(2012) 05 DEL CK 0668

Delhi High Court

Case No: Criminal Appeal No. 372 of 2009

James Eazy Franky		APPELLANT
	Vs	
D.R.I		RESPONDENT

Date of Decision: May 22, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 313, 35, 428
- Customs Act, 1962 - Section 108, 135
- Evidence Act, 1872 - Section 25
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 2, 21, 27A, 35, 42
- Penal Code, 1860 (IPC) - Section 231, 313

Citation: (2012) 130 DRJ 598

Hon'ble Judges: Suresh Kait, J

Bench: Single Bench

Advocate: Vikas Gupta and Mr. Ravinder Singh, for the Appellant; Satish Aggarwal, Ms. Mala Sharma and Ms. Pooja Bhaskar, for the Respondent

Final Decision: Allowed

Judgement

Suresh Kait, J.

Vide the instant Appeal, the appellant has challenged the impugned judgement dated 22.03.2009 passed by ld. Special Judge, NDPS, New Delhi in Sessions Case no.38-A/05, whereby the appellant has been held guilty and convicted for the offence punishable u/s 21 (C) of NDPS Act. Also challenged the order on Sentence dated 25.03.2009,whereby he was sentenced to undergo RI for a period of 12 years with a fine of Rs.1,50,000/- and in default of payment of the fine further sentenced to undergo RI for a period of 11/2 years.

2. Benefit of Section 428 Cr.P.C. has also been extended to the convict. convict.

3. The case of the prosecution before the Trial Judge, in brief was that on the basis of specific intelligence that one person of African original, travelling in a Indica-V2 Car bearing registration no. RJ-02- TEP-56822 was carrying about 4 Kgs. of heroin, a surveillance was mounted on NH-8 at Bilaspur Toll Tax Barrier on 02.04.2005 by the officers of DRI. Further the intelligence suggested that car would be coming from Jaipur side to Delhi between 13.15 Hrs. to 15.00 Hrs. Accordingly, the said vehicle came at about 13.50 Hrs. and was spotted while leaving the toll tax barrier towards Delhi and started follow-up through heavy traffic. As soon as, it was confirmed that there was a male of African Original sitting in the said Car, the same was intercepted at about 14.30 Hrs, just after Mahipalpur Crossing in Delhi on NH-8.

4. It is further case of the DRI that at the time of interception, car was found to be occupied by one Driver of Indian origin, a man of African origin, two women and a child. The officers disclosed their identity and asked the occupants of the car about their identity. They identified themselves as Rajesh Yadav (Driver of the car), James Ezea Franky, Nizerian Citizen (Appellant), Angela Julie and Suzanna Saili with her 5 year old daughter namely Chi Chi.

5. On enquiry by the officers, the appellant admitted that he was carrying Narcotic Drugs with him in the Car. Accordingly, Notice u/s 50 of NDPS Act was served upon the Appellant and driver Rajesh Yadav as well. The appellant expressed his consent to be searched by any officer of DRI and that he may not be searched at heavily crowded and a congested spot, therefore he was escorted to DRI Office at CGO Complex, Lodhi Road. To the notice served upon him u/s 50 of NDPS Act, he declined to require the presence of any Magistrate or Gazetted Officer and similarly driver Rajesh Yadav gave his consent for his search and of his Car by any Officer of DRI and also declined to require the presence of any Magistrate or Gazetted Officer.

6. The Officers of DRI served summons u/s 67 of NDPS Act to both the ladies who also escorted to the Office of DRI. Both the ladies mentioned above were also served notice u/s 50 of NDPS Act, but nothing incriminating was recovered in their search conducted by Mrs. Anju Singh, IO of the case. From the search of driver Rajesh Yadav, Toll Booth Receipts ACM 134077 dated 20.04.2005 and business cards were recovered and nothing incriminating was recovered.

7. However, from the personal search of the appellant, a paper on which Jaipur Road, Rajasthan, Main Road, Kotputli was written in green ink by pen, Indian Currency of Rs.3,600/-, US$ 2000, two mobile phone sets were recovered and in search of the Car led to recovery of bag of Feroze-grey-black colour of "Genovaclub" from rear seat and documents i.e. temporary registration Certificate no. 0056822 dated 30.03.2005, Insurance Cover note from the Dash Board of the Car were recovered.

8. Further, the case of DRI is that on opening the bag, three packets taped over with brown adhesive tapes were found and one more packet was found inside the bag

which was kept in a packet polythene bag. The bags were removed and the packets were found plain polythene packets containing white powder and granules secured in double polythene transparent bags giving pungent smell and further out of four bags, 3 were moisturised. Thereafter a pinch of powder was taken from all four bags and tested with UN filed drug testing kit which revealed the presence of Heroin in all the four packets marked A to C and were weighed on electronic balance having found gross weight as 4.387 Kgs. and net weight as 4.244 Kgs. and same seized u/s 42 of NDPS Act. Three samples of 5 gm. each from each of the packets were drawn and marked A-1 to A-3 to D-1to D-3 respectively kept in a small press lockable polythene packets and then in a brown envelopes sealed with DRI Seal or a paper slip bearing signatures of witnesses, signatures of Appellant, both the ladies mentioned above, Rajesh Yadav and Officers of DRI.

9. Similarly, seized heroin packets were stapled and kept in a light yellow envelopes marked A to D and were sealed with DRI Seal in the above manner along with a packet and other material recovered was kept in a metallic packets with lock and wrapped in cloth and stitched and sealed with DRI Seal in the above manner. Personal search belongings of the appellant were also seized and sealed. Thereafter, the car was also seized along with the papers. After recovery and seizure, the appellant, driver and both the ladies mentioned above gave their statement u/s 67 of NDPS Act.

10. Thereafter, the Appellant was arrested on 21.04.2005. Samples were sent to CRCL on 21.04.2005 itself and results thereon were obtained vide letter dated 06.06.2005 with opinion that the samples were having diacetylmorphine with purity of 65.9 to 87.1%. The seized Narcotic drugs and articles were deposited in New Custom House, New Delhi on 21.04.2005 in intact condition and Car was deposited in CWC Safdarjung. DRI seal was obtained on 20.04.2005 at 1.50 Hrs and return after completion of all formalities on 21.04.2005. Test memos in duplicate were prepared at the spot on 20.04.2005 on 20.04.2005 itself and signed by the complainant on 21.04.2005.

11. After completion of investigation, complaint was filed against appellant for possessing, transporting and importing Heroin from Rajasthan, for the offence punishable u/s 21 and 27A of NDPS Act.

12. Ld. Trial Judge framed charges against the appellant u/s 21 (C) vide its order dated 04.03.2006, to which he pleaded not guilty and claimed trial.

13. In order to prove its case, DRI examined as many as 20 witnesses. Thereafter Statement of appellant was recorded u/s 313 Cr.P.C. In his defence, appellant examined DW-1 Ajay Kumar Singh, Protect Director, National Highway-8 who deposed that the distance of Rajasthan Haryana boarder is about 83 KMs from Boarder of Delhi Gurgaon and filed rough sketch plan as Ex.DW1/A. In cross-examination he deposed that Delhi Gurgaon Boarder is about 24 KMs from

Rajghat. He further deposed that Ex.PW2/E-3 appears to have been issued by National Highway Authority from Villaspur.

14. Learned Trial Judge after considering the facts and circumstances opined that the DRI has successfully proved beyond reasonable doubts on record. There was a secret information regarding transportation of the heroin which was informed to the senior officers, who after discussion, constituted a raiding party. Pursuant thereof, the appellant was intercepted while sitting in a Indica car in which appellant alongwith two other ladies were coming from Jaipur towards Delhi. Since the place of interception was not suitable, therefore, appellant and driver were brought to DRI office after giving them notice u/s 50 of NDPS Act alongwith other occupants of the car where the search of person and baggage conducted in the presence of department witnesses. In search from the bag of appellant, four packets were recovered containing about 4.244 KGs heroin and same were tested with field test kit and same were giving positive for heroin. Out of them, three samples of 5 grams each were taken out of the heroin recovered and the samples were sealed with the seal of DRI alongwith the paper slip bearing the signature of the appellant, independent witnesses, seizing officer and other occupant of the car including the driver. Panchnama was prepared and also duly proved on record. Compliance of Sections 42,50, 55 & 57 of NDPS Act has also been proved besides the statement of the appellant u/s 67 of the Act and further when her two companions Angela Julie and Suzanna Saili had narrated the similar circumstances and rather supported the version of the DRI.

15. Learned Trial Judge has also opined that the DRI has successfully proved beyond reasonable doubt that the contraband i.e. heroin was in conscious possession of the appellant, which was recovered by the DRI. In the present case, appellant was apprehended at Mahipalpur Boarder. The apprehension and timing of apprehension are specifically and stated by the witnesses. Even the defence could not put any dent in the story of the DRI that he was not apprehended in the manner as stated by the DRI.

16. Similarly, the recovery and panchnama proceedings in DRI office has also duly established by DRI. In nutshell, the DRI has successfully established the conscious possession of the contraband by the appellant as well as the recovery from him which are the essential ingredients under NDPS Act, hence as discussed above in detail the only inference can be drawn from the circumstances and the statement made by the appellant u/s of the NDPS Act is that the statement was voluntarily and from no stretch of imagination it can be inferred that it was under forced circumstances.

17. It is further recorded by learned Trial Judge that DRI has proved the case property and samples remained intact condition. The CRCL report proves that the recovered heroin was having purity of 65.9% to 87.1% and thus, the net recovery of 4.244 KGs even after considering the purity is a ''commercial quantity'' recovered

from the possession of the appellant which the appellant was transporting and possessing illegally in contravention of Section 8 of NDPS Act.

18. Accordingly, learned Trial Judge found the appellant guilty of committing offence punishable u/s 21 (c) of the NDPS Act. Consequently, appellant was convicted for the offence mentioned above.

19. Learned Special Judge further failed to notice that the agency received specific secret information which is Ex.PW3/A regarding the alleged car carrying the contraband before 11:00 AM on 20.04.2005 and the same was put up before the senior officers of the department for authorization, whereas, in the statement of the driver PW 11 recorded u/s 67 of the NDPS Act, which is Ex.PW6/B has categorically stated that the call was made by the Hotel staff to requisition the Taxi, in which the Appellant was apprehended, at 11:30 AM. PW 11 about the time at which time call for taxi was received by him and the time he reached the hotel.

20. It is only too curious as to how did the Department got specific information regarding the Taxi number RJ 027 TEP 56822 and exact description of the car even before the Appellant herein availed its services at random. This casts a serious doubt as to the veracity of the story of the prosecution and speaks volumes about the entire story being concocted, as PW 11 has also deposed that he had a fleet of 6vehicles at that time.

21. To strengthen ld. Counsel for the petitioner has relied upon a case of Sarju Vs. State of U.P (2010) 2 SCC (Cri) 1510 wherein it is held as under:

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

22. It is further submitted that ld. Special Judge did not take into account the aspect that the case of the prosecution is that, the appellant received delivery of the alleged heroin recovered from his possession from one Bajju Singh. That it is pertinent to mention here that there is no witness to this alleged transaction. This

claim of the prosecution is further belied by the testimony of PW 11, the driver of the apprehended vehicle, who categorically stated that they did not stop anywhere on their way to Delhi and that they stopped for the first time only when they were allegedly apprehended at Mahipalpur. Moreover, no efforts were made to identify or apprehend the said Bajju Singh, therefore, leading to the view that, in fact, the story of the prosecution is frivolous and lacks any concrete evidence. Thus, the false implication of the Appellant in this case is a serious possibility in the entire gamut of facts.

23. Learned Special Judge has completely discarded the retraction statement tendered by the Appellant at least 3 times before the Learned Trial Court, in which, the Appellant has categorically stated that his statement u/s 67 NDPS Act, 1985 was obtained under duress, coercion and torture.

24. Ld. Counsel for the appellant has relied upon a case of Alok Nath Dutta v. State of West Bengal 2006 (13) SCA 467 wherein it is held as under:-

We are not suggesting that the confession was not proved, but the question is what would be the effect of a retracted confession. It is now a well- settled principle of law that a retracted confession is weak evidence. The court while relying on such retracted confession must satisfy itself that the same is truthful and trustworthy. Evidences brought on records by way of judicial confession which stood retracted should be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon." [See also Babubhai Udesinh Parmar Vs. State of Gujarat, .

