004, the appellant Sunil Yadav @ Soni came to his office with NCB officers and expressed his desire to make a statement. He told the appellant that the said statement could be used

against him or any other person. According to the witness, the appellant told him that he could not write whereupon Shri Mangal Dass, who was present there, was requested to write his statement. Mangal Dass accordingly wrote the statement of the appellant Ex. PW4/A, which was read over to him and accepted by him to be correct. He further stated that on 20.9.2004, Shri P.L. Verma, Superintendent gave to him three samples, two test memos in duplicate and a forwarding letter dated 18.9.2004. The samples were sealed with the seal of NARCOTIC CONTROL BUREAU DZU5 and were deposited by him with CRCL where it was received by one Mr. P.K. Aggarwal who gave him receipt Ex. PW 4/B. The receipt was handed over by him to Shri P.L. Verma. According to him there was no tampering with the samples so long as they were in his custody. He identified the appellant Sunil Kumar Yadav @ Soni as the person whose statement he had recorded.

PW 8 Inspector Ashwani Kumar inter alia stated that after medical examination of the accused persons on 18.9.2004, he had submitted report u/s 57 of NDPS Act Ex. PW 8/C to his superior officer and the said report bears his signatures at point "A" and that of the Superintendent at point "B". During cross-examination he first stated that only one panchnama pertaining to both the recoveries was prepared and no panchnama at Subzi Mandi Bus Stop was prepared. Later he changed his statement and said that a panchnama was prepared at the spot and during the preparation of the panchnama the accused had told Shri H.K. Pandey that rest of the material was lying in Village Kharkhari Jatmal.

PW 9 Malkeet Singh was the driver of the vehicle in which the NCB team travelled on that date. According to him, after they had reached Subzi Mandi Bus Stand NCB officials had come back after about 30-45 minutes. During cross-examination he stated that the officials of NCB had come back after half an hour or 45 minutes. He also claimed that after reaching the Village the officials had come back after about 30 minutes.

PW 10 Shri D.K. Beri is the Chemical Examiner who proved his reports Ex. PW 10/A and Ex. PW 10/B.

PW 11 Shri P.K. Aggarwal who was posted in CRCL at the relevant time inter alia stated that on 20.9.2004, Vikas Kumar brought three sealed samples marked as A1, B1 & C1 along with a forwarding letter and two set of test memos. The samples were sealed with the seals of NARCOTIC CONTROL BUREAU DZU. One paper slip bearing five (5) signatures was also pasted on each of the sample packets. According to the witness the impression of the seal was also tallied with the facsimile given on the test memo and later the samples were allotted to Shri D.K. Beri, Chemical Examiner. He further stated that on 29.12.2004, the samples were taken out of the strong room in the presence of Chemical Examiner, the seals were checked and found to be correct and thereafter they were opened and after taking their weight the samples were tested.

PW 13 Shri Mangal Dass stated that on 17.9.2004, he had written the statement

of the appellant Sunil Kumar @ Soni as per his dictation and his said statement was signed by him on each page.

PW 14 Shri R.R. Kumar was posted as the Superintendent in NCB on 16.9.2004. He inter alia stated that on the aforesaid date Shri N.S. Yadav had placed before him the information Ex. PW 12/A and thereafter a search authorization Ex. PW 7/A was issued by him in favour of Shri H.K. Pandey. He further stated that Shri H.K. Pandey submitted a seizure report u/s 57 of the NDPS Act to him on 17.9.2004 and on 18.9.2004, he submitted another report regarding the arrest of the appellant.

8. In his statement u/s 313 of Cr.P.C., the appellant denied the allegations against him. He also claimed that his signatures on the papers were obtained by NCB officers by use of force, against his wish. According to him nothing was recovered either from his possession or at his instance.

9. Vide impugned judgment dated 4.5.2010, the appellant was held guilty under Sections 20(b)(ii)(C) and 20(b)(C) read with Section 29 of NDPS Act. Vide impugned Order on Sentence dated 19.5.2010, the appellant was sentenced to undergo RI for ten (10) years and to pay fine of Rs. 1.00 lakh or to undergo RI for one (1) year in default under Sections 20(b)(ii)(B) of NDPS Act. Identical sentence was awarded to him u/s 29 read with Section 20(b)(C) of the Act. Being aggrieved from his conviction and sentence awarded to him, the appellant is before this Court by way of the present appeal.

10. The impugned judgment has been assailed by the learned counsel for the appellant on the following grounds:

a. Panchnama was not prepared on the spot.

b. The information with respect to hashish alleged to have been recovered from the house of the appellant was not recorded, thereby violating Section 42 of the Act.

c. The packets in which the residual hashish was kept, had been stitched from bottom as well as on both sides and, therefore, it was possible to tamper with the case property by removing the stitches and then again stitching the bags.

d. According to PW 9 Malkeet Singh, driver of the vehicle the NCB officials spent only about 30 minutes in the Village and it was not possible for the entire exercise to be completed within such a short time, which in turn would indicate that the sealing and writing work, etc. was not done in the house.

e. The statement u/s 67 of the Act was retracted by the appellant.

f. The weight of the samples when weighed in the CRCL was found to be 40.5, 42.9 and 43.3 though the case of NCB is that they had drawn samples weighing 25 grams each.

In support of his contention, the learned counsel for the appellant has relied

upon Custom Vs. Jorawar Singh Mundy, Mobi Fathu Bha Mulani vs. NCB 2001 (1) JCC (Delhi) 337, Valsala Vs. State of Kerala, Rajesh Jagdamba Avasthi Vs. State of Goa, Mahender Singh @ Sonu vs. State 2009 (4) JCC (Narcotics) 202, Praneet Ghildyal vs. State 1992 JCC 178, DRI Vs. Raj Kumar Mehta & Ors. CrI. A. No. 275/1998, decided on 12th July, 2011, Union of India (UOI) Vs. Bal Mukund and Others, Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat,

11. The learned counsel for the NCB contended that:

a. The panchnama was prepared partly at the bus stand and partly in the house of the appellant.

b. The time spent by NCB team in the Village having been given by PW 9 by estimate, it would have no bearing on the merits of the case.

c. The information with respect to Hashish being available in the house of the appellant was recorded in the panchnama itself, at the bus stand, before proceeding to the Village of the appellant.

d. The appellant did not retract his statement when he was produced before the Magistrate on 18.9.2004, which would show that retraction at a later date an afterthought.

