

# SUPREME COURT OF INDIA

Tofan Singh

Vs.

State of T.N.

Crl.A.No.152 of 2013

(A.K. Patnaik and A.K. Sikri JJ.)

08.10.2013

## JUDGMENT

### A.K. SIKRI, J

1. The appellant herein, Tofan Singh, was listed as Accused No. 3 in the trial for the offences under Section 8(c) r/w Section 21 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as the NDPS Act) as well as for the offences under Section 8(c) r/w Section 29 of the NDPS Act. This trial, conducted by the Special Judge, Additional Special Court, under NDPS Act, Chennai, resulted in the conviction of the appellant holding him guilty of the offences under the aforesaid provisions of the Act. As a consequence of the said judgment dated 18.12.2009 convicting him under the provisions of the NDPS Act, the learned Special Judge sentenced the appellant to undergo 10 years rigorous imprisonment and to pay a fine of Rs. one lakh. In default whereof, it was ordered that the appellant would undergo rigorous imprisonment for a further period of one year. Identical sentences were imposed for the offences under Section 8 (c) read with Section 21 & 29 of the NDPS Act, 1985 with the direction that both the sentences had to be undergone by the appellant concurrently.

2. Appeal filed by the appellant against the order of the Special Judge, Addl. Special Court, has been dismissed by the High Court of Judicature at Madras vide judgment dated 18.6.2012 thereby maintaining the conviction as well as the sentence awarded by the Special Judge, Addl. Special Court under NDPS Act, Chennai. Dissatisfied and undeterred by the judgments of the Courts below, the appellant preferred the Special Leave Petition in which the leave was granted on 18.1.2013. However, at the same time, bail application preferred by the appellant

was rejected and appeal was posted for hearing. This is how the present appeal arises against the impugned judgment dated 18.6.2012 of the High Court of Judicature at Madras.

3. The allegations against the appellant (alongwith five others out of whom two are absconding) were that 5.250 Kgs of heroin was seized from these accused persons which they were carrying and attempting to export out of India. As per the complaint filed by the Intelligence Officer, NCB, Chennai in this behalf, the prosecution case is stated, in a summary form, as below:-

4. On 23.10.2004, the Intelligence Officer, NCB, South Zone Unit, Mr. L.S. Aruldoss (PW-7), received information at about 9.00 p.m. that one Prem @ Kannan @ Sudeshwaran resident of Nanganallur, Chennai was procuring Narcotic Drugs from Guddu Singh resident of Rajasthan with the assistance of one Bapulal resident of Pattalam, Chennai, for trafficking it from Chennai to Srilanka and that they had made arrangements for the supply of 5 Kgs. of heroin through his two persons, who were identified to Bapulal by Guddusingh and those two persons were arriving at Chennai on the next day by Jaipur Express. It was further reported that the said Bapulal and Kannan had planned to leave at 10.00 p.m. on 23.10.2004 to Nellore, Andhra Pradesh, in a white Ambassador Car bearing Registration No. TN-01-K0923 and on reaching Chennai, Prem @ Kannan @ Sudeshwaran would receive the heroin and smuggle it out to Srilanka.

5. After receiving the information, Mr. L.S. Aruldoss, the Intelligence Officer (PW-7) discussed the matter with other officers namely Mr. Gunabalan (PW-6) and Mr. A. Sendhil Murugan (PW-10) resulting into the orders by Mr. Gunabalan (PW-6) to proceed with the case. Accordingly, on 24.10.2004, at about 9.00 a.m., P.W.6, P.W.7, and P.W.10 and two other staff members viz., one Sepoy and Driver left NCB Office and reached the scene of occurrence at 11.00 a.m. On the instruction of P.W.6, P.W.7 procured two independent witnesses viz. S. Gopi (P.W.8) and one Krishnamurthy (not examined). They intercepted the Ambassador Car bearing Registration No. TN-01-K0923 and found that there were six passengers inside the car. On the front seat, there were two drivers namely, Satyakeerthi and Mariappan and next to driver Mariappan, the appellant herein was sitting. On the back seat Prem @ Kannan @ Sudeshwaran (Accused No. 2) of Srilanka, Bapulal (Accused No. 1) of Chennai & Badrilal Sharma (Accused No. 4) were seated. After the police party enquired as to whether there were any Narcotic Drugs, Accused No. 1 & 2 who were seated on the back seat, took out one green colour bag from beneath their seat and handed it over to Mr. Aruldoss (P.W.7) stating that it contains 5 Kgs. of heroin. The recoveries were, thereafter, effected

and the accused persons were arrested for commission of offences under the NDPS Act. The two drivers of the ambassador car were, thereafter, allowed to go. The appellant and the other accused persons were arrested by the raiding party.

6. While the four accused persons including the appellant were arrested, the other two accused namely Guddu Singh @ Vikram Singh and Ravi could not be arrested and were absconding. The statements of the arrested accused persons were recorded by Mr. A. Sendhil Murugan, Intelligence Officer. The appellant also gave his statement under Section 67 of the NDPS Act as per which he confessed to the commission of the crime.

7. The case was, thereafter, handed over to Mr. R. Murugan (P.W.2) for investigation. After completing the investigation, he filed a report under Section 173 of the Code of Criminal Procedure, 1973 before the Special Judge under NDPS Act. Charges were framed and the matter went on trial. The prosecution examined as many as 10 witnesses. Among them were Mr. L.S. Aruldoss - Intelligence Officer, NCB (P.W.7), Mr. Gunabalan – Superintendent (P.W.6), Mr. A. Sendhil Murugan (P.W.10), Mr. R. Murugan (P.W.2), Smt. Saraswathy Chakravarthy, Chemical Examiner in Customs House Laboratory at Chennai (P.W.4), Mr. T. Sridhar (P.W.5).

