

CASE DETAILS

BALWINDER SINGH (BINDA)

v.

THE NARCOTICS CONTROL BUREAU

(Criminal Appeal No. 1136 of 2014)

SEPTEMBER 22, 2023

**[B.R. GAVAI, HIMA KOHLI AND
PRASHANT KUMAR MISHRA, JJ.]**

HEADNOTES

Issue for consideration: Matter pertains to admissibility in evidence of the confessional statement recorded by the Narcotics Control Bureau officers u/s. 67 of Narcotic Drugs and Psychotropic Substances Act, 1985; and proving of possession of contraband by the prosecution beyond reasonable doubt.

**Narcotic Drugs and Psychotropic Substances Act, 1985 – s. 67 –
Confession statement made by an accused u/s. 67 before an officer of
Narcotics Control Bureau – Admissibility in evidence:**

Held: Statement made by an accused and recorded u/s. 67 cannot be used as a confessional statement in the trial of an offence under the NDPS Act – Any confessional statement made by an accused to an officer invested with the powers u/s. 53 of the NDPS Act, is barred for the reason that such officers are “police officers” within the meaning of s. 25 of the Evidence Act – Evidence Act, 1872 – s. 25. [Para 10]

**Narcotic Drugs and Psychotropic Substances Act, 1985 – s.
54 – Presumption from possession of illicit articles – “Proof beyond
reasonable doubt vis-a-vis “preponderance of probability”:**

Held: Initial burden is cast on the prosecution to establish the essential factors on which its case is premised – After the prosecution discharges the said burden, the onus shifts to the accused to prove his innocence – However, the standard of proof required for the accused to prove his innocence, is not

as high as expected of the prosecution – For attracting the provisions of s. 54, it is essential for the prosecution to establish the element of possession of contraband by the accused for the burden to shift to the accused to prove his innocence – This aspect of possession of the contraband has to be proved by the prosecution beyond reasonable doubt. [Paras 15 and 16]

Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 67 and 54 – Two persons convicted for possession of commercial quantity of heroin – Out of the two, only accused was apprehended by Narcotics Control Bureau-NCB from the spot where Naka laid and co-accused was arrested later – Co-accused being repeated offender sentenced to death u/s. 21(c) rw s. 31A(1a) which was modified to 14 years of rigorous imprisonment – Accused sentenced u/s. 21(c) to rigorous imprisonment for twelve years with fine, by the courts below – Sustainability of:

Held: Confessional statement of the accused recorded by the NCB officers u/s. 67, who had attributed a role to co-accused and subsequently statement of co-accused was recorded u/s. 67 are rejected as it cannot be used as a confessional statement having been recorded by the NCB officials who are to be treated as “police officers” u/s. 25 of the Evidence Act – Furthermore, no other independent incriminating evidence for convicting co-accused, thus, his conviction cannot be sustained – As regards the accused, the conviction does not hinge solely on his confessional statement made to the NCB officials – His case rests on the testimonies of prosecution witnesses, which are consistent and there are no material contradictions in their depositions to extend any benefit to the accused – Plea by the accused that the prosecution failed to establish a *prima facie* case against him and thus, the burden of proving his innocence did not shift back to him cannot be accepted – As regards the plea of failure to establish foundational facts, the prosecution was able to discharge the onus cast on it to prove the foundational facts – Prosecution produced adequate evidence to prove beyond reasonable doubt that the accused had the knowledge of the car being used for transporting narcotics, the presumption u/s. 35 would have to be drawn against him to hold that he had a culpable mental state – As regards, the plea of the accused being in the custody of the NCB much before the naka was laid, there has been no arbitrariness or undue favour shown to the

prosecution witnesses from the accused to claim any bias – In view thereof, accused failed to make out a case for acquittal, thus, order of conviction and the sentence imposed by the courts below upheld, however, the co-accused stands acquitted. [Paras 12-14, 19, 23, 27]

Code of Criminal Procedure, 1973 – s. 100(4) – Persons in charge of closed place to allow search – Testimony of independent witness – Plea of unreliability in view of s. 100(4):

Held: Sub-section (4) of s. 100 provides that to maintain the purity of the process, before undertaking a search, a couple of independent and respectable inhabitants of the locality where the place to be searched is located, be joined as witnesses to the search – On facts, when Naka was laid by Narcotics Control Bureau, independent witness was associated with investigation – Plea of unreliability of the testimony of the independent witness, in view of the provisions u/s. 100 (4) cannot be accepted. [Paras 24, 25]

LIST OF CITATIONS AND OTHER REFERENCES

Tofan Singh v. State of Tamil Nadu (2021) 4 SCC 1: [2020] 12 SCR 583 – relied on.