In support of his submissions, the learned counsel for the respondent has placed reliance upon Ranghi Ram Vs. State of Haryana 2002 (2) JCC 1041 State of Haryana Vs. Vidhya Dhar, ; Jodha Sahani Vs. The State of NCT of Delhi, ; Balraj Singh Vs. The State of Punjab, Mohan Singh Vs. State of Punjab, Ladharam Sindhi Vs. State of M.P.,) Kashmiri Lal Vs. State of Haryana, K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin, CrI. A. No. 788/2005 titled Kanhaiyalal Vs. Union of India decided on 9.1.2008; Union of India Vs. Satrohan 2008(3) JCC (Narcotics) 182; Pon Adithan Vs. Deputy Director, Narcotics Control Bureau, Madras, ; Kalema Tumba Vs. State of Maharashtra and Another, M. Prabhulal Vs. The Assistant Director, Directorate of Revenue Intelligence, Ravinder Singh @ Bittu Vs. The State of Maharashtra, ; CrI. A. No. 90/2005 titled Rehmatullah Vs. NCB decided on 18.7.2008; Madan Lal and Another Vs. State of Himachal Pradesh, CrI. A. No. 248/1997 titled Kulwant Singh Vs. Narcotics Control Bureau decided on 18.1.2008 and Gurminder Singh Vs. Directorate of Revenue Intelligence 2007(1) JCC (Narcotics) 11.

Compliance of Section 42 of NDPS Act

12. Section 42 of NDPS Act, before it came to be amended w.e.f. 2.10.2001, required the empowered officer to reduce the information received by him into writing and forthwith transmit the same to his immediate official superior. However, consequent to the amendment the information which is reduced into writing can be transmitted to the superior officer at any time within 72 hours of its receipt. Thus, there is a substantial dilution of the rigours of the aforesaid requirement. Since in the case before this Court, the information was received on 17.9.2004, the amended provisions would be applicable, meaning thereby that

though the information, with respect to the contraband kept in the house of the appellant in Village Kharkhari Jatmal ought to have been reduced into writing, it could be conveyed to the superior officer, at any time within next 72 hours, meaning thereby that the house of the appellant could have been searched before transmitting the said information to the superior officer.

In *Karnail Singh Vs. State of Haryana*, the Apex Court inter alia held that the mandatory enforcement of the provisions of Section 42 of the Act, non-compliance of which may vitiate a trial, has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior, not to any other condition of the Section.

13. The panchnama prepared in this case is Ex. PW-7/G, the documents runs into six pages. The last three sentences on page three of the document read as under:-

Then the personal search of both the persons were taken in which no incriminating document/contraband substance was found. The test memos for sending the sample to CRCL was also prepared at the spot. The NCB office asked Sunil Kumar Yadav @ Soni that they have information that this 10 kg Hashish (charas) is a part of the big consignment and where he has concealed/left the drug, i.e., remaining drug of the consignment. He told that the remaining drug is lying in his house at Village Kharkhari Jatmal, Nazafgarh, Delhi.

The last sentence on page three spills over to page 4 of the document. The next two sentences in the panchnama which appear on the page 4 of the document read as under:-

the NCB officers decided to raid the house of Sunil Kumar @ Soni and the NCB officers also requested we panchas to be with them during the next search for which we panchas gave our willingness. The NCB officers started at 1600 hrs from the bus stop, Subzi Mandi, Nazafgarh, Delhi-43 and reached the house of Soni at 1620 Hrs.

At the end of the narration on page 5 of the document, two seal impressions of NARCOTIC CONTROL BUREAU DZU5 have been affixed. After the seal impressions, the document reads as under:

The panchnama was prepared at the spot. The panchnama was read/read over in vernacular to Sunil Kumar Yadav @ Soni, Krishan Kumar, Sunil Kumar (of Raxaul) and we panchas who after understanding it and finding it correct version put the dated signature on it.

Next to the above-referred writing is the sketch of the house of the appellant in Village Kharkhari Jatmal. After sketch, the following writing appears on the document:

The whole search was conducted peacefully and no damage to any person or property was done by the NCB officers. Nothing was taken from the house. The

panchnama was concluded at 1800 Hrs. of 17/09/2004.

The witnesses as well as the accused persons have signed at the bottom of the document. Copy of the document was given to the accused persons and the acknowledgements obtained from them also appear on the document.

It would thus be seen that the practice of NCB was to affix the seal impressions at the bottom of the narration and thereafter read over the panchnama in vernacular to the accused persons as well as the panch witnesses, who would thereafter put their signatures after finding it to be the correct version. This also was the practice to record the time when the preparation of panchnama was concluded, supply its copies to the accused persons and obtain acknowledgment from them on the document. Had the panchnama been prepared at two places, partly at the bus stand and rest in the house in the Village Kharkhari Jatmal, the officer who prepared the panchnama, after he had concluded writing with respect to the recovery at the bus stand would have put the seal impressions below the writing, evidencing the proceedings at the bus stand would have read over and explained the contents of the accused persons as well as the panch witnesses, noted the time writing of panchnama was concluded and obtained acknowledgment from the accused persons after providing the copy of the document to them. In the absence of the aforesaid procedure, it would not be safe to accept the contention of the learned counsel for NCB that the panchnama was prepared in two parts firstly at the bus stand and then in the house of the appellant, particularly when there is no explanation for not adopting the aforesaid procedure at the bus stand. It is true that the officials of NCB on receipt of information from the appellant that the remaining contraband had been kept by him in his house, would be in a hurry to rush to his house so as to ensure that the information with respect to his arrest was not leaked and the contraband kept in the house was not removed from there, nothing prevented them from deputing one or more officials to the house in Village Kharkhari Jatmal to ensure that nothing was taken out of the said house and the remaining officials could then proceed to the said house along with the appellant. Moreover, nowhere in the complaint filed by NCB, it is alleged that panchnama was in two parts, its first part having been prepared at the bus stand and the other part having been prepared in the house of the appellant. The impression one gets on a perusal of para 7 of the complaint is that immediately on the appellant informing NCB officials that the remaining quantity has been concealed by him in Village Kharkhari Jatmal, NCB officers decided to raid the house of the appellant. Had the panchnama been prepared partly at the bus stand, it would certainly have been stated so in the complaint. In fact, the only impression which a reading of the panchnama gives is that the document was prepared in one go and at one place though it refers to two recoveries, one at the bus stand and the other from the house of the appellant.