8. The information relating to the commission of the offence has been taken note of and discussed by the Trial Court as well as the High Court in the impugned judgment in detail. It is not necessary to burden this judgment with all those details as our purpose would be served by referring to those aspects which are essential for the purposes of the present appeal. We may state that the prosecution had also produced Exs. P1 to P81 and M.Os 1 to 19 during the trial. After examining the prosecution witnesses, statements of the accused persons under Section 313 of the Code of Civil Procedure (hereinafter to be referred as ‘Code’) were recorded. The accused persons denied the same and stated as follows:

A-1: Denied the incriminating evidence against him and stated that he was compelled to come to the NCB Office and a false case is foisted against him and gave a written statement stating that the NCB officers came to his house between 12.30 to 1.00 p.m. on 25.10.2004 and took him to their office at Chennai in the presence of his wife and his children and have forcibly taken the signatures on some papers written in Hindi and that he is not connected with the other accused and that he was not occupant of the Car as alleged in the case and he was not aware of the contraband seized and examined

defence witnesses on his behalf namely Mr. Vinay, son of A-1, D.W.1 and Dr. Somasundaram D.W.2.

A-2: Denying the incriminating evidence against him stated that he was taken from Nanganallur to the NCB Office and that he was not allowed to talk before the Judge during remand.

A-3: Stated that summon was not issued to him and Rs. 1,600/- and train tickets were seized from him at Chennai Central Railway Station and he was beaten and forced to sign in the NCB office on blank papers and stated that it is a false case.

A-4: Stated that he was arrested at Nellore Railway Station while he was coming from train and his signatures were obtained forcibly and the Intelligence Officer Mr. Karthikeyan (P.W.3) has foisted a false case against him due to quarrel in the train between him and the Intelligence Officer and that he was working in the RPF and is not connected with the contraband seized and gave a written statement stating that he travelled in mufti to go to Tirupathy and got down at Chennai Central Railway Station and was arrested and false case was foisted against him due to wordy quarrel with the officer and that Section 67 statement was obtained by force and torture and that he was not carrying any Narcotic Drug.

Thereafter, the accused persons produced two witnesses who were examined and one document Ex. D1 was marked.

#### 9. Defence evidence is as follows:-

DW.1: The NCB Officers came at about 1.00 p.m on 25.10.2004 and searched the house of A-1 and they obtained his signature and his mother's signature in blank papers by threatening them. A-2 has not gone anywhere during September and October of 2004 and he was at home doing cloth business. A-1 was taken from his office and arrested. The other accused had never contacted A-2 over phone at any time.

DW.2: Dr. Somasundaram has recommended A-1 for treatment for Paralysis at Royapettah Hospital and his case sheet containing 21 pages for treatment from January, 2008 to 25.9.2008 is Ex. D.1.

10. It would be relevant to point that two of the accused persons namely Guddu Singh @ Vikram Singh and Ravi were absconding and they could not be procured during the trial, resulting into splitting up of case as new C.C. No. 9 of 2007. Thereafter, the trial proceeded against the other four accused persons which led to their conviction, as mentioned above. All these four accused persons had filed the appeal which has been dismissed by the High Court of Judicature at Madras vide impugned Judgment. However, out of the four convicted persons, only the appellant herein has preferred the present appeal.

#### JUDGMENT OF THE TRIAL COURT:

11. The learned Trial Court in its judgment dated 18.12.2009, after pointing out the main prosecution evidence as well as the defence, noted that the gist of the prosecution case was that the six accused persons had hatched criminal conspiracy at Nellore, Andhra Pradesh, Chennai and Srilanka to procure, possess, transport and attempt to export out of India 5.250 Kgs. of heroin to Srilanka. Accused No. 2 had indulged in financing for purchase of heroin for which he entered India without registering himself as a foreigner. The heroin, which was seized, was being taken for the said export which was intercepted in the manner stated below:-

“As per the prosecution, after the information was received by Mr. L.S. Aruldoss, Intelligence Officer (P.W.9) on 23.10.2004 and discussed with Mr. Gunabalan, Superintendent (P.W.6) and Mr. A. Sendhil Murugan, Intelligence Officer (P.W.10) and further action was sanctioned, the raiding party consisting of PW.6, PW.7, PW.10 with Sepoy and driver, left the NCB office in the vehicle Mini Bus bearing Registration No. TN 09 C 3113 on 24.10.2004 at 9.00 a.m and had reached GNT Road 100’ Road Junction at 11.00 a.m. Two independent witnesses namely, Mr. S. Gopi (P.W.8) and Krishnamurthy were also associated. When they were mounting surveillance at about 12.00 noon, they noticed Ambassador Car bearing Regd. No. TN 01 K 0923 coming towards Chennai which was intercepted by the raiding authority and the heroin in question seized in the manner already explained above. The case argued by the prosecution was that the conspiracy hatched between Accused No. 1 to 4 was proved by the seizure of Ex. P-4 train ticket PNR No. 840-7161615 dt. 14.10.2004 and Ex. P-41 the booking particulars disclose the name of A-2, A-2 and Rajesh and the place of travel from Mumbai to madras and another passenger name through it was mentioned in it was given as Shahid by A-1 in his further voluntary statement in Hindi Ex. P- 6 of which the free English translation is Ex. P-77 in which it is stated that Shahid is the person through whom money was sent to Guddu Singh