Kanhaiyalal vs. Union of India 2008 (4) SCC 668: [2008] 1 SCR 350; *Ram Singh vs. Central Bureau of Narcotics* (2011) 11 SCC 347: [2011] 5 SCR 967; *Raj Kumar Karwal vs. Union of India* (1990) 2 SCC 409: [1990] 2 SCR 63; *Ritesh Chakarvarti v. State of M.P.* (2006) 12 SCC 321: [2006] 6 Suppl. SCR 772 ; *Noor Aga v. State of Punjab and Another* (2008) 16 SCC 417: [2008] 10 SCR 379; *Bhola Singh v. State of Punjab* (2011) 11 SCC 653:[2011] 2 SCR 642; *State of Delhi v. Ram Avatar alias Rama* (2011) 12 SCC 207: [2011] 7 SCR 1129; *Gorak Nath Prasad v. State of Bihar* (2018) 2 SCC 305; *Tofan Singh v. State of Tamil Nadu* (2013) 16 SCC 31: [2013] 9 SCR 962; *State of Punjab v. Baldev Singh* (1999) 6 SCC 172: [1999] 3 SCR 977; *Dudh Nath Pandey v. State of Uttar Pradesh* (1981) 2 SCC 166: [1981] 2 SCR 771, *State of Haryana v. Ram Singh* (2002) 2 SCC 426: [2002] 1 SCR 208; *Adambhai Sulemanbai Ajmeri and Others v. State of Gujarat* (2014) 7 SCC 716: [2014] 7 SCR 48; *Jumi and Others v. State of Haryana* (2014) 11 SCC 355: [2014] 3 SCR 673 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1136 of 2014.

From the Judgment and Order dated 08.07.2013 of the High Court of Punjab & Haryana at Chandigarh in CRLA No.365 of 2012.

With

Criminal Appeal No.1933 of 2014

Appearances:

Mayank Dahiya, Kuldeep Singh Kuchaliya, Prativa Prakash Janapriya Nayak, Akshay Nagarajan, Sanjay Jain, Advs. for the Appellant.

Vikramjeet Banerjee, ASG, Ms. Ruchi Gour Narula, Gautam Bhardwaj, Annirudh Sharma Ii, Arvind Kumar Sharma, B. Krishna Prasad, Advs. for the Respondent.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

HIMA KOHLI, J.

1. The present appeals arise from the common judgment dated 08th July, 2013 passed by the Division Bench of the High Court of Punjab and Haryana at Chandigarh deciding the Murder Reference¹ prepared by the Judge, Special Court for confirmation of death sentence, appeal² preferred by Balwinder Singh³ and the appeal⁴ filed by Satnam Singh⁵.

1.1 By the impugned judgment, the death sentence imposed upon Balwinder Singh³ was set aside under the Reference, thereby declining the

1 Murder Reference No. 5 of 2012 titled Narcotics Control Bureau, Chandigarh Zonal Unit v. Balwinder Singh @ Binda

2 CRA No. D-365-DB of 2012

3 Appellant in Criminal Appeal No. 1136 of 2014

4 CRA No. D-371-DB of 2012

5 Appellant in Criminal Appeal No. 1933 of 2014

Reference and imposed a sentence on him to undergo rigorous imprisonment for 14 years and to pay a fine of ₹1,50,000/- [Rupees one lakh fifty thousand only] and in default, to undergo rigorous imprisonment for one year for commission of offence under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985⁶. The appeals preferred by the accused were dismissed except for the modification in the order of sentence. Both the accused are before this Court in these appeals by way of special leave.

I. FACTUAL MATRIX:

(a) THE INCIDENT IN QUESTION

2. The incident in question relates back to 11th December, 2005, when as per the version of the prosecution, the Narcotics Control Bureau⁷ received secret information that some persons who were indulging in the sale of contraband, were travelling in a white coloured Indica car from Amritsar to supply contraband at a bus stand at Chandigarh. On 12th December, 2005, at 01:00 am, a *naka* was laid by the NCB team at Chandigarh and two independent witnesses [Mukesh Kumar and Sonu⁸] were associated in the investigation. At 03:15 am, the NCB team noticed that a car⁹ coming from Sector 25 and heading towards Sector 24, Chandigarh, stopped at a little distance from the place of *naka* and two persons wearing turbans alighted from the car and ran away. However, the third person, also wearing a turban who had later on disclosed his name as Satnam Singh⁵, remained seated in the car.

2.1. Members of the NCB team intercepted the vehicle and searched Satnam Singh⁵ in the presence of the independent witnesses. On searching the car, they found two packets wrapped in a *khaki* tape in the cavity of the door panel. On unzipping the seat cover of the rear back seat of the vehicle, two more similar packets wrapped in *khaki* tape were recovered. The prosecution claims that on inquiry, Satnam Singh⁵ disclosed that the packets contained heroin that he had brought from Amritsar with the assistance of Balwinder

⁶ For short 'NDPS Act'

⁷ For short 'NCB'

⁸ PW-1

⁹ White coloured Indica Car bearing registration number HR-01-J-9639 (Marked as P-1)

Singh³ and a person named Harpreet Singh alias Preet *alias* Sarpanch for sale in Chandigarh. He further disclosed that Balwinder Singh³ and *Sarpanch* ran away when the car had stopped a few yards before the *naka*. The NCB officers seized all the four packets and after taking out two representative samples, sealed them. The samples of the packets were signed by Satnam Singh⁵, the two independent witnesses, Intelligence Officer - Balwinder Kumar¹⁰ and O.P. Sharma, Superintendent, NCB¹¹.

(b) THE INVESTIGATION

2.2. A *panchnama*¹² in respect of the recovery made was prepared at the spot, read over to Satnam Singh⁵ who signed it. So did the independent witnesses. Thereafter, Satnam Singh⁵ was arrested and his statement¹³ was recorded after issuing him a notice¹⁴ under Section 67 of the NDPS Act. He was also searched personally. The statements of the independent witnesses [Sonu¹⁵ and Mukesh¹⁶] were recorded. Satnam Singh⁵ was produced before the *Illaqa* Magistrate with the case property¹⁷ and the documents. The case property was handed over to the Superintendent Incharge of the godown and the parcels of the samples¹⁸ were sent to the Chemical Examiner¹⁹ who forwarded the report²⁰ later on.

