
Balwinder Singh (Binda) Vs Narcotics Control Bureau

Criminal Appeal No. 1136, 1933 Of 2014

Court: Supreme Court Of India

Date of Decision: Sept. 22, 2023

Acts Referred:

Constitution Of India, 1950 " Article 14, 20(3), 21#Narcotic Drugs and Psychotropic Substances Act, 1985 " Section 8, 21, 21(c), 27A, 31A, 31A(1)(a), 35, 42, 43, 50, 53, 54, 60, 67#Code of Criminal Procedure, 1973 " Section 100(4), 313, 366#Evidence Act, 1872 " Section 25

Hon'ble Judges: B.R.Gavai, J; Hima Kohli, J; Prashant Kumar Mishra, J

Bench: Full Bench

Advocate: Akshay Nagarajan, Tanu Bedi, Sanjay Jain, Mayank Dahiya, Kuldeep Singh Kuchaliya, B. Krishna Prasad, Prativa Prakash Janapriya Nayak, Vikramjeet Banerjee, Aniruddha Sharma li, Gautam Bhardwaj, Ruchi Gour Narula, Arvind Kumar Sharma

Final Decision: Allowed/Dismissed

Judgement

Hima Kohli, J

1. The present appeals arise from the common judgment dated 08th July, 2013 passed by the Division Bench of the High Court of Punjab and

Haryana at Chandigarh deciding the Murder Reference [Murder Reference No. 5 of 2012 titled Narcotics Control Bureau, Chandigarh Zonal Unit v.

Balwinder Singh @ Binda] prepared by the Judge, Special Court for confirmation of death sentence, appeal [CRA No. D-365-DB of 2012] preferred

by Balwinder Singh [Appellant in Criminal Appeal No. 1136 of 2014] and the appeal [CRA No. D-371-DB of 2012] filed by Satnam Singh [Appellant

in Criminal Appeal No. 1933 of 2014].

1.1 By the impugned judgment, the death sentence imposed upon Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 was set aside under

the Reference, thereby declining the Reference and imposed a sentence on him to undergo rigorous imprisonment for 14 years and to pay a fine of

Rs. 1,50,000/- [Rupees one lakh fifty thousand only] and in default, to undergo rigorous imprisonment for one year for commission of offence under

Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 [For short "NDPS Act", 1985]. The appeals preferred by the accused

were dismissed except for the modification in the order of sentence. Both the accused are before this Court in these appeals by way of special leave.

I. FACTUAL MATRIX:

(a) THE INCIDENT IN QUESTION

2. The incident in question relates back to 11th December, 2005, when as per the version of the prosecution, the Narcotics Control Bureau [For short

"NCB"] received secret information that some persons who were indulging in the sale of contraband, were travelling in a white coloured Indica

car from Amritsar to supply contraband at a bus stand at Chandigarh. On 12th December, 2005, at 01:00 am, a naka was laid by the NCB team at

Chandigarh and two independent witnesses [Mukesh Kumar and Sonu PW-1] were associated in the investigation. At 03:15 am, the NCB team

noticed that a car [White coloured Indica Car bearing registration number HR-01-J-9639 (Marked as P-1)] coming from Sector 25 and heading

towards Sector 24, Chandigarh, stopped at a little distance from the place of naka and two persons wearing turbans alighted from the car and ran

away. However, the third person, also wearing a turban who had later on disclosed his name as Satnam Singh Appellant in Criminal Appeal No. 1933

of 2014, remained seated in the car.

2.1. Members of the NCB team intercepted the vehicle and searched Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 in the presence of

the independent witnesses. On searching the car, they found two packets wrapped in a khaki tape in the cavity of the door panel. On unzipping the

seat cover of the rear back seat of the vehicle, two more similar packets wrapped in khaki tape were recovered. The prosecution claims that on

inquiry, Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 disclosed that the packets contained heroin that he had brought from Amritsar

with the assistance of Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 and a person named Harpreet Singh alias Preet alias Sarpanch

for sale in Chandigarh. He further disclosed that Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 and Sarpanch ran away when the

car had stopped a few yards before the naka. The NCB officers seized all the four packets and after taking out two representative samples, sealed

them. The samples of the packets were signed by Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014, the two independent witnesses,

Intelligence Officer - Balwinder Kumar PW-2 and O.P. Sharma, Superintendent, NCB PW-5 (wrongly mentioned as PW-10 in the trial Court

judgement).

(b) THE INVESTIGATION

2.2. A panchnama Exhibit P-1/E in respect of the recovery made was prepared at the spot, read over to Satnam Singh Appellant in Criminal Appeal

No. 1933 of 2014 who signed it. So did the independent witnesses. Thereafter, Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 was

arrested and his statement Exhibit PW-1/B was recorded after issuing him a notice Exhibit P-5 under Section 67 of the NDPS Act. He was also

searched personally. The statements of the independent witnesses [Sonu Exhibit PW-1/D and Mukesh Exhibit P-9] were recorded. Satnam Singh

Appellant in Criminal Appeal No. 1933 of 2014 was produced before the Illaqa Magistrate with the case property Exhibit P-1 and the documents. The

case property was handed over to the Superintendent Incharge of the godown and the parcels of the samples Exhibit P-12 were sent to the Chemical

Examiner Chemical Examiner Shri. S.K. Mittal, PW-4 who forwarded the report Exhibit P-11 later on.