which in fact is within the special knowledge of A-1. In the same manner Ex. P-5 telephone bills were seized from the residence of A-1 and when A-21 was questioned about the telephone numbers Faroth and Sarola A-2 has stated in Ex. P-77 that these numbers belong to Guddu Singh and his brother through which he used to talk about smuggling of heroin. In the English translation of voluntary statement of A-3, Ex. P-78 of which the Hindi version is Ex. P-10 it is stated that A-3 met Guddu Singh who introduced him to A-4 and told him that A-4 is working in RPF, Bhawani Mandi, Rajasthan and that A-4 would travel with him in uniform in Jaipur Chennai Express and handed over a bag containing 5 Kgs. of heroin stating that it should be handed over to A-1 at Nellore who was already introduced to A-3 on 13.10.2004. The version of A-3 in Ex. P-78 that he travelled in Jaipur Chennai Express from Shamgarh is corroborated by the seizure of two train tickets Ex. P-61 and Ex. P-62 from Shamgarh to Chennai from A-3 and I.D. Card of A-4 Ex. P-63 discloses that A-3 was working in RPF. Ex. P-79 is the voluntary statement of A-4 which is free english translation of the hindi statement of Ex. P-74 in which A-4 has stated that he boarded Jaipur Express on 22.10.2004 and met A-3 in Bhopal in the train and that he knew that A-3 brought Narcotic Drug with him. Conspiracy could be proved only through the conduct of the accused. A-3 and A-4 had travelled with the contraband in the train and have met A-1 and A-2 at Nellore and handed over the same and boarded in the ambassador car only due to the previous meeting of minds by fixing the time and place of handing over the contraband to the concerned accused. From the proved conduct of A-1 to A-4 it is clear that they have involved themselves in the illegal trafficking of heroin. Ex. P-21 call analysis discloses that 07425-284050 in the name of Bhuvan Singh of M.P. was frequently in touch with A-2 and A-2 mobile numbers A-1 in his voluntary statement Ex. P-2 has stated that Guddu Singh Number is 07425-284050 through which he used to contact A-3 and Guddu Singh. Hence, the prosecution contended that the charges against A-1 to A-4 for possession transportation of heroin for Export from India and Conspiracy U/s. 8(c) r/2. 21 (c) and 29 of NDPS Act were well proved.”

12. In so far as the charge under Section 28 of the NDPS Act is concerned, the trial court held that the said charge was not proved against the accused persons, in as much as at the stage of preparation to commit the offence of illegal export of contraband, the car was intercepted and search and seizure conducted which resulted in the recovery of the contraband. As such, the accused persons were apprehended in the middle of the operation and since the attempt to commit the offence of export had not yet begun, it could not be said that the accused persons

had committed any act which could be considered as a step towards the commission of offence of export of the contraband. The accused persons were, thus, acquitted of the charge under Section 28 of the NDPS Act.

13. Likewise, the trial court held that charge under Section 27A of the NDPS Act foisted upon the accused No. 2 was not proved as no oral or documentary evidence was produced in the form of Bank Pass Book or income particulars or documents regarding the money transactions between the seller and the purchaser of heroin. Moreover, there was no oral or documentary evidence to show that the Accused No. 2 had failed to register himself as a foreigner or that he had entered into India without valid and legal documents and thus, he was acquitted of the charge under Section 3(3) of the Passport (Entry into India) Act, 1920 read with Rule 3 (a) as well as under Section 14 of the Foreigners Act, 1946.

14. While discussing the main charge leveled under Section 8(c) read with Section 21(c) and 29 of the NDPS Act, the trial court noted that the defence counsel had sought for discard of the prosecution case on the following grounds:

- (i) Voluntary statement recorded under Section 67 of the NDPS Act had been retracted and so, they had no evidentiary value.
- (ii) There was violation of Section 50 of the NDPS Act as there was non-compliance of the provisions thereof .
- (iii) Driver of the vehicle was not examined which was fatal to the prosecution case.
- (iv) Sample sent for analysis and the seized contraband were not one and the same.
- (v) There was no link evidence which vitiated the trial.
- (vi) Names of Accused No. 3 (the appellant) and Accused No. 4 were not mentioned in the information which was received by the Intelligence Officer and, therefore, they were wrongly included in the charge sheet.
- (vii) There was a violation of standing order 1/88 in as much as samples were not submitted to the Chemical Examiner within 72 hours of seizure and the report was not submitted within 15 days of receipt of contraband for analysis.

(viii) Statements under Section 67 were not recorded in accordance with law, as no statutory warning under Section 164 of the Code of Criminal Procedure was given to the accused persons before recording the statement.

15. The trial court discussed the arguments predicated on the aforesaid defence but found the same to be meaningless. On the basis of prosecution evidence, the trial court concluded that the prosecution was able to prove the charges under Section 8(c) read with Section 21(c) and Section 29 of the NDPS Act and convicted and sentenced the accused persons in the manner mentioned in the beginning of this judgment.

#### JUDGMENT OF THE HIGH COURT:

16. A perusal of the impugned judgment reveals that as many as six arguments were advanced before the High Court, attacking the findings of the learned Trial Court. Taking note of these grounds of appeal, the High Court framed the questions in Para 12 of the judgment. We reproduce hereinbelow those six questions formulated by the High Court which reflected the nature of defence:

- (i) Whether Section 50 of NDPS Act is complied with or not?
- (ii) Whether the provision of Section 42 of NDPS Act is complied with or not?
- (iii) Whether non-examination of drivers and non-seizure of vehicle/ car are fatal to the case of the prosecution?
- (iv) Whether Section 67 statement of the accused is reliable?
- (v) Whether Accused No. 2 is entitled to invoke Section 30 of NDPS Act?
- (vi) Whether conviction and sentence passed by the trial court is sustainable.

17. Obviously, all these questions have been answered by the High Court against the appellant herein as the outcome of the appeals has gone against the appellant. However, it is not necessary to mention the reasons/ rationale given by the High Court in support of its conclusion in respect of each and every issue. We say so because of the reason that all the aforesaid contentions were not canvassed before

us in the present appeal. Thus, eschewing the discussion which is not relevant for these appeals, we would be narrating the reasons contained in the impugned judgment only in respect of those grounds which are argued by Mr. Sushil Kumar Jain, learned Counsel appearing for the appellant, that too while taking note of and dealing with those arguments.

#### THE ARGUMENTS:

18. After giving brief description of the prosecution case, in so far as the alleged involvement of the appellant is concerned. Mr. Sushil Kumar Jain drew our attention to the following aspects as per the prosecution case itself:

(a) In the present case in the prior secret information with the police, there was no prior information with regard to the appellant herein. The secret information (Ex. P-72) does not disclose the name of the appellant at all.