2.3. Till this stage, the co-accused named by Satnam Singh⁵, i.e., Balwinder Singh³ was nowhere in the picture. The prosecution claims that sometime later, the NCB officers came across a newspaper report stating that Balwinder Singh³ had been arrested by Amritsar Police in an NDPS case and was lodged in the Central Jail, Amritsar. Based on the said information, Balwinder Singh³ was arrested and a notice²¹ was served on him under

10 PW-2

11 PW-5 (wrongly mentioned as PW-10 in the trial Court judgement)

12 Exhibit P-1/E

13 Exhibit PW-1/B

14 Exhibit P-5

15 Exhibit PW-1/D

16 Exhibit P-9

17 Exhibit P-1

18 Exhibit P-12

19 Chemical Examiner Shri. S.K. Mittal, PW-4

20 Exhibit P-11

21 Exhibit P - 6

Section 67 of the NDPS Act. Thereafter, his voluntary statement²² was recorded and duly signed by him and he was arrested.

2.4 On conclusion of the investigation, the NCB submitted a complaint²³ before the Judge, Special Court, Chandigarh stating that Satnam Singh⁵ and Balwinder Singh³ had committed offences punishable under Sections 8, 21, 27A and 60 of the NDPS Act. Charges were framed against the two accused under Section 21 r/w Sections 8, 27A and 60 of the NDPS Act. On 02nd July, 2007, both the accused pleaded not guilty and claimed trial.

(c) PROCEEDINGS BEFORE THE TRIAL COURT

2.5. On its part, the NCB examined five witnesses namely Sonu⁸ who was an independent witness and joined the investigation when the *naka* was laid on 12th December, 2005; Constable Balwinder Singh¹⁰ whose deposition related to deposit of the samples¹⁸ of the contraband with the Central Revenue Control Laboratory, Delhi²⁴; P.K. Sharma²⁵, the then Intelligence Officer, NCB who had received the secret information based on which the *naka* was laid and Satnam Singh⁵ was arrested; S.K. Mittal¹⁹, the Chemical Examiner who deposed about receiving the sample in the Narcotic Section of the CRCL, New Delhi from the PW- 2¹⁰ and his report²⁰ dated 24th February, 2006 to the effect that on testing, the sample was found positive for heroin and contained 73.5% of dialectical Morphine by weight and O.P. Sharma¹¹, Superintendent, NCB who narrated the sequence of events leading to the laying of the *naka*, search of the Indica car being driven by the accused Satnam Singh⁵ wherefrom the contraband was recovered, preparation of Recovery-cum-Seizure Memo²⁶ and forwarding of the seized contraband to Delhi for a chemical analysis²⁷, ending with the receipt of the report²⁰ of the Chemical Examiner¹⁹.

2.6. After the prosecution closed its evidence, both the accused were examined under Section 313 of the Criminal Procedure Code²⁸. They

22 Exhibit – P-17

23 Exhibit P-13

24 For short, the CRCL, New Delhi'

25 PW 3

26 Exhibit PW-1/C

27 Exhibit PW-1/A

28 For short ‘Cr.P.C’

denied the charges levelled against them, pleaded not guilty and alleged false implication in the case. In their defence, the accused examined four witnesses, namely, Soravdeep Singh²⁹; Naresh Kumar³⁰; Parkash Ram³¹ and Ravi Kant Pawar³². DW-1²⁹ and DW-2³⁰ were summoned by Satnam Singh⁵ to prove that a call for 27 seconds was made by him from his mobile number at 9.45 p.m. on 11th December, 2005 to a landline number installed in the office of the Zonal Director in Chandigarh, when he was actually in police custody.

2.7. It was argued on behalf of the applicants that PW-1 – Sonu⁸ was the real culprit from whom recovery of heroin was made and he had managed to bribe the officers of the NCB team due to which they planted the contraband in the car driven by Satnam Singh⁵. It was also contended on behalf of Satnam Singh⁵ that one of the two independent witnesses, namely, Mukesh Kumar, was a stock witness of NCB and was on its pay rolls as a daily wager. The testimonies of DW-3³¹ and DW-4³² was referred to, wherein it was deposed that Mukesh Kumar was joined in as a witness in another complaint registered by the NCB.

2.8. After discussing the entire evidence, *vide* judgment dated 10th March, 2012, the learned Judge, Special Court, Chandigarh held both the accused guilty and convicted them under Section 21 read with Section 8 of the NDPS Act. Subsequently, on 15th March, 2012, after hearing arguments on the quantum of sentence, noting that Balwinder Singh³ had been previously convicted under Section 21(c) of the NDPS Act for the offence involving commercial quantity of narcotic drugs and applying the provisions of Section 31A of the NDPS Act, he was sentenced to death under Section 21(c) read with Section 31A(1a) of the NDPS Act.