More importantly, it would be difficult to accept that the appellant was questioned with respect to the remaining quantity of the drug only after the

search recovery, sealing and seizure procedures had been conducted at the bus stand and the first part of the panchnama had been prepared. In the normal course of human conduct, immediately on finding that the contraband found with the appellant weighed only 10 kg, he would have been questioned with respect to the remaining quantity, when NCB officials had a prior information that the appellant would deliver 10 kg of hashish, out of huge quantity of 75 kg of hashish which he had received. In these circumstances, there is no escape from concluding that the panchnama was prepared only in the house of the appellant in Village Kharkhari Jatmal, after recovery from the said house had been effected. Therefore, it cannot be said that the information with respect to the contraband found in the house of the appellant had been reduced in writing before the recovery was effected.

14. This is not a case where any delay in acting upon the information would have resulted in the goods or evidence being removed or destroyed. As noted earlier, a number of NCB officials had gone to the bus stand and they also had a vehicle with them. Therefore, one or more officials could have been sent to the house of the appellant in Village Kharkhari Jatmal to keep a watch on the said house. In fact, even the appellant could have been taken by those officials with them and one officer could have recorded the information received from the appellant at the bus stand and sent it to his superior, before entering the house of the appellant in Village Kharkhari Jatmal. In the facts and circumstances of the case, it cannot be said that it was not feasible or practical to take down the information in writing and therefore postponement of the recording of the information in writing was justified. In fact, the NCB officials did not bother to inform their superiors even on telephone, on receipt of an information that the remaining quantity of hashish was lying in the house of the appellant in Village Kharkhari Jatmal. The least they could have done to inform their superior officer on telephone and then send the information to him, in writing after they had reached the house of the appellant in Village Kharkhari Jatmal.

15. Though it was contended by the learned counsel for the respondent that the information which was received on 16.09.2004 and had been reduced in writing amounts to due compliance of the provisions of Section 42 of the Act even with respect to the hashish seized from the house of the appellant, I find no merit in the contention. In the information which the NCB received on 16.09.2004, there was no mention of the place where the hashish had been kept by the appellant. There was no reference at all to the house of the appellant in Village Kharkhari Jatmal. In fact, the aforesaid information had no reference at all to any narcotic drug kept in any building, conveyance or place. Thus, the respondent NCB failed to comply with the first requirement of Section 42 of NDPS Act by not reducing in writing the information with respect to the narcotic drug seized from the house of the appellant, before its officials entered the said house for the purpose of seizing the narcotic drug.

16. In Abdul Rashid (*supra*), relied upon by the learned counsel for the appellant,

the facts were as follows:-

PW 2, Inspector of Police at Dariapur Police Station, got information on 12-1-1988 that one Iqbal Syed Husen was trying to transport charas up to Shahpur in an autorickshaw. At about 4.00 p.m. they sighted the autorickshaw which was then driven by the appellant. They stopped and checked it and found four gunny bags placed inside the vehicle. The police took the vehicle to the police station and when the gunny bags were opened ten packets of charas were found concealed therein. The Trial Court acquitted the accused. But, State of Gujarat preferred an appeal before the High Court. The Division Bench of the High Court set aside the order of acquittal and convicted the accused of the offences charged. The convicted accused filed SLP before this Court and contended that there was non-compliance of Section 42 of the Act which was enough to vitiate the search as a whole. After referring Section 42 of the Act and the evidence of police officer as PW 2, the Court held that (1) he should have taken down the information in writing; and (2) he should have sent forthwith a copy thereof to his immediate official superior. After finding that PW 2-police officer admitted that he proceeded to the spot only on getting the information that somebody was trying to transport a narcotic substance and noting that PW 2 admitted that he proceeded on getting prior information from a Constable and the information was precisely one falling within the purview of Section 42(1) of the Act, the Court decided that PW 2 cannot wriggle out of the conditions stipulated in the said Sub-section and unhesitatingly found that there was non-compliance of Section 42 of the Act.

Allowing the appeal filed by the convict, the Apex Court inter alia held as under:-

If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised it on the strength of such unrecorded information, would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused.

The decision in Abdul Rashid Ibrahim (supra) analysed by the Constitution Bench of the Supreme Court in Karnail Singh vs. State of Haryana (supra) and it was held that the ratio in the said case is that the non-recording of vital information collected by the police at the first instance can be counted as a circumstance in favour of the accused/appellant. It was also noted by the Constitution Bench that in Abdul Rashid (supra), not only the police officer had failed to take down the information in writing, he had also failed to apprise his superior officer of the said information either then or later, much less sending a copy of the same to him and thus it was a case of absolute non-compliance with the requirement of Section 42(1) and (2).

In *Raj Kumar Mehta and Ors. (supra)*, a decision of this Court, relied upon by the appellant, there was an intelligence information that a large quantity of heroin was likely to be brought in a truck. A raiding party was then constituted and the truck was intercepted. The truck was found to contain 62.37 kg of heroin. The accused were acquitted by the Trial Court inter alia on account of non-compliance of Section 42 of the Act. Being aggrieved from the acquittal, DRI filed an appeal before this Court and contended that the judgment of the Trial Court was illegal and perverse since neither Section 50 nor Section 42 of the Act was applicable and it was Section 43 of the Act which applied. The contention of the appellant was rejected on the ground that there was no dispute that the search had been conducted after sunset and the recovery had been effected from a vehicle which was not a public conveyance and was not transmitted when it was intercepted. This Court, while rejecting the appeal filed by DRI, was of the view that when recovery is to be made from a conveyance, which is not a public conveyance though on public road, Section 42 of the Act is applicable.