(b) On the date of incident also, the appellant was found sitting on the front seat alongwith the two drivers who have been let off by the investigating agency itself and the ambassador car from which the recoveries had been effected has also not been seized. The said drivers could have been the best witnesses but they have not been examined by the prosecution.

(c) The recovery of the narcotic substance was made at the instance of A1 and A2 (and not the appellant herein), who while sitting on the back seat took out a green colour bag from beneath their seat and handed it over to PW.7. The appellant cannot be said to be in conscious possession of the narcotic substance.

(d) In the search conducted of the appellant herein, the raiding party found Indian currency of Rs. 680/- (vide Ex. P-11) which is M.O. 15 and two second class train tickets from Shamgarh to Chennai. Thus no incriminating material has been recovered from the appellant. Further there is also no recovery of any mobile phone from the appellant herein which could link the appellant with the other co- accused.

(e) The prosecution case hinges solely upon the confessional statement of the appellant herein (Ex. P-9), which was recorded by PW.2 – R. Murugan under Section 67 of the Act, and the same person acted as the investigating officer in the present case.

19. From the above, Mr. Jain argued that there was no evidence worth the name implicating the appellant except the purported confessional statement of the appellant recorded under Section 67 of the NDPS Act. After drawing the aforesaid sketch, Mr. Jain endeavoured to fill therein the colours of innocence in so far as the appellant is concerned with the following legal submissions:-

(I) It was argued that the conviction of the appellant is based upon a purported confessional statement (Ex. P-9] recorded by PW.2 R. Murugan under the provisions of Section 67 of the NDPS Act, which did not have any evidentiary value. Mr. Jain submitted in this behalf that:

(a) There is no power under Section 67 of the NDPS Act to either record confessions or substantive evidence which can form basis for conviction of an accused, in as much as:

(i) The scheme of the Act does not confer any power upon an officer empowered under Section 42 to record confessions since neither a specific power to record confession has been conferred as was provided under Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) or under Section 32 of the Prevention of Terrorism Act, 2002 (POTA) nor the power under Section 67 is a power to record substantive “evidence” as in Section 108 of the Customs Act or Section 14 of the Central Excise Act which are deemed to be judicial proceedings as specifically provided under Section 108(4) of the Customs Act or Section 14(3) of the Central Excise Act.

(ii) The powers under Section 67 has been conferred upon an officer under Section 42 so that such officer can effectively perform his functions. The power under Section 67 is incidental to and intended to enable an officer under Section 42 to effectively exercise his powers of entry, search, seizure or arrest which is provided under Section 42 of the Act. The powers under Section 67 are powers to “call for information” which information can thereafter form the basis for satisfaction of “reasons to believe by personal knowledge or information” appearing in Section 42 and which a jurisdictional basis and a pre-condition to exercise powers under Section 42 of the Act. Absence of reasons to believe or information would render the exercise under Section 42 of the Act bad in law and hence in order to derive the said information power has been conferred under Section 67 to an officer empowered under Section 42. This statement is, therefore, merely

“Information” subject to investigation and cannot be treated as substantive evidence.

(b) Pitching this argument to the next level, it was submitted that the power under Section 67(c) of the Act is merely a power to examine any person acquainted with the facts and circumstances of the case. Such statements are not required in law to be truthful as provided under Section 161(2) of the Criminal Procedure Code, which required the person making statement to a police officer under Section 161 Cr.P.C. to make a true statement. Even such a statement made under Section 161 Cr. P.C. is not a substantive evidence on which a conviction can be based. Statements under Section 67 are not required in law to be given truthfully and hence cannot in any case be treated to be a substantive evidence. Further statement under Section 67 are not recorded after administration of oath as is required under Section 164(5) of the Criminal Procedure Code, the officers are not competent to administer oaths and, therefore, the statements under Section 67 cannot be substantive evidence for recording conviction.

(c) Taking the arguments to a still higher pedestal, Mr. Jain’s effort was to demonstrate that the officer recording the statement was a police officer and, therefore, such a statement was hit by Section 25 of the Indian Evidence Act. He submitted that an officer empowered under Section 42 of the Act has been conferred with substantive powers which are powers available to a police officer for detection and prevention of crime. The learned Counsel placed heavy reliance upon the ratio of the judgment of the Constitution Bench of this Court in the case of *Batku Jyoti Sawat Vs. State of Mysore* 1966 (3) SCC 698 which accepted a broader view, as laid down in the case of *Rajaram Jaiswal Vs. State of Bihar* 1964 (2) SCR 752 and *State of Punjab Vs. Barkat Ram* 1962 (3) SCR 338. It was submitted that in view of the ratio of the above judgments, officers empowered under Section 42 and conferred with powers to enter, search, seize or arrest are “police officers” properly so called and hence statements made to such officers would be hit by the provisions of Section 25 of the Evidence Act. In any case such officers would come within the meaning of term “person in authority” and hence the statements recorded by such officers would be hit by the provisions of Section 24 of the Evidence Act especially since the statements were not voluntary and had been retracted by the accused.

(d) In the alternate, the submission of Mr. Jain was that even if it is assumed, without admitting, that Section 67 confers powers to record confessions, the

status of a statement recorded by an officer under Section 42 of the Act can at best be recorded as “extra judicial confession” and no conviction can be based solely on the basis of extra judicial convictions.

(e) It was also argued that in any case the statement under Section 67 was retracted and as such the confession in the present case is a retracted confession which ought to have been investigated and could have been used only to corroborate other evidence and not as a substantive evidence itself. He submitted that no conviction can be based on uncorroborated retracted confessional statement as held in *Noor Aga Vs. State of Punjab* 2008 (9) SCALE 681.