2.9. Coming to the co-accused Satnam Singh⁵, the learned Judge, Special Court, Chandigarh took note of the fact that he was a government servant working as a Warden in Punjab Jail and was posted at Sangrur at the time of committing the offence, which added to the gravity of the

29 DW 1

30 DW 2

31 DW 3

32 DW 4

offence. Therefore, he was sentenced under Section 21(c) of the NDPS Act to undergo rigorous imprisonment for a period of twelve years and to pay a fine of ₹1,50,000/- (Rupees One lakh and fifty thousand) and in default thereof to further undergo rigorous imprisonment for a period of three years.

(d) PROCEEDINGS BEFORE THE HIGH COURT

3. Aggrieved by the aforesaid judgment, both the appellants approached the High Court. A Murder Reference under Section 366 Cr.P.C. was also forwarded to the High Court in view of the death sentence awarded by the Special Court, Chandigarh to the appellant – Balwinder Singh³. The entire evidence was analysed afresh by the High Court and relying on the decisions of this Court in *Kanhaiyalal vs. Union of India*³³, *Ram Singh vs. Central Bureau of Narcotics*³⁴ and *Raj Kumar Karwal vs. Union of India*³⁵ wherein, it was held that an order of conviction can be passed solely on the basis of the confession made by the accused under Section 67 of the NDPS Act and that such a confession before the officer of the NCB was admissible in evidence since the NCB officer is not considered as a “police officer” within the meaning of Section 25 of the Indian Evidence Act, 1872, both the appellants were convicted under the NDPS Act. For arriving at the said conclusion, the High Court took into consideration the statements of Balwinder Singh³ and Satnam Singh⁵ recorded under Section 67 of the Act and held them to be admissible in evidence for being used as confession against them. The deposition of the prosecution witnesses, namely, PW-1⁸, PW-2¹⁰ and PW-5¹¹, who had searched the car of Satnam Singh⁵ that had resulted in the recovery of 4 kgs. of heroin, was also relied on by the High Court and it was observed that Satnam Singh⁵ was apprehended by the NCB Officers in the vehicle in question and there was sufficient evidence to hold that he was guilty of possession of 4 kgs. of heroin.

3.1. Similarly, in the case of Balwinder Singh³, the High Court held that his confession¹⁹ recorded under Section 67 of the NDPS Act was admissible in view of the law laid down by this Court in *Kanhaiyalal*³³ (supra). The Court noted that neither Satnam Singh⁵ nor Balwinder Singh³ had moved

33 2008 (4) SCC 668

34 (2011) 11 SCC 347

35 (1990) 2 SCC 409

any formal application for retracting the confessions made and there was no reason to discard their confessional statements or to reject the testimonies of the prosecution witnesses [PW-1⁸, PW-2¹⁰ and PW-5¹¹]. Even though Balwinder Singh³ was not identified by PW-3²⁵ and PW-5¹¹, his statement²² was duly recorded under Section 67 of the NDPS Act and the co-accused, Satnam Singh⁵ had also stated in his confessional statement that Balwinder Singh³ was involved in the crime. Both the confessional statements when read together, were held to be sufficient to hold that Balwinder Singh³ was guilty of the offence committed. Added to this was the fact that Balwinder Singh³ had already been convicted and sentenced in a case under the NDPS Act and his appeal against the said conviction was pending at that time in the High Court. Therefore, he had a propensity towards committing such crimes. The High Court opined that merely because Balwinder Singh³ had escaped from the car just before the point where the *naka* had been laid and could not be apprehended, would not be a ground to acquit him or exonerate him of the charge of conscious possession of heroin.

3.2. The High Court went on to reject the defence version sought to be projected by Satnam Singh⁵ that Sonu⁸ [PW-1] was the real culprit and it was from him that the contraband was recovered but he got away by bribing the NCB team who cleverly planted the contraband in the car driven by Satnam Singh⁵. The plea taken that the other independent witness, Mukesh Kumar though arrayed as a prosecution witness and not produced, was a stock witness of the NCB, was also found to be meritless. The High Court observed that Mukesh Kumar was not examined during the trial since he had been won over by the appellants. As a result of the aforesaid discussion, both, Balwinder Singh³ and Satnam Singh⁵ were found to be in conscious possession of commercial quantity of heroin on the relevant date and the findings returned by the trial Court holding them guilty of the commission of offences punishable under Section 21(c) read with Section 8 of the NDPS Act, were upheld. The order of sentence imposed on Satnam Singh⁵ of rigorous imprisonment for a period of 12 years was affirmed by the High Court. However, the death penalty awarded to the appellant – Balwinder Singh³ for being a repeat offender under Section 31A of the NDPS Act, was held to be too harsh a punishment. Resultantly, the death sentence awarded to Balwinder Singh³ was set aside and the High Court sentenced him to undergo rigorous imprisonment for a period of 14 years along with fine of

₹1,50,000/- [Rupees one lakh fifty thousand only] and in default of payment of fine, suffer imprisonment for one year. Dissatisfied by the aforesaid decision, the appellants have preferred the present appeals.

II ARGUMENTS ADVANCED BY LEARNED COUNSEL FOR THE PARTIES

(a) SUBMISSIONS MADE BY COUNSEL FOR BALWINDER SINGH³ AND SATNAM SINGH⁵

4. Mr. Mayank Dahiya, learned counsel for the appellant – Balwinder Singh³, argued that his client had been convicted solely on the basis of the purported statement of confession made by the co-accused, Satnam Singh⁵ before the NCB officials which is no longer admissible in law, in the light of the decision of this Court in the case of *Tofan Singh v. State of Tamil Nadu*³⁶. It was stated that the High Court was swayed by the fact that at that time, Balwinder Singh³ was facing three other cases for offences under the NDPS Act but subsequently, he has been acquitted in all the said cases on being extended benefit of doubt. However, in the instant case, he has already undergone the sentence awarded by the High Court during the pendency of the present appeal.