In Pon Adithan Vs. Deputy Director, Narcotics Control Bureau, Madras, , whereupon reliance has been placed by the High Court, this Court had used retracted confession as a corroborative piece of evidence and not as the evidence on the basis whereof alone, a judgment of conviction could be recorded.

25. It is further submitted that the Ld. Special Judge failed to appreciate the fact that PW2, I.O. Arvind Kumar Sharma, who admitted in his cross examination that the sealed packets of samples as well those of the allegedly seized contraband, could be opened without tempering the seals.

26. It is further submitted that Learned Special Judge failed to note the inconsistencies in sampling the seized heroin. As the Test Memo which is Ex.PW2/L, the weight of the 4 samples received was 5 grams each, whereas, the report received from the CFSL on the 4 samples drawn from the seized material, A1, A2, A3, A4 which is Ex.PW2/N states the weight as 6.6 grams, 6.6 grams, 6.7 grams and 7.5 grams respectively. That further, the word ''gross'' of the CFSL report, has been overwritten on the word ''net''. All these inconsistencies point towards the malafide intention on part of the department. The CFSL report Ex.PW 2/N and the questions put to appellant u/s 313 Cr.P.C. talks of white colour substance, however, the case property opened in the court by PW2 i.e IO found of brown colour.

27. On colour and weight learned counsel has referred the case of of Eze Val Okeka @ Valeza V. NCB 2005 (1) JCC (Nar) 57 wherein it is observed as under:-

Narcotics drugs and Pschotropic Substance Act, 1985- sec 21 (c)- conviction and Substance- Sustainability of- appellant had no connection with the premises from where Contraband (Herion) was recovered from his possession- Statement of the landlord was not recorded to establish the fast that appellant used to reside therein- Tenant of the premises was somebody else- Public witness did not support the prosecution case- no attempt to join any respectable witness of the locality in the raiding party- Absence of entries in the log book of the vehicle used by raiding party- casts a shadow of doubt- Moreover prosecution failed to prove case beyond reasonable doubt- Possibility of tampering with the investigating agency was there- Non- production of public witness and Non- Joining of neighbors in raiding party - Hence conviction and sentence set aside- Appellant allowed Criminal Examiner-Appreciation of- Deposed that what was analyzed was of white colour powder, whereas the prosecution case is that the powder recovered from the appellant was of brown colour- Under such circumstance it is difficult to held that what was recovered was actually chemically tested.

28. Mr. Gupta, learned counsel argued that the prosecution case has not been supported by the public witness PW- 7 Shanmugham. It is true that he was declared hostile but that does not provide any strength to the prosecution which was under an obligation to prove beyond reasonable doubt that the Heroin in question was recovered from the appellant as alleged. The investigating officer had made no attempt whatsoever to join any respectable witness of the locality in the raiding party. PW-7 Shanmugam as well as Ravi Tiwari, who was not produced in trial court, were only watchman of the area and as such, were not respectable residents of the locality. The investigating officer had sufficient time and opportunity to go to the other residents of the building or the neighbouring houses and make request to them to join the raiding party.

29. In State of West Bengal vs. Babuchkerverty JT 2004 (7) SC 216 the Supreme Court while examining the provision of the and the quality of the evidence required for conviction of an accused thereunder clearly observed in Para 28 of the judgment that in the case where mandatory provisions are not complied with and where independent witnesses are not examined, the accused would be entitled to acquittal. In the present case also, firstly; the quality of public witnesses allegedly joined in raiding party was not up to the mark, secondly; out of two witnesses one was not produced at all and the other who was examined in the court did not support the prosecution case and rather support the defence by saying that when the door of the premises opened, two persons from inside had run away. He also stated that the appellant came there later. This creates the serious lacuna in the prosecution case.

30. It is further submitted that in this case the prosecution miserably failed to prove on record that the article recovered from the appellant was properly sealed, properly preserved and then sent to the CRCL for analysis in the same condition and none had tempered with it before it was examined by the comical Examiner. The first and foremost reason for holding so is that the seal with which recovered article and sample was sealed at the spot was not handed over to any public witness after the sealing process was over and instead it was handed over to an official witness PW-8 only. This was highly improper. There is no explanation as to why the seal was not handed over to any public witness especially, when he was available to ensure that the recovered article was not tempered with; during the period case property remained with the investigating officer or with the authorized officer u/s 53 of the Act. Regarding the seal, PW8 C.B. Singh, Superintendent, NCB deposed that this seal was handed over after alleged recovery of the articles, then handed back the seal to PW-12 N.S. Ahlawat, Assistant Director on the same day. If the seized article as well as seal remained with PW- 12 only from the time of seizure till the time sample ware sent to CRCL for analysis, there is no guarantee that the samples were not tempered with, during that period. Furthermore the prosecution was under an obligation to establish on record as to who had taken the sample of contraband from PW-12 and taken those to CRCL. The person who had taken the samples to CRCL was not examined before the court. In the testimony of PW-8 C.B. Singh, superintendent, NCB, it was also brought that the seized article could be taken out of the packet without disturbing the seals. It shows that the sealing was not proper and as such possibility of tempering with the sample was there. No malkhana register have been produced nor entries therein proved before the court to show as to at what time and on what date the article and samples allegedly recovered from the appellant were deposited in the malkhana and on what date and time and by whom the samples taken out for CRCL analysis.

31. Learned counsel submitted that besides all these, it has come in the testimony of PW-3, the Chemical Examiner who analyzed the case property was an "off white" colour powder, whereas the prosecution case is that the powder recovered from the appellant was of brown colour. It has also come in the testimony of PW3, Narinder Singh Chemical Examiner, CRCL had the sample been of brown powder, the report would have been different. Therefore, his statement, makes it very difficult for the Court to hold that, the article which was recovered from the appellant was the same which was examined by the Chemical Examiner. It also shows that there may be tampering of article allegedly recovered from the appellant before it reached to CRCL for analysis.

32. In "Valsala vs. State of Kerala 1993 SCC (Crl) 1028," Supreme Court while dealing with the contention as to whether the article seized to was sent to Chemical Examiner observed that the evidence adduced in the case was wholly insufficient to conclude that what was seized from the appellant was sent to the chemical Examiner and through it was purely a question of fact but was an important link. In

view of doubt in regard to the proper custody and sending of the sample of the article for analysis, the accused was given the benefit of doubt and acquitted.

33. In State of Rajasthan Vs. Daulat Ram, the Apex Court while dealing with an offence under Opium Act held that it was the duty of the prosecution to prove that while in their custody the sample was not tempered with before reaching the public analyst.

34. This Court also in the case of Subhash Chand Mishra Vs. State 2002 (2) JCC 1379 relied upon several judgments of this court and came to the conclusion that the prosecution is under the obligation to prove the sample delivered to CRCL was in the same condition and there was no possibility of tempering with it. In the view of several doubts in the prosecution in regard to the connection of the appellant with the premises in question, recovered of Heroin from him, the possibility of tempering with the recovered article during the period it remained with the investigating agency, the non- production of public witness and non-joining of neighbours, this court is not in position to hold that the prosecution has succeeded in establishing its case against the appellant beyond reasonable doubt. The act lays down stringent punishment for the offence committed thereunder and as such casts a heavy duty upon the courts to ensure that there remains no possibility of an innocent getting convicted. The officers concerned with the investigation of offences under the act must produce best and unimpeachable evidence to satisfy the courts that the accused is guilty because no chance can be taken with the liberty of a person. No doubt that the drug tracking is a serious matter but the investigations into such offences also have to be serious and not perfunctory.

35. Learned counsel appearing on behalf of appellant has referred on Nor Aga v. State of Punjab & Anr. 2008 (3) JCC Nar SCC 67 wherein it has been observed as under:-

The fate of these samples is not disputed. Two of them although were kept in the malkahana along with the bulk but were not produced. No explanation has been offered in this regard. So far as the third sample which allegedly was sent to the Central Forensic Science Laboratory, New Delhi is concerned, it stands admitted that the discrepancies in the documentary evidence available have appeared before the court, namely:

i) While original weight of the sample was 5 gms, as evidenced by Ex. PB, PC and the letter accompanying Ex.PH, the weight of the sample in the laboratory was recorded as 8.7 gms.

ii) Initially, the colour of the sample as recorded was brown, but as per the chemical examination report, the colour of powder was recorded as white.

We are not oblivious of the fact that a slight difference in the weight of the sample may not be held to be so crucial as to disregard the entire prosecution case as

ordinarily an officer in a public place would not be carrying a good scale with him. Here, however, the scenario is different. The place of seizure was an airport. The officers carrying out the search and seizure were from the Customs Department. They must be having good scales with them as a marginal increase or decrease of quantity of imported articles whether contraband or otherwise may make a huge difference under the Customs Act.

36. Also, in Karam Chand v. The State(Delhi) 2006 (1) JCC 12, this Court has discussed on weight and samples recovered as under:-

31. The net weight of samples purportedly sent and actually found at CRCL is as under:

Net Wt of sample purportedly sent	Net Wt. actually found at CRCL
1 Kg.	961.1 gms.
200 gms.	183.7 gms.
200 gms.	183.7 gms.
1 Kg.	963.9 gms.
200 gms.	169.7 gms.

32. Evidently, net weight of all the five samples was found much less than what sealed sample parcels purported to contain. The deficit is not insignificant. The prosecution has no explanation for such deficit. Suspicion regarding tampering with sealed sample parcels in the backdrop of prosecution failure to prove that CRCL forms were actually deposited in the Malkhana and that the same had been delivered at CRC Laboratory, Pusa Road, along with sealed sample parcels grows stronger.

33. In Rajesh Jagdamba Avasthi v. State of Goa, 2004 (4) Cri 347 (SC), where the parcel which was said to contain 115 gms. of Charas was found to contain only 82.54 gms. of Charas, it was not considered to be a minor discrepancy and the Supreme Court proceeded to observe:

The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by the Junior Scientific Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope A ignoring the quantity of charas found in envelope B. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed

in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by PW 1 was less than the quantity sealed and sent to him. As he rightly emphasized, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for Chemical analysis to PW1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful.

37. In the present case also, he submitted that the discrepancy in the weight of the contents of the sample parcels sealed at the spot and that which was actually found at CRC Lab can by no means be reconciled. Consequently, the credibility of the alleged recovery proceedings stands considerably eroded. It is, in the circumstances, rendered difficult to find beyond reasonable doubt that the samples sent to CRCL actually represented the lot allegedly recovered from the respective appellants.

38. Mr. Gupta, further argued that the Special Judge failed to notice the glaring contradictions in the story of the prosecution which could have been instrumental in exonerating the Appellant. This is clear from the major contradictions in the timings of the alleged events. The appellant was allegedly intercepted by the arresting team at 2:30 PM on 20.04.2005 and notices u/s 67 of NDPS Act are alleged to be served at 3:00 PM in which the quantities of the contraband are also mentioned. Interestingly enough, the bags allegedly containing the contraband were first checked at 3:20 PM at the DRI office. This entire sequence of contradictions is conveniently ignored by the Learned Special Judge, which in fact raises serious questions on the very recovery of the contraband from the possession of the Appellant herein.

39. Further it is argued that PW 18, then Deputy Director of the prosecuting agency deposed that he came to know about the raid and interception at 2:50 PM, which, again, is highly improbable as the alleged interception itself took place at 2:30 PM on 20.04.2005. He further went to the extent of saying that he knew the weights of the seized contraband at 2:30 PM, which again is highly contradictory as the weights of the material seized was known only after 3:20 PM.

40. Learned Special Judge, further glossed over the irregularities carried out by the Department in effecting the alleged recovery of contraband from the possession of the Appellant, for instance, after apprehending, the Appellant was taken to the DRI office in a DRI vehicle and the keys of the alleged apprehended car were taken by the DRI officials and the same was also driven to the DRI office and was further searched in the absence of the Appellant. Hence, there arises no question of any conscious possession of contraband by the Appellant as the entire process of recovery is jeopardized by the mere fact that there has been no authentic witness to the alleged recovery of contraband from the possession of the Appellant. The Appellant actually deserves to be acquitted on this short point alone.