(II) Next submission of Mr. Jain was that there was complete absence of Fair Investigation and Non-compliance of the provisions of Section 52(3) of the Act-

Pointing out that in the present case the appellant had been arrested by PW.2 – R. Murugan after recording statement under Section 67 of the Act, the Id. Counsel made a fervent plea to the effect that it was evident that PW.2 R. Murugan was exercising purported powers conferred to an officer under Section 42 of the Act. It was submitted that Section 52(3) of the Act casts an obligation on an officer empowered under Section 42 of the Act to forward, without unnecessary delay every person arrested or article seized to either an officer-in-charge of a police station or an officer empowered under Section 53. According to him, since there is an obligation to forward such person arrested or article seized, to an officer under Section 53 or an officer-in-charge of the police station, it necessarily follows that an officer under Section 42 would be different and distinct from an officer invested with the task of investigation, i.e., either the officer-in-charge of the police station or an officer empowered under Section 53 of the Act. In the present case, however, the PW.2 R. Murugan recorded the statement of the appellant under Section 67 and thereafter arrested him. He was, therefore, required to forward the statement as well as the appellant to the Investigating officer in terms of Section 52(3). Instead, he himself became the Investigating Officer in the present case, which amounted to non-compliance of Section 52(3) read with Section 58 of the Act. Fair investigation demands existence of an independent investigating agency which is also contemplated and is evident from the scheme of NDPS Act. It was submitted that since Section 58 of the Act provides for punishment for vexatious entry, search, seizure and arrest, the conduct of the officer arresting or an officer under Section 42 is subject

matter of investigation by an independent agency and hence PW. 2 R. Murugan could not have been made an investigating officer in the present case after he has already acted and exercised powers under Section 42 of the Act.

(III) Another submission of Mr. Jain was that trial was initiated because of Non-compliance of the Provisions of Section 57 of the Act –

It was submitted that Section 57 requires that whenever any person makes any arrest or seizure under the Act, then a report thereof has to be submitted of such arrest or seizure to his immediate superior officer. In the present case the raiding party comprised of PW.6- Gunabalan, Superintendent – PW.7 Aruldoss, Intelligence Officer, PW.10 Sendhil Murugan, Intelligence Officer and two other staff members i.e., one Sepoy and one driver. It was submitted that the senior most officer among the raiding team was PW.6 Gunabalan who was, therefore, exercising powers under Section 42 of the Act and the other officers being his subordinates were assisting him in exercise of such powers. Therefore, the report contemplated under Section 57 ought to have been made by PW.6 Gunabalan to his immediate superior officer but instead, in the present case PW.7 Aruldoss has submitted a report to PW.6 Gunabalan under Section 57 of the Act with regard to seizure and PW.2 R. Murugan has submitted report to PW.6 Gunabalan under Section 57 with regard to arrest of the appellant herein. It is, thus, submitted that there is a complete non-compliance of the provisions of Section 57 of the Act which has vitiated the safeguards provided under the Act and as such the appellant could not have been convicted.

20. Arguing on behalf of the prosecutor, Mr. S. Nanda Kumar, learned Counsel submitted that the appellant had given voluntary statement that discloses his involvement in the commission of the offence alongwith other accused persons. In the statement he has categorically admitted having bringing 5.250 kgs of heroin/ narcotic substance from Maniki Village, District Mandsaur, Rajasthan to Chennai by Jaipur – Chennai Express along with other co-accused Badrilal Sharma wearing RPF Uniform till Nellore, Andhra Pradesh. He has also admitted that, thereafter, the other accused namely Guddu Singh @ Vikram Singh and Babulal Jain picked them in a car and proceeded to Chennai. It is on the way that these accused persons were caught by the respondent's officials and based on their confession as well as the material seized, the case was registered. He also pointed out that it has come on record that Babulal Jain (declared as absconder) and Guddu Singh were involved in the similar offence by selling 8 Kgs. of heroin on earlier occasions which was

handed over to Prem @ Kannan, a Srilankan National, another co-accused in this case. It was the second time that the accused persons planned to smuggle the heroin to Srilanka.

21. Refuting the submissions of the appellant, it was submitted that the confessional statement recorded under Section 67 of the NDPS Act could be acted upon, as the officer recording statement under this provision under Section 67 is not a “police officer” and, therefore, such a statement is not hit by the provisions of Section 24 to 27 of the Evidence Act or Article 20(3) of the Constitution of India. His submission was that law on this aspect had already been settled by the judgment of this Court in *Kanhaiyalal v. Union of India*; 2008 (4) SCC 668 as well as *Raj Kumar Karwal v. Union of India*; 1990(2) SCC 409. The learned Counsel pointed out that judgment relied upon by the appellant pertains to other Acts like Customs Act etc. whereas the aforesaid judgments specifically dealt with the nature of duties performed by officers under the NDPS Act and, therefore, on this issue *Raj Kumar (Supra)* and *Kanhaiyalal (Supra)* were the binding precedents. He also submitted that as per Section 67 of NDPS Act, any officer referred to in Section 42 of NDPS Act was empowered to obtain a statement. Once the said statement is made it can also be construed as confessional statement since there is no specific provision in the Act to obtain the confessional statement from the accused. Therefore, such a statement of the appellant was rightly relied upon resulting into his conviction.

22. The learned Counsel for the state also countered the submission of the appellant that the officer acting under Section 53 of the NDPS Act i.e. the investigating officer had to be necessarily different from the officer who is acting under Section 42 of the NDPS Act. He submitted that Sections 42, 53 and 67 of NDPS Act do not bar the officer authorized under the act to conduct, search, seizure, investigate and enquire into the matter. His submission was that the depositions of PW.2 – Murugan, Intelligence Officer, PW.6 – Gunabalan, Superintendent and PW.10 – Senthil Murugan, Intelligence Officer establish that they are empowered to act under Section 42, 53 and 67 of the NDPS Act.