2.3. Till this stage, the co-accused named by Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014, i.e., Balwinder Singh Appellant in Criminal

Appeal No. 1136 of 2014 was nowhere in the picture. The prosecution claims that sometime later, the NCB officers came across a newspaper report

stating that Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 had been arrested by Amritsar Police in an NDPS case and was lodged

in the Central Jail, Amritsar. Based on the said information, Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 was arrested and a notice

Exhibit P - 6 was served on him under Section 67 of the NDPS Act. Thereafter, his voluntary statement Exhibit P-17 was recorded and duly

signed by him and he was arrested.

2.4 On conclusion of the investigation, the NCB submitted a complaint Exhibit P-13 before the Judge, Special Court, Chandigarh stating that Satnam

Singh Appellant in Criminal Appeal No. 1933 of 2014 and Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 had committed offences

punishable under Sections 8, 21, 27A and 60 of the NDPS Act. Charges were framed against the two accused under Section 21 r/w Sections 8, 27A

and 60 of the NDPS Act. On 02nd July, 2007, both the accused pleaded not guilty and claimed trial.

(c) PROCEEDINGS BEFORE THE TRIAL COURT

2.5. On its part, the NCB examined five witnesses namely Sonu [PW-1] who was an independent witness and joined the investigation when the naka

was laid on 12th December, 2005; Constable Balwinder Singh [PW-2] whose deposition related to deposit of the samples Exhibit P-12 of the

contraband with the Central Revenue Control Laboratory, Delhi For short, the CRCL, New Delhi P.K. Sharma PW 3, the then Intelligence

Officer, NCB who had received the secret information based on which the naka was laid and Satnam Singh Appellant in Criminal Appeal No. 1933 of

2014 was arrested; S.K. Mittal [Chemical Examiner Shri. S.K. Mittal, PW-4], the Chemical Examiner who deposed about receiving the sample in the

Narcotic Section of the CRCL, New Delhi from the PW- 210 and his report [Exhibit P-11] dated 24th February, 2006 to the effect that on testing, the

sample was found positive for heroin and contained 73.5% of diacetylmorphine by weight and O.P. Sharma [PW-5 (wrongly mentioned as PW-10

in the trial Court judgement)], Superintendent, NCB who narrated the sequence of events leading to the laying of the naka, search of the Indica car

being driven by the accused Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 wherefrom the contraband was recovered, preparation of

Recovery-cum-Seizure Memo Exhibit PW-1/C and forwarding of the seized contraband to Delhi for a chemical analysis Exhibit PW-1/A, ending with

the receipt of the report [Exhibit P-11] of the Chemical Examiner [Chemical Examiner Shri. S.K. Mittal, PW-4].

2.6. After the prosecution closed its evidence, both the accused were examined under Section 313 of the Criminal Procedure Code [For short

Cr.P.C.]. They denied the charges levelled against them, pleaded not guilty and alleged false implication in the case. In their defence, the

accused examined four witnesses, namely, Soravdeep Singh DW 1; Naresh Kumar DW 2; Parkash Ram DW 3 and Ravi Kant Pawar DW 4. DW-

129 and DW-230 were summoned by Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 to prove that a call for 27 seconds was made by

him from his mobile number at 9.45 p.m. on 11th December, 2005 to a landline number installed in the office of the Zonal Director in Chandigarh,

when he was actually in police custody.

2.7. It was argued on behalf of the applicants that PW-1 "Sonu [PW-1] was the real culprit from whom recovery of heroin was made and he had

managed to bribe the officers of the NCB team due to which they planted the contraband in the car driven by Satnam Singh Appellant in Criminal

Appeal No. 1933 of 2014. It was also contended on behalf of Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 that one of the two

independent witnesses, namely, Mukesh Kumar, was a stock witness of NCB and was on its pay rolls as a daily wager. The testimonies of DW-331

and DW-432 was referred to, wherein it was deposed that Mukesh Kumar was joined in as a witness in another complaint registered by the NCB.

2.8. After discussing the entire evidence, vide judgment dated 10th March, 2012, the learned Judge, Special Court, Chandigarh held both the accused

guilty and convicted them under Section 21 read with Section 8 of the NDPS Act. Subsequently, on 15th March, 2012, after hearing arguments on the

quantum of sentence, noting that Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 had been previously convicted under Section 21(c)

of the NDPS Act for the offence involving commercial quantity of narcotic drugs and applying the provisions of Section 31A of the NDPS Act, he

was sentenced to death under Section 21(c) read with Section 31A(1a) of the NDPS Act.