41. On the point of conscious possession and personal search, learned counsel for appellant relied upon Bahadur Singh vs. State of Madhya Pradesh 2002 (1) JCC 12 SC, wherein it has been observed as under:-

According to the prosecution there were two independent witnesses in whose presence the poppy straw was recovered and seized. The prosecution, however, examined only one of them, namely, Pawan Kumar Sharma, PW1. PW1 did not support the prosecution and was declared hostile. He though admitted his signatures as a punch witness to the documents but denied that in his presence 3.900 kgs. of poppy straw was recovered and seized from the driver, Bahadur Singh and cleaner, Amreek Singh. The conviction was, however, based on the sole testimony of Investigating Officer, Head Constable Gontiya, PW3.

There are serious material discrepancies in the evidence in respect of recovery and seizure. PW4, a constable, stated in the cross-examination that when Pawan Kumar Sharma reached Kabir Chowk where the truck was apprehended PW3 told him that there is poppy straw in the truck and when they reached there, PW3 had already taken the search of the truck. There are also serious discrepancies in respect of the deposit of the seized poppy straw in the Maalkhana. The deposit is shown to have been made under Entry No.68-A dated 11th October, 1997. The date of the incident is 10th October, 1997. The Entry above Entry 68-A, is Entry No.68 dated 15th October, 1997. The Entry after Entry 68-A, is Entry No.69. That is also dated 15th October, 1997. The concerned police official who made these entries was not examined by the prosecution but was examined as a defence witness. His explanation to the aforesaid entries was that he forgot to make an Entry of the seized material in the Maalkhana register and made the entry later after `15th day''. The explanation is far from satisfactory. Assuming he forgot to make the entry, that then cannot be made by interpolation as aforesaid. The entry could be made at its appropriate place under the correct date on which it was actually made and delay in making the entry could be explained. He further deposed that since no cash was deposited he did not make any Entry for receipt of Rs.27,000/- connected with the crime. In respect of this amount, PW3, the Investigating Officer, in cross-examination stated as under:
During arrest, 54 currency note of Rs.500 denomination each were seized from Bahadur Singh, which was Rs.27,000/- in all and it is true. It is wrong to say that Rs.27,000/- were never returned to Bahadur Singh. Head MoharrirJagat Ram of police station has got the receipt of the refund of that money. It is wrong to say that for harassing accused Bahadur Singh and Amreek Singh, I entered in their truck and searched the truck unnecessarily and the accused were unnecessarily arrested. It is wrong to say that Rs.27,000/- were not returned to accused persons.

42. Learned counsel also cited Surendera Singh & Chintu Vs. UOI 2005 (1) JCC (Nar) wherein it has been held as under:-

Narcotic Drugs- and Psychotropic substance Act, 1985- sec. 18- conviction and sentence- contraband article seized from a Room- Room was not owned and possessed by the accused- Accused was present in room tried to run away seeing the police party- It would not constitute any offence because the room from where contraband articles were recovered was not being possessed by the Accused Appellant- Hence conviction and sentence cannot be sustained.

NDPS case- Search of a person- How to be conducted- The person searching the accused is required to offer himself for his personal search before entering in the premises- officer conducting search did not offer for their search and hence conviction and sentence cannot be sustained.

43. That Learned Special Judge further failed to ensure a proper compliance of the provisions of section 313 of the Code of Criminal Procedure in the interest of justice and in order to give the appellant a fair opportunity to defend his case effectively. He referred to questions Nos.7,12,14,15,19,23, 25, 28, & 38 put to appellant which reads as under:-

Q7 It is further in evidence against you that thereafter, notices u/s 50 of NDPS Act, were served upon you, Ex.PW2/A and Rajesh Yadav, Ex.PW2/B and were informed in the said notices that it was their legal right to be searched in the presence of any Magistrate or a gazetted Officer, if they desire so, to which you said that you did not require the presence of any Gazetted Officer or Magistrate for the search. However, you requested that the said search be carried out in the DRI office. This option was reduced into writing on the face of the said notice by you. What do you have to say?

Ans. It is incorrect. However, I was tortured to write on many papers as per the dictation of DRI officers namely Sh. Arvind Kumar Sharma in DRI office. My signatures were also taken forcibly on many blank papers and on semi written papers and small paper slips under torture by the officers of DRI in DRI office.

Q12 It is further in evidence against you that thereafter, the car was searched, which resulted in the recovery of car''s registration certificate, Ex.PW2/E1, insurance papers, Ex.PW2/E3, delivery challan Ex.PW2/E2, from the dash board of the car and feroze grey black colour bag, near the rear seat of the car was found. All the documents mentioned above were taken into possession for further enquires. What do you have to say?

Ans. It is incorrect as nothing was searched in my presence.

Q14 It is further in evidence against you that on removing the adhesive tape one by one of each packet, recovered plain polythene bag and on further examination of the said polythene bag, recovered off white powdery and granular substance, from which pungent smell was emanating. What do you have to say?

Ans. It is incorrect.

Q15 It is further in evidence against you that from the blue and white polythene bag, there was another black colour polythene bag was found, from which another packet wrapped in adhesive tape was found which was also opened after removing the adhesive tape and recovered off white powdery and granular substance from which pungent smell was emanating. What do you have to say?

Ans. It is incorrect.

Q19 It is further in evidence against you that the remaining quantity of heroin were kept back in their respective packets and stapled and after this, all these packets were separately kept in envelopes and were respectively marked as A, B, C, and D corresponding to the marking made previously and those packets were further sealed with DRI seal over a paper slip bearing signatures of panch witnesses, you, Rajesh Yadav, Suzana Saillo, Angela Juile and PW2. What do you have to say? Ans. It is incorrect. However, I was tortured to write on many papers as per the dictation of DRI officers namely Shri Arvind Kumar Sharma in DRI office. My signatures were also taken forcibly on many blank papers and on semi written papers and small paper slips under torture by the officers of DRI in DRI office.

Q23 It is further in evidence against you that the test memos, Ex.PW2/L and Ex.PW2/N, were also prepared at the spot. The panchnama, Ex.PW2/D was also prepared and the same was read over and explained to all the concerned people. The site plan, Ex.PW2/E was also prepared. Facsimile seal of the DRI was also appended on the pachnama and the test memos. What do you have to say?

Ans. It is incorrect.

Q25 It is further in evidence against you that in pursuance to the summons Ex.PW2/C, you appeared before PW2 Shri Arvind Kumar Sharma on 20.04.2005 to tender your voluntary statement, Ex.PW2/F under the NDPS Act and in your statement, you admitted the aforesaid recovery and seizure and other incriminating facts. What do you have to say?

Ans. It is incorrect. However, I was tortured to write on many papers as per the dictation of DRI officers namely Shri Arvind Kumar Sharma in DRI office. My signatures were also taken forcibly on many blank papers and on semi written papers and small paper slips under torture by the officers of DRI in DRI office. I had not tendered any voluntary statement to the officers of DRI. However, I had retracted the contents of the said statement when I was produced before the Court vide my retraction Ex.DXZ and DXZ-1.

Q28 It is further in evidence against you that in pursuance to the summons, Ex.PW7/A and Ex.PW7/B issued to Ms. Angela Julie and Suzanna Salio, they tendered their statements, Ex.PW7/C and Ex.PW7/D respectively before PW7 Sh. Devnedera Singh, in which they admitted the aforesaid recovery, seizure and other incriminating facts. What do you have to say?

Ans. It is incorrect.

Q38 It is further in evidence against you that PW2 Sh. Arvind Kumar Sharma conducted enquiries regarding Ms. Suzana Sailo, Okatth Chika Anthony and submitted the enquiry reports, which are Ex.PW2/S to Ex.PW2/U respectively. What you have to say?

Ans. It is incorrect. PW2 facilitated Ms. Suzana Sailo, Oktath Chika Anthony and Rajesh Yadav to leave the DRI office and I was implicated in the present false case, though I have nothing to do with the present case.

44. Learned counsel submitted that the no incriminating evidence was put to the accused with respect to the case property. The question no 14 put to the accused with respect to the white powder and granular substance recovered is different from the brown colour powder which was opened in the court when by the IO when the case property was opened.

45. It is submitted that no question of conscious possession was put to appellant, therefore, it is clear that noncompliance of Section 313 Cr. P.C.. He relied upon Raj Kumar v. State of Punjab (2005) 1 JCC (Nar) wherein it has observed as under:-

In the present case the beg contained 8.250 kg of Opium was lying on the seat between the two appellants. Both appellants had been charged for possession of Opium but neither of them had been asked any question in their statement under sec. 313 CrPC. that they were in conscious possession of opium. Therefore neither the presumption of under sec 35 nor the presumption under sec 54 of the Act would be attracted.

Section 35 provides that in any prosecution for an offence under the Act which requires the culpable mental state of the accuse (conscious possession), the court shell presume the existence of such mental state but it shall be a defence for accused to prove the fact that he has no such mental state with respect to the Act charged as an offence in the prosecution. There is an explanatory clause which states that "culpable mental state" including "intention, motive, knowledge of a fact and belief in or reason to believe, a fact.

46. Learned counsel relied upon B.P. Moideen Sevamandir and Another Vs. A.M. Kutty Hassan, wherein it is held as under:-

In the present case through, there was evidence regarding conscious possession, but, unfortunately, no question relating to possession, much less conscious possession was put to the accused under sec 313 Cr.P.C. The questioning u/s 313 Cr.P.C is not an empty formality.

When the accused was examined u/s 313 Cr. P.C., the essence of accusation was not brought to his notice, more particularly, that possession aspect, as was observed by this court in Avtar Singh v. State of Punjab. The effect of such omission vitally affects

the prosecution case.

47. He submitted that Learned Special Judge failed to appreciate that the story of the prosecution could not stood on its feet in the face of material contradictions in the testimonies of the prosecution witnesses. PW 8 deposed that the seal was obtained at 1:15 PM on 20.04.2005 while PW 2 I.O. stated that the arresting team left the DRI office at 11:50 AM. PW 2 further states that test memos were prepared at the spot of arrest, which allegedly happened on 20.04.2005, whereas the date on the test memo Ex.PW2/L is 21.04.2005, further creating doubts on the entire case of the prosecution.

48. Learned counsel further submitted that there are interpolations on dates which prove that the prosecution had tempered the evidence. He has referred Ramdass & Anr Vs. The State (NCT of Delhi) 2011 JCC 156, wherein it is held as under:-

One cannot lose sight of the fact that such inadvertent mistakes happens sub-consciously when the author of the document or its signatory is not conscious of the actual date. In the normal course of circumstances, in such cases, the author or signatory of the document is always likely to append the date proceeding to the actual date on the document. On perusal of Ex.PW2/ DA, we find that it is not only purported to have been signed on the date subsequent to the date of occurrence but the month is also not the same. It is highly improbable that such an inadvertent mistake could have been committed by the investigating officer. This circumstance raises a strong possibility that purported statement of the witness Ex.PW2/DA has been subsequently introduced by the investigating officer on an afterthought to project PW2 Vijender as an eye witness and make the prosecution story suspect.

49. He further argued that the Special Judge has completely glossed over the testimony of PW 13, an alleged panch witness, which belies the entire story of the prosecution regarding arrest of and recovery from the Appellant. PW 13 states that there were only 5 persons in all in the alleged intercepting team, i.e., himself, 1 driver, and 3 officers including I.O. Arvind Kumar Sharma. Whereas, it is stated by PW 2 I.O. Arvind Kumar Sharma that there were 7 persons in the arresting party consisting of 5 officers and 2 panch witnesses.

50. Learned Special Judge further failed to appreciate that PW 13 stated that he was absent from his office only from 12:00 to 2:00 PM on 20.04.2005, the alleged date of arrest of the appellant, and that he had returned to his office at the CGO Complex at 2:00 PM on that date. This clearly indicates that the alleged interception and seizure from the Appellant which is allegedly happened at 2:30 PM. Therefore, either event did not happen at all or it happened in the absence of PW 13, the alleged panch witness, which itself is a grave irregularity and is sufficient to absolve the appellant from the allegations.

51. He further submitted, learned Special Judge failed to notice that PW 13 is, actually a planted witness which is clear from the aspect that in his testimony he

stated that he could read English and he was told that the words "box", "mobile", "money" etc. were written on the slips signed by him, whereas, no such words were actually found on those slips apart from the signatures.

52. He pointed out that learned Special Judge also failed to appreciate the glaring lacuna in the story of the prosecution that the second alleged panch witness, namely Shiv Mangal, was untraceable despite the fact that his address was same as that of the first panch witness, PW 13. This only points out that the entire story of the prosecution is false and frivolous.