23. The learned Counsel also highlighted incriminating facts as per the records viz. the raid team was led by PW.6 - Gunabalan, Superintendent along with the PW.10 A. Senthil Murugan, Intelligence Officer and one Aruldoss, Intelligence officer. Also two other officials conducted the raid and made a search and seizure of the heroin on 24.10.2004 at 12.00 hrs. at GNT Road, 100 ft. road, Madhavaram in Chennai where the vehicles come from Nellore, Andhra Pradesh towards Chennai Junction. After the seizure, PW.2 – Murugan enquired into the matter as per the

direction of the superintendent. He also obtained the voluntary statement under Section 67 of the NDPS Act. The accused also gave another statement for supply of heroin to Guddu Singh. The confessional statement of Badrilal Sharma, who travelled alongwith accused/ appellant was also recorded. The confessional statement of absconded accused viz. Babulal Jain is also on the original record. In addition to that, the Identity Card of Badrilal Sharma and the train tickets of the appellant and Badrilal Sharma, as both of them travelled together, have come on record. All this proves that the appellant was in possession of the heroin 5.250 Kgs. and carried it from Rajasthan to Chennai with intention to smuggle the same to Srilanka, when he was caught. He thus pleaded that conviction and sentence of the appellant was rightly recorded by the courts below, which warranted no interdicting by this court.

24. From the arguments noted above, it would be clear that the appellant has challenged the conviction primarily on the following grounds:-

(i) The conviction is based solely on the purported confessional statement recorded under Section 67 of the NDPS Act which has no evidentiary value in as much as:

(a) The statement was given to and recorded by an officer who is to be treated as “Police Officer” and is thus, hit by Section 25 of the Indian Evidence Act.

(b) No such confessional statement could be recorded under Section 67 of the NDPS Act. This provision empowers to call for information and not to record such confessional statements. Thus, the statement recorded under this provision is akin to the statement under Section 161 Cr.PC.

(c) In any case, the said statement having been retracted, it could not have been the basis of conviction and could be used only to corroborate other evidence.

(ii) There was absence of fair investigation and non-compliance of the provisions of Section 52(3) of the NDPS Act. This submission is primarily based on the argument that same person cannot be an officer under Section 42 of the NDPS Act as well as investigating officer under Section 52 of the said Act.

(iii) Non-compliance of Section 57 of the NDPS Act is also alleged because of the reason that P.W.7 who was the senior most officer among the raiding team has submitted the report under Section 57 of the NDPS Act with regard to arrest of the appellant to P.W.6j. Instead P.W.6 should have submitted the report of such arrest to P.W.7.

25. We shall take up these arguments in seriatim for our discussion:

Evidentiary value of statement u/s 67 of the NDPS Act.

Before examining this contention of the appellant, it would be apposite to take note of the provisions of Sections 42, 53 and 67 of the NDPS Act. These provisions read as under:-

42. Power of entry, search, seizure and arrest without warrant or authorization.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs, control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence fo the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building , conveyance or enclosed place, may between sunrise and sunset-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he reasons to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act.

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

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

“53. Power to invest officers of certain departments with powers of an officer-in-charge of a police station:-

(1) The Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of the Department of Central Excise, narcotics, Customs, Revenue Intelligence or the Border Security Force or any class of such officers with the powers of an officer-in-charge of Police Station for the investigation of the offences under this Act.

(2) The State Government may, by notification published in the official gazette, invest any officer of the Department of Drugs Control, Revenue or Excise or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of offences under this Act.”

“67. Power to call for information etc.

Any officer referred to in Section 42 who is authorized in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provision of this Act:-

(a) Call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provision of this Act or any rule or order made thereunder:

(b) Require any person to produce or deliver any document or thing useful or relevant to the enquiry

(c) Examine any person acquainted with the facts and circumstances of the case.”

26. We have already taken note of the contentions of Counsel for the parties on the interpretation of the aforesaid provisions. To recapitulate in brief, the submission of Mr. Jain is that there is no power in the Section 67 of the NDPS Act to either record confessions or substantive evidence which can form basis for conviction of the accused. It is also argued that, in any case, such a statement is not admissible in evidence as the excise official recording the statement is to be treated as “police officer” and thus, the evidential value of the statement recorded before him is hit by the provisions of Section 25 of the Indian Evidence Act.

27. The learned Counsel for the respondent had pointed out that in the case of *Kanhaiyalal vs. Union of India*; 2008(4) SCC 668, it has been categorically held that the officer under Section 63 is not a police officer. In arriving at that conclusion the two judge Bench judgment had followed earlier judgment in the case of *Raj Kumar Karwal Vs. Union of India*; 1990(2) SCC 409.

28. Had the matter rested at that, the aforesaid dicta laid down by two judge Bench would have been followed by us. However, on the reading of the aforesaid judgment, we find that the only reason to conclude that an officer under Section 53 of the NDPS Act was not a police officer was based on the following observations:

These provisions found in Chapter V of the Act show that there is nothing in the Act to indicate that all the powers under Chapter XII of the Code, including the power to file a report under Section 173 of the Code have been expressly conferred on officers who are invested with the powers of an

officer-in-charge of a police station under Section 53, for the purpose of investigation of offences under the Act.

29. We find, prima facie, in the arguments of Mr. Jain to be meritorious when he points out that the aforesaid observations are without any detailed discussion or the reasons to support the conclusion arrived at. Mr. Jain's fervent plea to depart from the view taken in the said judgment deserved consideration as there is no provision under the NDPS Act which takes away the power of filing a report under Section 173 of the Code which is available with an officer-in-charge of a police station. He further argued that the provision of Section 173 are contained in Chapter XII of the Code and since all powers of an officer in-charge of a police station has been conferred, there is no legal basis to suggest that the said power is not available with the officer under Section 53 of the Act. Above all, we find that the judgment in Raj Kumar Karwal (supra) was considered by this court in few cases but without giving imprimatur, as can be seen below:

30. Abdul Rashid v. State of Bihar; (2001) 9 SCC 578, this Court after noticing the judgment in Raj Kumar Karwal (supra), chose to apply the Constitution Bench judgment in the case of Raja Ram Jaiswal reported as (1964) 2 SCR 752 and observed thus:-

“ Mr. B.B. Singh also brought to our notice a judgment of this Court in the case of Raj Kumar Karwal v. Union of India in support of the contention that even a superintendent of excise under the Bihar and Orissa Excise Act is not a police officer and as such a confessional statement made to him would be admissible in evidence. In the aforesaid case, the question for consideration is whether the officers of the Department of Revenue Intelligence (DRI) invested with powers of officer in- charge of a police station under Section 53 are police officers or not within the meaning of Section 25, and this Court answered that those officers are not police officers. This decision is in pari material with the Constitution Bench decision in 1966 and does not in any way detract from the conclusion of this Court in Raja Ram which we have already noticed. In Pon Adithan v. Dy. Director, Narcotics Control Bureau this question had not directly been in issue and the only question that was raised is whether the statement made was under threat and pressure. It is obvious that a statement of confession made under threat and pressure would come within the ambit of Section 24 of the Evidence Act. This decision therefore would not be direct authority on the point in issue. In the aforesaid premises, the decision of Raja Ram would apply to the alleged confessional

statement made by the appellant to the superintendent of excise and therefore would be inadmissible in evidence.”