17. In *Karnail Singh (supra)*, the matter had been referred to a Constitution Bench noticing an apparent conflict between *Sajan Abraham Vs. State of Kerala*, regarding the scope and applicability of Section 42 of the Act in the matter of conducting search, seizure and arrest, without warrant or authorization. After examining the aforesaid two decisions in the light of the provisions of Section 42 of the Act, including the amendment of the said Section with effect from 02.10.2001, the Constitution Bench was of the view that neither *Abdul Rashid (supra)* required literal compliance of the requirement of Section 42(1) and (2) nor did *Sajan Abraham (supra)* hold that the requirements of the said section need not be fulfilled at all. During the course of judgment, the Constitution Bench inter alia observed as under:-

15. u/s 42(2) as it stood prior to amendment such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same would adversely affect the prosecution case and to that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case, it is to be concluded that the mandatory enforcement of the provisions of Section 42 of the Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior and not to any other condition of the Section. *Abdul Rashid (supra)* has been decided on 01.02.2000 but thereafter Section 42 has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused.

The effect of the decisions in Abdul Rashid (supra) and Sajan Abraham (supra) was stated by the Constitution Bench as follows:-

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of Clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the 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 Clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) 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. But 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 by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of Sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending 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 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 or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

18. In *Bahadur Singh Vs. State of Haryana*, , which was a case of recovery of narcotic drug prior to 02.10.2001 (when Section 42 of the Act came to be amended) the police officer while on patrolling with other police officials received a secret information with respect to sale of poppy husk in a house. The house was raided by him. After conveying the information to his superior officers on

wireless, he raided the house in question and 32 kg of poppy husk was recovered. The accused having been convicted by the learned trial Court and the appeal filed by him in the High Court having been dismissed, he preferred an appeal before the Hon''ble Supreme Court by way of Special Appeal and it was, inter alia, contended on his behalf that the prosecution case stood vitiated on account of non-compliance with the provisions of Section 42 and 57 of the NDPS Act. Rejecting the contention, the Apex Court, inter alia, observed that the decision of the Constitutional Bench in *Karnail Singh v. State of Haryana* (supra) had made it clear that non-compliance with the provisions of Section 42 may not vitiate the trial if it did not prejudice the accused. As regards the compliance of the provisions of Section 57 of the Act, it was reiterated that the said provision is not mandatory. The appeal filed by the accused was accordingly rejected. Thus, the Apex Court upheld the conviction though the information received by the police officer had not been reduced into writing before the house in question was searched by him.

In *Dalel Singh Vs. State of Haryana*, which was a case of recovery of narcotic drug prior to 02.10.2001 when Section 42 of the Act came to be amended, the Inspector of Police with the other police officials was present at a bus stop when a secret information was received with respect to charas kept in the courtyard of the house of the accused. After conveying the information to the Additional Superintendent on wireless, the police party searched the house and recovered contraband from there. It was contended on behalf of the appellant that there was total non-compliance of Section 42 of the Act. Rejecting the contention, the Apex Court noted that immediately after receipt of information, the superior officer had been informed on wireless though the information was not recorded in writing and, therefore, there was substantial compliance of Section 42 of the Act, as a situation of emergency.

19. Though the information which PW 7 received from the appellant, at the bus stand, with respect to the contraband kept in his house in the Village should have been reduced into writing before searching the aforesaid house, the aforesaid in view of the decision of the Apex Court in *Karnail Singh* (supra) was not a mandatory requirement. Moreover, considering the fact that NCB officials were in the field at the time the said information was disclosed by the appellant, it could not have been recorded in a register such as a Daily Diary, though PW 7 Shri H.K. Pandey could have reduced it into writing on a paper and kept the same with him, before proceeding to the house of the appellant. It can hardly be disputed that recording the information on a paper and keeping it with him would not be more authentic than recording the information in a panchnama, after 1-2 hours, particularly when the panchnama is signed by NCB officials, panch witnesses as well as the accused persons. For all intents and purposes, considering that it was not obligatory on the part of Mr. H.K. Pandey to transmit the information to his superior immediately on reducing it into writing, recording it in panchnama prepared in the house of the appellant, instead of recording it at the bus stand could not have prejudiced the appellant in any manner whatsoever.

Therefore, the delay of 1-2 hours in recording the information would not adversely affect the case of the prosecution when examined in the light of the amended provisions of Section 42 of the Act. It would also be pertinent to note here that the information which PW 7 received from the appellant at the bus stand finds mention in Ex. PW 7/H which is the seizure report submitted by him to his superior to Shri P.L. Verma on 17.9.2004, itself.

Discrepancy in the weight of samples:

20. Coming to the discrepancy in the weight of the samples which was sent to CRCL for the purpose of analysis, a perusal of the report would show that three samples were sent to the laboratory, out of which, one weighed 40.8 gram, one weighed 43.3 gram and one weighed 42.9 gram. Thus, the excess weight was almost uniform in all the three samples.

In *Rajesh Jagdamba (supra)*, the contraband found with the accused was 100 gram in the right foot and 115 gram in the left foot. However, when weighed in the laboratory, the quantity of the substance alleged to have been recovered from the right foot was found to be 98.16 gram, whereas the quantity of the substance alleged to have been recovered from the left foot was found to be 82.54 gram. The Apex Court was of the view that the prosecution had not been able to explain the discrepancy which rendered the case of the prosecution doubtful. The Apex Court in this regard observed that the question was not how much seized, but whether there was an actual seizure and whether what was seized was really sent for commercial analysis. However, discrepancy in weight was not the only ground of acquittal in the aforesaid case and the case of the prosecution suffered from several other infirmities. It was found that the seals as well as the packets were in the custody of the same person, meaning thereby that there was every possibility of the seized substance being tampered with. The Court felt that this was the only hypothesis on which the discrepancy in the weight could be explained. Another aspect of the case was that PW-2, a panch witness was found to be a stock witness, he having been associated in two other cases as panch witness. The decision in *Rajesh Jagdamba (supra)* was considered by the Apex Court in its subsequent decision *Dehal Singh Vs. State of Himachal Pradesh*, . In the aforesaid case, two samples of 50 gram each were taken and sent to FSL for examination, but in the laboratory, the net weight of the sample was found to be 65.5606 gram. It was contended before the Apex Court that discrepancy in the weight of the sample casts serious doubt to the credibility of the prosecution case and was enough to reject the said case. Reliance by the learned counsel for the accused in that case was placed on the decision of the Apex Court in *Noor Aga Vs. State of Punjab and Another*, as well as *Rajesh Jagdamba Avasthi Vs. State of Goa*, . Both the cases relied upon by the accused were cases of recovery of charas. Noticing that the weighing scale and the weights came from a nearby grocery shop, the Apex Court observed that samples were taken by a common weighing scale and the weights found in a grocery shop, whereas the weight in the laboratory is recorded with precision