53. Further, it is submitted that the Learned Trial Judge also failed to test the veracity of the Notice u/s 50 NDPS Act which is ExPW2/A, served upon the Appellant as it has no signatures of any witnesses whatsoever and further, neither the provisions of Section 42 of NDPS Act, 1985 complied with.

54. Learned counsel relied upon Vijaysinh Chandubha Jadeja Vs. State of Gujarat, wherein it has been held as under:-

In view of the foregoing discussion, we are of the firm opinion that the object with which right u/s 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

As observed in Re Presidential Poll14,(SCC p.49, para 13)"it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole

We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh''s case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be

possible nor feasible to lay down any absolute formula in that behalf.

55. The Learned Special Judge further failed to test the veracity of the Panchnamas. This is evident from the fact that the complaint of the prosecution does not mention the seizure of mobile phones from the person of the appellant, whereas such seizure is mentioned in the Panchnama. This puts the genuineness of the Panchnama under heavy suspicion. It is also pointed out towards the likelihood that the Panchnama as well as all other documents were prepared only at the DRI office as a material afterthought and that the entire case of the prosecution is a fallacy.

56. He has submitted that the Learned Special Judge has disregarded the fundamental principle of criminal law that any benefit of doubt should go in favour of the accused, of the prosecution failed to prove its case on its own strength and not on the weakness of the defence.

Therefore, learned Judge has committed grave error of law by arriving at the judgment convicting the Appellant based on an extremely flimsy trail of evidence, wherein, just only one officer was examined from the arresting party by the prosecution.

57. Moreso, there were only 4 statements u/s 67 of NDPS Act on record which included the Appellant, a driver of the allegedly apprehended car and 2 ladies who were allegedly travelling with the Appellant in the said car. Ironically, these 2 ladies were not examined during the trial, therefore, depriving the prosecution of any weight or reliance, to gain from the statements of the 2 ladies recorded u/s 67 of the NDPS Act Ex.PW7/C and Ex.PW7/D. It goes against all tenets of criminal jurisprudence when a conviction is based upon such unreliable and weak pieces of evidence, wherein just one officer, i.e. the I.O., the complainant in the case, has been examined to prove the entire case.

58. The MLC, which is Mark G conducted on the appellant by the Doctor of Ram Manohar Lohia Hospital, does not bear the name and the stamp of the Doctor who is alleged to have performed the MLC. More interestingly, against the column of BP the pulse of the appellant is recorded, and against the column of the pulse, BP is recorded, which is highly improbable of any Doctor practicing at RML hospital, which cast serious doubt on the authenticity of the MLC, thus weakens the case of the prosecution.

59. Learned counsel argued, other officers who allegedly participated in the interception and raid were not even named in the complaint, neither were they examined during the trial nor their statements were recorded anywhere by the agency.

60. Mr. Gupta, learned counsel argued that learned Special Judge disregarded all likelihood of the appellant being falsely implicated in the case by organized fake recoveries orchestrated by the DRI officials in order to claim rewards from the

government. This aspect has been proved by PW 18, Deputy Director, DRI who has stated that the officials were suitably rewarded on showing such seizures.

61. The Special Judge also failed to appreciate, while convicting the appellant, material inconsistencies in the case of the prosecution. Moreso, the Learned Special Judge erred in not considering that in case of two possible views, then the benefit of doubt ought to be exercised in favour of the accused.

62. The presumption of innocence and proof beyond a reasonable doubt postulates that the evidence led in the court during trial by the prosecution has to be subjected to a minute and meticulous examination. Because of these cardinal principles of criminal jurisprudence the deposition / statements of the witnesses in the court cannot be accepted at their face value as gospel true, but it is imperative that their veracity be tested on a strict touch stone. In the present case the Court ought to consider that such witnesses have to be weighed with caution and ought not to be made the sole basis for the conviction in the absence of any clear testimony.

63. While refuting the submission of learned counsel for petitioner, Mr. Satish Aggarwala, learned counsel for DRI submitted that this is a case of recovery and seizure of 4.244 kgs. of heroin, having purity percentage 65.9% to 87.1%. In support of the case, the prosecution examined the witnesses, who, all supported the case of prosecution, which led to conviction of appellant.

64. PW1 Shri R.P. Meena, who proved the acknowledgment receipt as Ex.PW1/A, test report as Ex.PW1/B, final test report as Ex.PW1/C, polythene pouches containing off white powdery substance Mark A-1 to D-1 as Ex.P-1 to P-4, four envelopes marked A-1 to D-1 as Ex.P-5 to Ex.P-8, yellow colour envelope as Ex.P-9 & paper slips Ex.P-10 to Ex.P-13.

65. In cross-examination, he denied the suggestion that the samples and paper slip were tempered with. He denied to the suggestion that the documents were also fabricated in the present case to implicate the accused. He also denied to the suggestion that the seal affixed on Ex.PW1/B and Ex.PW1/D-1 were also tempered with. To the suggestion that Ex.PW1/C was prepared by Yogender Kumar and it was merely signed by him and Shri D.K. Beri. He has further denied the suggestion that he has not analyzed the sample in the present case nor the analysis was supervised by Shri D.K. Beri.

66. PW2 Shri Arvind Kumar Sharma, the complainant, who proved the notice to the accused u/s 50 of NDPS Act as Ex.PW2/A, notice u/s 50 to Rajesh Yadav as Ex.PW2/B, summons dated 20.4.2005 to accused as Ex.PW2/C, panchnama dated 20.4.2005 as Ex.PW2/D, site plan as Ex.PW2/E, RC certificate as Ex.PW2/E-1, delivery challan as Ex.PW2/E-2, certificate of insurance company as Ex.PW2/E-3, receipt issued by National Highway Authority as Ex.PW2/D-4, Business card as Ex.PW2/E-5, paper slip of Jaipur Road, Rajasthan as Ex.PW2/E-6, statement of accused as Ex.PW2/F, report u/s 57 of the Act as Ex.PW2/G, summons to accused as Ex.PW2/H, statement of the

accused dated 21.4.2005 as Ex.PW2/I, arrest memo as Ex.PW2/J, paper slips as P-10 to P-13, polythene pouches containing off white powder as P-1 to P-4, four envelopes marked A-1 to D-1 as P-5 to P-8, yellow envelope as P-9, forwarding letter as Ex.PW2/K, test memo as Ex.PW2/L, deposit memo PW-2/M, test memo as Ex.PW2/N, summons to Ashok Kumar as Ex.PW2/O, statement of Ashok Kumar as Ex.PW2/P, documents submitted by Ashok Kumar as Ex.PW2/P-1 to P-2, summons to Joginder Singh as Ex.PW2/Q, statement of Joginder Singh as Ex.PW2/R, copy of election I. Card as Ex.PW2/R-1, enquiry report dated 5.5.2005 as Ex.PW2/S, Enquiry report dated 1.8.2005 as Ex.PW2/T, enquiry report dated 5.8.2005 as Ex.PW2/U, the investigation report dated 6.10.2005 as Ex.PW2/V, copy of seal movement register at Sr. No.16 of point X to X-1 as Mark F, copy of application to the Special Court for enquiry in jail as Ex.PW2/W.

67. During his cross examination, he has voluntarily stated that the packets were damaged due to moisture and the box was in rusted condition due to moisture.

68. He further deposed that the sitting arrangement was not remained same till reaching the DRI office and was changed at Mahipalpur Crossing itself, after the interception of the vehicle in question. He has specifically stated that he did not talk to anybody in the office after the interception till reaching in the DRI office and nobody from the raiding party in his presence talked to any officer in the office.

69. He further stated that the notice was prepared at the spot while sitting in the Gypsy after interception and no proceedings were recorded separately at the point of interception while preparing or serving then notice to the occupants of the car.

70. He has denied the suggestion that the accused was unable to read and understand the English language by reading, except copying the vernacular. He has further specifically stated that there was one facsimile of DRI seal which he used during his tenure in the office and all the facsimile of the seals were looking like one. He further stated that seal was being kept by the custodian. He has denied the suggestion that no seal was used or tampered with.

71. PW3, Shri K.S. Ratra has proved the intelligence report as Ex.PW3/A. During his cross examination, he denied the suggestion that he intentionally did not submit the report Ex.PW3/A to his immediate superior officer, as he alongwith Deputy Director had already planned to implicate the accused in the present case. He has further denied the suggestion that the document Ex.PW3/A was not prepared on 20.4.2005 at 11 a.m. He has further denied the suggestion that the said document was concocted / fabricated and prepared later on, with the connivance of Deputy Director and other officer of DRI to implicate the accused. He further denied the suggestion that he was deposing falsely.

72. PW4 Shri R.S. Kashyap, who has proved the deposit memo as Ex.PW2/M. During his cross examination, he has denied the suggestion that the case property has been tempered with. He further denied the suggestion that he was deposing falsely

in this regard. He has specifically stated that he has no knowledge as to who had prepared Ex.PW2/M.

73. PW5 Shri N.D. Azad has proved report u/s 57 of NDPS Act, Ex.PW2/G, letter to Nigerian Embassy as Ex.PW5/A, Deposit memo as Ex.PW2/M, covering letter alongwith correspondence from mobile telephone operator supplying the call details from Idea cellular Co. as PW-5/B, letter of Reliance Infocom containing call details of mobile mentioned in the covering letter running into 14 pages as Ex.PW5/C, covering letter containing call details from Bharti Cellular Ltd. regarding mobile No. mentioned in the letter - computer print out running into 4 pages as Ex.PW5/D, subscriber details from Reliance Infocom pertaining to mobile No. mentioned in the covering letter Ex.PW5/E as Ex.PW5/E, letter from Reliance Infocom alongwith annexures running into two pages as Ex.PW5/F, covering letter from Idea Cellular Ltd. alongwith annexure A and B as Ex.PW5/G, covering letter from Bharti Televentures Ltd. as Ex.PW5/H.

74. In the cross-examination, he has specifically stated that no statement of any lady Nigerian was shown to him at any point of time, however, he was told that one statement of Nigerian lady was recorded by one lady officer. He denied the suggestion that all the communications and telephone details were fabricated and manipulated in order to implicate the accused. He has further denied the suggestion that they have implicated the accused in the present case by preparing the manipulated documents and that he was deposing falsely.

75. PW6Shri Vinod Kumar Sharma has proved summons to Rajesh Yadav, driver of the vehicle in question as Ex.PW6/A and statement of Rajesh Yadav as Ex.PW6/B. During his cross examination, he has specifically stated that before recording the statement, the driver was briefed that he has been given the summons and he was to give the correct information. He further stated that statement was not recorded specifically in question answer form. The witness was told to narrate the story and accordingly narrated. He had not asked any specific question while narrating his role. He has denied the suggestion that the accused was falsely implicated. He has further denied the suggestion that the statement facilitating the driver to out of the case was prepared by him at the instance of senior officers of DRI to implicate the accused. He further denied the suggestion that Ex.PW6/B, was dictated by him to the driver to implicate the accused and the driver was shown as innocent. He has also stated that he was not aware at what time panchnama was concluded, as the panchnama was not prepared in his presence nor he knew who were the persons present at the time of preparing the panchnama or who signed the same.

76. PW7 Shri Devendra Singh has proved the summons to Ms. Angela Julie as Ex.PW7/A, summons to Ms. Suzanna Sailo as Ex.PW7/B, statement of Ms. Angela Julie dated 20.4.2005 as Ex.PW7/C, statement of Ms. Suzanna Sailo as Ex.PW7/D. During his cross examination, he has stated that he was orally asked by Shri N.D. Azad to record the statements of Angela Julie and Suzzsanna Sailo. He has denied

the suggestion that the department was determined to implicate the accused in the present case and that is why the lady officer was not asked to record the statement and he recorded the statement to facilitate the said two ladies to escape. He further stated that there was no sticker or the name affixed on any unit of the luggage indicating the ownership of the said luggage. He further stated that summons were served upon above mentioned two ladies in the vehicle itself when they were intercepted at Mahipalpur. He further stated that their team was not briefed by anyone nor any secret information was shown to their team. He further stated that whatever questions were put, those ladies answered and he recorded in the statement form. He has denied the suggestion that he deliberately recorded the statements of ladies to facilitate of those ladies to go and to falsely implicate the accused in the present case. He has further denied the suggestion that the accused has been falsely implicated in the present case. He further denied the suggestion that he was deposing falsely.