31. Both the said judgments i.e. Raj Kumar Karwal (supra) as well as Kanhiyalal (supra) were thereafter considered by this court in Noor Aga vs. State of Punjab (2008) 9 SCALE 681 where the court, has after considering the entire scheme of the Customs Act, has held that the officer under Section 53 of the customs Act is a police officer and would, therefore, attract the provisions of Section 25 of the Evidence Act. It observed:

“104. Section 53 of the Act, empowers the Customs Officer with the powers of the Station House Officers. An officer invested with the power of a police officer by reason of a special status in terms of sub-section (2) of section 53 would, thus, be deemed to be police officers and for the said purposes of Section 25 of the Act shall be applicable.”

32. No doubt, Abdul Rashid & Noor Aga were the cases under the Customs Act. But the reasons for holding custom officer as police officer would have significant bearing even when we consider the issue in the context of NDPS Act as well. It would be more so when the schemes & purport of the two enactments are kept in mind. NDPS Act is purely penal in nature. In contradistinction, as far as the Customs Act and the Central Excise Act are concerned, their dominant object is to protect revenue of the State and penal provisions to punish the person found offending those laws are secondary in nature.

33. Further, the NDPS Act is a complete code relating to Narcotic Substances, and dealing with the offences and the procedure to be followed for the detection of the offences as well as for the prosecution and the punishment of the accused. The provisions are penal provisions which can, in certain cases, deprive a person of his liberty for a minimum period of 10 years and can also result in sentences which can extend upto 20 years or even death sentence under certain circumstances. The provisions therefore have to be strictly construed and the safeguards provided therein have to be scrupulously and honestly followed. [See Baldev Singh (1997) 1 SCC 416 Para 28; Union of India vs. Bal Mukund (2009) 12 SCC 161 Para 26, 27 & 28; Balbir Singh vs. State of Haryana (1987) 1 SCC 533].

34. We have also to keep in mind the crucial test to determine whether an officer is a police officer for the purpose of Section 25 of the Evidence Act viz. the “influence or authority” that an officer is capable of exercising over a person from whom a confession is obtained. The term “police officer” has not been defined

under the Code or in the Evidence Act and, therefore, the meaning ought to be assessed not by equating the powers of the officer sought to be equated with a police officer but from the power he possesses from the perception of the common public to assess his capacity to influence, pressure or coercion on persons who are searched, detained or arrested. The influence exercised has to be, assessed from the consequences that a person is likely to suffer in view of the provisions of the Act under which he is being booked. It, therefore, follows that a police officer is one who:-

(i) is considered to be a police officer in “common parlance” keeping into focus the consequences provided under the Act.

(ii) is capable of exercising influence or authority over a person from whom a confession is obtained.

35. We would also like to point out that Mr. Sushil Kumar Jain had referred to the provisions of the Police Act as well to support his submission. The preamble of the Police Act, 1861 (Act 5 of 1861), which is an Act for the regulation of a group of officers who come within the meaning of the word “police” provides”

“Whereas it is expedient to re-organize the police and to make it a more efficient instrument for the prevention and detection of crime, it is enacted as follows.”

He argued that from the above, it can be seen that the primary object of any police establishment is prevention and detection of crime which may be provided for under the Indian Penal Code or any other specific law enacted for dealing with particular offences and bring the guilty to justice. It was submitted by him that if special authorities are created under special enactments for the same purpose i.e. prevention and detection of crime, such authorities would be “Police and have to be understood in the said perspective. Sections 23 and 25 of the said Act lay down the duties of the police officers and Section 20 deals with the authority and provides that they can exercise such authority as provided under the Police Act and any Act for regulating criminal procedure. Section 5(2) of the Criminal Procedure Code provides that “all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

36. On the strength of these provisions, the argument of the learned Counsel for the petitioner was that persons categorized as “police officers” can do all the activities and the statute gives them the power to enable them to discharge their duties efficiently. Of the various duties mentioned in Section 23, the more important duties are to prevent the commission of offences and public nuisances and to detect and bring offenders to justice and to apprehend all persons whom the police officer is legally authorized to apprehend. It is clear, therefore, in view of the nature of the duties imposed on the police officer, the nature of the authority conferred and also the purpose of the Police Act, that the powers which the police officers enjoy are powers for the effective prevention and detection of crime in order to maintain law and order. According to the learned Counsel, a comparison to the powers of the officers under the provisions of the NDPS Act makes it clear that the duties and responsibilities of the officers empowered under the Act are comparable to those of the police officers and, therefore, they ought to be construed as such. It is submitted that the primary objective of a NDPS Officer is to detect and prevent crime defined under the provisions of the act and thereafter the procedure has been prescribed to bring the offenders to justice. Thus, the officers under the Act are “Police Officers” and statements made to such officers are inadmissible in evidence.

37. He also drew our attention to the following pertinent observation of this Court in the case of *State of Punjab v. Barkat Ram*; (1962) 3 SCR 338.