2.9. Coming to the co-accused Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014, the learned Judge, Special Court, Chandigarh took note

of the fact that he was a government servant working as a Warden in Punjab Jail and was posted at Sangrur at the time of committing the offence,

which added to the gravity of the offence. Therefore, he was sentenced under Section 21(c) of the NDPS Act to undergo rigorous imprisonment for a

period of twelve years and to pay a fine of ₹1,50,000/- (Rupees One lakh and fifty thousand) and in default thereof to further undergo rigorous

imprisonment for a period of three years.

(d) PROCEEDINGS BEFORE THE HIGH COURT

3. Aggrieved by the aforesaid judgment, both the appellants approached the High Court. A Murder Reference under Section 366 Cr.P.C. was also

forwarded to the High Court in view of the death sentence awarded by the Special Court, Chandigarh to the appellant "Balwinder Singh Appellant

in Criminal Appeal No. 1136 of 2014. The entire evidence was analysed afresh by the High Court and relying on the decisions of this Court in

Kanhaialal vs. Union of India 2008 (4) SCC 668, Ram Singh vs. Central Bureau of Narcotics (2011) 11 SCC 347 and Raj Kumar Karwal vs. Union

of India (1990) 2 SCC 409 wherein, it was held that an order of conviction can be passed solely on the basis of the confession made by the accused

under Section 67 of the NDPS Act and that such a confession before the officer of the NCB was admissible in evidence since the NCB officer is not

considered as a "police officer" within the meaning of Section 25 of the Indian Evidence Act, 1872, both the appellants were convicted under the

NDPS Act. For arriving at the said conclusion, the High Court took into consideration the statements of Balwinder Singh Appellant in Criminal Appeal

No. 1136 of 2014 and Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 recorded under Section 67 of the Act and held them to be

admissible in evidence for being used as confession against them. The deposition of the prosecution witnesses, namely, PW-18, PW-210 and PW-511,

who had searched the car of Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 that had resulted in the recovery of 4 kgs. of heroin, was

also relied on by the High Court and it was observed that Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 was apprehended by the NCB

Officers in the vehicle in question and there was sufficient evidence to hold that he was guilty of possession of 4 kgs. of heroin.

3.1. Similarly, in the case of Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014, the High Court held that his confession¹⁹ recorded

under Section 67 of the NDPS Act was admissible in view of the law laid down by this Court in Kanhaialal 2008 (4) SCC 668 (supra). The Court

noted that neither Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 nor Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014

had moved any formal application for retracting the confessions made and there was no reason to discard their confessional statements or to reject the

testimonies of the prosecution witnesses [PW-18, PW-210 and PW-511]. Even though Balwinder Singh Appellant in Criminal Appeal No. 1136 of

2014 was not identified by PW-325 and PW-511, his statement [Exhibit "P-17"] was duly recorded under Section 67 of the NDPS Act and the co-

accused, Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 had also stated in his confessional statement that Balwinder Singh Appellant in

Criminal Appeal No. 1136 of 2014 was involved in the crime. Both the confessional statements when read together, were held to be sufficient to hold

that Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 was guilty of the offence committed. Added to this was the fact that Balwinder

Singh Appellant in Criminal Appeal No. 1136 of 2014 had already been convicted and sentenced in a case under the NDPS Act and his appeal against

the said conviction was pending at that time in the High Court. Therefore, he had a propensity towards committing such crimes. The High Court

opined that merely because Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 had escaped from the car just before the point where the

naka had been laid and could not be apprehended, would not be a ground to acquit him or exonerate him of the charge of conscious possession of

heroin.

3.2. The High Court went on to reject the defence version sought to be projected by Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 that

Sonu [PW-1] [PW-1] was the real culprit and it was from him that the contraband was recovered but he got away by bribing the NCB team who

cleverly planted the contraband in the car driven by Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014. The plea taken that the other

independent witness, Mukesh Kumar though arrayed as a prosecution witness and not produced, was a stock witness of the NCB, was also found to

be meritless. The High Court observed that Mukesh Kumar was not examined during the trial since he had been won over by the appellants. As a

result of the aforesaid discussion, both, Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 and Satnam Singh Appellant in Criminal

Appeal No. 1933 of 2014 were found to be in conscious possession of commercial quantity of heroin on the relevant date and the findings returned by

the trial Court holding them guilty of the commission of offences punishable under Section 21(c) read with Section 8 of the NDPS Act, were upheld.

The order of sentence imposed on Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 of rigorous imprisonment for a period of 12 years

was affirmed by the High Court. However, the death penalty awarded to the appellant "Balwinder Singh Appellant in Criminal Appeal No. 1136 of

2014 for being a repeat offender under Section 31A of the NDPS Act, was held to be too harsh a punishment. Resultantly, the death sentence

awarded to Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 was set aside and the High Court sentenced him to undergo rigorous

imprisonment for a period of 14 years along with fine of ₹1,50,000/- [Rupees one lakh fifty thousand only] and in default of payment of fine, suffer

imprisonment for one year. Dissatisfied by the aforesaid decision, the appellants have preferred the present appeals.