77. PW8 Shri Sanjay, tax Assistant has proved the copy of the seal movement register as Ex.PW2/X. During his cross examination, he has stated that he was given oral directions on 20.4.2005 by Shri N.D. Azad to deliver the seal to Shri Arvind Kumar Sharma and the same was entered in the record. He further stated that he did not maintain about the record of delivering the seal and the record of the same remained with Shri N.D. Azad. He further stated that there is only one seal in DRI and Shri N.D. Azad is the custodian of that seal. He further stated that he recorded the direction issued by Shri N.D. Azad in the seal movement register. He had admitted his writing at point X to on Ex.PW2/X. He has denied the suggestion that he has made the entries at point X to X on a waste paper which is nothing to do with the seal of DRI. He has further denied the suggestion that he made the entry on Ex.PW2/X after 22.4.2005 on the instruction of Shri Arvind Kumar Sharma to implicate the accused in the present case. He has denied the suggestion that neither he handed over the seal to Shri Arvind Kumar Sharma on 20.4.2005 nor the same was ever returned to him by Shri Arvind Kumar Sharma on 21.4.2005. He has further denied the suggestion that the entry made at point X to X on Ex.PW2/X is manipulated and fabricated to implicate the accused in the present case and that he was deposing falsely.

78. PW9, Shri Jai Bahadur, has proved the receipt of CRCL as Ex.PW1/A. During his cross examination, he denied the suggestion that there is no seal available in the DRI which bears only facsimile of Directorate of Revenue Intelligence. He further stated that he deposited all the papers in CRCL whatever he had carried with him. He specifically stated that Ex.PW2/L i.e. Test memo was visible and words "Directorate of Revenue Intelligence Rev Intelligence" are visible. He further stated that he handed over the documents and pullandas to Shri R.P. Meena, who compared the seal on the test memo as well as on the pullandas in his presence and he has not pointed out any deficiency. He has denied the suggestion that the samples and the test memos were tampered with. He has further denied the

suggestion that he was depositing falsely in this regard.

77. PW10 Mrs. Anju Singh has testified the issuance of notice u/s 50 of NDPS Act, to Suzanna Sailo and Angela Julie and conducted their personal search in which nothing was recovered from their possession and has also talked about his presence during recording of their statement before Shri Devendra Singh, I.O. In her cross examination, she has stated that he had explained the provisions of Section 50 of NDPS Act, 1985, to both the ladies. She had denied the suggestion that both the ladies were tortured and compelled to write the option on Ex.PW10/DA and PW-10/DB as given by her. She has further denied the suggestion that no required proceedings against these ladies were conducted as the DRI wanted to made them free in the present case and wanted to implicate the accused. She has further denied the suggestion that she was not asked to record the statements as the DRI wanted to implicate the accused in the presence case through Shri Devender Singh. She has further denied the suggestion that accused was arrested in the case falsely and that she was deposing falsely.

78. PW11 Shri Rajesh Yadav who admitted his statement, Ex.PW6/B. He was declared hostile and was cross examined by the prosecution. During his cross examination, he has admitted his signatures on Ex.PW2/B which was in his own handwriting. He has also admitted his signatures on the panchnama of recovery and seizure, Ex.PW2/E, Ex.PW2/E4 and also on Ex.PW2/E6. He also admitted that the officers told him that the search of the person and vehicle was to be conducted. He further admitted service of notice, Ex.PW2/B and his reply on the same and his signatures below the reply. He further admitted that some powder was taken by the officers from each packet and was tested and he was told that the same was narcotic drug. He also admitted that drawl of samples from each packet. He further admitted recovery of two mobile phones and currency from the possession of the accused. He further admitted sealing of the sample and remaining contraband with seals.

79. He further deposed in his cross examination that the contraband was kept in the trunk alongwith the bag from which the contraband was recovered alongwith other goods and wrapping of the trunk. On the one hand he said that he did not remember if the paper Ex.PW2/E-6 was recovered from the possession of the accused but admitted his signatures. He further admitted his signatures on he paper slips Ex.P-1 to Ex.P-8 which were used for sealing the sample packets. He further admitted the car was the same from which the recovery was effected. He admitted his signatures on the paper slips Ex.P-17, P-23, P-25, P-29, P-33 and P-37. He further admitted recovery of two mobile phones Ex.P-18 and P-19 and Indian and foreign currency Ex.P-21 from the possession of the accused, which were sealed with DRI seal in separate envelope, Ex.P-22 (Colly.). He further admitted recovery of four packets Ex.P-27, PW-31, P-35 and P-39 containing the substance, bag alongwith polythene Ex.P-24 and adhesive tapes Ex.P-28,Ex.P-32, P-36 and P-40 from the possession of the accused. He further admitted taking out of eight samples on the

relevant date and were sealed in paper envelopes separately.

80. During his cross-examination by the defence counsel, he admitted that he received telephone call on mobile No.9414215955 asking for the vehicle. He further admitted that at the time of occupying the car, one lady occupied the front seat whereas the gentleman accused and one lady sat on the back seat. He also admitted that the writing work was done prior to dinner and admitted signing of papers. He further admitted that all the papers he signed were prepared in the office of CGO Complex and were hand written. He further admitted that he had gone through the documents which were signed by him. He further admitted the colour of the substance and weight of the same was 4.250 kgs. He denied the suggestion that he was not present and deposing falsely. He further admitted the search of the accused and both the ladies when they reached in the office. He denied the suggestion that he was involved in the dealings with narcotic drugs. He further denied the suggestion that the drug was being carried by him in their vehicles. Also denied that narcotic substance was not recovered from the accused. He further denied the suggestion that he had blindly signed all the documents which were not prepared in his presence to escape his skin from the sin of carrying drugs. He further denied the suggestion that the accused has been falsely implicated in the present case at his behest and he had shown as witness in the same. He further denied the suggestion that he was deposing falsely.

81. Attention was also invited to the application filed by Rajesh Yadav dated 24.11.2005, which is available on the judicial file of the trial court, wherein he has admitted about tendering of the statement u/s 67 of NDPS Act. In the said application, he nowhere stated that he was forced to make that statement.

82. PW12 Shri Ved Prakash has proved the letter of Shri Rakesh Debas Ex.PW5/C and call details running into 14 pages, Mark A and identified the signatures of Shri Rakesh Debas on Ex.PW5/C. He also admitted his letter dated 15.7.205, providing the call details as Ex.PW5/F and call details as Ex.PW12/A.

83. During his cross examination, he stated that Ex.PW12/DA did not bear the name of the subscriber of the telephone numbers available on those documents.

84. PW13 Shri Ram Sharan Verma admitted his signatures on panchnama Ex.PW2/D and on the documents, EEx.PW2/E, E-1,E-2, E 3, E-4, E-5 and E-6. He was cross examined by the prosecution since he was not deposing the full facts.

85. During his cross examination by the prosecution, he admitted the recovery of white powder and weight of 4 kgs. He further admitted drawing of samples and sealing. He admitted his signatures on Ex.P-1 to P-8 which were used for sealing the samples. He also admitted that the recovered packets were sealed. He further admitted that the foreign and Indian currency and two mobile phone recovered from the accused was sealed. He also admitted his signatures on the paper slips Ex.P-17, P-23, P25, P=29, P-33 and P-37. He further admitted that the sample

pouches were sealed in papers envelopes separately.

86. During his cross examination by the defence, he had denied the suggestion that he was deposing falsely being stock witness of DRI and he had not joined any proceedings conducted by DRI on 20.4.2005. He further denied the suggestion that he had not accompanied the raiding party. He further denied the suggestion that he was not present in the DRI office at the time of preparation of documents. He further denied the suggestion that his signatures were taken on blank paper on inducement by the officers. He also denied that the documents were fabricated and manipulated to implicate the accused. He deposed that he did not remember how many times the seal was affixed and by whom, but admitted the seal was being used while sealing the packets and box. He has denied the suggestion that no seal was used in his presence. He had further denied the suggestion that he had not gone to Haryana Rajasthan border on 20.04.2005. He further denied that he had not joined any proceedings with DRI officials on 20.04.2005 and his signatures were obtained by Shri Arvind Kumar Sharma. Also denied that the accused was tortured in his presence by DRI officers and out of torture and coercion signatures of the accused were taken on many blank papers. He further denied the suggestion that he was deposing falsely.

87. PW14 Shri R.K. Singh, Nodal Officer, Bharti Airtel Ltd. had proved the letter dated 13.5.2005, Ex.PW5/D, details of mobile No.9818933079 running into 3 pages as Ex.PW14/A, call details of mobile No.9818155531 as Ex.PW14/B, letter dated 16.8.2005 of Capt. Rakesh Bakshi as E.PW-5/H and had identified his signatures. During his cross examination, he denied the suggestion that he had given those printouts after manipulating the same to implicate the accused. He has denied the suggestion that he was deposing falsely.

88. PW15 Shri Rajesh Jogender Khanna had identified his signatures on the letter Ex.PW5/G and Ex.PW15/A and B. He has identified the signatures of Shri Umesh Kalra on Ex.PW5/B. He further proved the call details Ex.PW11/DX3. During his cross examination, he denied the suggestion that the documents Ex.PW5/G, PW-15/A and B were manipulated and fabricated to implicate the accused.

89. PW16 Shri Vinod Kumar Khosla has proved the report sent to DRI, Ludhiana as Mark 16/A. During his cross examination, he has denied the suggestion that a shadow investigation was carried out to implicate the accused.

90. W17 Mr. P.V. George has proved the report as Mark C. During his cross examination, he has denied the suggestion that no investigation was carried out at the said guest house on or before 4.5.2005. He has further denied the suggestion that a false, bogus and fabricated report was made to implicate the accused.

91. PW18 Shri Amitesh Bharat Singh has also proved the intelligence report, Ex.PW3/A, office copy of letter sent to Ministry of External Affairs, Ex.PW11/DX-1, office copy of letter received from Shri P.V. George, Ex.PW11/DX-2, letter received

from the High Commission of Nigeria as Ex.PW18/A, letter received from the office of Ministry of External Affairs as xh.PW-18/B and his signatures on the same, letter mark 16/A received from Shri V.K. Khosla, Letter dated 4.5.2005, Ex.PW11/DX-2 and document mark C dated 4.5.2005 which is photocopy of fax copy.

92. During cross examination, he denied the suggestion that the motive of the department and the officers was to conduct the proceedings and involve the innocent persons for the purpose of reward. He further denied the suggestion that the informer was accordingly arranged to give the colour of source of information for recovery. He also denied to the suggestion that the document Ex.PW3/A was not placed before him on 20.4.2005 at 11:00AM. He further denied the suggestion that the said document was manipulated and fabricated for the purpose of completing the paper formalities subsequently to implicate the accused. He denied the suggestion that documents Ex.PW3/A, Ex.PW11/DX-1, Ex.PW11/DX-2, Ex.PW18/A and B as were fabricated and manipulated to implicate the accused.

93. PW19 Shri Ashok Kumar Singh admitted his statement, Ex.PW2/P. He also admitted handing over his identity proof, Ex.PW2/P-1 and P-2. During his cross examination, he has denied the suggestion that telephone No.9818155531 belonged to him. He further denied the suggestion that he applied for the phone giving his identity proof and had the connection of the above mentioned mobile phone in his name. He further denied the suggestion that he under the coercion of DRI made the statement before the DRI. He also denied the suggestion that he intentionally disown the telephone under the coercion of DRI. He further denied the suggestion that the statement, Ex.PW2/P was given by him under the pressure of DRI officers.

94. PW20 Shri Dhananjay Rawat, talked about the visit of Shri Arvind Kumar Sharma to Tihar Jail alongwith Court orders for making further enquiries from accused and having shown some photocopies of the documents to the accused and signatures of accused and refusal of the accused to make any statement and documents prepared in that regard, Ex.PW2/P, identification of photocopies of five documents as Colly. PW-20/A. During his cross examination, he has denied the suggestion that the document Ex.PW2/V was manipulated and fabricated to implicate the accused. He also denied the suggestion that signatures of the accused were not obtained in his presence.

95. The appellant, in his statement dated 06.01.2009, tendered u/s 313 Cr.P.C. had denied the allegations. As regards to his statement, he talked of some retractions Ex.DXZ and Ex.DXZ-1. According to him, he had retracted the statement when he was produced before the Court. This is contrary to judicial record. It is also not understood as to how the alleged retractions were exhibited. No document can be exhibited unless the maker thereof enters the witness box and faces the cross examination. He also stated that he has been falsely implicated but she has not given the reasons and motive for false implication, except "racial discrimination". In

defence, the appellant produced Ajay Kumar Singh as defence witness, whose deposition does not come to his rescue by any stretch of imagination.