scale and, therefore, the small difference in the weight loses its significance when no infirmity in the other part of the prosecution story is found. It was noted that in the case of Noor Aga (supra), the sample was taken by custom official at the Airport from a precision scale and discrepancy in the weight alone was not the reason to reject the case of the prosecution in the said case. The Court, in this regard, also referred to the observations in Noor Aga (supra) to the effect that discrepancy in weight individually may not be fatal. It was also noted that in Rajesh Jagdamba Avasthi (supra), the recovery proceedings were found to be suspicious and there was every possibility of the seized substance being tampered with and it were those infirmities which had led the Court to doubt the truthfulness of the prosecution case.

In Mahender Singh (supra), 21 samples of 50 gram each were drawn at the time of seizure. However, when weighed in the laboratory, the weight of the samples varied from 21 grams (lowest) to 84 grams (highest). Thus, the difference in the weight was not uniform, in some samples it being less than the quantity stated to have been drawn as sample and in another cases it being much more than the stated quantity. Moreover, the discrepancy in the weight of samples was not the only ground for acquittal of the accused, the other discrepancies being a) material contradiction in the deposition of witnesses; b) the accused did not try to run away despite seeing police officials in uniform; c) keys of the motorcycle of the accused had not been seized; d) the seal was never given to an independent witness and retained by IO; e) samples were sent for analysis, after one month, meaning thereby that there was sufficient time to tamper with them.

21. In State Vs. Dilbagh, dealing with the difference in weight of sample, the Apex Court inter alia observed as under:

8. The other ground on which the High Court has acquitted the respondent is that there was a difference in weight. In such cases what has to be ensured is that what has been recovered is what has to be sent for chemical analysis. In case there is any doubt that what was received by the Chemical Analyser is not the same, then the benefit of that doubt could be given to the accused. But in cases where it is proved that what was sent to the Chemical Analyser is the same as what was recovered, minor differences in weight would not vitiate the trial.

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11. It was next urged that in view of the difference in weight, this Court should give benefit of doubt to the respondent. It was urged that difference in weight supports the respondent that he has been falsely implicated in this case. In view of the evidence, including the evidence of the independent witnesses it is not possible to accept this submission. In our view, the defence taken appears to be highly improbable.

In Kulwant Singh Vs. Narcotics Control Bureau (supra), the learned counsel for the respondent stated that the sample weighing 5 gm was drawn by the Investigating Officer from the contraband. In the laboratory, its weight was found

to be 4.6 gm. Rejecting the plea taken by the appellant with respect to variation in the weight of the sample, this Court, inter alia, observed as under:

21. A plea has been taken by the appellant that weight of sample, as found by forensic laboratory was 4.6 gm and not 5 gm. The discrepancy in the weight of the sample as found in the test laboratory is no ground to doubt the case of the prosecution. Anybody having a little knowledge of science and the scientific instruments knows that every scientific instrument has a least count. The accuracy of a scientific balance is much more than the ordinary balance used by a I.O. and there may be a variation of weight plus or minus depending upon the least count of the scientific balance. The atomic balances are more accurate than scientific balance. Such balances are used in more sensitive laboratories and are accurate to .0001 gm and even more accurate. An Investigating Officer, who draws sample for testing, need not have a balance of a high accuracy in order to draw the samples. He can draw sample weighing approximately 05 gm using ordinary balance. If the same sample is weighed at an accurate scientific balance used in CRCL, the weight of each sample is bound to differ. The difference in weights of samples rather shows the genuineness of the case. If the case had been a made up or a false case, the IO might have used more accurate balance and weighed the samples with accuracy. One may have doubt on the genuineness of the case if the each sample weigh the same on accurate balance used in CRCL, but one cannot doubt if the weight difference is found as in this case. Such difference in weight is natural. No malafide can be drawn by the appellant by this difference of weight. Thus the weight difference in the sample cannot be considered as a ground for acquittal."

In Sunday Emegha Vs. State, , the case of the prosecution was that two samples of contraband, each weighing five grams were drawn. In the laboratory the weight of one sample was found to be 6.5 grams whereas the weight of the other sample was found to be 5.5 grams. It was contended on behalf the accused that the aforesaid discrepancy in the weight indicated tampering with the case property. The contention, however, was rejected considering that the link witnesses examined by the prosecution as well as FSL report duly proved that the samples which were taken were sent to laboratory and at the time of examination the seals on them were intact.

22. As noted earlier, the weight of the samples, at the time they were weighed in CRCL was found to be about 40 grams each, meaning thereby that excess weight in all the three samples was almost the same. This kind of variation in the weight, in my view, can be safely attributed to the difference in the accuracy of the scale which would form part of the field kit given to an empowered officer and the precision scale which is used in a laboratory such as CRCL. Though on a percentage basis, the variation appears to be substantial, in terms of the weight it was only about 15 gram each. Moreover, it has also come in the deposition of PW 10 Shri D.K. Beri that the weight taken in the laboratory included the weight of the envelope in which the sample was received. On the other hand, the weight

of the sample drawn at the place of recovery did not include the weight of the envelope in which the samples were later kept. Though not much, the envelope would have some weight depending upon whether it was of a thick or a thin paper. As noted by this Court in *Kulwant Singh* (supra) even a scientific balance would have variation of weight depending upon the least count of the balance. Even if an electronic balance had been provided to PW 7, as a part of the field kit, that could not have been so accurate and sensitive as the balance in laboratory such as CRCL would be.