II ARGUMENTS ADVANCED BY LEARNED COUNSEL FOR THE PARTIES

(a) SUBMISSIONS MADE BY COUNSEL FOR BALWINDER SINGH APPELLANT IN CRIMINAL APPEAL NO. 1136 OF 2014

4. Mr. Mayank Dahiya, learned counsel for the appellant " Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014, argued that his client

had been convicted solely on the basis of the purported statement of confession made by the co-accused, Satnam Singh Appellant in Criminal Appeal

No. 1933 of 2014 before the NCB officials which is no longer admissible in law, in the light of the decision of this Court in the case of Tofan Singh v.

State of Tamil Nadu (2021) 4 SCC 1. It was stated that the High Court was swayed by the fact that at that time, Balwinder Singh Appellant in

Criminal Appeal No. 1136 of 2014 was facing three other cases for offences under the NDPS Act but subsequently, he has been acquitted in all the

said cases on being extended benefit of doubt. However, in the instant case, he has already undergone the sentence awarded by the High Court during

the pendency of the present appeal.

4.1. Besides a similar argument advanced by learned counsel for Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 that the statement

of confession made by Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 before the NCB officials is not admissible in law and could not

be read in evidence against him in view of the recent decision of this Court in Tofan Singh (2021) 4 SCC 1 (supra), Mr. Akshay Nagarajan, learned

counsel for the said appellant has assailed the impugned judgement primarily on five counts. Firstly, that an offence committed under the NDPS Act

being a grave one, all the procedural safeguards provided under the Statute to the accused require strict compliance and strict scrutiny and in the

instant case, as the prosecution failed to establish a prima facie case, the burden did not shift to the accused. To buttress the said submission, learned

counsel has cited Ritesh Chakarvarti v. State of M.P. (2006) 12 SCC 321; Noor Aga v. State of Punjab and Another (2008) 16 SCC 417; Bhola Singh

v. State of Punjab (2011) 11 SCC 653; State of Delhi v. Ram Avatar alias Rama (2011) 12 SCC 207; and Gorak Nath Prasad v. State of Bihar (2018)

2 SCC 305.

4.2 The second plea taken is that the entire story setup by the prosecution is shaky inasmuch as the independent witnesses who were joined in, have a

murky background and their testimonies ought to be disbelieved. The testimony of Sonu [PW-1] has been questioned as untrustworthy and it is stated

that he could not be treated as an independent witness in terms of Section 100(4) of the Cr.P.C. It was contended that the High Court has erred in

failing to re-evaluate the credibility of the said witness and satisfy itself as to whether he was in fact an independent witness. Thirdly, it was argued

that the other independent witness, Mukesh Kumar was arrayed in the list of witnesses but not examined by the prosecution for the reason that he

was a stock witness, as would emerge from the deposition of DW-331 and DW-432. Next, it was argued that the case property [Exhibit P-1], mainly

the contraband that was allegedly recovered, was not handled properly which is apparent from the fact that in the panchnama [Exhibit P-1/E] the

contraband was described as a substance that was white in colour but in his testimony, the Chemical Examiner [Chemical Examiner Shri. S.K. Mittal,

PW-4], described the contraband to be of light brown colour with lumps. This discrepancy in the contraband pointed out by the defence goes to the

root of the matter.

4.3 Lastly, it was argued on behalf of Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 that the High Court ought not to have discarded

outright the defence version that it was Sonu [PW-1] [PW-1] who was found to be in possession of the contraband and on his bribing the NCB

officers, he was let off whereas Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014, who was innocent, was framed. Learned counsel

submitted that the deposition of DW-230 proved that the landline number on which a phone call was made by the NCB officers from the mobile phone

of Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 at 09.45 pm on 11th December, 2005, was the official number belonging to the Zonal

Director, NCB, Chandigarh and the said evidence once brought on record, was sufficient for the High Court to have discounted the version of the

NCB that they had met Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 for the first time at the naka on 12th December, 2005, at 03.00

am. Learned counsel concluded by submitting that though Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 has already undergone the

sentence imposed on him, he is pressing the appeal for an acquittal on merits because the appellant was a Government servant who was dismissed

from service on having been convicted which order, if reversed, would entitle him to relief in relation to his service benefits.

(b) SUBMISSIONS MADE BY LEARNED COUNSEL FOR THE RESPONDENT, NCB

5. On the other hand, learned counsel for the respondent-NCB has supported the impugned judgement and stated that there was ample evidence

brought on record by the NCB for indicting Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 and Satnam Singh Appellant in Criminal

Appeal No. 1933 of 2014. He asserted that none of the witnesses produced by the NCB were planted, as alleged; that NCB had successfully

established a prima facie case against the appellants whereafter the burden had shifted on them to prove their innocence and that they had miserably

failed to discharge the said burden; that the prosecution had amply proved the foundational facts to attract the rigours of the NDPS Act and the actus

reus, namely possession of contraband by the appellants was convincingly established for holding them guilty of the offence for which they were

charged. It was thus stated that the impugned judgement does not deserve interference.