4.1. Besides a similar argument advanced by learned counsel for Balwinder Singh³ that the statement of confession made by Satnam Singh⁵ before the NCB officials is not admissible in law and could not be read in evidence against him in view of the recent decision of this Court in *Tofan Singh*³⁶ (supra), Mr. Akshay Nagarajan, learned counsel for the said appellant has assailed the impugned judgement primarily on five counts. Firstly, that an offence committed under the NDPS Act being a grave one, all the procedural safeguards provided under the Statute to the accused require strict compliance and strict scrutiny and in the instant case, as the prosecution failed to establish a *prima facie* case, the burden did not shift to the accused. To buttress the said submission, learned counsel has cited *Ritesh Chakravarti v. State of M.P.*³⁷; *Noor Aga v. State of Punjab and*

36 (2021) 4 SCC 1

37 (2006) 12 SCC 321

Another³⁸; Bhola Singh v. State of Punjab³⁹; State of Delhi v. Ram Avatar alias Rama⁴⁰; and Gorak Nath Prasad v. State of Bihar⁴¹.

4.2 The second plea taken is that the entire story setup by the prosecution is shaky inasmuch as the independent witnesses who were joined in, have a murky background and their testimonies ought to be disbelieved. The testimony of Sonu⁸ has been questioned as untrustworthy and it is stated that he could not be treated as an independent witness in terms of Section 100(4) of the Cr.P.C. It was contended that the High Court has erred in failing to re-evaluate the credibility of the said witness and satisfy itself as to whether he was in fact an independent witness. Thirdly, it was argued that the other independent witness, Mukesh Kumar was arrayed in the list of witnesses but not examined by the prosecution for the reason that he was a stock witness, as would emerge from the deposition of DW-3³¹ and DW-4³². Next, it was argued that the case property¹⁷, mainly the contraband that was allegedly recovered, was not handled properly which is apparent from the fact that in the *panchnama*¹² the contraband was described as a substance that was white in colour but in his testimony, the Chemical Examiner¹⁹, described the contraband to be of light brown colour with lumps. This discrepancy in the contraband pointed out by the defence goes to the root of the matter.

4.3 Lastly, it was argued on behalf of Satnam Singh⁵ that the High Court ought not to have discarded outright the defence version that it was Sonu⁸ [PW-1] who was found to be in possession of the contraband and on his bribing the NCB officers, he was let off whereas Satnam Singh⁵, who was innocent, was framed. Learned counsel submitted that the deposition of DW-2³⁰ proved that the landline number on which a phone call was made by the NCB officers from the mobile phone of Satnam Singh⁵ at 09.45 pm on 11th December, 2005, was the official number belonging to the Zonal Director, NCB, Chandigarh and the said evidence once brought on record, was sufficient for the High Court to have discounted the version of the NCB that they had met Satnam Singh⁵ for the first time at the *naka* on 12th December, 2005, at 03.00 am. Learned counsel concluded by submitting

38 (2008) 16 SCC 417

39 (2011) 11 SCC 653

40 (2011) 12 SCC 207

41 (2018) 2 SCC 305

that though Satnam Singh⁵ has already undergone the sentence imposed on him, he is pressing the appeal for an acquittal on merits because the appellant was a Government servant who was dismissed from service on having been convicted which order, if reversed, would entitle him to relief in relation to his service benefits.

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

5. On the other hand, learned counsel for the respondent-NCB has supported the impugned judgement and stated that there was ample evidence brought on record by the NCB for indicting Balwinder Singh³ and Satnam Singh⁵. He asserted that none of the witnesses produced by the NCB were planted, as alleged; that NCB had successfully established a *prima facie* case against the appellants whereafter the burden had shifted on them to prove their innocence and that they had miserably failed to discharge the said burden; that the prosecution had amply proved the foundational facts to attract the rigours of the NDPS Act and the *actus reus*, namely possession of contraband by the appellants was convincingly established for holding them guilty of the offence for which they were charged. It was thus stated that the impugned judgement does not deserve interference.

III ANALYSIS AND DISCUSSION

(a) SIGNIFICANCE OF TOFAN SINGH'S DECISION

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

7. When the present matter was considered by the High Court in the year 2013, it had accepted the arguments advanced by learned counsel for the respondent-NCB that officers of the Department of Revenue Intelligence who are vested with the powers of an officer-in-charge of the police station under Section 53 of the Act, are not “police officers” within the meaning of Section 25 of the Evidence Act and therefore held that a confessional statement of a person accused of an offence under the NDPS Act recorded by such an officer in the course of investigation, is admissible against him. The said argument had found favour with the High Court in the light of the

decisions of this Court in Kanhaiyalal³³ (supra) and Raj Kumar Karwal³⁵ (supra) where it was held that a confession made by the accused before an officer of the NCB, is admissible in evidence because the said officer cannot be treated as a “police officer” within the meaning of Section 25 of the Evidence Act. It was further held that a conviction can be maintained on the sole confession made by an accused under Section 67 of the NDPS Act. A similar view taken by this Court in Ram Singh³⁴ (supra), was cited by the High Court to fortify its decision that the confessions made by the appellants herein before the officers of the NCB were admissible in evidence, being of voluntary nature.