Moreover, though an unexplained variation in the weight of the sample, along with other shortcomings and discrepancies in the case of the prosecution may, in appropriate cases, lead to acquittal of the accused, it cannot be made the sole basis of acquittal in a case where the prosecution produced the entire link evidence to rule out any reasonable possibility of the sample having been tampered with before it is examined in the laboratory. The learned counsel for the appellant has not drawn my attention even to a single case where discrepancy in the weight of the sample was the sole ground for acquittal of the accused in a case under NDPS Act. In fact, the Apex court observed in *Noor Aga* (supra) that the discrepancy in weight individually may not be fatal.

As noted earlier, the NCB has examined PW 7 Shri H.K. Pandey, who deposited the sample duly sealed with the seal of NARCOTIC CONTROL BUREAU DZU5 in NCB office; it has examined PW 3 Shri P.L. Verma, to whom the samples duly sealed with the aforesaid seal were delivered on the same date for safe custody, PW 4 Shri Vikas Kumar who delivered the samples along with test memos and a forwarding letter dated 18.9.2004 to CRCL on 20.9.2004; PW 11 Shri P.K. Aggarwal who received the samples from Shri Vikas Kumar with the aforesaid seals intact on them as well as PW 10 Shri D.K. Beri who analyzed the samples in the laboratory. There was no delay in sending the samples to the laboratory, the forwarding letter having been prepared on 18.9.2004 and the samples having been actually delivered on 20.9.2004. The seal of NARCOTIC CONTROL BUREAU DZU5 which PW 3 Shri P.L. Verma had handed over to PW 7 Shri H.K. Pandey on 17.9.2004 at about 11:00 a.m. was returned to him on the same day at about 7:15 p.m., meaning thereby that Shri H.K. Pandey had no control over the said seal after 7:15 p.m. on that day. Since the sample duly sealed with the above-referred seal as well as the original seal were in the custody of Shri P.L. Verma w.e.f. about 7:00 p.m. on 17.9.2004, it was not possible for Shri H.K. Pandey to tamper with the samples, even if he so desired. Even the officer who took the sample to CRCL could not have tampered with the samples since the seal was not in his custody. In any case, if someone was to replace the substance which had been sealed at the bus stand and in the house of the appellant, he would certainly have taken the precaution of replacing the contraband with a substance of exactly equal weight, since NCB officers know that the sample when received in the laboratory would be weighed there. Therefore, a person seeking to replace the substance would certainly take the precaution of replacing it by another substance of exactly the equal weight.

I, therefore, hold that in the facts and circumstances of the case, discrepancy in the weight of the samples, cannot lead to acquittal of the appellant.

Statement u/s 67 of NDPS Act

23. In K.T.M.S. Mohd. and another Vs. Union of India, , the Apex Court, with respect to a retracted confession, inter alia observed as under:

But suffice it to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine quo non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected *brevi manu*. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing.

In Vinod Solanki Vs. Union of India (UOI) and Another, the Apex Court with respect to a retracted confession inter alia held as under:

23. It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded.

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37. With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such.

In Bharat Vs. State of U.P., a three Judges Bench of the Hon"ble Supreme Court,

with respect to retracted confession inter alia observed as under:

...Retracted confession, however, stands on a slightly footing. As a Privy Council once stated, in India it is rule to find a confession and to find it retracted later. A Court may take into account the retraced confession, but it must look for their reason for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an after-thought or advice, the retraction may not weigh with the Court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an after thought and that the earlier statement was true.

In *Pyare Lal Vs. State of Assam* 1957 CrL. LJ 481, a four Judges Bench of the Apex Court in this regard clarified the legal position as under:

A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convicted of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars.

24. In *Bal Mukund & Ors.* (supra), relied upon by the learned counsel for the appellant, the confession made u/s 67 of the NDPS Act was retracted on 21.06.1999 and one of the accused retracted the confession on 24.06.1998 through the Jail Suptd whereas the other two accused retracted it on 15.09.1998. It was retracted by way of an application through Jail Suptd. On 24.06.2008. The application was received by the Special Judge on the same date. This was followed by further application retracting the confession, made on or before 5.9.1998. It was contended on behalf of the appellant that the trial court had committed error in relying upon the said retracted confession. The case of the prosecution hinged principally on the confession made by the respondents/accused persons. The Apex Court dismissing the appeal filed the Union of India against acquittal of the accused persons/respondents, inter alia, observed that since the respondent no. 3 had retracted his confession at the earliest possible opportunity, he could have been convicted only if independent corroboration of threatening was available and admittedly the contraband was

found from his possession. As regards the confessional statement of respondents no. 1 and 2, the Apex Court, inter alia, observed that it was doubtful whether they would have made the said statement on the road where they were alleged to have been found in possession of narcotic. It was noted that as per Ex. 20 and 21, the respondents no. 1 and 2 had been interrogated and that was so while they were in custody, it could not be said that they had made voluntary statements which satisfied the condition precedent which was laid down u/s 67 of the Act. The Apex Court found it difficult to accept that such a statement had been made by them though they had not been put under arrest, observing that the authority under the Act could always show that they had not formally been arrested before such statements were recorded. However, in the present case, there is no evidence of the appellant having been interrogated before his statement u/s 67 of the Act was recorded.

25. Ex. PW 4/A is the statement made by the appellant u/s 67 of the NDPS Act. The complainant has examined not only the officer before whom the statement was made by the appellant, but also the official who wrote the said statement on the dictation of the appellant. In the aforesaid statement, the appellant gave various personal details such as (a) he had studied up to 8th class (b) his mother had died (c) he had one brother Hanchandra and younger sister namely Kusum respectively (d) his brother Hanchandra was engaged in welding work, whereas his sister was studying in 10th class. This was not the case of the appellant, in his statement u/s 313 Cr.PC that the aforesaid particulars are incorrect. Without the appellant having given those particulars to the officer before whom the aforesaid statement purports to have been recorded, they could not have formed part of the statement. In his statement u/s 313 Cr.PC, the appellant claimed that he was forced to write the statement on the dictation of NCB officials. The plea taken by the appellant in this regard appears ex facie false, since he claimed to have been forced to write the statement on the dictation of NCB Officers, though the said statement is not at all in his hand and was written by the witness Mr. Mangal Das on his dictation.