III ANALYSIS AND DISCUSSION

(a) SIGNIFICANCE OF TOFAN SINGH'S DECISION

6. We have perused the impugned judgement and the records and given our thoughtful consideration to the arguments advanced by learned counsel

for the parties.

7. When the present matter was considered by the High Court in the year 2013, it had accepted the arguments advanced by learned counsel for the

respondent-NCB that officers of the Department of Revenue Intelligence who are vested with the powers of an officer-in-charge of the police station

under Section 53 of the Act, are not "police officers" within the meaning of Section 25 of the Evidence Act and therefore held that a confessional

statement of a person accused of an offence under the NDPS Act recorded by such an officer in the course of investigation, is admissible against

him. The said argument had found favour with the High Court in the light of the decisions of this Court in *Kanhaialal* 2008 (4) SCC 668 (supra) and

Raj Kumar Karwal (1990) 2 SCC 409 (supra) where it was held that a confession made by the accused before an officer of the NCB, is admissible in

evidence because the said officer cannot be treated as a "police officer" within the meaning of Section 25 of the Evidence Act. It was further

held that a conviction can be maintained on the sole confession made by an accused under Section 67 of the NDPS Act. A similar view taken by this

Court in *Ram Singh Appellant in Criminal Appeal No. 1136 of 2014* (supra), was cited by the High Court to fortify its decision that the confessions

made by the appellants herein before the officers of the NCB were admissible in evidence, being of voluntary nature.

8. However, much water has flown under the bridge since the year 2013. In the year 2020, a three-judges Bench of this Court answered a Reference

Order of a Division Bench in *Tofan Singh v. State of Tamil Nadu* (2013) 16 SCC 31 and re-examined the ratio of *Kanhaialal* 2008 (4) SCC 668

(supra) and *Raj Kumar Karwal* (1990) 2 SCC 409 (supra) to decide as to whether the officer investigating a matter under the NDPS Act would

qualify as a "police officer" or not. The other related issue which was examined by the larger Bench in *Tofan Singh Appellant in Criminal*

Appeal No. 1136 of 2014 (supra) was whether the statement recorded by the investigating officer under Section 67 of the NDPS Act can be treated

as a confessional statement or not even if the officer is not treated as a "police officer".

9. After a detailed examination of the legal position in the light of the provisions of the NDPS Act, vis-à-vis revenue Statutes like the Customs Act,

1962 and the Central Excise Act, 1944 as also the Cr.P.C and Section 25 of the Evidence Act, the majority decision authored by Justice Nariman,

arrived at the following conclusion:

"155. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under Section 42 or Section 53 can be the

basis to convict a person under the NDPS Act, without any non obstante clause doing away with Section 25 of the Evidence Act, and without any

safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India.

156. The judgment in Kanhaiyalal [Kanhaiyalal v. Union of India, (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474] then goes on to follow Raj Kumar

Karwal [Raj Kumar Karwal v. Union of India, (1990) 2 SCC 409 : 1990 SCC (Cri) 330] in paras 44 and 45. For the reasons stated by us hereinabove,

both these judgments do not state the law correctly, and are thus overruled by us. Other judgments that expressly refer to and rely upon these

judgments, or upon the principles laid down by these judgments, also stand overruled for the reasons given by us.

157. On the other hand, for the reasons given by us in this judgment, the judgments of Noor Aga [Noor Aga v. State of Punjab, (2008) 16 SCC 417 :

(2010) 3 SCC (Cri) 748] and Nirmal Singh Pehlwan v. Inspector, Customs [Nirmal Singh Pehlwan v. Inspector, Customs, (2011) 12 SCC 298 : (2012)

1 SCC (Cri) 555] are correct in law.

158. We answer the reference by stating:

158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are "police officers" within the meaning of Section 25

of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the

Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the

NDPS Act.

[emphasis laid]

10. In view of the aforesaid decision that declares that any confessional statement made by an accused to an officer invested with the powers under

Section 53 of the NDPS Act, is barred for the reason that such officers are "police officers" within the meaning of Section 25 of the Evidence

Act, a statement made by an accused and recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an

offence under the NDPS Act.

(b) EFFECT OF TOFAN SINGH'S VERDICT ON BALWINDER SINGH'S CASE

11. Now that it has been declared in Tofan Singh's case (2021) 4 SCC 1 (supra) that the judgements in the case of Kanhaiyalal 2008 (4) SCC 668

(supra) and Raj Kumar Karwal (1990) 2 SCC 409 (supra) did not state the correct legal position and they stand overruled, the entire case set up by

the prosecution against Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014, collapses like a House of cards. It is not in dispute that

Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 was not apprehended by the NCB officials from the spot where the naka was laid

and that Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 alone was apprehended in the Indica car. The version of the prosecution is that

after Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 was arrested, his statement [Exhibit PW-1/B] was recorded under Section 67 of

the NDPS Act wherein he ascribed a specific role to the co-accused - Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 and the

Sarpanch. The NCB officers claimed that they were on the lookout for both of them since they had managed to run away from the spot. While

Sarpanch could not be apprehended, the NCB officers learnt from reports in the newspaper that Balwinder had been arrested by the Amritsar Police

in an NDPS case and was lodged in the Central Jail, Amritsar. Permission was taken from the concerned Court to take Balwinder Singh Appellant in

Criminal Appeal No. 1136 of 2014 into custody in the instant case and he was arrested. A notice [Exhibit P - 6] was served on him under Section 67

of the NDPS Act and his statement [Exhibit A-17] was recorded. Treating his statement [Exhibit A-17] as a confessional statement,

Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 was arrested.