96. Learned counsel appearing on behalf of the respondent/DRI invited the attention of this Court to the law laid down in the two latest judgments of Hon''ble Supreme Court - State of Punjab Vs. Lakhwinder Singh & Anr. -Crl. Appeal No.32 of 2009 (SC) and Ajmer Singh Vs. State of Haryana, , and in the appeals filed by Vimal Behl & Surinder Raj Singh by Delhi High Court. He submitted that after dismissal of their appeals by Delhi High Court against the judgment of conviction, both the appellants filed Special Leave Petitions in the Supreme Court which were also dismissed.

97. The samples and the case property when produced in the court were in sealed condition and there was no possibility of tampering with the same. He referred Lakhwinder Singh & Anr. (supra).

98. While refuting the submission of petitioner, Mr. Satish Aggarwala, learned counsel submitted that at the outset, it is pointed out that the facts of the case and the evidence on record irresistibly towards the guilt of the appellant. Most of the submissions of the appellant are covered by judgments of the Apex Court and Delhi High Court and have been held to be devoid of force. Further submitted, that the facts of the instant case are similar to the case decided by the Supreme Court in M. Prabhulal v. Asstt. Director, DRI, 2003 (3) JCC 1631. In that case also, search and seizures were made in the presence of a Gazetted Officer, and the Supreme Court held that the provisions of Section 42 were inapplicable. Similarly, the independent witnesses were not examined by the prosecution. Also, in that case, recovery of heroin was from two vehicles, a truck and a car, which were apprehended at a public place and then escorted to the Customs House, which was 20 kms away from the place of interception, for search and seizure. The accused person therein had contended that their statements u/s 67 of the NDPS Act were involuntary and obtained by torture and harassment. Yet, the Supreme Court relied upon the statement of accused u/s 67 and testimony of official witnesses to uphold conviction.

99. On Panchnama being tainted, it is submitted that this argument lacks force and is devoid of logic and common sense. The panchnama, also known as "seizure memo", as the name suggests, is prepared to record the factum and proceedings of seizure and not of interception. Since the seizure took place at the Paryavaran Bhawan where DRI office is situated, it is obvious that the seizure memo / panchnama would have been prepared there only. It is immaterial that the area is a restricted one. There is no requirement of law that panchnama shall be prepared at a public place. The reason for escorting the car to the office of DRI for search, was that the place of interception was not safe, particularly where such a large quantity of narcotic drugs were suspected to be concealed. No prejudice caused to the appellant by merely conducting the seizure at the DRI office. There is no infirmity in

the panchnama as the same is signed by the appellant and the independent witnesses in token of having seen and accepted it. The panchnama is also corroborated by the statements of the appellant and panch witnesses, tendered u/s 67 of NDPS Act, 1985, sworn in testimony of the witnesses.

100. One panch witness Ram Sharan Verma has appeared as PW-13. Though he was declared hostile, yet he admitted certain material facts. As regards the other panch witness Shiv Mangal, he was dropped on 16.12.2008 in view of the report received.

101. It is humbly submitted that non-examination of panch witnesses or any other witness including companions of the appellant does not adversely affect the case of the prosecution. It is nobody''s case that panch witnesses were not joined. The fact is that one of them has not been examined in view of the report filed on 16.12.2008. As regards the other witnesses, such as Joginder Singh, Anjela Juli, Sujana and Venkatsana, reports are available on record and is reflected in the order-sheet dated 16.12.2008. As regards, B.K. Beri and Ved Prakash, they were dropped on 12.12.2008. It cannot be inferred from this fact that the department did not examine the witnesses due to ulterior motives. The contention of appellant that the addresses were bogus or fictitious, not borne from the record. The report in respect of panch witnesses is on judicial file.

102. He further submitted, if the appellant was of the view that the panch witnesses and other witnesses, would have deposed something to the contrary, he was to lead them to the witness box.

103. Learned counsel further submitted that in any event, even if there was some defect in investigation and that will of any assistance to the appellant. Does the contention of the appellant lead to the conclusion of false implication of the appellant in the present case? The irresistible answer is "No".

104. With reference to contention of the appellant with regards the weight, the admitted case is that the four samples A-1, A-2, A-3 and A-4 were of 5 grams each. The contention of the appellant that as per PW-2/N the weight of the samples was more than 5 grams each. There is no discrepancy. This is clear from column No.1 of Section 2 of Ex.PW2/N i.e. column 1 of Ex.PW1/B where the weight is Gross of each sample. Thus, there is no difference in the weight which is clear from column No.3 of Section F and column No.1 of Section 2 of Ex.PW2/N i.e. test memo. In any event, even in Nor Agha Vs. State of Punjab heavily relied upon by the appellant in his written submissions, it has been observed "We are not oblivious of the fact that a slight difference in the weight of the sample may not be held to be so crucial as to disregard the entire prosecution case as ordinarily an officer in a public place would not be carrying a good scale with him.

105. As regards the colour, there is no difference in the colour. Even if in the question u/s 313 Cr.P.C, the Special Judge inadvertently has used the white colour, it has not prejudiced the appellant. It is reiterated that the case property was received

in the godown in intact condition. The samples when received in the laboratory were also in sealed condition and tallied with the facsimile of the seal affixed on the test memo.

106. He further submitted, there is no requirement of law or even caution of handing over the seal to any public witness, particularly in the cases booked by DRI, Customs and NCB, wherein the procedure of sealing is entirely different, which has been recognized right upto Apex Court. Availability of the paper slips on the samples as well as the case property inter-alia duly signed by the appellant guarantee that the samples were not tampered with, at any point of time, as alleged by the appellant. The appellant is misreading the deposition of PW8 Shri C.B. Singh.

107. Learned counsel appearing on behalf of DRI submitted that there is no requirement of Section 50 NDPS Act in the present case. The appellant is totally wrong in saying that provisions of Section 42 NDPS Act had not been complied with.

108. Regarding procurement of panch/public witnesses, he submitted that the officers of the department did not know the background of the panch witnesses, establishes the independent nature of investigation. It corroborates the fact that these panch witnesses were not earlier known to the officers and therefore, could not have been tutored. The absence of the panch witnesses for examination does not help the appellant since there statements duly proved on the judicial file, which were exhibited without any objection from the accused. It is also submitted that the fact of search and recovery from the accused persons has already been established beyond reasonable doubt by testimony of official witnesses and there is no need to repeat the same evidence by way of examination of panch witnesses.

109. Regarding Section 67 of the NDPS Act, learned counsel submitted that appellant has tendered his voluntary statements u/s 67 of the NDPS Act, wherein he has admitted their involvement in the offence. It is submitted that statements are admissible in evidence and conviction can be based only on the basis of the statements, tendered u/s 67 of NDPS Act, 1985. In support of this contention, attention is invited to the following judgments:

Ravinder Singh @ Bittu Vs. State of Maharashtra - 2002(2) JCC 1059 (SC) The confessional statement of the accused, if found voluntary and truthful, requires no corroboration for conviction.

Kalema Tumba Vs. State of Maharashtra - JT 1999 (8) SC 293

It was then urged that no reliance should have been placed upon the statement recorded u/s 108 of the Customs Accused, as it was not made by the appellant voluntarily and he did not know what was written in it when he had signed it. The submission was that the appellant does not know English language. He knows only French language. In his examination u/s 313 Cr.P.C. he had stated that the statement was obtained by force and that he was beaten by the officers of Narcotics

Control Bureau. He had not stated at that time that he did not know English. Apart from the evidence of the officers of the Narcotics Department there is evidence of an employee of the Jewel Hotel, where the appellant had stayed from 16th November, 1990, who was proved some of the entries made in English by the appellant himself in the register maintained by the hotel. The panchnama, also contains words "received copy" written by the appellant. The said statement of the appellant was recorded in 1990. He retracted it in 1994. Till then he had not complained against any officer as regards the alleged beating or use of force nor h had stated that he did not know English. Therefore, this contention also cannot be accepted.

Raj Kumar Karwal Vs. UOI & Ors. - 1991 Cr.L.J. 97 (SC)

The High Court held that a confessional or self incriminating statement made by a person accused of having committed a crime under the Act to an officer invested with the power of investigation u/s 53 of the Act was not hit by Section 25 of the Evidence Act Powers u/s 53 of NDPS Act with the powers of officer incharge of police station - does not have the power to submit report u/s 173 Cr.P.C. - not therefore, Police Officer within Section 25 of the Evidence Act.

110. As far as the retraction statement, learned counsel submitted that the retraction if filed subsequently before the Trial Court is nothing but waste papers. In any event, reply to the alleged retraction application was filed. The Ld. Trial Court has dealt with this aspect in detail. The appellant has not entered the witness box to say that his statement was involuntary. Mere retraction is of no consequences and help to the appellant. He had to establish by evidence that he was forced to make statement. There is nothing to this effect on the judicial file. The appellant was medically examined, immediately after recording of his statements and his arrest and before production in the Court. The medical report does not indicate any use of force. Attention is invited to the following judgments:-

Satya Narain Pareek Vs. State of Rajasthan and another,

Accused retracting confession - Immaterial - Confession though retracted binds accused - Plea of articles being exempted. Accused, in view of the admission that he purchases gold and converted and brought accused is not entitled to benefit of exemption.

K.T.M.S. Mohd. & Anr. Vs. UOI - 1992 SCC (Cr) 572

Statement obtained under, must be voluntary - Statement retracted by its maker alleging that it was obtained by inducement, coercion, threat promise or any other improper means - It is for the maker of the statement to establish that it was involuntary and extracted by such illegal means.

Shankaria Vs. State of Rajasthan - AIR 1978 Sup1248 49.

Where the confession was not retracted at the earliest opportunity....the circumstance reinforces the conclusion that confession was voluntary.

Hem Raj Vs. The State of Ajmer,

But a mere bald assertion by the prisoner that he was threatened, tutored or that inducement was offered to him, cannot be accepted as true without more.

K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin,

However, a confessional statement recorded by reasons of statutory compulsion or given voluntarily by the accused pursuant to his appearing against summons or on surrender, held, cannot be said to have obtained by inducement or promise. Hence, is admissible in evidence for prosecution under S.135 of the Customs Act or other relevant statutes. Such a confessional statement although subsequently retracted, if on facts found voluntary and truthful, can form the exclusive basis for conviction - Not necessary that each detail in the retracted confession be corroborated by independent evidence.

Narcotics Control Bureau - Allauddin @ Mir @ Malik & Anr. - Crl. Appeal No.111/1997 decided on 16.12.2010 by Delhi High Court.

111. Regarding conviction on the basis of testimony of official witnesses, he submitted that in addition to the statement tendered u/s 67 of NDPS Act, 1985, there is panchnama, inter-alia, signed by the appellant to establish recovery of 4.244 kgs. heroin. The panch witnesses in their statements tendered u/s 67 of NDPS Act, 1985, have also deposed about recovery and seizure. The appellant was intercepted at the spot. There is no reason for the officers to falsely implicate the appellant. Conviction can be based upon the solitary statement of official witnesses, who are presumed to be trustworthy and disinterested. Statutory presumption of correctness of official acts is in their favour.

112. Reliance has been placed on the decisions; in T. Shankar Prasad V. State of Andhra Pradesh - Crl. Appeal No.909 of 1997, decided by Hon''ble Supreme Court on 12.1.2004

The Court may feel safe in accepting the prosecution version on the basis of the oral evidence of the complainant and the official witnesses even if the trap witnesses turn hostile or are found not to be independent".

Chander Bhan Ram Chand Vs. The State - 1971 Cr.L.J. 197 (P&H)

It is practically a rule of law that where independent witnesses are joined but do not support the prosecution, then conviction cannot be held on the statement of official witnesses alone.

113. Regarding quantity of contraband, learned counsel submitted that this is a case of recovery of 4.244 kgs. of heroin. It is not possible to plant such huge quantity of

heroin upon the appellant. Moreover, there is no reason to falsely implicate the appellant. Attention is invited to the following judgments:

Sanjiv Kumar Vs. State of H.P. - 2005(1) Cri 358 (H.P) (D.B)

It is not believable that the police would implicate an innocent person in such a serious case by planting a huge quantity of charas on his person Police had no axe to grind in implicating the accused.