8. However, much water has flown under the bridge since the year 2013. In the year 2020, a three-judges Bench of this Court answered a Reference Order of a Division Bench in Tofan Singh v. State of Tamil Nadu⁴² and re-examined the ratio of Kanhaiyalal³³ (supra) and Raj Kumar Karwal³⁵ (supra) to decide as to whether the officer investigating a matter under the NDPS Act would qualify as a ‘police officer’ or not. The other related issue which was examined by the larger Bench in Tofan Singh³⁶ (supra) was whether the statement recorded by the investigating officer under Section 67 of the NDPS Act can be treated as a confessional statement or not even if the officer is not treated as a “police officer”.

9. After a detailed examination of the legal position in the light of the provisions of the NDPS Act, *vis-à-vis* revenue Statutes like the Customs Act, 1962 and the Central Excise Act, 1944 as also the Cr.P.C and Section 25 of the Evidence Act, the majority decision authored by Justice Nariman, arrived at the following conclusion:

“155. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under Section 42 or Section 53 can be the basis to convict a person under the NDPS Act, without any *non obstante* clause doing away with Section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India.

156. The judgment in *Kanhaiyalal [Kanhaiyalal v. Union of India, (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474]* then goes on to follow *Raj Kumar Karwal [Raj Kumar Karwal v. Union of India, (1990) 2 SCC 409 : 1990 SCC (Cri) 330]* in paras 44 and 45. For the reasons stated by us hereinabove, both these judgments do not state the law correctly, and are thus overruled by us. Other judgments that expressly refer to and rely upon these judgments, or upon the principles laid down by these judgments, also stand overruled for the reasons given by us.

157. On the other hand, for the reasons given by us in this judgment, the judgments of *Noor Aga [Noor Aga v. State of Punjab, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748]* and *Nirmal Singh Pehlwan v. Inspector, Customs [Nirmal Singh Pehlwan v. Inspector, Customs, (2011) 12 SCC 298 : (2012) 1 SCC (Cri) 555]* are correct in law.

158. We answer the reference by stating:

158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

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

[emphasis laid]

10. In view of the aforesaid decision that declares that any confessional statement made by an accused to an officer invested with the powers under Section 53 of the NDPS Act, is barred for the reason that such officers are “police officers” within the meaning of Section 25 of the Evidence Act, a statement made by an accused and recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.

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

11. Now that it has been declared in *Tofan Singh's case*³⁶ (supra) that the judgements in the case of *Kanhaiyalal*³³ (supra) and *Raj Kumar Karwal*³⁵ (supra) did not state the correct legal position and they stand overruled, the entire case set up by the prosecution against Balwinder Singh³, collapses like a House of cards. It is not in dispute that Balwinder Singh³ was not apprehended by the NCB officials from the spot where the naka was laid and that Satnam Singh⁵ alone was apprehended in the Indica car. The version of the prosecution is that after Satnam Singh⁵ was arrested, his statement¹³ was recorded under Section 67 of the NDPS Act wherein he ascribed a specific role to the co-accused - Balwinder Singh³ and the *Sarpanch*. The NCB officers claimed that they were on the lookout for both of them since they had managed to run away from the spot. While *Sarpanch* could not be apprehended, the NCB officers learnt from reports in the newspaper that Balwinder had been arrested by the Amritsar Police in an NDPS case and was lodged in the Central Jail, Amritsar. Permission was taken from the concerned Court to take Balwinder Singh³ into custody in the instant case and he was arrested. A notice²¹ was served on him under Section 67 of the NDPS Act and his statement²² was recorded. Treating his statement²² as a confessional statement, Balwinder Singh³ was arrested.

12. Once the confessional statement¹³ of the co-accused, Satnam Singh⁵ recorded by the NCB officers under Section 67 of the NDPS Act, who had attributed a role to Balwinder Singh³ and the subsequently recorded statement²² of Balwinder Singh³ himself under Section 67 of the NDPS Act are rejected in the light of the law laid down in *Tofan Singh*³⁶ (supra), there is no other independent incriminating evidence that has been brought to the fore by the prosecution for convicting Balwinder Singh³ under the NDPS Act. On ignoring the said confessional statements^{13&22} recorded before the officers of the NCB in the course of the investigation, the vital link between Balwinder Singh³ and the offence for which he has been charged snaps conclusively and his conviction order cannot be sustained.

13. As a result of the above discussion, we are of the opinion that Balwinder Singh³ deserves to be acquitted of the charge of being in conscious possession of commercial quantity of heroin under the NDPS Act. Ordered accordingly.