12. Once the confessional statement [Exhibit PW-1/B] of the co-accused, Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 recorded by

the NCB officers under Section 67 of the NDPS Act, who had attributed a role to Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014

and the subsequently recorded statement [Exhibit A-17] of Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 himself under Section

67 of the NDPS Act are rejected in the light of the law laid down in Tofan Singh Appellant in Criminal Appeal No. 1136 of 20146 (supra), there is no

other independent incriminating evidence that has been brought to the fore by the prosecution for convicting Balwinder Singh Appellant in Criminal

Appeal No. 1136 of 2014 under the NDPS Act. On ignoring the said confessional statements [Exhibit PW-1/B] & [Exhibit A-17] recorded before

the officers of the NCB in the course of the investigation, the vital link between Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 and

the offence for which he has been charged snaps conclusively and his conviction order cannot be sustained.

13. As a result of the above discussion, we are of the opinion that Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 deserves to be

acquitted of the charge of being in conscious possession of commercial quantity of heroin under the NDPS Act. Ordered accordingly.

(c) HOW IS SATNAM SINGH'S CASE PLACED ON A DIFFERENT FOOTING

14. We next come to the case of the appellant, Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014. Again, as in the case of Balwinder

Singh Appellant in Criminal Appeal No. 1136 of 2014, the statement [Exhibit PW-1/B] made by Satnam Singh Appellant in Criminal Appeal No. 1933

of 2014 and recorded under Section 67 of the NDPS Act will have to be discarded outright as it cannot be used as a confessional statement having

been recorded by the NCB officials who, in terms of the verdict in Tofan Singh's case (2021) 4 SCC 1 (supra) are to be treated as "police

officers" under the provisions of Section 25 of the Evidence Act. But unlike the case of Balwinder Singh Appellant in Criminal Appeal No. 1136 of

2014, the conviction of Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 does not hinge solely on his confessional statement [Exhibit PW-

1/B] made to the NCB officials. His case is on a different footing because it also rests on other relevant factors including the testimonies of three

prime prosecution witnesses namely, Sonu [PW-1] [PW-1], P.K. Sharma [PW-3] and O.P. Sharma [PW-5 (wrongly mentioned as PW-10 in the trial

Court judgement)] [PW-5]. We propose to discuss below that their testimonies when examined carefully, show that they had remained consistent and

unfailing. There appear no material contradictions or deviations in their depositions for this Court to extend any benefit to the appellant " Satnam

Singh Appellant in Criminal Appeal No. 1933 of 2014.

(d) "PROOF BEYOND REASONABLE DOUBT VIS-À-VIS "PREPONDERANCE OF PROBABILITY" :
LEGAL POSITION

15. We may first test on the anvil of settled law, the plea taken by learned counsel for the appellant " Satnam Singh Appellant in Criminal Appeal

No. 1933 of 2014 that the prosecution had failed to establish a prima facie case against the accused and therefore, the burden of proving his innocence

did not shift back to him. In the case of Noor Aga³⁸ (supra), a two-Judges Bench of this Court was required to decide several questions, including the

constitutional validity of the NDPS Act and the standard and extent of burden of proof on the prosecution vis-À-vis the accused. After an extensive

discussion, this Court upheld the constitutional validity of the provisions of Sections 35 and 54 of the NDPS Act, but went on to hold that since the

provisions of the NDPS Act and the punishments prescribed therein are stringent, the extent of burden to prove the foundational facts cast on the

prosecution, would have to be more onerous. The view taken was that courts would have to undertake a heightened scrutiny test and satisfy itself of

"proof beyond all reasonable doubt". Emphasis was laid on the well-settled principle of criminal jurisprudence that more serious the offence, the

stricter would be the degree of proof and a higher degree of assurance would be necessary to convict an accused. [Also refer: State of Punjab v.

Baldev Singh (1999) 6 SCC 172, Ritesh Chakarvarti v. State of M.P. (2006) 12 SCC 321 and Bhola Singh Appellant in Criminal Appeal No. 1136 of

20149 (supra)].

35. Presumption of culpable mental state"(1) In any prosecution for an offence under this Act which requires a culpable mental state of the

accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such

mental state with respect to the act charged as an offence in that prosecution.

Explanation" "In this section "culpable mental state" includes intention motive, knowledge of a fact and belief in, or reason to believe, a fact.

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

its existence is established by a preponderance of probability.