Gulam Rasool Vs. State of Punjab - 1994(3) RCR 750 (DB)(P&H)

Contention of accused that he was falsely implicated and heroin was planted on him - Contention not tenable - It is not conceivable that Customs authorities would plant such a huge quantity of heroin with a view to falsely implicate the accused.

114. Regarding Section 35 & 45 of the NDPS Act, he submitted that there are two statutory presumptions in favour of the department. u/s 35 of the NDPS Act, 1985, there is a presumption of culpable mental state. u/s 54 of the Act ibid, it is presumed that the appellant has committed an offence in respect of the narcotic drugs or psychotropic substances found in his possession which he has not satisfactorily explained. Attention, in this behalf, is invited to:

State of Punjab Vs. Lakhwinder Singh & Anr. 2010 (3) JCC (Nar) 142 Madan Lal & Anr. Vs. State of Himachal Pradesh - 2003(3) JCC 1330

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

Megh Singh v. State of Punjab - 2003 VIII AD (SC) 27

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

Pawan Mehta Vs. State - 2002 Dru 183 (Delhi High Court)

Culpable state of mind or the knowledge of the accused required to be proved under the Act, has to be presumed and it is for the accused to prove the he had no such "knowledge or the mental state''. The appellant has not proved that the car in question was used for carrying the narcotic drugs without his knowledge.

Karam Singh & Ors. Vs. State - 1981 Cr.L.J. 123 (Raj)

Where contraband opium in large quantities was being transported in a truck, the drivers of the truck sitting in the driver''s cabin and the person sleeping over the bags containing opium, in the cabin of the truck would be deemed to be connected with the opium transported in the truck and when they failed to furnish any explanation for the presence of the opium in the truck, they would all be guilty of an offence under Sec.9.

Birendra Rai & Ors. Vs. State of Bihar 2005(1) CC (SC) 61

It was then submitted that the investigating officer was not examined in this case and that has resulted in prejudice to the accused. Having gone through the evidence of witnesses and other material on record, we do not find that any prejudice has been caused to the defence by non-examination of the investigating officer.

State of U.P. Vs. Anil Singh,

It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable...The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on ground that all witnesses to occurrence have not been examined.

Dalbir Kaur & Ors. Vs. State of Punjab - 1977 Cr.L.J. 273 (SC)

Omission to examine material witnesses, who were not deliberately withheld or unfairly kept back, in the circumstances, held, was not sufficient to throw doubt on the prosecution case.

Banti @ Guddu Vs. State of Madhya Pradesh,

When the case reaches the stage as envisaged in Section 231 of the Code, the Sessions Judge is obliged "to take all such evidence as may be produced in support of the prosecution". It is clear from the said section that the Public Prosecutor is expected to produce evidence "in support of the prosecution" and not in derogation of the prosecution case. At the said stage, the Public Prosecutor would be in a position to take a decision as to which among the persons cited are to be examined. If there are too many witnesses on the same point, the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects. That principle applies when there are too many witnesses cited, if they all had sustained injuries at the occurrence....If he is satisfied by examining any two or three of them, it is open to him to inform the Court that he does not propose to examine the remaining persons in that category. This will help not only the prosecution in relieving itself of the strain of adducing repetitive evidence on the same point but also help the Court considerably in lessening the workload. The time has come to make every possible effort to lessen the workload, particularly of those Courts crammed with cases, but without impairing the cause of justice.

115. He further submitted that the alleged defects in the investigation it is also settled law that the accused should not be let off merely on account of defective investigation. Enquiry ought to be made into whether the lapses committed by the investigating agency cause prejudice to the appellant.

116. Reference is made to the case of Khet Singh Vs. Union of India (UOI), , wherein it was held:-

16. Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the Court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence.

117. Also relied upon Inder Singh and Another Vs. The State (Delhi Administration), wherein it has been held as under:-

Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction.

118. In Krishna Mochi & Ors. Vs. State of Bihar & Ors. - 2002(2) CC (SC) 58, it has been held that:-

Now the maxim "let hundred guilty persons be acquitted but not a single innocent be convicted? is in practice changing world over and Courts have been compelled to accept that society suffers by wrong convictions and it equally suffers by wrong acquittals.

In the same judgment, in para No.76, it has been held that:

In a criminal trial credible evidence of even a solitary witness can form basis of conviction and that of even half a dozen witnesses may not form such a basis unless their evidence is found to be trustworthy in as much as what matters in the matter of appreciation of evidence of witnesses is not the number of witnesses but the quality of their evidence.

In para No.93 of the same judgment, it has been held that:

It is duty of the Court to separate grain from chaff - when chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding that

evidence found difficult to prove guilt of other accused persons - Falsehood of particular material witness or material particular would not seclude it from the beginning to and - The maxim Falsus in uno falsus in omnibus? has no application in India and the witnesses cannot be branded as liar.

119. In Nallabothu Venkaiah Vs. State of Andhra Pradesh - 2002 (3) JCC 1582, it has been held that:-

Criminal justice System - Must be alive to the expectation of the people - The principle that no innocent man should be punished is equally applicable that no guilt man should be allowed to go unpunished - Wrong acquittal of the accused will send a wrong signal to the society.

120. Further in CBI vs. Ashiq Hussain Faktoo & Ors. - 2003(2) JCC 316, the last sentence of para No.9 reads as follows:-

It is held that procedure is the hand-maid and not the mistress of law. It was held that procedures are intended to subserve and facilitate the cause of justice and not govern or obstruct it. It is held that minor deficiencies, if any, cannot be considered to be fatal for the prosecution.

121. While, in confrontation of decisions relied upon by petitioner, Mr. Aggarwala, learned counsel for respondent submitted that the judgments cited on behalf of the appellant, it is submitted that the facts of the said judgments are not applicable to the facts of the case in hand.

122. In Ritesh Chakravorty Vs. State of Madhya Pradesh - 2006(3) JCC (Nar) 150 - in para No.24 of this judgment, the Hon''ble Supreme Court has observed that PWs 1 and 2 could not be said to be independent. This is not the position in the present case. There is nothing on the judicial file to hold that the panch witnesses in the present case are not independent. Thus, no adverse influence can be drawn in the present case, as has been drawn in the said case, as recorded in para No.27 thereof. In the said judgment, the Hon''ble Supreme Court had held that the appellant therein had been prejudiced by non examination of Ms. Sabia Khatoon and Bajpai. In the said case, the seizure witnesses has deposed that there signatures had been taken on blank papers. In view of this deposition, the Supreme Court had recorded that the seizure had become doubtful. In the said case, in para No.29, Supreme Court had reached the conclusion that PW-5 was not a reliable witness. The reason for recording such a finding are embodies in para No.29 of the judgment.

123. In the present case, there is no reason even to say that PW-2, the Seizing Officer and the officer before whom statement u/s 67 of NDPS Act was recorded, was not a reliable witness. What is important is that in para No.29 of this judgment itself, Supreme Court has held that there is no dispute that it is the quality of evidence and not the quantity thereof which would matter. It is submitted that in the present case, no material witness has been withheld from the Court and thus,

no adverse inference can be drawn. In the case before the Supreme Court, in para No.23 it has been recorded that informer had given full particulars of the information to Ms. Sabiha Khatoon and she had not been examined by the department. In this judgment itself, it has been held that a document does not prove itself. The contents of the documents are required to be proved by the maker thereof. Will this judgment does not apply to the accused who has not enter the witness box to prove the contents of alleged retraction application. Thus, by no stretch of imagination, this judgment is of any help to the accused.

124. Learned counsel further submitted that in Bahadur Singh Vs. State of Madhya Pradesh - 2002(1) JCC 12 - The accused had been acquitted because of the reasons recorded in para No.8 - sole testimony of applicability of Section 35 - recovery was doubtful - the appellant had disputed the recovery; there were serious discrepancies in the recovery, seizure and deposit in the malkhana. Undisputedly this was a case booked by police. There was no statement u/s 67 of NDPS Act, 1985. In the present case, in addition to the sworn in testimony of the seizing officer, panchnama is duly signed by the accused and there is a confessional statement of the accused. There are other statements also which implicate the accused. It is unfortunate that the accused has chosen to place this Judgment in this temple of justice. Again this was a case of recovery by the police, where the aid of statement u/s 67 of NDPS Act is not available. In the present case, the department has the testimony of the seizing officer, other officers as well as the statements u/s 67 of NDPS Act. In the case before the Supreme Court, the court had recorded "serious discrepancies in recovery, seizure and deposit in malkhana". There are no such allegations in the present case.

125. In Parmananda Pegu Vs. State of Assam - 2004 (4) RCR (Crl) 955 - This was a case under Indian Penal Code. This case did not discuss the validity of statement tendered u/s 67 of the NDPS Act. As has been repeatedly held by the Courts that the statements given in Cr.P.C. and the statements given u/s 67 of NDPS Act are entirely on different footings. Attention is also invited to the law laid down by Delhi High Court in the case of Yudhister Kumar - II 1992 CCR 1122.

126. In Superintendent of Customs Vs. Bhana Bhai Khalap Bhai Patel - 2004(1) JCC 198 - The facts of this judgment are entirely different. The Court had recorded in the judgment that there was no evidence or prove that cultivation of Ganja plants by the appellant. It was a case booked by local police, where no statement u/s 67 of NDPS Act was / could be recorded.

127. In Jagdish Vs. State of Madhya Pradesh - 2002(1) JCC 54 - This was also a case by the local police. There was no statement u/s 67 of NDPS Act, and the recovery was from the bus with there were 30-40 passengers. It was not a case of prior information but significantly enough, the I.O. had searched only the appellant.

128. In Eze Val Okek Vs. NCB 2005 (1) JCC (Nar) 57,- The facts of the said judgment are not applicable to the facts of the present case. Otherwise too, the judgment is contrary to the law laid down by the Supreme Court as regards non-production of public witnesses. In the said case the court had recorded a finding in para No.15 that the possibility of tampering with the recovered article was not ruled out. The court had also doubted the connection of the appellant therein with the premises from where the recovery had been affected. In the said case, no malkhana register had been produced.

129. In UOI Vs. Shah Alam - This was a case where there was violation of Section 50 of NDPS Act and the recovery was from the shoulder bags. Undisputedly, Section 50 of NDPS Act is not applicable to the facts of the present case. It is not understood as to how this judgment has been cited by the appellant.

130. In Karam Chand Vs. State - This was a police case, where the procedure of sealing is entirely different and the aid of statements u/s 67 of NDPS Act is not available. Moreover, the facts are entirely different. The conviction had been set-aside because of non compliance of mandatory requirements of law. In the present case, the appellant has not even argued that there is non compliance of any mandatory requirement of law.

131. In the said case, the appellant had been acquitted the ground that the essence of accusation was not brought to his notice, more particularly, the possession aspect. In the present case, the fact of recovery, statement and other entire material and evidences have been brought to the notice of the appellant, while recording his statement u/s 313 Cr.P.C.

131. As regards recovery, seizure, sealing, deposit in malkhana, handing over the seal, non-production of panch witnesses, value of the statement u/s 67 of NDPS Act, appreciation of evidence and standard of proof, attention is also invited to the following judgments:-

a) Stephano Gianpiero Mancini Vs. NCB - Crl. Appeal No.263 of 1994 decided on 17.10.2001 by Delhi High Court

b) Gurminder Singh Vs. Directorate of Revenue Intelligence - 2007 (1) JCC (Nar) 11

c) Kulwant Singh Vs. Narcotics Control Bureau - Crl. Appeal No.248/1997 decided on 18.01.2008 by Delhi High Court.

d) Vinod Kumar Vs. Jaspal Singh @ Jassa - Crl. Appeal No.703-4/2005 decided on 30.04.2008 by Delhi High Court.

e) Siddiqua Vs. Narcotics Control Bureau 2007 (1) JCC (Nar) 22 (Special Leave Petition as well as Review Petition were dismissed by the Hon''ble Supreme Court)

f) Vimal Behl & Surinder Raj Singh - Crl. Appeal No.694 of 2005 and 779 of 2005 - Special Leave Petitions dismissed right upto Supreme Court

g) Kanhaiyalal Vs. UOI 2008 1 AD(Crl.) S.C. 277.

h) Namdi Francis Nwazor VS NCB Vs. Crl. Appeal No. 122 of 1991, decided on 15.12.1993.