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

14. We next come to the case of the appellant, Satnam Singh⁵. Again, as in the case of Balwinder Singh³, the statement¹³ made by Satnam Singh⁵ and recorded under Section 67 of the NDPS Act will have to be discarded outright as it cannot be used as a confessional statement having been recorded by the NCB officials who, in terms of the verdict in *Tofan Singh's case*³⁶ (supra) are to be treated as "police officers" under the provisions of Section 25 of the Evidence Act. But unlike the case of Balwinder Singh³, the conviction of Satnam Singh⁵ does not hinge solely on his confessional statement¹³ made to the NCB officials. His case is on a different footing because it also rests on other relevant factors including the testimonies of three prime prosecution witnesses namely, Sonu⁸ [PW-1], P.K. Sharma²⁵ [PW-3] and O.P. Sharma¹¹ [PW-5]. We propose to discuss below that their testimonies when examined carefully, show that they had remained consistent and unfailing. There appear no material contradictions or deviations in their depositions for this Court to extend any benefit to the appellant – Satnam Singh⁵.

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

15. We may first test on the anvil of settled law, the plea taken by learned counsel for the appellant – Satnam Singh⁵ that the prosecution had failed to establish a *prima facie* case against the accused and therefore, the burden of proving his innocence did not shift back to him. In the case of *Noor Aga*³⁸ (supra), a two-Judges Bench of this Court was required to decide several questions, including the constitutional validity of the NDPS Act and the standard and extent of burden of proof on the prosecution *vis-à-vis* the accused. After an extensive discussion, this Court upheld the constitutional validity of the provisions of Sections 35 and 54 of the NDPS Act⁴³, but went on to hold that since the provisions of the NDPS Act and

43 **35. Presumption of culpable mental state**—(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

the punishments prescribed therein are stringent, the extent of burden to prove the foundational facts cast on the prosecution, would have to be more onerous. The view taken was that courts would have to undertake a heightened scrutiny test and satisfy itself of “*proof beyond all reasonable doubt*”. Emphasis was laid on the well-settled principle of criminal jurisprudence that more serious the offence, the stricter would be the degree of proof and a higher degree of assurance would be necessary to convict an accused. [Also refer: *State of Punjab v. Baldev Singh*⁴⁴, *Ritesh Chakarvarti v. State of M.P.*⁴⁵ and *Bhola Singh*³⁹ (supra)].

16. Thus, it can be seen that the initial burden is cast on the prosecution to establish the essential factors on which its case is premised. After the prosecution discharges the said burden, the onus shifts to the accused to prove his innocence. However, the standard of proof required for the accused to prove his innocence, is not pegged as high as expected of the prosecution. In the words of Justice Sinha, who speaking for the Bench in *Noor Aga*³⁸ (supra), had observed that:

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

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

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

54. Presumption from possession of illicit articles—In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of—

- (a) any narcotic drug or psychotropic substance or controlled substance;
- (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
- (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or
- (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.

44 (1999) 6 SCC 172

45 (2006) 12 SCC 321

“preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”

The essence of the discussion in the captioned case was that for attracting the provisions of Section 54 of the NDPS Act, it is essential for the prosecution to establish the element of possession of contraband by the accused for the burden to shift to the accused to prove his innocence. This aspect of possession of the contraband has to be proved by the prosecution beyond reasonable doubt.

(e) PLEA OF FAILURE TO ESTABLISH FOUNDATIONAL FACTS

17. The submission made by learned counsel for the appellant – Satnam Singh⁵ that the prosecution failed to establish the underlying facts of possession of the contraband by Satnam Singh⁵ and therefore, the burden of proof could not have shifted to the accused, is found to be devoid of merits having regard to the evidence placed on record by the prosecution. The prosecution was successful in establishing the fact that it was the appellant – Satnam Singh⁵ who was driving the car⁹, when he was accosted at the spot where the *naka* was laid by the NCB Officers on the relevant date. A photocopy of the registration certificate of the car⁹ was recovered on a search of the appellant – Satnam Singh⁵. He was the owner of the car⁹. The car⁹ was searched by the NCB Officers in the presence of two independent witnesses. The contraband was recovered from the car⁹ being driven by the appellant – Satnam Singh⁵ in the presence of the independent witnesses and P.K. Sharma, a Gazetted Office²⁵, who was part of the NCB team. Even though one of the two independent witnesses [Mukesh Kumar] had turned hostile and was dropped by the prosecution, the testimony of the other independent witness [Sonu⁸] was consistent and nothing material could be elicited by the accused during his cross-examination.

18. Through the deposition of the Chemical Examiner [S.K. Mittal²²], the prosecution successfully proved the report²⁰ submitted by him stating *inter alia* that on testing the samples¹⁸, the substances drawn from the bags recovered from the car⁹ of the appellant – Satnam Singh⁵, were heroin. The samples¹⁸ drawn and sealed were found untampered and the testimony of

Constable Balwinder Kumar¹⁰ corroborated the fact that he had carried the samples¹⁸ with him and deposited them with the CRCL, New Delhi on 14th December, 2005 with all the seals intact.

19. Given the aforesaid narrative, we are of the opinion that the prosecution was able to discharge the onus cast on it to prove the foundational facts. Thus, the initial burden of proving that the appellant – Satnam Singh⁵ had the knowledge that the car⁹ owned and being driven by him at the relevant point in time was being used for transporting narcotics, stood discharged. Once it is concluded that the prosecution had produced adequate evidence to prove beyond reasonable doubt that the accused – Satnam Singh⁵ had the knowledge, the presumption contemplated under Section 35 of the NDPS Act would have to be drawn against him to hold that he had a culpable mental state for indicting him for the offence for which he had been charged.