“Section 5(2) of the Code of Criminal Procedure also contemplates investigation of, or inquiry into, offences under other enactments regulating the manner or place of investigation, that is, if an act creates an offence and regulates the manner and place of investigation or inquiry in regard to the said offence, the procedure prescribed by the Code of Criminal Procedure will give place to that provided in that Act. If the said Act entrusts investigation to an officer other than one designated as police officer, he will have to make the investigation and not the police officer. In this situation, the mere use of the words "police officer" in section 25 of the Evidence Act does not solve the problem, having regard to permissible rules of interpretation of the term "police officer" in that section. It may mean any one of the following categories of officers : (i) a police officer who is a member of the police force constituted under the Police Act; (ii) though not a member of the police force constituted under the Police Act, an officer who by statutory fiction is deemed to be a police officer in charge of a police station under the Code of Criminal Procedure; and (iii) an officer on whom a

statute confers powers and imposes duties of a police officer under the Code of Criminal Procedure, without describing him as a police officer or equating him by fiction to such an officer. Now, which meaning is to be attributed to the term "police officer" in a section 25 of the Evidence Act ? In the absence of a definition in the Evidence Act it is permissible to travel beyond the four corners of the statute to ascertain the legislative intention. What was the meaning which the legislature intended it give to the term "police officer" at the time the said section was enacted ? That section was taken out of the Criminal Procedure Code, 1861 (Act 25 of 1861) and inserted in the Evidence Act of 1872 as section 25. Stephen in his Introduction to the Evidence Act states at p. 171 thus:

"I may observe, upon the provisions relating to them, that sections 25, 26 and 27 were transferred to the Evidence Act verbatim from the Code of Criminal Procedure, Act XXV of 1861. They differ widely from the law of England, and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody. "

So too, Mahmood, J., in *Queen Empress v. Babulal* I.L.R.(1884) . 6 All. 509), gave the following reasons for the enactment of section 25 of the Evidence Act at p. 523.

"..... the legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and that those malpractices went to the length of positive torture; nor do I doubt that the Legislature, in laying down such stringent rules, regarded the evidence of police officers as untrustworthy, and the object of the rules was to put a stop to the extortion of confessions, by taking away from the police officers as the advantage of proving such exported confessions during the trial of accused persons. "

It is, therefore, clear that section 25 of the Evidence Act was enacted to subserve a high purpose and that his to prevent the police from obtaining confessions by force, torture or inducement. The salutary principle underlying the section would apply equally to other officers, by whatever designation they may be known, who have the power and duty to detect and investigate into crimes and is for that purpose in a position to extract confessions from the accused.

“..Shortly stated, the main duties of the police are the prevention and detection of crimes. A police officer appointed under the Police Act of 1861 has such powers and duties under the Code of Criminal Procedure, but they are not confined only to such police officers. As the State's power and duties increased manifold, acts which were at one time considered to be innocuous and even praiseworthy have become offences, and the police power of the State gradually began to operate on different subjects. Various Acts dealing with Customs, Excise, Prohibition, Forest, Taxes etc., came to be passed, and the prevention, detection and investigation of offences created by those Acts came to be entrusted to officers with nomenclatures appropriate to the subject with reference to which they functioned. It is not the garb under which they function that matters, but the nature of the power they exercise or the character of the function they perform is decisive. The question, therefore, in each case is, does the officer under a particular Act exercise the powers and discharge the duties of prevention and detection of crime? If he does, he will be a police officer.”

38. In our view the aforesaid discussion necessitates a re-look into the ratio of Kanhiyalal Case. It is more so when this Court has already doubted the dicta in Kanhaiyalal (supra) in the case of Nirmal Singh Pehalwan (2011) 12 SCC 298 wherein after noticing both Kanhiyalal as well as Noor Aga, this Court observed thus:

“15. We also see that the Division Bench in Kanhaiyalal case; 2008 (4) SCC 668; (2008) 2 SCC (Cr.) 474, had not examined the principles and the concepts underlying Section 25 of the Evidence Act vis.-a-vis. Section 108 of the Customs Act the powers of Custom Officer who could investigate and bring for trial an accused in a narcotic matter. The said case relied exclusively on the judgment in Raj Kumar's case (Supra). The latest judgment in point of time is Noor Aga's case which has dealt very elaborately with this matter. We thus feel it would be proper for us to follow the ratio of the judgment in Noor Aga's case particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with.”

39. For the aforesaid reasons, we are of the view that the matter needs to be referred to a larger Bench for re-consideration of the issue as to whether the officer investigating the matter under NDPS Act would qualify as police officer or not.

40. In this context, the other related issue viz. whether the statement recorded by the investigating officer under Section 67 of the Act can be treated as confessional statement or not, even if the officer is not treated as police officer also needs to be referred to the larger Bench, inasmuch as it is intermixed with a facet of the 1st issue as to whether such a statement is to be treated as statement under Section 161 of the Code or it partakes the character of statement under Section 164 of the Code.

41. As far as this second related issue is concerned we would also like to point out that Mr. Jain argued that provisions of Section 67 of the Act cannot be interpreted in the manner in which the provisions of Section 108 of the Customs Act or Section 14 of the Excise Act had been interpreted by number of judgments and there is a qualitative difference between the two sets of provisions. In so far as Section 108 of the Customs Act is concerned, it gives power to the custom officer to summon persons “to give evidence” and produce documents. Identical power is conferred upon the Central Excise Officer under Section 14 of the Act. However, the wording to Section 67 of the NDPS Act is altogether different. This difference has been pointed out by Andhra Pradesh High Court in the Case of Shahid Khan vs. Director of Revenue Intelligence; 2001 (Criminal Law Journal) 3183.

42. The Registry is accordingly directed to place the matter before Hon’ble the Chief Justice for the decision of this appeal by a larger Bench after considering the issues specifically referred as above.

43. We find from the record that as against the sentence of 10 years awarded to the appellant he has already undergone more than 9 years of sentence. In these circumstances, we deem it a fit case to suspend further sentence till the disposal of this appeal by the larger Bench. The appellant shall be released on bail on furnishing security in the sum of Rs.50,000/- (Rupees Fifty Thousand) with two sureties of the same amount, to the satisfaction of the trial court.