I) Shesh Ram Vs. State H.P. III (2001) CCR 36 (DB)

J) Rangi ram Vs. State of Haryana - 2002 (2) JCC 1041

K) P.P. Fathima Vs. State of Kerla - 2003(3) CC cases (SC)299

L) Balbir Kaur Vs. State of Punjab - 2009 (3) JCC (Nar) 143.

M) Delias Christophe Gey Jeans vs. Customs - 2004 (3) JCC 1747.

N) Rehmaatullah Vs. NCB-2008 (3) JCC (Nar) 174.

133. Additionally, learned counsel for respondent submitted that most of these judgments of this Court were carried to the Apex Court but of no avail.

134. I have heard learned counsels for the parties.

135. It is emerged, after going through the evidence on record and submissions of learned counsels that the appellant was apprehended at Mahipalpur Crossing on National Highway - 8 in Delhi. The DRI officials did not search the appellant and car as well there and escorted to DRI office at CGO Complex, Lodhi Road, New Delhi. Thereafter, notice also served upon him u/s 50 of the NDPS Act at DRI office. The appellant declined to require the presence of any Magistrate of any Gazetted Officer and similarly driver Rajesh Yadav, PW11 gave his consent for his search and of his car by any officer of DRI and also declined to require the presence of any Magistrate of Gazetted Officer.

136. The DRI agency received the secret information Ex.PW3/A regarding the alleged car carrying contraband before 11:00AM on 20.04.2005 and same information was transmitted to the senior officers for authorization, whereas in the statement of driver Rajesh Yadav, PW-11 recorded u/s 67 of the NDPS Act Ex.PW6/B, who categorically stated that the call was made by the hotel staff to requisition the taxi, in which the appellant was apprehended. The department got specific information regarding the Taxi bearing registration No.RJ-027-TEP-56822 and exact description of the car even before the appellant availed its services at random.

137. PW-11 Rajesh Yadav has deposed that he had a fleet of six vehicles at that time. As per the prosecution version, the appellant received the delivery of the alleged heroin recovered from his possession from one Bajju Singh; however, there is no witness to this alleged transaction. The driver of the car, Rajesh Yadav, PW-11 has stated that he did not stop anywhere on their way at Mahipalpur crossing. Moreso, no efforts were made to identify or apprehend said Bajju Singh.

138. Investigating Officer of the case, PW2 Arvinder Kumar Sharma admitted in his cross-examination that the sealed packets of samples as well as those allegedly seized contraband, could be opened without tempering the seals. As per the test memo Ex.PW2/L, the weight of four samples received was 5 Grams each; whereas the report received from CFLS on four samples drawn from the seized material viz; A1 to A4 in Ex.PW2/N states that weight is about 6.6 Grams, 6.6 Grams, 6.7 Grams, & 7.5 Grams respectively. On the CFSL report, the word - ''Gross'' has been overwritten on the word ''Net''. The CFSL report Ex.PW2/N and the questions put to the appellant u/s 313 Cr.P.C. talks of white colour substance; however the case property opened in the Court by PW2 i.e. IO of the case found of brown colour.

139. The case of the prosecution has not been supported by the public witnesses i.e. PW7 Shanmugum. He was declared hostile. Heroin in question was allegedly recovered from appellant. The Investigating Officer had made no attempt whatsoever to join any respectable witness of the locality in raiding party. Witness Ravi Tiwari, has not been examined in the Trial Court. The Investigating Officer had sufficient time and opportunity to go to other residents of the building or the neighbouring houses and would have made a request to them to join the raiding party.

140. The law has been settled in Babuchkerverty (Supra) that while examining the provisions of Act and the quality of the evidence required conviction of accused thereunder, it is observed, in the case where mandatory provisions are not complied with and where independent witnesses are not examined, the accused would be entitled to acquittal.

141. In the case in hand, the seal with which recovered articles and samples were sealed at the spot was not handed over to any public witness after the sealing process was over and instead it was handed over to official witness to PW8 only. This was highly improbable. To this effect, there is no plausible explanation as to why the seal was not handed over to the public witness, especially when he was available, to ensure that the recovered article was not tampered with, during the period case property remained with the Investigating Officer or with the authorized officer u/s 53 of the Act. In the context of seal, PW8 Sh. C.B. Singh, Superintendent, NCB deposed that this seal was handed over after the alleged recovery of articles then handed back the seal to PW12 - N.S. Ahlawat, Assistant Director on the same day.

142. If the seized article as well as the seal remained with PW2 only from the time of seizure till the time sample was sent to CRCL for analysis. Then, there is no guarantee that the samples were not tempered with during that period. Furthermore, the prosecution was under an obligation to establish on record as to who had taken the samples to CRCL.

143. The person who had taken the samples to CRCL was not examined before the Court. In the testimony of PW8 C.B. Singh, Superintendent, NCB stated that the

seized articles could be taken out from the packets without disturbing the seals. It shows that the sealing process was not proper and as such possibility of tempering with the samples was there. Malkahana register has not been produced nor entries therein proved before the Court to show as to at what time and on what date, the articles and samples allegedly recovered from the appellant were deposited in the Malkhana on that date and time and by whom the samples were taken out for CRCL analysis.

144. It is emerged from the testimony of PW3 Chemical Examiner, who analyzed the case property was of "off white" colour granules powder; whereas the prosecution case is that the case property recovered from the appellant was of "brown" colour. It has also come in the testimony of PW3 Narender Singh, Chemical Examiner, CRCL that had the samples been of brown colour powder, the report would have been different. Therefore, his statement makes it very difficult for the Court to hold that the articles which were recovered from the appellant was the same, which was examined by the chemical examiner. It also shows that there may be tempering of alleged article recovered from the appellant before it reached for CRCL analysis.

145. The law has been settled in Valsala (supra) that in view of the doubt in regard to the proper custody and sending of the sample article for analysis, the accused is entitled for the benefit of doubt.

146. The prosecution is under obligation to prove that the samples delivered to CRCL was in the same condition and there was no possibility of tempering with it. In view of the several doubts in the prosecution, in regard to the connection of the appellant with the premises in question, recovery of heroin from him, possibility of tempering with the recovered article during the period it remained with the investigating agency, the non-production of the public witness and non-joining of the neighbours, it proves the prosecution failed to prove its case beyond reasonable doubts.

147. Though, the Act lays down stringent punishment for the offence committed thereunder and as such casts a heavy duty upon the Courts to ensure that there remains no possibility of an innocent getting convicted. The officers concerned with the investigation of offences under the Act must produce best and unimpeachable evidence to satisfy the Courts that the accused is guilty because no chance can be taken with the liberty of a person. No doubt that the drug tracking is a serious matter but the investigations into such offences also have to be serious and not perfunctory.

148. There are major contradictions in the times of the alleged events. The appellant was allegedly intercepted by the arresting team at 02:30PM on 20.04.2005 and notices u/s 67 of the NDPS Act are alleged to have been served at 03:00PM, in which the quantity of the contraband was also mentioned. The bags allegedly containing the contraband were first time checked at 03:20 PM at the DRI office. The entire

sequence of contradictions has been conveniently ignored by the Learned Special Judge, which in fact raises serious questions on the very recovery of the contraband from the possession of the appellant.

149. PW-18, then Deputy Director of the prosecuting agency deposed that he came to know about raid and interception at 02:50PM, which again is highly improbable as alleged interception itself took place at 02:30PM on 20.04.2005. He further went to depose that he knew the weight of the seized contraband at 02:30PM, which again is highly contradictory as the weights of the material seized was known only after 03:20PM.

150. Learned Special Judge further glossed over the irregularities carried out by the department in effecting the alleged recovery of the contraband from the possession of the appellant. For instance, after apprehending the appellant was taken to DRI office in a DRI vehicle and keys of the allegedly apprehended car was taken by the DRI officials and the same was also driven to the DRI office and was further searched in absence of the appellant. Hence, there arises no question of conscious possession of contraband by the appellant as the entire process of recovery is jeopardised by the mere fact that there has been no authentic witness to the alleged recovery of the contraband from the possession of the appellant.

151. On perusal of the statement u/s 313 Cr. P.C., reveal that no incriminating evidence was put to the appellant with respect to the case property. The question No.14 put to the appellant with respect to the "off white" powder and granules substance recovered is different from the "brown colour" powder which was opened in the Court by the Investigating Officer when the case property was opened.

152. Learned Special Judge also failed to appreciate that the prosecution case could not stand on its feet in view of the material contradictions in the testimony of prosecution witnesses. PW8 deposed that the seal was obtained at 01:15PM on 20.04.2005 while PW2 IO has stated that the arresting team left the DRI office at 11:50AM. This witness further states that test memos were prepared at the spot and the arrest which allegedly happened on 20.04.2005 whereas the date on the test memo Ex.PW2/L is 21.04.2005 further creating doubts on the entire prosecution case.

153. Even there are interpolations of date which proves that the prosecution has tempered with the evidence.

154. In case of Ramdass (supra) it is held that the author or signatory of the document is always likely to append the date proceeding to the actual date on the document.

155. Learned Trial Judge has also completely oversight the testimony of PW13, panch witness who stated that there were only five persons in all in the alleged interception team i.e. himself, one driver and three officers including the IO Arvind

Kumar Sharma; whereas, PW2 the IO himself deposed that there were seven persons in the arresting party consisting of five officers and two panch witnesses. Statement of PW13 further creates the doubt that he was absent from his office from 12:00 Noon to 02:00PM only on 20.04.2005, the alleged date of arrest of the appellant and he returned to his office at CGO Complex, New Delhi at 02:00PM on that date. This clearly indicates that the alleged interception and seizure from the appellant which is said to have happened at 02:30 PM. Therefore, either the event did not happen at all or happened in the absence of PW 13, the alleged panch witness, which in itself is a grave irregularity and is sufficient to absolve the appellant from the allegations.

156. Learned Special Judge has ignored the fundamental principal of criminal jurisprudence that benefit of doubt would go in favour of the accused only and not otherwise. The impugned judgment is based on extremely flimsy trial of evidence wherein just only one officer was examined from the arresting party by the prosecution. Moreso, there are only four statements u/s 67 of the NDPS Act on record which included the appellant, the driver of allegedly apprehended car, and two ladies, who were allegedly travelling with the appellant in the said car. Ironically, these two ladies were not examined during trial, therefore, depriving the prosecution of any weight or gain from the statements of both ladies recorded u/s 67 NDPS Act, Ex.PW7/C and Ex.PW7/D. It goes all against the tenets of criminal jurisprudence when the conviction is based on unreasonable and weak piece of evidence where just one officer i.e. the IO/complainant has been examined to prove the entire case.

157. The instant case has been dealt with in a casual approach. This fact proves from the MLC conduct on the appellant by the Doctor of Ram Manohar Lohia Hospital, wherein it does not bear the name and the stamp of the doctor concerned who have prepared the MLC. More interestingly, against the column of the Blood Pressure - Pulse of the appellant is recorded and against the column of Pulse - Blood Pressure is recorded, which is highly improbably on the part of any doctor of such a prestigious hospital, which casts serious doubt on the authenticity of MLC.

158. I am also conscious to the fact that the provisions of NDPS Act, 1985 were amended by the Amending Act 9 of 2001, which rationalised the structure of punishment under the Act by providing graded sentences linked to the quantity of narcotic drug or psychotropic substance in relation to which the offence was committed. The application of strict bail provisions was also restricted only to those offenders who indulged in serious offences. The Statement of Objects and Reasons appended to the Bill declares this intention thus:-

Statement of Objects and Reasons:- Amendment Act 9 of 2001:- The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years rigorous

imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalization of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences."

159. However, in view of the discussion above, legal position, and submissions of learned counsels for parties, I am of the view that learned Trial Judge has ignored the material which emerged in favour of the appellant. The Court has to clear the chaff from grain and has to weigh what is in favour of accused and what is against. Only thereafter, conviction or acquittal has to be recorded.

160. In the present case, the material contradictions are there, as discussed above. Keeping them into view, the appellant is entitled for the benefit of doubt. Therefore, the impugned judgment of conviction dated 22.03.2009 and order on sentence dated 25.03.2009 respectively are hereby set aside.

161. Appellant is in custody since the date of his arrest i.e. 20.04.2005. Consequent to his acquittal, Jail authorities are directed to set him free forthwith, if not required in any other case.

162. Accordingly, instant appeal is allowed.

163. Copy of order be sent to Jail Superintendent for compliance. No order as to costs.