20. As has been observed by this Court in the case of Ram Avatar alias Rama⁴⁰ (supra), that possession of the contraband is a *sine qua non* to secure a conviction under Section 21 of the NDPS Act and that such a contraband article should be recovered in accordance with the provisions of Section 50 of the NDPS Act, being a statutory safeguard favouring the accused; otherwise the recovery itself shall stand vitiated in law.

21. The argument advanced on behalf of the appellant – Satnam Singh⁵ that both the courts below have erred in discarding the defence taken by him to the effect that it was Sonu⁸ who was the real culprit and was apprehended by the NCB officers with the contraband, but he was let off on bribing the NCB officers, does not meet the test of preponderance of probability and has rightly been disbelieved by both the courts in the absence of any corroboration through cogent evidence.

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

22. Another plea taken by the appellant – Satnam Singh⁵ is that he was in the custody of the NCB officers much before the point in time when the *naka* was laid on 11th December, 2005. The deposition of witness produced by him, Soravdeep Singh¹⁹ [DW-1] to substantiate that a call was made from his mobile number at 09.54 PM on 11th December, 2005 when he had already been detained by the NCB officers, to a landline number installed

in the Office of the Zonal Director at Chandigarh, was not of any assistance as the mobile phone bills summoned by the appellant were not proved in accordance with law. The trial Court observed that the bill in question⁴⁶ was only a computer-generated one. The records pertaining to the bill were not produced by the witness summoned and the bill did not bear the signature of any authority even to prove that the mobile phone number asserted by the appellant – Satnam Singh⁵ as belonging to him, stood in his name. We see no reason to take a different view.

23. Reliance placed by learned counsel on the decisions in Dudh Nath Pandey v. State of Uttar Pradesh⁴⁷, State of Haryana v. Ram Singh⁴⁸, Adambhai Sulemanbhai Ajmeri and Others v. State of Gujarat⁴⁹ and Jumi and Others v. State of Haryana⁵⁰ to urge that defence witnesses are entitled to equal treatment with those produced by the prosecution and different yardsticks cannot be prescribed for prosecution witnesses as compared to defence witnesses is a well-settled principle of criminal jurisprudence, but cannot take the case of the appellant – Satnam Singh⁵ any further inasmuch as the trial Court has carefully analysed the testimonies of the defence witnesses before drawing an adverse presumption against the accused. The High Court has also taken pains to go through the entire testimonies of the defence witnesses and only thereafter endorsed the view taken by the trial Court. There has been no arbitrariness or undue favour shown to the prosecution witnesses from the appellant-Satnam Singh⁵ to claim any bias.

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

24. As for the contention of learned counsel for the appellant – Satnam Singh⁵ that the testimony of Sonu⁸ cannot be treated as that of an independent witness in view of the provisions under Section 100 (4) of the Cr.P.C., we are of the view that the said plea does not hold any water. Section 100 (4) of the Cr.P.C. that falls under Chapter VII titled “***Process to Compel the Production of Things***”, states as follows :

46 Ex.DW-1/A

47 (1981) 2 SCC 166

48 (2002) 2 SCC 426

49 (2014) 7 SCC 716

50 (2014) 11 SCC 355

“100. Persons in charge of closed place to allow search –

(4). Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.”

25. It can be discerned from a bare reading of the aforesaid provision that it is a general provision relating to search and applies to a closed place, as for example, a residence, office, shop, a built-up premises etc, where a search is required to be conducted by the investigation. It is in this context that sub-section (4) of Section 100 Cr.P.C. provides that to maintain the purity of the process, before undertaking a search, a couple of independent and respectable inhabitants of the locality where the place to be searched is located, be joined as witnesses to the search.

26. In the case at hand, the *naka* was laid by the officials of the NCB in an open area near the roundabout of Sectors 24/25, Chandigarh. Such was the location that there was no inhabitant in the vicinity and the time of the *naka* was an unearthly hour of 01.00 a.m. on 12th December, 2005. In this background, the two independent witnesses who were driving from Jalandhar towards Chandigarh, were flagged down by the NCB officers and joined in the investigation. Therefore, the shadow of doubt sought to be cast on the testimony of Sonu⁸ by claiming that he was the real culprit, is clearly a trumped up story that cannot be sustained. The other independent witness, Mukesh Kumar, had turned hostile and the prosecution did not examine him. As a consequence, the two defence witnesses, Parkash Ram³¹ and Ravi Kant Pawar³² produced by the appellant – Satnam Singh⁵ to demonstrate that Mukesh Kumar was a stock witness, would hardly be of any assistance. The other procedural discrepancies sought to be pointed out by learned counsel for the appellant – Satnam Singh⁵ and referred to in paras 4.3 and 4.4 above, are not considered so vital in nature as to unsettle or demolish the entire case set up by the prosecution against the appellant – Satnam Singh⁵.

(IV) CONCLUSION

27. In view of the aforesaid discussion, we are of the opinion that the appellant – Satnam Singh⁵ has failed to make out a case for acquittal. Therefore, the order of conviction and the sentence imposed on Satnam Singh⁵ is maintained. Criminal Appeal No. 1933 of 2014 is accordingly dismissed and the order of conviction and the sentence imposed on Satnam Singh⁵ by trial Court and upheld by the High Court is affirmed. However, Criminal Appeal No.1136 of 2014 is allowed and the appellant, Balwinder Singh³ is acquitted.

Headnotes prepared by:
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Appeals disposed of.