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

accused has committed an offence under this Act in respect of—

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

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

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

controlled substance; or

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

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

possession of which he fails to account satisfactorily.

16. Thus, it can be seen that the initial burden is cast on the prosecution to establish the essential factors on which its case is premised. After the

prosecution discharges the said burden, the onus shifts to the accused to prove his innocence. However, the standard of proof required for the

accused to prove his innocence, is not pegged as high as expected of the prosecution. In the words of Justice Sinha, who speaking for the Bench in

Noor Aga³⁸ (supra), had observed that:

“58. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it

is “preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35

of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

The essence of the discussion in the captioned case was that for attracting the provisions of Section 54 of the NDPS Act, it is essential for the

prosecution to establish the element of possession of contraband by the accused for the burden to shift to the accused to prove his innocence. This

aspect of possession of the contraband has to be proved by the prosecution beyond reasonable doubt.

(e) PLEA OF FAILURE TO ESTABLISH FOUNDATIONAL FACTS

17. The submission made by learned counsel for the appellant — Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 that the prosecution

failed to establish the underlying facts of possession of the contraband by Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 and therefore,

the burden of proof could not have shifted to the accused, is found to be devoid of merits having regard to the evidence placed on record by the

prosecution. The prosecution was successful in establishing the fact that it was the appellant — Satnam Singh Appellant in Criminal Appeal No. 1933

of 2014 who was driving the car [White coloured Indica Car bearing registration number HR-01-J-9639 (Marked as P-1)], when he was accosted at

the spot where the naka was laid by the NCB Officers on the relevant date. A photocopy of the registration certificate of the car [White coloured

Indica Car bearing registration number HR-01-J-9639 (Marked as P-1)] was recovered on a search of the appellant " Satnam Singh Appellant in

Criminal Appeal No. 1933 of 2014. He was the owner of the car [White coloured Indica Car bearing registration number HR-01-J-9639 (Marked as

P-1)]. The car [White coloured Indica Car bearing registration number HR-01-J-9639 (Marked as P-1)] was searched by the NCB Officers in the

presence of two independent witnesses. The contraband was recovered from the car [White coloured Indica Car bearing registration number HR-01-

J-9639 (Marked as P-1)] being driven by the appellant " Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 in the presence of the

independent witnesses and P.K. Sharma, a Gazetted Officer [PW 3], who was part of the NCB team. Even though one of the two independent

witnesses [Mukesh Kumar] had turned hostile and was dropped by the prosecution, the testimony of the other independent witness [Sonu [PW-1]]

was consistent and nothing material could be elicited by the accused during his cross-examination.

18. Through the deposition of the Chemical Examiner [S.K. Mitta Exhibit " P-17], the prosecution successfully proved the report [Exhibit P-11]

submitted by him stating inter alia that on testing the samples Exhibit P-12, the substances drawn from the bags recovered from the car [White

coloured Indica Car bearing registration number HR-01-J-9639 (Marked as P-1)] of the appellant " Satnam Singh Appellant in Criminal Appeal No.

1933 of 2014, were heroin. The samples Exhibit P-12 drawn and sealed were found untampered and the testimony of Constable Balwinder Kumar

[PW-2] corroborated the fact that he had carried the samples Exhibit P-12 with him and deposited them with the CRCL, New Delhi on 14th

December, 2005 with all the seals intact.

19. Given the aforesaid narrative, we are of the opinion that the prosecution was able to discharge the onus cast on it to prove the foundational facts.

Thus, the initial burden of proving that the appellant " Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 had the knowledge that the car

[White coloured Indica Car bearing registration number HR-01-J-9639 (Marked as P-1)] owned and being driven by him at the relevant point in time

was being used for transporting narcotics, stood discharged. Once it is concluded that the prosecution had produced adequate evidence to prove

beyond reasonable doubt that the accused " Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 had the knowledge, the presumption

contemplated under Section 35 of the NDPS Act would have to be drawn against him to hold that he had a culpable mental state for indicting him for

the offence for which he had been charged.

20. As has been observed by this Court in the case of Ram Avatar alias Rama (2011) 12 SCC 207 (supra), that possession of the contraband is a sine

qua non to secure a conviction under Section 21 of the NDPS Act and that such a contraband article should be recovered in accordance with the

provisions of Section 50 of the NDPS Act, being a statutory safeguard favouring the accused; otherwise the recovery itself shall stand vitiated in law.

21. The argument advanced on behalf of the appellant "Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 that both the courts below

have erred in discarding the defence taken by him to the effect that it was Sonu [PW-1] who was the real culprit and was apprehended by the NCB

officers with the contraband, but he was let off on bribing the NCB officers, does not meet the test of preponderance of probability and has rightly

been disbelieved by both the courts in the absence of any corroboration through cogent evidence.