The statement u/s 67 of the Act was made by the appellant on 17.09.2004. The appellant was produced before the ACMM, New Delhi on 18.09.2004. The appellant, however, did not complain to the learned ACMM that he had been forced to make a statement u/s 67 of the NDPS Act. The appellant was produced before the Duty Magistrate on 22.10.2004. No complaint was made by him on that date with respect to forcible statement. The appellant was produced before the learned ASJ on 25.10.2004. Even on that date, no such complaint was made by him. He was produced before the Court on 08.11.2004. Even on that date, there was no such complaint. The statement u/s 67 of the Act came to be retracted only on 22.11.2004.

In K.I. Pavunny (supra), the Apex Court, inter alia, held that the confession made before the custom officer though retracted, is admissible and binds the petitioner. In Kanhaiyalal Vs. Union of India (supra), it was contended on behalf

of the appellant/accused that the High Court had erred in relying upon a retracted statement made u/s 67 of the NDPS Act. The retraction in that case had been made immediately after the statement was made. Dealing with the submissions, the Apex Court, inter alia, observed as under:

36....In the case of both the latter enactments, initially an inquiry is contemplated during which a person may be called upon to provide any information relevant to the inquiry as to whether there has been any contravention of the provisions of the Act or any Rule or Order made thereunder. At that stage the person concerned is not an accused although he may be said to be in custody. But on the basis of the statements made by him he could be made an accused subsequently. What is important is whether the statement made by the person concerned is made during inquiry prior to his arrest or after he had been formally charged with the offence and made an accused in respect thereof. As long as such statement was made by the accused at a time when he was not under arrest, the bar under Sections 24 to 27 of the Evidence Act would not operate nor would the provisions of Article 20(3) of the Constitution be attracted. It is only after a person is placed in the position of an accused that the bar imposed under the aforesaid provision will come into play. Of course, this Court has also held in Pon Adithans case (supra) that even if a person is placed under arrest and thereafter makes a statement which seeks to incriminate him, the bar under Article 20(3) of the Constitution would not operate against him if such statement was given voluntarily and without any threat or compulsion and if supported by corroborating evidence.

Noticing that there was nothing on record to suggest that the appellant was compelled under threat to make a statement after he had been placed under arrest which renders the said statement inadmissible and incapable of being relied upon in order to convict him, the appeal was dismissed. In the case before this Court also, the statement u/s 67 of the Act was made by the appellant before he had been arrested, the statement having been made on 17.09.2004 and he having been arrested on 18.09.2004. Moreover, there is no evidence of his having been subjected to any kind of pressure intimidation before he made the said statement.

It was observed by the Apex Court in State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, the retracted confession stands on a slightly different footing from a statement which has not been retracted. The Court may taken into account the retracted confession, but it must look for the reasons in making of the confession as well as for its retraction and must weigh the two to determine whether the retraction is voluntary nature of the confession or not.

26. A perusal of the application dated 12.11.2004 submitted by the appellant to the learned ASJ would show that in the said application he, inter alia, alleged that in NCB office, his signatures were obtained on a number of places after beating him and he was made to write on a number of things which were absolutely untrue. He further alleged that he had been threatened that if he

complained to the Court his entire family would be implicated in false cases and that was the reason for the delay in making the aforesaid complaint. However, there is no evidence of any NCB official having threatened to implicate the family members of the appellant in false cases. No such suggestion was given to any of the NCB official in his cross examination. PW 4 Mr. Vikas Kumar is the officer before whom the statement u/s 67 of the Act was made by the appellant. In his cross examination, no suggestion was given to him that the NCB officers/officials had pressurized the appellant to sign the aforesaid statement by threatening to implicate his family members in false cases. Even during the cross examination of PW 13, no suggestion was given to him that the NCB officials/officers had threatened to implicate the family members of the appellant in a false case though it was suggested that his signatures had been obtained by use of force.

In this application retracting the confession, the appellant did not claim that his personal information was obtained from him by subjecting him to physical torture.

27. For the reasons stated hereinabove, it appears to me that the appellant had made a voluntary statement before an officer of NCB on 17.9.2004, at the time he was not in custody, he having been arrested on 18.9.2004 and the retraction of the said statement much later, on 22.11.2004, was only an afterthought. As observed by the Hon"ble Supreme Court in K.T.M.S. Mohd. (supra), mere retraction does not lead to the inference that it was involuntarily made or unlawfully obtained and the onus is on the person alleging threat, inducement, etc. to establish such allegation either by leading evidence or by showing existence of circumstances from which inference of the said statement having been obtained by inducement, threat, etc. can be drawn. Though, a retracted confession ordinarily cannot form the sole basis of conviction and the court must look for evidence which would corroborate such a statement, the requisite evidence is available to this Court, in the form of recovery of the contraband which the appellant handed over to his co-accused at the bus stand as well as the contraband which was later recovered from his house in the Village. To put in another way the recovery of the contraband corroborates the retracted confessional statement whereas the confessional statement corroborates the recovery of the contraband.

Sealing of the residual case property

28. It is an admitted case that all the three bags in which the remaining charas after drawing sample was kept, had been stitched at the bottom. This is also an admitted case that two out of the aforesaid three bags were found stitched at the sides. It was admitted by PW 7 Mr. S.K. Pandey that All the bags were not stitched from the side but all the three bags are stitched from the bottom. Two bags are stitched from the side but they were found stitched even when the contraband was recovered from these bags. He admitted that the bag C containing the substance was in the torn condition in the middle and that substance could be taken in and taken out and kept in the bag without tampering with the seal, though according to the witness, the bag was not in that condition

when it was deposited in the Malkhana.