(f) PLEA OF THE ACCUSED BEING IN THE CUSTODY OF THE NCB MUCH BEFORE THE NAKA WAS LAID

22. Another plea taken by the appellant "Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 is that he was in the custody of the NCB

officers much before the point in time when the naka was laid on 11th December, 2005. The deposition of witness produced by him, Soravdeep

Singh [DW-1] to substantiate that a call was made from his mobile number at 09.54 PM on 11th December, 2005 when he had already been

detained by the NCB officers, to a landline number installed in the Office of the Zonal Director at Chandigarh, was not of any assistance as the mobile

phone bills summoned by the appellant were not proved in accordance with law. The trial Court observed that the bill in question [Ex.DW-1/A] was

only a computer-generated one. The records pertaining to the bill were not produced by the witness summoned and the bill did not bear the signature

of any authority even to prove that the mobile phone number asserted by the appellant "Satnam Singh Appellant in Criminal Appeal No. 1933 of

2014 as belonging to him, stood in his name. We see no reason to take a different view.

23. Reliance placed by learned counsel on the decisions in *Dudh Nath Pandey v. State of Uttar Pradesh* (1981) 2 SCC 166, *State of Haryana v. Ram*

Singh (2002) 2 SCC 426, *Adambhai Sulemanbhai Ajmeri and Others v. State of Gujarat* (2014) 7 SCC 716 and *Jumi and Others v. State of Haryana*

(2014) 11 SCC 355, to urge that defence witnesses are entitled to equal treatment with those produced by the prosecution and different yardsticks

cannot be prescribed for prosecution witnesses as compared to defence witnesses is a well-settled principle of criminal jurisprudence, but cannot take

the case of the appellant "Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 any further inasmuch as the trial Court has carefully

analysed the testimonies of the defence witnesses before drawing an adverse presumption against the accused. The High Court has also taken pains

to go through the entire testimonies of the defence witnesses and only thereafter endorsed the view taken by the trial Court. There has been no

arbitrariness or undue favour shown to the prosecution witnesses from the appellant-Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 to

claim any bias.

(g) PLEA OF UNRELIABILITY OF THE TESTIMONY OF THE INDEPENDENT WITNESS, SONU

24. As for the contention of learned counsel for the appellant Āĉâ,-" Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 that the testimony of

Sonu [PW-1] cannot be treated as that of an independent witness in view of the provisions under Section 100 (4) of the Cr.P.C., we are of the view

that the said plea does not hold any water. Section 100 (4) of the Cr.P.C. that falls under Chapter VII titled

Āĉâ,-"Process to Compel the Production of ThingsĀĉâ,-â€œ, states as follows :

Āĉâ,-"100. Persons in charge of closed place to allow search Āĉâ,-

(4). Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable

inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is

willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.Āĉâ,-â€œ

25. It can be discerned from a bare reading of the aforesaid provision that it is a general provision relating to search and applies to a closed place, as

for example, a residence, office, shop, a built-up premises etc, where a search is required to be conducted by the investigation. It is in this context that

sub-section (4) of Section 100 Cr.P.C. provides that to maintain the purity of the process, before undertaking a search, a couple of independent and

respectable inhabitants of the locality where the place to be searched is located, be joined as witnesses to the search.

26. In the case at hand, the naka was laid by the officials of the NCB in an open area near the roundabout of Sectors 24/25, Chandigarh. Such was

the location that there was no inhabitant in the vicinity and the time of the naka was an unearthly hour of 01.00 a.m. on 12th December, 2005. In this

background, the two independent witnesses who were driving from Jalandhar towards Chandigarh, were flagged down by the NCB officers and

joined in the investigation. Therefore, the shadow of doubt sought to be cast on the testimony of Sonu [PW-1] by claiming that he was the real culprit,

is clearly a trumped up story that cannot be sustained. The other independent witness, Mukesh Kumar, had turned hostile and the prosecution did not

examine him. As a consequence, the two defence witnesses, Parkash Ram DW 3 and Ravi Kant Pawar DW4 produced by the appellant Āĉâ,-" Satnam

Singh Appellant in Criminal Appeal No. 1933 of 2014 to demonstrate that Mukesh Kumar was a stock witness, would hardly be of any assistance.

The other procedural discrepancies sought to be pointed out by learned counsel for the appellant Āĉâ,-" Satnam Singh Appellant in Criminal Appeal No.

1933 of 2014 and referred to in paras 4.3 and 4.4 above, are not considered so vital in nature as to unsettle or demolish the entire case set up by the

prosecution against the appellant Āĉâ,-" Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014.

(IV) CONCLUSION

27. In view of the aforesaid discussion, we are of the opinion that the appellant Āĉâ,-" Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 has

failed to make out a case for acquittal. Therefore, the order of conviction and the sentence imposed on Satnam Singh Appellant in Criminal Appeal

No. 1933 of 2014 is maintained. Criminal Appeal No. 1933 of 2014 is accordingly dismissed and the order of conviction and the sentence imposed on

Satnam Singh Appellant in Criminal Appeal No. 1933 of 2014 by trial Court and upheld by the High Court is affirmed. However, Criminal Appeal

No.1136 of 2014 is allowed and the appellant, Balwinder Singh Appellant in Criminal Appeal No. 1136 of 2014 is acquitted.