Thus, it cannot be disputed that it was possible to remove/replace the case property, without tampering with the seals, simply by removing the stitches either at the bottom or on the sides and then re-stitching the bags opening the case property. However, there is no evidence of the case property having actually been replaced or tampered with. The respondent-NCB produced before the trial court the entire link evidence which would rule out any reasonable possibility of the case property having been tampered with. The official who deposited the case property in NCB Office has been examined, the in-charge of Malkhana namely Mr. H.K. Pandey has been examined. The officials with whom the case property was deposited namely Mr. P.L. Verma has also been examined. The case property was duly sealed with the seal of NCB at the time it was received by Mr. P.L. Verma. Therefore, it was not possible to replace or tamper with the case property without Mr. P.L. Verma or his successor being a party to such replacement/tampering. Neither there could be any reason for the persons having the charge of the case property to replace or tamper with the same nor is it the case of the appellant that the case property was actually replaced or tampered with. The question which then arises for consideration is as to whether the appellant is entitled to acquittal solely on the ground that there was a possibility of the case property being tampered with, though not without connivance of the officer having its charge in NCB office.

29. In *Jorawar Singh Mundy* (supra), relied upon by the learned counsel for the appellant, it was found, during trial, that the case property had not been properly secured since it was possible to take out the case property after opening the stitches on both the sides. However, the possibility of the case property being replaced on account of its having not been secured properly was not the sole ground of acquittal in this case, the other grounds being non compliance of Section 50 of the Act and the possession of the contraband not being a conscious possession.

In *Mobi Fathu Bha Mulani* (supra), the second judgment relied upon by the learned counsel for the appellant on this issue, it was found that the cardboard box had been tied with a string which could be removed without tampering with the paper slip. In this case also, failure to properly secure the case property was not the sole ground of acquittal, the other grounds being that the public witnesses had not been examined and there was no compliance of Section 55 of the Act.

In *Valsala* (supra), there was inordinate delay in sending the seized article to the Magistrate, there was no evidence as to whether the seized article had been sealed and if so, when; there was no evidence as to with whom the seized article was lying before it was produced in the Court. It was, in these circumstances, that the appellant was acquitted. This judgment, therefore, would not apply to the case before this Court.

On the other hand in Rangī Ram (supra), the seal on the gunny bag in which the contraband had been kept, when examined in the Court, was found broken. It was contended on behalf of the accused that there was no guarantee as to what was found in the gunny bag. The contention was rejected by the Apex Court, noticing from the evidence that from the material which was found in the gunny bag, a sample was taken and the chemical examiner had reported that it was powder of poppy husk. The Apex Court held that merely from the circumstance that the seal was found broken, we cannot jump to the conclusion that the material in the gunny bag was substituted. It was also observed that the bag was handed over to Malkhana in good condition much earlier. In view of the aforesaid binding decision of the Apex Court, no reliance can be placed upon the decision relied upon by the learned counsel for the appellant.

In Jodha Sahani (supra), the seal on the gunny bag when produced in the Court was found broken. It was contended that it was a case where benefit of doubt should be given to the accused. Relying upon the Rangī Ram (supra), the contention was rejected by this Court holding inter alia that merely because of the seal being broken the Court could not jump to the conclusion that the material in gunny bag was substituted.

In Balraj Singh (supra), the issue before the Court was whether the non production of a part or the whole of the case property in a criminal trial would by itself vitiate the conviction of the accused. It was inter alia held by the High Court that the production of case property later in the Court is only a corroborative piece of evidence since it is the actual possession of the contraband by the accused, at the material time which is a crucial issue to be established. It was further held that if the direct evidence is credible and unimpeachable, sufficient to establish the charge and a conviction, it cannot be said that the whole of it would lose all its value by mere non-production of the case property which is merely corroborative. Reliance in this regard was placed upon Section 451 of the Code of Criminal Procedure. In the case before this Court, the case property was produced and there is no evidence of its having been actually tampered with or substituted. The NCB has led evidence to prove that samples were drawn from the contraband recovered from the appellant. It is also established by the NCB that there was no tampering with the samples till the time they were examined in the laboratory. The sample substance, when examined in the laboratory was found to be charas. It thus stands duly established that whole of the contraband recovered from the appellant was in fact charas. In these circumstances, a mere possibility of the case property being substituted or replaced, on account of the gunny bags in which it was kept being stitched, cannot lead to acquittal of the person, from whom the contraband was recovered.

In Sukhpal Singh vs. State of Punjab CrI. Appeal No. S-1454-SB of 2009, decided on 25.07.2013, when the case property was produced in the Court, the seal of the bulk parcel was found broken. The High Court declined to acquit the accused

on the aforesaid ground observing that even non-production of the case property was not fatal to the prosecution case.

In State of Rajasthan Vs. Udai Lal, out of 119 bags of the contraband, only five were produced in the Court, which led to acquittal of the accused by the High Court which found that no convincing reason had been given for not production all the 119 bags before the Court. The decision of the High Court, however, was set aside by the Hon''ble Supreme Court holding that it had failed to take note of the fact the quantity of the recovered article was huge and the Investigating Officer had produced the samples of the articles taken from the seized articles in the Court. The Apex Court felt that no adverse inference could have been drawn against the prosecution.

For the reasons stated hereinabove, I am of the view that mere possibility of the case property being taken out of the bags in which it had been kept, cannot lead to the acquittal of the appellant, when there is no evidence of actual tampering with the case property and the evidence produced by the complainant proves not only the total quantity of the contraband, but also that the samples drawn from the contraband, when examined in the laboratory, were found to be charas.

30. As regards the deposition of the driver of the vehicle that NCB officials, who went to the village of the appellant had come back after about 30-45 minutes, the said time having been given only by estimate, would have no bearing on the merits of the case. The contraband recovered at the bus stand as well as the contraband seized from the house of the appellant were commercial quantity. Even if the contraband recovered from the house of the appellant is excluded from consideration, the quantity which he handed over to his co-accused at the bus stand, being 10 kg was also a commercial quantity. I, therefore, find no ground to interfere with the conviction of the appellant.

The substantive sentence awarded to the appellant as well as the fine imposed upon him being the minimum prescribed in the Act, there is no scope for its reduction. However, it is directed that in the event of failure to deposit the fine, unless already deposited, the appellant shall undergo SI for three months each as against one year each awarded by the Trial Court.

The appeal stands disposed of.

One copy of this judgment be sent to the concerned Jail Superintendent for information & necessary action.

LCR be sent back along with a copy of this order.